

Draft Code of Conduct for Adjudicators in International Investment Disputes and Commentary Version Four – July 2022

**Comments by
State/Commenter
as of November 11, 2022**

Compilation of comments
Draft Code of Conduct and Commentary

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ARGENTINA'S COMMENTS ON INITIAL DRAFT COMMENTARY TO THE CODE OF CONDUCT.

Los siguientes comentarios se realizan sin perjuicio de aquellos remitidos en el transcurso del año 2021 que continúen resultando aplicables, ni de las intervenciones realizadas durante el 43° período de sesiones del Grupo de Trabajo III (GT III) que tuvo lugar entre los días 5 a 16 de septiembre de 2022, en Viena (Austria).

Article 1 – Definitions

En términos generales, la República Argentina considera necesario mantener la amplitud en la aplicación de este código, independientemente del tipo de procedimiento. Ello teniendo en cuenta que los tratados de inversión suelen contener cláusulas relativas a disputas entre Estados.

Respecto del párrafo 7 del comentario, la República Argentina considera apropiado mantener la expresión “*or any constituent subdivision or agency of that State*”, puesto que es posible que haya acuerdos de inversión celebrados por alguna de las agencias o subdivisiones del Estado que eventualmente sean llevadas a una disputa en materia de inversión.

En relación con la explicación provista en el párrafo 11 del comentario, la República Argentina considera más adecuada la alternativa de que “*upon accepting the appointment as an Arbitrator*”, para calificar el momento a partir del cual alguien se convierte en Arbitrator.

Article 2 – Application of the Code

Respecto del inciso 1, la República Argentina considera que el Código de Conducta debería aplicarse desde el mismo momento en que una persona es Candidate y no esperar a que sea Adjudicator para evitar que los problemas de conflicto aparezcan en un momento tardío y haya que comenzar un nuevo proceso de designación del Adjudicator.

En lo que hace al inciso 2, la República Argentina no ha tomado una decisión en cuanto a la forma de aplicación de este código. Sin embargo, independientemente de ello, la Argentina sugiere utilizar el vocablo “*complement*” para que la aplicación subsidiaria de este código de conducta no se interprete como opcional o de aplicación subsidiaria, sino complementaria.

Article 3 – Independence and Impartiality

Sobre el inciso 1, la República Argentina considera fundamental incluir en el texto la frase encorchetada, para no dejar librado a interpretaciones el período temporal de aplicación del Código. Asimismo, sugerimos utilizar el Comentario para clarificar el alcance de las nociones de imparcialidad e independencia.

Respecto del *chapeau* del inciso 2, la Argentina sugiere agregar una expresión que permita entender que el listado contenido en la norma no es taxativo. Por ejemplo, a través de expresiones “*for example*”, “*for instance*” o “*but it’s not limited to*”. Si bien se observa que esto está aclarado en los comentarios, consideramos realmente importante que el texto del artículo también refleje el carácter meramente enunciativo de este listado.

En relación con el literal c) del inciso 2, la Argentina concuerda con la incorporación del agregado entre corchetes “*or judgement*”, ya que el conflicto de interés no solo podría afectar la conducta del adjudicador sino también su habilidad para tomar una decisión en la disputa.

En lo que hace a la explicación contenida en el párrafo 23 del comentario, la República Argentina considera preferible incluir texto del tipo encorchetado, ya que estima que un cierto tiempo luego de la emisión del laudo debe tenerse en cuenta para garantizar que si se presenta un recurso de corrección o clarificación o suplementación el Adjudicator aún se mantiene imparcial e independiente.

Se considera asimismo necesario que en los Comentarios se clarifique que las nociones de independencia e imparcialidad implican evitar conflictos de intereses directos e indirectos.

Article 4 – Limit on multiple roles

En términos generales, la República Argentina expresa su apoyo por la incorporación del período de “*Cooling-off*” de tres años sugerido, además de que es de la posición favorable a que su alcance se extienda a la participación concurrente de los Árbitros en otros roles tanto en “*IID proceedings*” como en “*any other proceedings*”. Esto mismo se sugiere en relación con la propuesta del artículo 4.2, que contiene las mismas sugerencias que el art. 4.1.

Respecto del literal c) del inciso 1, la República Argentina sugiere modificar la redacción por la siguiente: “*The same or similar provision(s) involving the same parties or at least one of them.*” Esto se justifica ya que es posible que haya dos arbitrajes en los que no necesariamente se esté discutiendo el mismo tratado pero que la cláusula en cuestión si sea la misma o similar y que al menos una de las partes en los dos tratados sea la misma. Esta situación no quedaría cubierta por la cláusula en su redacción actual.

Article 5 – Duty of Diligence

Teniendo en cuenta la vaguedad del término “*timely manner*”, pero a la vez el hecho que la expresión depende de las circunstancias en cada caso, se considera necesario que en los Comentarios se establezcan algunos parámetros temporales que, considerando los diferentes tipos de decisiones y la magnitud de los casos, sirvan de referencia para interpretar el término “*timely*”.

Article 8 – Confidentiality

En relación con el inciso 5, la República Argentina considera necesaria la incorporación de la expresión entre corchetes “*and continue to apply indefinitely*”, ya que las obligaciones de confidencialidad suelen extenderse más allá del período en que el proceso permanece activo.

Article 9 – Fees and expenses

Sobre el inciso 2, la República Argentina considera que será necesario mantener la expresión entre corchetes “*or immediately upon*”, puesto que en los casos donde no hay honorarios ya preestablecidos y hay que acordarlos, la discusión necesariamente se dará una vez constituido el Tribunal.

En lo que hace al párrafo 73 de los comentarios, en tanto el artículo 9 también hace referencia a los honorarios de los Assistants, la República Argentina considera oportuno incluir a tales personas también en los Comentarios.

Se considera necesario incorporar en los Comentarios del Código la referencia a la necesidad que los gastos y honorarios sean “razonables”. Se propone el siguiente lenguaje: *"Los honorarios y gastos de los árbitros y sus asistentes deberán ser razonables, en función del monto involucrado en la controversia, la complejidad del caso y el tiempo que sea necesario dedicarle a la misma"*.

Article 10 – Disclosure obligations

En relación con el *chapeau* del inciso 2, la República Argentina considera que la lista no puede ser taxativa sino que es enumerativa, y que los Adjudicators tienen la obligación “*to disclose any circumstances likely to give rise to justifiable doubts*”. Por lo tanto, se sugiere agregar una frase del estilo de: *"At least, the following information shall be included in the disclosure"* o agregar un inciso final que diga: *"Any other information about circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality"*.

Respecto del numeral (iv) del literal (a) del inciso 2, la Argentina entiende que la obligación de informar debe ser abordada en sentido amplio y, en consecuencia, debe abarcar la relación de los decisores con cualquier tercero que tenga interés directo o indirecto en el resultado de la controversia. De no ser así quedarían excluidas relaciones derivadas, por ejemplo, de obligaciones o intereses fiduciarios.

Sobre el inciso 7, la República Argentina concuerda con la inclusión de la segunda expresión encorchetada, ya que el incumplimiento del deber de revelar cualquier conflicto de interés necesariamente debe implicar una violación al código de conducta. De lo contrario su objeto y propósito podría verse desnaturalizado.

Con relación al inciso 8, la República Argentina considera que sería importante desarrollar una discusión más profunda sobre si la renuncia debe ser explícita o si puede ser también implícita debido al paso del tiempo sin que se plantee la circunstancia develada como una afectación a la independencia o imparcialidad del Adjudicator. Sobre todo, porque cierta información, más allá de ser divulgada por Candidates o Adjudicators puede estar disponible públicamente.

En lo que refiere al párrafo 91 del comentario, la República Argentina considera que convendría calificar como “*necessarily*” a la frase *"does not constitute"*, puesto que puede haber casos en los que esa relación sí dé lugar a un conflicto de interés.

Article 11 – Compliance with the Code

En términos generales, la República Argentina considera aceptable evaluar la inclusión de algún tipo de sanción adicional frente al incumplimiento de las disposiciones del Código, más allá de la recusación del decisor, como por ejemplo la reducción de honorarios y la publicidad del tiempo de demora en emitir decisiones, incluso podría señalarse en los Comentarios que, en algunos casos, el incumplimiento grave podría constituir un incumplimiento grave de normas fundamentales de procedimiento. Además, se propondrá calificar en el artículo 11.1

(o en el Comentario específico correspondiente) las disposiciones del código como "*fundamental rules of procedure*".

POSSIBLE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) COMMENTARY TO THE CODE OF CONDUCT

Submission by the Government of Armenia October 2022

Armenia respectfully submits its comments with regard to the initial draft Commentary to the Code of Conduct prepared by UNCITRAL and ICSID Secretariats in the context of the possible reform of Investor-State dispute settlement. Armenia is grateful to the Secretariats for preparing this initial draft, which forms an excellent basis for further discussions. Armenia reserves its right to amend or to supplement its positions expressed herein as the discussions of the Working Group progress.

Preliminary remarks

As a general observation, we suggest the greater use of citations and illustrative examples throughout the draft commentary in order to strengthen its authoritativeness by providing the most precise explanations possible to users.

Article 1 - Definitions

1. The first sentence at paragraph 4 is self-referential: “The term “International Investment Dispute” ...covers all types of IIDs...” As the phrase “[disputes between States]” is currently in squared brackets in the second sentence, there is ambiguity concerning whether the term covers only Investor-State proceedings or may also apply to inter-State investment proceedings. In this respect, the Commentary will need to elaborate on the final decision of the Working Group to be taken as to whether to include inter-State investment disputes in the definition of an IID.
2. In the second sentence, the clause “disputes arising out of commercial contracts that do not arise out of an investment” does not clarify for users who is to determine the difference and at what stage of arbitral proceedings. If the Working Group intend an arbitral tribunal to determine whether a dispute “arise out of an investment” or not, then it would be useful to clarify this.
3. If the arbitral tribunal were to find in its award on jurisdiction that the dispute did not concern an “investment”, the Code would nonetheless apply for the purposes, for example, of the application of Article 4 with respect to a “cooling-off period” for arbitrators as well as the duty of confidentiality under Article 8. It seems important to clarify for users that the Code applies to international investment *disputes* in arbitration or adjudication. Thus, it is not dependent on the substantive question whether an arbitral tribunal find there to have been an “investment” or not for the purposes of jurisdiction or admissibility. This seems to be critical to the distinction between an “IID” and an “IID proceeding” in paragraph 5 – the Code concerns the latter, not the former. This should be linked in the Commentary to draft Article 2(1) of the Code.
4. In light of the discussion of the Working Group concerning the insertion of a provision in the Code requiring an adjudicator to consult the disputing parties before engaging an assistant, the Commentary could use stronger language at paragraph 15. For example, instead of stating that the selection of

Assistants and the tasks to be performed by them *are usually addressed* with the disputing parties prior to their engagement, it could rephrase it as the duty of an Adjudicator.

Article 2 – Application of the Code

5. It would be useful to state from the temporal perspective that the Code starts applying from the initiation of IID proceedings pursuant to a treaty providing for the protection of investments or investors, legislation governing foreign investments or an investment contract.
6. Paragraph 17 of the draft Commentary states that the disputing parties may agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution; for example, to an adjudicator appointed to resolve an inter-State dispute or an arbitrator appointed to resolve a commercial arbitration dispute. The Working Group has not yet made the policy decision whether an IID also covers inter-State investment disputes, as described at paragraph 4 of the draft Commentary. In case the Working Group decide that the IID also covers inter-State investment disputes, paragraph 17 of the draft Commentary should be revisited.
7. At paragraph 19, we propose to delete the word “clear” from the term “clear conflict” to preclude the impression that the word is intended to convey an emphasis in terms of the degree of conflict required. In addition, we agree with the suggestion in the note to the Working Group to include one or two pertinent examples in the draft Commentary, which would be helpful to users for interpretation. One example might be the provisions of the EU-Canada Trade Agreement, which contains a code of conduct.
8. Meanwhile, the situation described in the note at paragraph 19 highlights the complementary nature of the Code of Conduct and the other applicable provisions on the conduct of adjudicators. By providing a specified timeframe for the declaration to be submitted, the other applicable provisions on the conduct of adjudicators complement the Code.
9. The language at paragraph 21 suggests that Adjudicator should continue to ensure that the Assistant effectively complies with the obligations and standards of the Code during the course of his or her duties. Given that ensuring the continuous compliance with the Code by the Assistant is an Adjudicator’s obligation, it would be appropriate to replace the word “should” with “shall” or “must”.

Article 3 – Independence and Impartiality

10. We support the retention of the bracketed text at paragraph 23. Illustrative examples of a lack of independence or impartiality would be helpful. Though there exist examples from the inter-State arbitration context (e.g. – *Gulf of Piran Arbitration*) and commercial arbitration, it would be useful to draw clear examples from the investor-State arbitration context. Successful challenges have appeared to focus mostly on prior relationships with disputing parties or other entities, rather than conduct of an arbitrator during the ISDS proceeding. This is shown by the note provided to the Working Group, which is based on the IBA Guidelines on Conflicts of Interest.
11. We support the objective standard and reference to the instruments set out at paragraph 30. In light of the extensive discussion of the Working Group on the question of the standard and the decisive reference to the UNCITRAL Arbitration Rules 2010 to find consensus, we suggest that greater prominence be given to the UNCITRAL Arbitration Rules 2010 in the draft Commentary and further detail be provided on the objective standard.

12. It would also be useful if paragraph 25 of the draft Commentary clarified that the definition of “a non-disputing party” encompasses the third-party funders and expert witnesses.

Article 4 – Limit on multiple roles

13. Paragraph 31 should elaborate on the interplay between the “conflicts of interest” as recognised through limited ban on multiple roles in draft Article 4, on the one hand, and the duty of disclosure addressed in draft Article 10, on the other hand. Those relationships that are subject to the limited ban contained in draft Article 4 are recognised *ipso facto* as conflicts of interest. In contrast, the duty of disclosure of relationships in draft Article 10 might give rise to a conflict of interest, whether by engaging the limited ban in draft Article 4 or by otherwise forming the basis for a successful challenge through existing procedures outside of the Code of Conduct.
14. Paragraph 32 should expand on the scope and purpose of the “cooling off period” in draft Article 4(2), illustrative examples from the practice of other international courts and tribunals would be useful. These include, for example, Practice Directions VII and VIII of the International Court of Justice and Rules 4(2) and 28(2) of the Rules of Court of the European Court of Human Rights.
15. As the Working Group spent considerable time in discussion concerning the start of the “cooling off period”, in particular, it is vital to provide exact guidance to users of the Code. We suggest that the period start from the date of adoption of the award or order terminating the proceedings, i.e. – an award on jurisdiction, or an award on the merits. The Commentary should also address the possibility of a successful challenge or annulment resulting in a new proceeding; for example, the successful challenge to the award on jurisdiction in the *Gold Pool v. Kazakhstan* arbitration that resulted in new proceedings before the same arbitral tribunal. In such a case, the Commentary should state that the cooling off period would start from the date of termination of the *new* proceedings rather than the *old* proceedings but only if a particular arbitrator from the *old* proceedings was also involved in the *new* proceedings. In addition, if the arbitrator were resigned or successfully challenged, then the start of the “cooling off period” could be the effective date of resignation or removal.
16. We consider that Article 4(1) should apply to a candidate or arbitrator who acts as counsel, judge or arbitrator in a non-ISDS proceeding involving a disputing party, not only for ISDS proceedings. For example, a person who acts as counsel for a disputing party before the International Court of Justice or a challenge proceeding in a national court would be disqualified from appointment as an arbitrator by that same party. Paragraph 34 should accordingly address these possibilities; in addition, the bracketed text concerning judges may need to change considerably, depending whether judges be full-time or part-time.
17. We disagree with the second sentence of paragraph 36: “In other words, the threshold to trigger the prohibition is high.” This does not follow, in our view, from the use of the word “same” in draft Article 4. It is a question of fact whether a particular measure, party or treaty provision is the “same”.
18. We suggest that more illustrative examples of the “same measure” be provided at paragraph 37 and of the “same disputing party” at paragraph 38.
19. Concerning the note to the Working Group at paragraph 39, we consider that the prohibition should be limited to the same “treaty”, as this has been the source of the criticism in recent practice. This is understandable, as investment contracts and national investment laws are the basis for a minority of ISDS proceedings and it is less likely that multiple proceedings arising from the same provision would occur with respect to those types of instruments. We also agree that the Commentary should explain

that the term “treaty” is intended to designate the treaty upon which consent to arbitrate or adjudicate is based.

20. Regarding “party autonomy” at paragraph 40, we suggest that the scope of “informed” waiver needs to be clarified in the Commentary, in particular, to address the possibility of incomplete compliance with the duty of disclosure under Article 10 of the Code. In this respect, we suggest that the waiver of a disputing party to a conflict under Article 4 should be obviated by a failure to fully comply with the duty of disclosure under Article 10 where the non-disclosed information was connected to the conflict waived under Article 4.
21. Concerning “issue conflicts” at paragraph 41, we consider that the Commentary should elaborate on how and when the test is intended to apply during arbitral proceedings. Though the Working Group have considered the problem of identification of the “legal issues” at an early stage of the proceedings, we consider it to be important to avoid the promotion of challenges at later stages of the arbitration (e.g. – the jurisdictional stage in bifurcated proceedings). This is to avoid wasted time and cost to the disputing parties to challenge on the basis of “legal issues” at later stages of an arbitration.
22. Rather, we suggest that the matter should be addressed at the constitution of the arbitral tribunal on the basis of the request for arbitration. Whilst this would necessarily limit the scope of application of draft Article 4(2) to the information known at that stage (e.g. – counterclaims would not be brought until later) it would preclude the problem of issue conflicts dogging the arbitration. On balance, we consider the need for certainty and economy in dealing with issue conflicts at the point of constitution of the arbitral tribunal to outweigh the risk of concerns about issue conflicts arising later.
23. Regarding the reference to “another IID proceeding” in paragraph 42, we repeat the point made with respect to Article 4(1), namely, that the scope of the ban should be linked to other types of proceedings (e.g. – before national courts) in which the same legal issue arises. This is to avoid an individual serving as an arbitrator when he has an incentive to use his position as arbitrator to influence a legal issue in a way that might benefit his professional practice as counsel not only in other IID proceedings but also in other courts and tribunals.
24. On the application of Article 4 to judges in paragraphs 44 to 51, we note the substantive point we have raised with respect to the need to decide on the full-time or part-time conditions of service of judges in the standing multilateral mechanism project (WP 213). The Working Group has yet to decide on this point, yet the assumption underpinning Article 4 is that judges would be full-time in contrast to part-time arbitrators. If, however, the Working Group were to decide that judges should be part-time, then Article 4 would need to be revised to account for the fact that part-time judges would essentially be similar to arbitrators and so the same approach on multiple roles should be taken for them. As the decision was taken in September 2022 to create a separate Code for judges, this point concerns that instrument rather than the one for arbitrators.

Article 5 – Duty of diligence

25. Paragraph 53 of the draft Commentary could elaborate more on the duty of diligence, stipulating that it encompasses the obligation to be “available to perform the duties”, on the one hand, and the commitment to refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner, on the other hand.
26. Paragraphs 52 to 56 could also provide indicative examples of a failure to perform arbitral duties “diligently”. This is due to the fact that the provision, in its very nature, is more abstract than others in

the Code. In particular, paragraph 54 appears to be pertinent due to public commentary on the perception that certain arbitrators have accepted too many appointments at any one time to the impediment of their ability to diligently perform their duty on each arbitration. Another example might be exceptional slowness in the rendering of an award, e.g. – over multiple years.

27. Although the idea of an indicative number of acceptable appointments was dropped from the first version of the draft Code due to concerns about the difficulty of quantifying an acceptable figure, particularly for full-time versus part-time arbitrators, it is suggested that indicative guidance in the Commentary would be helpful to users. For example, 15 appointments for full-time arbitrators and 5 appointments for part-time arbitrators at any one time might be a useful benchmark to guide candidates and appointing parties and authorities.

Article 6 - Integrity and competence

28. In light of the revision of draft Article 6(1)(c) stipulating that an Adjudicator shall possess the necessary competence and skills and make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties, the Commentary could indicate some qualities that are commonly-considered to be necessary for a “competent” arbitrator, such as prior professional experience whether as government or private counsel, in-house counsel or academic, educational background, or linguistic skills. In this respect, we consider there to be sufficient experience (particularly by appointing authorities in the appointment of first-time arbitrators) to be able to indicate qualities that are often identified by them in exercising their power of appointment.

Article 7 – Ex parte communication

29. Given the fact that the former draft Article 7(1)(b) dealing with *ex parte* communication aimed at determining the expertise, experience, competence, skills, availability and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, has been deleted, the Commentary could clarify that the disputing parties may nevertheless agree on such communication, covering the communication both with the party-appointed arbitrator, as well as directly with the Candidate for presiding arbitrator.

Article 8 – Confidentiality

30. Concerning the bracketed text at paragraph 69, we recommend that a Candidate or Adjudicator not be allowed to publicly comment on confidential information that is publicly-available through a leak. This is to prevent a ‘public re-trial’ of the arbitration; for example, if a split panel take different positions on the deliberations. Although the confidential information (for example, a report summarising on a confidential award) might be available, it would be inconsistent with the confidentiality of the proceedings to allow an adjudicator to comment on a leak unless so authorised by the applicable rules of procedure.
31. Following the discussions on draft Article 8(3), and the Commentary could stipulate the general agreement of the Group that an Adjudicator should be permitted to comment on a publicly available decision after the completion of an IID proceeding in which he or she participated, or of set-aside,

annulment, appeal, enforcement proceedings, thus contributing to the development and understanding of the jurisprudence.

32. We also think that paragraph 72 could be expanded to elaborate on the circumstances in which an Adjudicator might be legally compelled to disclose confidential information. For example, in the context of a disciplinary proceeding before a professional accreditation bodies or employer connected to his or her conduct as adjudicator. It is also worth noting that such disclosure might be required both in public and closed proceedings depending on the regulations of the given authority (court, national bar, etc.). Hence, the Commentary could emphasise the importance of compliance with the applicable rules of the authority.

Article 9 – Fees and expenses

33. In light of the addition of a new paragraph at draft Article 9 stating that “Fees and expenses should be reasonable in accordance with the applicable rules”, the Commentary could list elements determining the reasonableness of fees and expenses based on the practice of the arbitral institutions. Such elements could include hourly fees for work performed in connection with the proceeding, travel expenses, per diem allowance, and other fees incurred for the purpose of the proceeding.
34. Reflecting on the deliberation of the Working Group about the timing of the discussion of fees and expenses, in particular the possibility of such discussion before the constitution of the arbitral tribunal in case of *ad hoc* arbitrations, Armenia believes that while the parties can hold such discussions with the Candidates prior to the constitution of the Tribunal, the conclusion thereof may occur only after the constitution of the arbitral tribunal. This approach is also in line with the new language, as proposed in the September 2022 meeting, stating that “Unless the disputing parties agree or the applicable rules or treaty provide otherwise, a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before or as soon as possible after the constitution of the arbitral tribunal”, thus allowing the parties to conclude the discussion on fees and expenses either before or right after the constitution of the arbitral tribunal.

Article 10 – Disclosure obligations

35. As the Working Group was not able to debate draft Article 10 in its September session, our comments on this draft provision are necessarily predicated upon our position concerning the content of the provision itself.
36. We prefer the deletion of the bracketed text [, including in the eyes of the disputing parties,] principally for the purpose of clarity: the reference to the established “justifiable doubts” test in the UNCITRAL Arbitration Rules is both lucid and understandable. We consider the bracketed text to be implicit in the justifiable doubts test – if the disputing parties have doubts, that will be a relevant factor when deciding a challenge. However, the bracketed text has the potential to confuse the application of the test by implying that one or both of the disputing parties may, simply by having doubts (i.e. – by challenging) have an intrinsically strong basis for the challenge. However, we consider that the point of the bracketed text can be addressed at paragraph 85 or onwards of the draft Commentary in explaining that doubts expressed by the disputing parties (i.e. – by challenging) are a relevant factor for the arbitrators or appointing authority to take into account when deciding the challenge.

37. The observation at paragraphs 86 and 87 of the draft Commentary suggests that the scope of the obligation to disclose is broader at paragraph 1 than at paragraph 2. Since any circumstance “likely to give rise to justifiable doubts” would be subject to disclosure, it is particularly important to provide indicative guidance in the Commentary, drawing upon decisions that have been made on challenges, as to what such circumstances might be. Hence, given the breadth of the scope of disclosure under draft Article 10(1), specific examples are necessary to provide users with sufficient guidance to be able to understand what circumstances would fall under that duty that are not already covered at draft Article 10(2).
38. In response to the question addressed to the Working Group at paragraph 106 of the draft Commentary, Armenia believes that it might be useful to indicate the form or method of the waiver in the Commentary. The waiver can be both tacit, i.e. any of the disputing parties did not challenge the Arbitrator on the basis of the disclosed circumstance, thus, waiving their right to objection at a later stage, and can also have a written form, e.g. the disputing parties exchange correspondence where they agree to waive their respective rights to raise an objection with respect to circumstances that were disclosed.

Article 11 – Compliance with the Code

39. As the Working Group was not able to debate draft Article 11 in its September session, our comments on this draft provision are necessarily predicated upon our position concerning the content of the provision itself.
40. We acknowledge that the Code as it stands currently does not aim at regulating challenges, as it states that any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall apply/continue to apply to the Code. Therefore, we consider that the draft Code is a document regulating the conduct of arbitrators in general, rather than a document aimed solely at regulating challenges.
41. However, assuming that “minor” breaches of the Code might occur, which do not form the basis for a successful challenge, we consider it to be necessary to provide for sanctions in alternative to challenge to enable those duties that are not enforceable by challenge to be enforced by other means. Such sanctions could be “reputational” or “financial” ones. Such an approach could also enable flexibility for disputing parties to consider whether to seek a remedy for a complaint by challenge or other means. If, for example, their complaint pertains to long delays in awaiting an award, they might well not wish to challenge (e.g. – on the basis of the duty of diligence) because that would inflict further delay on the resolution of the dispute. Yet, they might wish their complaint to be submitted in some alternative forum so as to seek a change in the future conduct of the arbitrator in question.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)
Working Group III: Investor-State Dispute Settlement Reform

Code of Conduct

Initial Draft Commentary

Comments from the Republic of Colombia

I. General comments

1. Colombia thanks the Secretariat for preparing this initial draft commentary, incorporating necessary clarifications aimed to ensure that the potential provisions of the Code of Conduct for Adjudicators have the desired effect. As Colombia has stated during the Working Group's sessions, it is of the view that the development of a Code of Conduct could be a doable and viable option for ISDS reform and therefore, attaches high importance to it. In fact, and as Colombia pointed out in its submission (document A/CN.9/WG.III/WP.173), standards on independence, impartiality and conflicts of interests for arbitrators and decision makers, reflected in a Code of Conduct, should be one of the minimum standards or core provisions an ISDS multilateral instrument for implementing reforms should contain.
2. Colombia clarifies that the mere fact of submitting these comments does not prejudice its position regarding other reform options specifically mentioned in the draft.
3. Colombia reserves its right to modify, withdraw or make further comments or state a specific position on this and any other issues in the course of discussions taking place within the Working Group III on a possible Investor-State dispute settlement (ISDS) reform.

II. Specific comments

Article 1 – Definitions

4. Regarding paragraph 4, Colombia favors the inclusion of the text “regardless of the legal basis of consent to adjudicate the dispute”. In Colombia's view, for the sake of coherence and completeness, the bracketed text (“disputes between States”) must be included. The definition of IID, as drafted in article 1, excludes this kind of disputes.
5. In respect to the definition of “International Investment Dispute” Colombia first reaffirms that this definition does not concern questions of attribution. Any reference to attribution should therefore be deleted from the comments to the definition of “International Investment Dispute” in Article 1. In second place, Colombia reaffirms that clarity would be served if dispute is defined as it is consistently defined under international law, meaning, as a disagreement on a point of

law or fact. Colombia further accepts that a dispute may be triggered, in certain circumstances, by [any constituent subdivision or agency of a State or a REIO]. Hence, Colombia takes no issue with the bracketed text. In any case, Colombia underlines that subsequent reference in the same definition to the sources of consent for the dispute to be adjudicated created confusion and heated debated amongst the delegations. For that reason, Colombia proposes to have a different paragraph for the definition of consent. In this regard, although consent for the adjudication of international investment disputes can only be expressed through treaties signed by a public official with full powers, it is also aware that in other States consent can be given in contracts signed by constituent subdivision or agency of a State. In consequence, Colombia would have no objection to the bracketed text in a separate provision on consent.

6. On the definition of “Arbitrator” as commented in paragraph 11, Colombia considers that a person formally becomes an Arbitrator once he or she has accepted the appointment. Thus, it is not in favor of including the bracketed text (“upon appointment as Arbitrator”).
7. This would avoid inconsistencies between this provision and the practice of certain arbitral institutions, like ICSID.

Article 2 – Application of the Code

8. It is Colombia’s view that the bracketed text “regulating” as proposed in paragraph 18 is better aligned with the complementary nature of the code. On paragraph 19, Colombia considers that the inclusion of examples of potential inconsistencies is desirable.
9. Paragraph 20 refers to the provisions of the code that are relevant to an Assistant. Instead of referring to the “relevance” of the provisions, Colombia would favor the inclusion of the following text:

“Article 2(3) provides that the Adjudicator assigning tasks to an Assistant must ensure that the Assistant is aware of and complies with the applicable provisions of the Code.”

Article 3 – Independence and Impartiality

10. Colombia considers that the bracketed text in paragraph 25 (“Having the same nationality as a disputing party or a legal representative does not indicate loyalty to that disputing party”) is not a necessary clarification, and might have the potential of leading to confusion, considering, for example, that ICSID arbitration rules bar the possibility of appointing an arbitrator who bears the nationality of either party.
11. As to the bracketed text in paragraph 28 (“such as an appointment as adjudicator in another IID or non-IID”), Colombia considers its inclusion to be useful, bearing in mind that non-availability can derive from an Arbitrator’s appointment in other IID.

Article 4 – Limit on Multiple Roles

12. With regards to the Secretariat’s note in paragraph 39, in Colombia’s view, the term “treaty” must be effectively qualified as to mean the instrument upon which consent is based, yet also the instrument under which the merits of the dispute are going to be decided. This is important considering that investment agreements can incorporate provisions which might give way to the applicability of other treaties in matters related to the merits of a dispute, usually through a most favored nation clause.
13. Colombia considers that further elaboration on the relation between article 2(2)(f) and 4(2) would be of use, particularly since the circumstances described in article 4(2) could be easily construed as a breach of the duty contained in article 3(2)(f).

Article 5 – Duty of Diligence

14. With regards to the duty not to delegate decision-making functions, Colombia would prefer to remove the reference to “relevant” in paragraph 55. Every element of an award must be reviewed by an arbitrator. The following text might be appropriate:

“However, an Arbitrator is not precluded from having his or her Assistant prepare a preliminary draft of a decision, provided that it has been effectively reviewed and determined by the Arbitrator”

Article 9 – Fees and Expenses

15. For Colombia, the reference to the reasonability of fees and expenses in paragraph 74 is critical. Thus, it favors the incorporation of the bracketed text (“reasonable”).

Article 10 – Disclosure

16. Colombia considers it is relevant to specify the necessary contents of the waiver referenced in article 10(8) and developed in paragraph 106, particularly whether it could be general (referring to all the circumstances that were disclosed) or if it could refer partially to the disclosure.

Annotated comments on this initial draft Commentary to the Code of Conduct by the European Union and its Member States

14 October 2022

This is an initial draft for comments until 14 October 2022. All comments on this initial draft should be communicated to the UNCITRAL and ICSID Secretariats with the subject “Comments on initial draft Commentary to the Code of Conduct”.

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Possible reform of investor-State dispute settlement (ISDS)

Commentary to the Code of Conduct

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I. Introduction

1. The following is an initial draft of the Commentary to the Code of Conduct (the “Code”) to assist the delegations during their deliberations on the Code (contained in document [A/CN.9/WG.III/WP.216](#)) at the forty-third session of Working Group III to be held in Vienna from 5 to 16 September 2022. It has been prepared with the ICSID Secretariat **and is an informal document for discussion purposes only**. Based on the deliberations at the forty-third session and reflecting decisions taken by the Working Group, the Commentary will be updated and presented to the forty-fourth session of the Working Group scheduled for January 2023.

2. The draft articles of the Code are reproduced below for information purposes only. The draft Code, along with notes identifying issues that require further consideration and decision by the Working Group, is found in document [A/CN.9/WG.III/WP.216](#). Accordingly, the Commentary will need to be elaborated further after the forty-third session.

General Comment by the European Union and its Member States:

The European Union and its Member States would like to express their gratitude to the Secretariats of UNCITRAL and ICSID for their excellent work done in drafting this Commentary. While submitting some preliminary annotated comments on this initial draft of the Commentary, we reserve our position to submit further comments in light of the outcome of discussions on the remaining open issues of the Code and in light of the split of the Code into two separate Codes applicable to arbitrators and judges respectively.

II. Draft Commentary

Article 1 – Definitions

For the purposes of the Code:

- (a) “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;
- (b) “Arbitrator” means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;
- (c) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;
- (d) “Adjudicator” means an Arbitrator or a Judge;
- (e) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet [been appointed] [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
- (f) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];
- (g) “Ex parte communication” means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.

Commentary

3. Article 1 defines key terminology of the Code. These terms apply only in the context of the Code and are not intended to be self-standing definitions applicable to international investment disputes generally.

“International Investment Dispute”

4. The term “International Investment Dispute” (“IID”) in subparagraph (a) covers

all types of IIDs regardless of, the legal basis of consent to adjudicate the dispute, and whether the proceedings are conducted under the auspices of a standing mechanism, administered by an arbitral institution, or ad hoc. By contrast, it does not cover [disputes between States or] disputes arising out of commercial contracts that do not arise out of an investment.

5. The term “IID” refers to the dispute itself, while the term “IID proceeding(s)” refers to the process of resolving an IID.

6. “Regional Economic Integration Organization (REIO)” means an organization constituted by States to which they have transferred competence in respect of IID matters, including the authority to make decisions binding on them in respect of such matters.¹ [“Any constituent subdivision or agency of a State or REIO” should be read in accordance with article 25 of the ICSID Convention and public international law on attribution of State responsibility. It usually includes any decentralized or federated organ such as a municipality or a regional entity.]

Comment No. 1 by the European Union and its Member States:

The European Union and its Member States consider that the expression “...any constituent subdivision or agency of a State or REIO” is aimed to operationalise the Code in the ICSID context, and should therefore be understood in the light of the ICSID framework. For this reason, we believe that the Commentary should explicitly clarify that such reference needs to be understood and read in line with Article 25(1) and (4) of the ICSID Convention and Article 2(2) of the ICSID Additional Facility Rules. We therefore support the inclusion of the clarification in brackets in paragraph 6 above, as modified below in red:

6. “Regional Economic Integration Organization (REIO)” means an organization constituted by States to which they have transferred competence in respect of IID matters, including the authority to make decisions binding on them in respect of such matters.¹ *[“Any constituent subdivision or agency of a State or REIO” should be read in accordance with article 25(1) and (4) of the ICSID Convention and Article 2(2) of the ICSID Additional Facility Rules and public international law on attribution of State responsibility. It usually includes any decentralized or federated organ such as a municipality or a regional entity. This reference is without prejudice to public international law rules on attribution of the responsibility of States or international organizations.]*

7. “Investment contract” refers to an agreement entered into between a foreign investor and a State [or any constituent subdivision or agency of that State] regarding an investment made in the territory of that State.

Comment No. 2 by the European Union and its Member States:

The European Union and its Member States support the application of the Code to adjudicators in investment dispute settlement proceedings also when based upon “(iii) investment contracts” as provided in the text of the code.

However, we do not support the inclusion of paragraph 7 above and the last sentence of paragraph 4 of this draft Commentary. Both paragraphs 7 and 4 refer to “investment”, however there is no generally accepted definition of “investment” under public international law and the Working Group has agreed not to work on a definition of “investment” for the purpose of this Code. So rather than bringing clarity to the concept of “investment contract”, those paragraphs raise further questions and doubts. For these reasons, we believe that paragraph 7 and the last sentence of paragraph 4 should be deleted from the Commentary.

“Arbitrator”, “Judge”, “Adjudicator” and “Candidate”

8. Subparagraph (b) defines the term “Arbitrator” as any person appointed as a member of an arbitral tribunal, regardless of the nature of the arbitration (*ad hoc* or institutional).

9. The term “Judge” in paragraph (c) refers to any person who is a member of a standing mechanism that is established for the purpose of resolving IIDs. The term

includes both permanent and *ad hoc* judges appointed to the standing mechanism.

Comment No. 3 by the European Union and its Member States:

The sentence “[t]he term includes both permanent and *ad hoc* judges appointed to the standing mechanism” in paragraph 9 above should be deleted pending discussions on whether or not to provide for *ad hoc* judges in the context of a standing mechanism. The statute of the standing mechanism can clarify to whom the code of conduct applies.

10. The term “Adjudicator” in paragraph (d) is used to refer collectively to Arbitrators and Judges. It does not include mediators, conciliators, fact finders or expert witnesses.

Comment No. 4 by the European Union and its Member States:

For further clarity, it would be preferable if paragraph 10 above clarified that the “disputing parties (including Treaty Parties in advance of a dispute) could always agree to apply this code or certain provisions thereof to mediators, conciliators, fact finders or expert witnesses or other persons involved in an IID proceeding”. We would therefore suggest the changes below in red in paragraph 10 of the Commentary:

10. The term “Adjudicator” in paragraph (d) is used to refer collectively to Arbitrators and Judges. ~~It does not include mediators, conciliators, fact finders or expert witnesses.~~ Disputing parties (including Treaty Parties in advance of a dispute) may agree to make the Code or certain provisions thereof applicable to mediators, conciliators, fact finders, expert witnesses or other persons involved in an IID proceeding.

11. Under paragraph (e), the term “Candidate” refers to any person being considered for appointment as an Arbitrator or a Judge. With respect to an Arbitrator, an individual effectively becomes a Candidate immediately upon being contacted by a disputing party or an arbitral institution about the possibility of an appointment to a specific case. A person ceases to be a Candidate and becomes an Arbitrator [upon appointment as an Arbitrator] [upon accepting the appointment as an Arbitrator]. [A person who has been appointed but has not yet accepted the appointment will be a Candidate. This is to reflect the practice of certain arbitral institutions. Under the ICSID framework for instance, such person would have twenty days to accept the appointment, at which time he or she becomes an Arbitrator.] A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a Candidate. With respect to a Judge, the time at which an individual becomes a Candidate will depend on the standing mechanism’s selection process. The individual ceases to be a Candidate and becomes a Judge upon confirmation in such role.

“Assistant”

12. The term “Assistant” defined in paragraph (f) refers to a person who is assigned certain tasks, for instance, an associate in an Arbitrator’s firm, chamber or practice, related to a specific dispute. Tasks typically carried out by such an Assistant could include factual and legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments. An Assistant does not exercise decision-making functions on the merits of the IID. An Assistant may create preliminary drafts of awards, decisions or orders, but always on instructions from and under the direction of an Adjudicator.

13. The definition of Assistant for the purposes of the Code does not include staff of arbitral institutions or of a standing mechanism – for example, tribunal secretaries, paralegals, clerks, and registry assistants who are employed by the institution or a standing mechanism. This is because such persons do not work under the direction or control of an Adjudicator in the same manner as an Assistant and they are bound by institution-specific or standing mechanism-specific obligations or terms of employment.

¹ ICSID Additional Facility Rules, Rule 1 (2022).

14. Tribunal-appointed experts are also excluded from the definition of Assistant, as they are not employed by or under the control of an Adjudicator and have a different role in the IID. While an Adjudicator provides terms of reference to a tribunal-appointed expert, experts remain independent in their tasks, methodology and submissions.

15. The selection of Assistants and the tasks to be performed by them are usually addressed with the disputing parties prior to their engagement. This means that at the start of a proceeding, an Adjudicator should discuss the name, proposed tasks, hearing attendance, fees and expenses of the Assistant, and share the Assistant's curriculum vitae with the disputing parties, which would give them a timely opportunity to raise any questions or concerns regarding the Assistant.

“Ex parte communication”

16. Ex parte communication in the context of an IID refers to a Candidate or an Adjudicator communicating with a disputing party or its legal representative without the presence or knowledge of the other disputing party. The term “other related person” is aimed at making the list of persons concerned an open one, to the extent that such person is relevant to the IID. Typically, the term would include a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities. The definition of ex parte communication is to be read in conjunction with article 7 which sets specific provisions with regard to ex parte communication.

Article 2 – Application of the Code

1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.
2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.
3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code.

Commentary

Scope of application

17. According to article 2(1), the Code applies to individuals in an IID, namely an Adjudicator or a Candidate as defined in article 1. The second sentence clarifies that the disputing parties may also agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution. Examples could include an adjudicator appointed to resolve a State-to-State dispute, or an arbitrator appointed to resolve a commercial arbitration dispute. Such agreement between the disputing parties should be express on in writing, as there is no presumption that the Code applies in any dispute other than an IID.

Comment No. 5 by the European Union and its Member States:

It could be clearer to add in the commentary that the “agreement of the disputing parties” in the second sentence of Article 2(1) includes the agreement of Treaty Parties for State-to-State disputes, which would be a form of agreement of the disputing parties given *ex ante*. In addition, we do not find it useful to add that “there is no presumption that the Code applies in any dispute other than an IID”. We would therefore suggest the following changes:

17. [...] Such agreement between the disputing parties should be expressed on in writing, ~~as there is no presumption that the Code applies in any dispute other than an IID~~, and would include an agreement given in advance by Treaty Parties to apply the Code to adjudicators in inter-state dispute resolution proceedings under that Treaty.

Complementary nature of the Code

[This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 16-19.]

18. Article 2(2) notes that if the investment treaty, legislation governing foreign investments or an investment contract upon which consent to adjudicate is based contains provisions [regulating][on] the conduct of an Adjudicator or a Candidate in an IID proceeding, such provisions would continue to apply and the Code would complement such provisions. This means that those provisions as well as the Code apply and hence an Adjudicator must comply with all such obligations at once.

19. The term “inconsistency” in paragraph 2 refers to situations of clear conflict between the provisions of the Code and other applicable provisions on conduct, namely where the two sets of provisions are irreconcilable or cannot be complied with at the same time.

Comment No. 6 by the European Union and its Member States:

The European Union and its Member States agree with the suggestion discussed at the Working Group session of September 2022 to replace the term “inconsistency” in Article 2(2) of the Code with the word “incompatibility”. This change would be useful also to align the text of Article 2(2) of the Code with paragraph 19 of the Commentary above.

[Note to the Working Group: The Working Group may wish to consider whether the Commentary should provide concrete examples, which may, however, be subject to different interpretation depending on the actual circumstance. For instance, the Working Group may wish to consider the situation where other applicable provisions on the conduct of adjudicators would request a declaration to be made within a specified timeframe before the constitution of the tribunal, while the Code remains silent on that aspect.]

Compliance of an Assistant with the Code

20. Article 2(3) provides that the Adjudicator assigning tasks to an Assistant must ensure that the Assistant is aware of and complies with the Code. [Provisions of the Code relevant to an Assistant are [contained in] articles [3, 5, 6, 8, 11]].

Comment No. 7 by the European Union and its Member States:

In line with the Working Group’s request to the Secretariat in September 2022 to indicate what Articles of the Code would be relevant for Assistants, the European Union and its Member States believe these provisions should include the obligation of independence and impartiality (Article 3), the duty of diligence and the standards of integrity and competence provided for in Articles 5 and 6, respectively, the duty of confidentiality under Article 8 and Article 11(4) as it may be redrafted by the Secretariat in light of the discussions of the Working Group in September 2022. In line with the EU bilateral treaty practice, the European Union and its Member States believe that Article 10 on disclosure obligations is also relevant for assistants and that, therefore, at least paragraphs 1 and 6 of Article 10 should be added to the list of relevant provisions in paragraph 20 of this Commentary. We believe that it is important that assistants disclose those circumstances to the disputing parties and adjudicators.

21. One way of ensuring that the Assistant is aware of and complies with the Code would be to have the Assistant sign a declaration stating that he or she has read the Code and will abide by its relevant terms. After the Assistant has signed the declaration, the Adjudicator should continue to ensure that the Assistant effectively complies with the obligations and standards of the Code during the course of his or her duties. The obligation in paragraph 3 is incumbent on the Adjudicator who shall remove an Assistant in breach of the Code (see article 11(4)).

Article 3 – Independence and Impartiality

1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].
2. Paragraph 1 includes the obligation not to:
 - (a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;
 - (b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;
 - (c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];
 - (d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;
 - (e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or
 - (f) Take any action that creates the appearance of a lack of independence or impartiality.

Commentary

Independence and impartiality

22. Article 3(1) provides that an Adjudicator shall be independent and impartial. “Independence” refers to the absence of any external control, in particular the absence of relations with a party that might influence an Adjudicator’s decision . “Impartiality” means the absence of bias or predisposition of an Adjudicator towards a disputing party or issues raised in the proceedings].

Temporal scope of the obligation

23. The obligation to be independent and impartial is a continuous one. [For Arbitrators, it starts upon appointment or confirmation and extends until he or she ceases to exercise his or her functions. This may differ depending on the case, for example, when the final award is issued, the IID is settled or otherwise discontinued, the Arbitrator resigns or is removed from the IID proceeding. If the Arbitrator is liable to continue to exercise his or her functions in the IID proceeding (for instance, if the tribunal was asked to correct or rectify the arbitral award after it has been issued or to consider the decision on remand by an appellate tribunal), the obligation would continue to apply.] Judges must remain independent and impartial until the end of their term of office.

Non-exhaustive list

24. Article 3(2) clarifies the meaning of “independence and impartiality” by providing a non-exhaustive list of examples of when an Adjudicator could be found to lack independence or impartiality.

25. For instance, subparagraph (a) provides that an Adjudicator shall not be influenced by loyalty to persons involved in the IID such as a disputing party or any of their legal representatives. [Having the same nationality as a disputing party or a legal representative does not indicate loyalty to that disputing party.] The term “non-disputing party” refers to an individual or entity that is not a party to the dispute but has been given the tribunal’s permission to file a written submission in the IID. The term “non-disputing Treaty Party” refers to a State or REIO that is a party to the treaty upon which consent to adjudicate the IID is based but is not a claimant or respondent in the case.

26. Subparagraph (b) provides that an Adjudicator shall not take any instructions regarding any matter addressed in the IID. This includes instructions from any organization (either private or public), government (including public entities and their emanations) or individual. “Instruction” means any form of order, direction, recommendation or guidance concerning the proceeding. “Matters addressed in the

IID” means any factual, procedural or substantive issue considered in the course of the IID proceeding. By contrast, compliance by the Adjudicator with binding interpretations of a joint committee or referencing a decision by another arbitral tribunal would not be considered as taking instructions within the meaning of subparagraph (b).

27. Subparagraph (c) focuses on past or existing relationships that could influence an Adjudicator’s conduct, including the exercise of his or her judgment. For a violation to occur, such a relationship must have an impact on the Adjudicator’s conduct of the case or the decisions taken in the proceeding, including the final findings on the case.

Note to the Working Group

The below is a list of examples taken from the [IBA Guidelines](#) that could provide guidance as to the types of relationships that could be problematic in the context of subparagraph (c). Such a relationship in itself would not necessarily result in a violation of subparagraph (c), which would largely depend on the facts of the case.

- An Adjudicator (X) has previously given legal advice, or provided an expert opinion, in a dispute involving disputing party (Y) or one of its affiliates;
- X currently represents or advises Y or one of its affiliates;
- X currently represents or advises the lawyer or law firm acting as counsel for Y;
- X is a manager, director or member of the governing board of Y, or has a controlling interest in an affiliate of Y, and Y is directly involved in the matters raised in the IID;
- X’s law firm currently has a significant commercial relationship with the respondent State (Z), or a public entity of Z;
- X has a close family relationship with Y, or with a manager, director or member of the governing board of Y.

28. The term “function” in subparagraph (e) refers to a professional responsibility, [such as an appointment as adjudicator in another IID or non-IID]. The term “benefit” encompasses any gift, advantage, privilege or reward.

29. Subparagraph (f) indicates that if the Adjudicator takes any action which creates the appearance of a lack of independence or impartiality, it could result in a breach of the obligation in paragraph 1 to be “independent and impartial”. This stresses the fact that an Adjudicator must remain vigilant and be proactive in ensuring that he or she does not create any impression of bias.

30. The standard of appearance of a lack of independence or impartiality in subparagraph (f) is an objective one, based on a reasonable evaluation of the evidence by a third party. It is akin to the notion of justifiable doubts, as applied in a number of arbitration instruments including the ICSID Arbitration Rules,² the UNCITRAL Arbitration Rules,³ and the IBA Guidelines on Conflicts of Interest.⁴

Article 4 – Limit on multiple roles

[Paragraphs applicable to Arbitrators only]

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:

- (a) The same measure(s);
- (b) The same or related party(parties); or
- (c) The same provision(s) of the same treaty.

2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.

[Paragraphs applicable to Judges only]

3. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.

4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.

5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.

6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.

Commentary

² Convention on the settlement of investment disputes between States and nationals of other States , Article 57.

³ UNCITRAL Arbitration Rules, Article 12(1) (2013): “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2.

Limitation on multiple roles

[This section will be elaborated further following the discussion by the Working Group. See document [A/CN.9/WG.III/WP.216](#), paragraphs 27-31.]

31. Performing multiple roles in IIDs can give rise to conflicts of interest or the appearance thereof. Article 4 therefore sets forth distinct obligations for Arbitrators and Judges and prohibits them from undertaking certain other roles while functioning as an Arbitrator or a Judge.

32. Article 4 does not impose an absolute ban on multiple roles. Rather, the prohibition only applies [within a certain period of time (including concurrently) and] when the IID proceedings share some commonalities, and is limited to undertaking certain functions.

33. Paragraphs 1 and 2 set forth the temporal scope of the prohibition for Arbitrators. They are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding [and for a period of three years following the end of his or her functions as an Arbitrator]. This means that an individual functioning as a legal representative or an expert witness in an IID proceeding would need to resign from that role before accepting an appointment as an Arbitrator.

Limited roles

34. Paragraph 1 only concerns the Arbitrator acting as a legal representative or an expert witness in another IID proceeding. It does not limit an Arbitrator from performing other adjudicatory function, such as acting as an arbitrator in another IID or non-IID proceeding. [While the paragraph does not address an Arbitrator performing the functions of a Judge, the terms of office of a Judge could require him or her to resign his duties as an Arbitrator prior to being appointed as a Judge.]

Criteria triggering the prohibition

35. The prohibition only applies if the other IID proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same treaty. When any of these criteria are met, the Arbitrator would be prohibited from acting as a legal representative or an expert witness in another IID proceeding.

36. The use of the term “same” throughout article 4 means that the elements under scrutiny in the IID must be identical. In other words, the threshold to trigger the prohibition is high.

The same measures

37. The first criteria triggering the prohibition under subparagraph 1(a) is if the other IID proceeding deals with “the same measure(s)”. This term refers to the measures that have given rise to the dispute. Generally speaking, measures include any law, regulation, procedure, requirement, or practice⁵ of the respondent State that allegedly affected the investor’s investment or protected rights under the investment instrument.

Comment No. 8 by the European Union and its Member States:

We suggest adding the term “conduct” in the following sentence in paragraph 37 above:

37. [...] measures include any law, regulation, procedure, requirement, **conduct** or practice [...].

The same or related party(parties)

38. The second criteria under subparagraph 1(b) relates to the “same or related party(parties)”. This includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities. By contrast, it does not include non-disputing parties, such as third-party funders or non-disputing Treaty Parties.

The same provision(s) of the same treaty

39. The third criteria refers to “the same provision(s) of the same treaty”. This means that for the prohibition to be triggered, the provisions applicable to the IID must be identical and in the same treaty.

[Note to the Working Group: This part would need to be supplemented following a discussion on the scope of the intended limitation. One question would be whether the prohibition in subparagraph (c) should be applied only to provisions in the same

⁵ See for instance North American Free Trade Agreement, Article 201.

“treaty” and not other instruments upon which consent to adjudicate is based. The term “treaty” might need to be qualified as the treaty upon which consent to adjudicate is based, to avoid for example, reliance on the ICSID Convention, to trigger the prohibition. Another question would be whether relying on the same provision allowing claims to be raised or providing the basis of the jurisdiction of the tribunal would trigger the prohibition in subparagraph (c), which could lead to a very broad limitation.]

Comment No. 9 by the European Union and its Member States:

The European Union and its Member States have three comments on the Commentary relating to Article 4(1)(c):

First, we believe that the term “treaty” should not refer only to bilateral investment treaties but also to multilateral investment treaties. There is no need to clarify this in the commentary in our view, unless there are divergent requests from other Delegations on this point.

Second, we believe that the Commentary should clarify that the term “provision” should not refer exclusively to investment treaty rules of substantive nature, but also to investment treaty rules of procedural nature, including those on jurisdiction. Therefore, the term “provision” should be understood to refer *as a minimum* to provisions of the investment treaty upon which consent to adjudicate is based.

Third, Article 4(1)(c) should be aligned with the definition of IID in Article 1(a), which refers also to “legislation” and “contracts”. We believe this is a change that should be made in the text of Article 4(1)(c) and not only clarified in the Commentary.

Party autonomy

[This section will be elaborated further following the discussion by the Working Group. See [A/CN.9/WG.III/WP.216](#), paragraph 24.]

40. The term “unless the disputing parties agree otherwise” in paragraph 1 means that the limitation of roles prescribed in article 4, paragraph 1 could be waived by the disputing parties. To allow the disputing parties to make an informed waiver, the Arbitrator should disclose relevant information about the role currently undertaken or to be undertaken, in accordance with article 10.

Another IID proceeding involving legal issues that are substantially so similar

41. Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding that involves “legal issues which are substantially so similar that accepting such a role would be in breach of article 3 (independence and impartiality). The prohibition in paragraph 2 would be triggered only if the role to be assumed by an Arbitrator concurrently [or undertaken within the three years after the IID proceeding] would amount to a lack of independence or impartiality in breach of article 3. This includes the creation of an appearance of a lack of independence or impartiality as mentioned in article 3(2)(f).

[Note to Working Group: The Working Group may wish to consider the relationship between articles 3(2)(f) and 4(2), which could be further elaborated in the Commentary.]

42. For example, article 4(2) would be breached if an Arbitrator accepts a role as a legal representative in another IID proceeding which does not fall under paragraph 1, but raises issues substantially so similar that accepting that role would create the appearance that the Arbitrator was not independent and impartial in the IID proceeding. This may also be the case when an Arbitrator is appointed as an expert witness in another IID proceeding to address a provision in an investment treaty very similar to that being addressed in the proceeding that he or she is functioning as the Arbitrator but based on a different investment treaty and involving different parties.

43. [The prohibition in paragraph 2 could be waived by the disputing parties if they so agree. This would mean that all of the disputing parties would waive their rights to raise an objection with respect to the Arbitrator being appointed as a legal representative or an expert witness in another specific IID proceeding raising

substantially similar legal issues.]

Non-compliance with paragraphs 1 and 2

[This section will be elaborated further following the discussion by the Working Group. See A/CN.9/WG.III/WP.216, paragraphs 24-34.]

Comment No. 10 by the European Union and its Member States:

The European Union and its Member States reserve their position on the paragraphs of the Commentary related to Article 4(1) and (2) pending future discussions on the text of those paragraphs at the upcoming Working Group III session in Vienna in January 2023.

Prohibition to exercise any political or administrative function

44. Paragraph 3 prohibits a Judge from carrying out any “political or administrative function” outside the standing mechanism. A Judge would be prohibited, for instance, in acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches for a political organization or candidate, or [publicly] soliciting funds for or donating to a political organization or candidate. The limitation does not include administrative functions that a Judge might carry out in the context of a standing mechanism in accordance with the applicable rules of such mechanism or with his or her terms of office. For example, a Judge would be able to function as President elected through a vote or head a committee on financing of the standing mechanism.

45. A Judge would have an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of a full-time office. In particular, pursuant to paragraph 3, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.

Party autonomy with regard to Judges

46. In accordance with paragraph 4, before assuming any other function or occupation, a Judge should inform the [President of the] standing mechanism, which would determine whether such function or occupation would be prohibited under paragraph 3

47. In contrast to Arbitrators where the disputing parties can agree to waive limitations on multiple roles, whether a Judge could assume such function or occupation is to be determined by the standing mechanism. For example, if not prohibited under the terms of his or her office, whether a Judge can function as an Arbitrator in another IID proceeding outside the standing mechanism would be determined by the standing mechanism. If any such function or occupation has already been undertaken, the Judge should promptly inform the standing mechanism.

48. Paragraphs 5 and 6 apply to former judges and limit the role that they can undertake after their term of office. Paragraph 5 addresses IID proceedings before the standing mechanism that were initiated prior to the end of the Judge’s term. Paragraph 6 addresses IID proceedings before the standing mechanism initiated after the end of the Judge’s term.

49. Paragraph 5 prohibits a former Judge from being involved in any manner in an IID proceeding that was pending or which he or she had dealt with before the standing mechanism during his or her term. The scope of this prohibition is quite broad and covers any involvement including, but not limited to, acting as an ad hoc judge, legal representative, expert witness, third-party funder or amicus curiae. The prohibition is a continuing one.

50. Paragraph 6 addresses an IID proceeding brought before the standing mechanism after the Judge’s term of office. For a period of three years after his or her term of office, a former Judge would not be able to act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in a proceeding before the standing mechanism. This prohibition ceases to apply three years after the end of his or her term of office.

51. Paragraphs 5 and 6, however, do not limit a former Judge from being involved in an IID proceeding that is not before the standing mechanism.

Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

1. An Arbitrator shall:
 - (a) Perform his or her duties diligently throughout the IID proceeding;
 - (b) Devote sufficient time to the IID proceeding;
 - (c) Render all decisions in a timely manner;
 - [(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and
 - (e) Not delegate his or her decision-making function.

[Paragraph applicable to Judges only]

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.

Commentary

52. Article 5 addresses the Adjudicator’s duty of diligence. It sets forth distinct provisions for Arbitrators and Judges, as such obligations of Judges are usually provided under their terms of office.

Perform his or her duties diligently

53. Article 5(1)(a) complements requirements in arbitral rules and terms of appointment requiring an Arbitrator to act diligently and expeditiously.

Render all decisions in a timely manner

54. The amount of time needed for an Arbitrator to render decisions can differ depending on the complexity of the factual and legal issues that arise in the IID. In particular, the time for making decisions should respect due process and the parties’ ability to effectively present their case. To render decisions in a “timely manner” in accordance with article 5(1)(c), an Arbitrator should take these into consideration and abide by the timelines or deadlines in the applicable rules.

No delegation of decision-making functions

55. Article 5(1)(e) states that an Adjudicator should not delegate his or her decision-making function. Decision-making is the core function of an Arbitrator in an IID proceeding. However, an Arbitrator is not precluded from having his or her Assistant prepare a preliminary draft of a decision, provided that all relevant elements pertaining to that decision have been effectively reviewed and determined by the Arbitrator.

56. It is also without prejudice to applicable arbitral rules or procedural orders issued in the course of an IID proceeding which may stipulate that certain decision-making functions can be delegated, for example, to the presiding arbitrator.

Obligations applicable to a Judge

57. The availability of a Judge to perform his or her duties is addressed in paragraph 2. The modalities of such duties and availability are to be found under the terms of appointment of a Judge.

Article 6 – [Integrity and competence]

1. An Adjudicator shall:
 - (a) Conduct the IID proceedings in accordance with high standards of integrity, fairness[, civility] and competence;
 - (b) Treat all participants in the IID proceeding with civility; and
 - (c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

[Paragraph applicable to Arbitrator candidates only]
2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

[Paragraph applicable to Judge candidates only]
3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.

Commentary

Necessary qualities in the conduct of the proceedings

58. Article 6(1)(a) requires that an Adjudicator act with integrity, fairness, [civility] and competence. These are elements commonly expected from any Adjudicator, and are based on provisions found in existing instruments.⁶

⁶ See e.g. ICSID Convention, Article 14: “Persons designated to serve on the Panels shall be persons

59. [Article 6(1)(b) provides that an Adjudicator shall treat all participants in the proceeding with civility. “All participants” includes not only the disputing parties and their legal representatives but also other Adjudicators, witnesses, experts, non-disputing parties, clerks and interpreters. The term “civility” means being polite and respectful when interacting with those participants and is associated with the Adjudicator’s demonstration of professionalism.^{7]}

Obligations of prospective arbitrators

60. Article 6(2) contains a distinct provision for prospective Arbitrators. It requires an Arbitrator candidate to accept an appointment only if he or she possesses the necessary competence, skills, and is available to discharge the duties of an Arbitrator. This is a self-assessment to be conducted by the candidate.

Obligations of prospective judges

61. A specific provision for prospective Judges is contained in paragraph 3. It provides that a Judge candidate shall possess the necessary competence and skills to fulfil the duties of a Judge. As a Judge is not appointed by the disputing parties, it is usually the appointing authority within the standing mechanism that would assess such skills and competence. In the selection process, particular consideration should usually be given to a candidate’s previous experience in handling IIDs, as well as his or her knowledge of public international law or international investment law.

Article 7 – Ex parte communication

[Paragraphs applicable to Arbitrators and Arbitrator candidates only]

1. Ex parte communication is prohibited except:

(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;

(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;

(c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.

2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.

[Paragraph applicable to Judges and Judge candidates only]

3. Ex parte communication is prohibited.

Commentary

Principle – general prohibition

62. Article 7 introduces a general prohibition on ex parte communication for Adjudicators and Candidates. As defined in article 1, the prohibition relates to a communication (i) by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person; (ii) concerning the IID; and (iii) without the presence or knowledge of the other disputing party or parties. A communication not meeting these criteria, for example, a communication regarding a

of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” [See also ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”]

⁷ See e.g. ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”

matter distinct from the IID, or an e-mail copying the other parties, would not fall under the definition of ex parte communication that is prohibited under article 7.

Exceptions

63. Article 7(1) sets forth a limited list of circumstances whereby ex parte communication would not be prohibited.

64. The first exception under Article 7(1)(a) concerns pre-appointment interviews. It covers communications by a candidate with a disputing party considering their nomination as party-appointed Arbitrator. Such communications may address the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of the Candidate as well as fee expectations and whether an Assistant will be requested. The disputing party or its legal representative may provide a general description of the IID, including the identity of the disputing parties, the other Arbitrators or Arbitrator candidates, expert witnesses or other interested parties. The terms of the consent to adjudication (treaty, contract or law), the applicable procedural rules, and any other agreements between the disputing parties concerning the applicable language, seat, or other similar administrative matters could also be communicated. Candidates may discuss publications and presentations they have made with the disputing parties. They may also discuss any activities of their law firm or organization which might raise a concern as to their independence or impartiality. It would be prudent to keep a record of the pre-appointment interviews to ensure that there is no dispute as to the content of these communications.

65. Subparagraph (b) addresses communication between a candidate for presiding arbitrator with the disputing parties or their legal representatives for the purpose of selecting the presiding Arbitrator. The notion of “presiding Arbitrator” includes a sole Arbitrator as well as the chair of an arbitral tribunal consisting of three or more Arbitrators. Such communication is allowed only when the disputing parties have agreed to such ex parte communication.

[Note to the Working Group: The Working Group may wish to confirm that subparagraph 1(b) would allow an Arbitrator appointed by a disputing party (or an Arbitrator candidate to be appointed by a disputing party) to discuss with the disputing party or its legal representative the qualifications of a potential candidate for the presiding Arbitrator. Yet this would be subject to the agreement of the other disputing party and if that condition (the disputing parties so agree) is met, such a discussion might not fall under the definition of ex parte communication as the other disputing party would be aware of the communication. See document [A/CN.9/WG.III/WP.216](#), paragraph 44.]

66. There may be circumstances where the applicable rules or treaty authorize ex parte communications; this would pre-empt the prohibition in article 7(1). In a similar vein, ex parte communication would not be prohibited if there is an agreement by the disputing parties to permit such communication.

Limit to the exceptions

67. Even when ex parte communication is permitted under article 7(1), matters pertaining to procedural or substantive aspects of the IID proceeding or those that can be anticipated to arise in the IID proceeding should not be discussed. For example, a Candidate or an Arbitrator’s prospective views on the jurisdiction of the tribunal, the substance of the dispute, or the merits of the claims should not be discussed.

Article 8 – Confidentiality

1. A Candidate and an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, an IID proceeding unless:
- (a) the information is publicly available [in accordance with the applicable rules or treaty,]; or
 - (b) permitted under the applicable rules or treaty or by agreement of the disputing parties.

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2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].
 3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].
 4. An Adjudicator shall not disclose any draft decision in the IID proceeding.
 5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].
 6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

Commentary

68. Paragraph 1 sets forth a general prohibition not to disclose or use any information relating to the IID proceeding. It does not regulate the disclosure or use of such information for the purposes of the IID proceeding. For example, Adjudicators would be able to freely discuss among themselves information provided by the disputing parties.

69. The confidentiality obligation in paragraph 1 does not apply if the information is already publicly available [but only in accordance with the applicable rules or treaty. For example, if the information was made public in violation of the applicable rules or somehow “leaked”, the Candidate or the Adjudicator would be bound by the confidentiality obligation.] Another exception to the confidentiality obligation would be if the disclosure is allowed for expressly in the applicable rules or treaty or by the agreement of all the disputing parties.

70. Paragraphs 2 to 4 elaborate further on the confidentiality obligation. An Adjudicator cannot disclose the contents of the deliberations in the IID proceeding including views expressed by other Adjudicators. Adjudicators are prohibited from disclosing earlier drafts of decisions and commenting on a decision which is not publicly available.

71. Paragraph 5 indicates that the obligation in article 8 is a continuing one and that an Adjudicator must abide by the obligation even after the proceedings. The same would apply to former Judges after their term of office.

72. Paragraph 6 provides for a general exception to the obligations in article 8 in two circumstances: (i) where the Adjudicator is legally required to disclose the information in domestic courts or requested to do so (for example, in a set aside or a n enforcement proceeding) or any other competent body; and (ii) where the Adjudicator must disclose the information in a court or other competent body to protect his or her rights.

Article 9 – Fees and expenses

[Article applicable to Arbitrators and Arbitrator candidates only]

1. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated by the sole or presiding Arbitrator.
2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.
3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.

4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.

5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Commentary

73. Article 9 concerns the fees and expenses applicable in an IID and applies only to Arbitrators and Arbitrator candidates.

Fees and expenses

74. “Fees and expenses” in paragraph 1 refer to the fees of the arbitral tribunal including the respective fees of each Arbitrator, which is to be fixed with the disputing parties or by the institutional rules, as well as all [reasonable] travel and other expenses incurred by the Arbitrators. It does not cover the legal and other costs incurred by the disputing parties in relation to the IID proceeding, such as representation costs.

Proposal and discussions concerning fees and expenses

75. As indicated in paragraph 2, discussions concerning fees and expenses are usually concluded prior to or [immediately upon] the constitution of the arbitral tribunal.⁸

76. The term “proposal” in paragraph 1 generally refers to any proposal on fees and expenses made by an Arbitrator or the arbitral tribunal during or following such discussion. Any such proposal is to be communicated through the administering institution. In an ad hoc setting, the proposal should be communicated by the sole Arbitrator or the presiding Arbitrator, meaning that it would indeed be after the constitution of the arbitral tribunal.

Timing of the discussions

77. The rule in paragraph 2 is intended to avoid a situation where an Arbitrator would request different (higher) fees than originally contemplated or agreed to when the arbitral tribunal was formed, putting the disputing parties in the untenable position of having to refuse a request by the arbitral tribunal or having to agree to higher fees.

78. The term “conclude” in paragraphs 2 and 3 means that an Arbitrator, solely or jointly with the other members of the arbitral tribunal, must consult the disputing parties on any fees and expenses related to the IID proceeding and/or the Assistant. It does not mean that actual fees and expenses to be paid need to be already determined or fixed.

79. The applicable rules or treaty may prescribe the fees and expenses of an Arbitrator (see for example, ICSID Schedule of Fees and Memorandum on Fees and Expenses; ICC Memorandum on Fees). Alternatively, the applicable rules may provide a process for determining the applicable fees and expenses. For instance, article 41(3) of the UNCITRAL Arbitration Rules provides that “[p]romptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.”⁹ Where no such provision exists or the applicable rules or treaty are silent as to how and when these discussions should take place, paragraph 2 would be applicable. Unless the applicable rules or treaty contain a pre-determined rate or a specific method for the

⁸ For instance, the 2022 ICSID Rules provide that requests regarding fees and expenses shall be made prior to the constitution of the arbitral tribunal (see Administrative and Financial Regulation 14(1)).

⁹ UNCITRAL Arbitration Rules, article 41(3): “ Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.”

calculation of fees and expenses, such determination rests entirely within the disputing parties and the arbitrator(s).

Engaging the Assistant

80. The phrase “engaging any Assistant” in paragraph 3 should be understood in a broad sense, as an Assistant might be employed specifically for the purpose of the IID proceeding or might already be employed in the law firm to which the Arbitrator belongs. Paragraph 3 does not require the Arbitrator to discuss the fees and expenses of the Assistant with the disputing parties prior to contacting the Assistant to enquire about his or her availability to assist in the IID.

81. In practice, an Arbitrator may not have determined to engage an Assistant prior to or upon appointment. In such case, discussions related to fees and expenses of the Assistant should take place as soon as an Arbitrator foresees the need to engage an Assistant.

82. The express reference to Assistants in paragraph 3 should not be understood as prejudging the necessity or relevance of engaging Assistants in a particular IID proceeding. Such determination should be made on a case-by-case basis by the participants in the IID proceeding, taking into account elements such as the existence of an institution administering the IID proceeding.

Maintenance and availability of accurate records

83. Paragraph 4 requires an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding and to ensure that his or her Assistant, if any, does the same. This is common practice aimed at avoiding any dispute regarding fees and expenses. Paragraph 5 requires that the record maintained in accordance with paragraph 4 is made available. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not necessarily directly to the disputing parties. The phrase “requesting the disbursement of funds” in paragraph 5 refers to any request for the payment of fees or expenses incurred that are covered under article 9.

Article 10 – Disclosure obligations

[Article applicable to Arbitrators and Arbitrator candidates only]

1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.
2. The following information shall be included in the disclosure:
 - (a) Any financial, business, professional, or personal relationship in the past five years with:
 - (i) Any disputing party or an entity identified by a disputing party;
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and
 - (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];
 - (b) Any financial or personal interest in:
 - (i) The outcome of the IID proceeding;
 - (ii) Any other IID proceeding involving the same measure(s); and
 - (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;

(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and

(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.

3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].

4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

5. A Candidate and an Arbitrator shall make the disclosure using the form in the Annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.

6. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.

7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code].

8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.

Commentary

84. Article 10 addresses the disclosure obligations of a Candidate and an Arbitrator. Such obligations are central to the Code as they assist in identifying conflicts of interest and compliance with other obligations in the Code, mainly, the possible lack of independence and impartiality.

Standard of disclosure - “Any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality”

[This section will be elaborated further following the discussion by the Working Group. See document [A/CN.9/WG.III/WP.216](#), paragraph 59.]

85. The standard of disclosure in paragraph 1 is an objective one that stems from article 11 of the UNCITRAL Arbitration Rules which provides that “[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence”.

Comment No. 11 by the European Union and its Member States:

The European Union and its Member States believe that the text in brackets “[, including in the eyes of the disputing parties,]” in Article 10(1) should be deleted and, if necessary, explained in the Commentary.

Scope of disclosure in accordance with paragraphs 1 and 2

86. The standard of disclosure in paragraph 1 is a broad one that covers any circumstances, including any past or present interest, relationship or other relevant matter, likely to give rise to justifiable doubts regarding the independence or impartiality of the Arbitrator or Arbitrator candidate. The circumstances to be disclosed are not limited in time, meaning that a circumstance which arose more than five years before the Candidate was contacted about the appointment would need to be disclosed in accordance with paragraph 1 if it is likely to give rise to justifiable doubts.

87. Paragraph 2 includes a list of matters that must be disclosed regardless of

whether they give rise to justifiable doubts as contemplated in paragraph 1. Subparagraphs (a), (c) and (d), require disclosure of the relationships, proceedings and appointments within the past five years. The five-year time frame is calculated from the moment a Candidate is contacted for potential appointment by a disputing party or an appointing authority.

88. Information not falling within the scope of paragraph 2 may still need to be disclosed in accordance with paragraph 1. For example, if a particular personal relationship dates back to more than five years from the time of the appointment and would give rise to justifiable doubts, such relationship must be disclosed. At the same time, information listed in paragraph 2 must be disclosed even if it does not give rise to justifiable doubts as it may help identify possible conflicts of interest. For example, the Candidate's or Arbitrator's involvement in an unrelated IID may lead to the identification of conflicts of interest by other participants in the proceeding.

Comment No. 12 by the European Union and its Member States:

The European Union and its Member States agree with the explanations in paragraphs 87 and 88 above. However, we believe that the text of the chapeau of Article 10(2) does not clearly reflect this intended relationship between paragraphs 1 and 2 of Article 10. One way to do so could be to add the text underlined hereafter in the chapeau of Article 10(2): “Without prejudice to the disclosure obligation under paragraph 1, the following information shall also be included in the disclosure:”.

“Any financial, business, professional, or personal relationship”

89. Article 10(2)(a) addresses disclosures of information related to potential conflict arising from any financial, business, professional, or personal relationship a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.

90. “Business” relationship means any past or present connection related to commercial activities, either directly with the persons or entities listed in subparagraphs (2)(a)(i)-(iv), or indirectly through another person or entity, with or without the knowledge of such persons. It usually includes having shared financial interests, even if such interests do not specifically relate to an Arbitrator's or Candidate's professional activity.

91. “Professional” relationship in paragraph 2(a) refers to any past or present connection with another person relating to professional activities. It includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same firm as another person involved in the IID. It also includes involvement on the same projects or cases, for instance as opposing counsel or sitting as co-Arbitrator. By contrast, being a member of the same professional association or social or charitable organization as another person involved in the IID proceeding does not constitute a professional relationship for the purpose of paragraph 2(a). A Candidate or an Arbitrator who is an employee, associate or partner in a law firm is in principle considered to bear the identity of that law firm.¹⁰ Therefore, he or she would also need to disclose any relationship between any others involved in the IID and that law firm under Article 10(2)(a). For example, if a person in another office of that law firm represents an entity that is a subsidiary of one of the disputing parties in the IID, that relationship must be disclosed even if the Candidate or Arbitrator was not involved in that matter.

92. Article 10(2)(a)(i) concerns relationships with the disputing parties and any entity identified by a disputing party. This latter category includes for instance subsidiaries, affiliates, parent entities, State agencies and State-owned enterprises. In practice, the disputing parties should, at the latest upon appointment of a Candidate or an Arbitrator, identify all relevant entities so that the Candidate or Arbitrator can check and assess any potential relationships. In accordance with Article 10(3), a Candidate and an Arbitrator should also make reasonable efforts to become aware of and identify any relationships even if a disputing party has not identified related entities or agencies. For example, based on the knowledge of the State party to the dispute, the Candidate or Arbitrator should disclose any relationship with an agency or state-owned company of that State. If he or she subsequently acquires knowledge

of a relationship with an entity that a disputing party has not identified pursuant to Article 10(2)(a)(i), he or she should disclose such relationship.

“Any financial or personal interest”

93. The Candidate or Arbitrator’s remuneration for work performed and reimbursement of expenses incurred in the IID proceeding is not considered a financial interest for the purpose of Article 10.

94. For the purpose of Article 10(2)(b), the term “same measures” is to be interpreted in the same manner as in Article 4.

¹⁰ See IBA Guidelines, General Standard 6(a).

95. The terms “identified by a disputing party” mean that the disputing parties should identify other entities having a direct or indirect interest in the outcome of the IID proceeding, if any. It does not mean however that disclosure is limited to those relationships with a disputing party’s entities that have been identified by a disputing party. Even in the absence or partial identification of a disputing party, if a Candidate or Arbitrator knows of such related entities, he or she would be subject to the disclosure obligation.

Involvement in other proceedings

96. The terms “any other proceeding” in paragraphs 2(b)(iii) cover any type of dispute involving a disputing party or an entity identified by a disputing party, including alternative dispute resolution methods such as mediation or conciliation proceedings. For example, this could be a commercial arbitration involving the parent company of a disputing party.

97. Paragraph 2(c) requires disclosure of the IID proceedings in which a Candidate or an Arbitrator has been involved in the past five years. The term “related proceedings” in this paragraph means any proceeding that is related to the IID but not covered by the definition in Article 1, including proceedings before domestic courts and tribunals to set aside, annul or enforce an IID award, judgment and challenge proceedings of an Adjudicator, other parallel proceedings brought before domestic courts or other arbitral tribunals related to the IID (for example based on a consent clause in a contract while the IID is based on a consent clause in a treaty), or other mediation or conciliation proceedings related to the IID.

98. Paragraph (2)(d) requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed either as a legal representative, expert witness or arbitrator by one of the disputing parties or their legal representatives over the past five years. While multiple appointments of arbitrators are not prohibited under the Code, multiple appointments from the same party, its legal representative or its affiliate entities are subject to disclosure as they could indicate a lack of independence or impartiality. For instance, if a Candidate or an Arbitrator has already been appointed over the past five years as Arbitrator on a number of occasions [*number to be determined by the Working Group*] by one of the parties or a subsidiary, affiliate or parent entity of a party, this could give rise to legitimate doubts as to his or her independence or impartiality. Consequently, the circumstances to be disclosed under subparagraph (d) are not limited to appointments made in the context of investment disputes, but all types of proceedings. This is informed by the use of the term “or any other proceeding”, which bears the same meaning as in paragraph 2(b)(iii).

Obligation to make reasonable efforts

99. The term “[reasonable] [best] efforts to become aware” in paragraph 3 means that a Candidate or Arbitrator must be proactive to the best of his or her ability to identify the existence of circumstances[, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or Arbitrator to ensure proper disclosure.

100. By way of illustration, the obligation under paragraph 3 could involve reviewing relevant documentation already in the possession of the Candidate or Arbitrator, conducting relevant conflict checks, or requesting the persons involved in the IID to provide further relevant information in case of doubt or if deemed necessary to conduct proper assessment.

101. A failure to become aware of a circumstance despite the Candidate or Arbitrator’s best efforts would not as such give rise to disqualification. [However, if such efforts reveal a conflict of interest, a Candidate shall not accept the appointment, or the Adjudicator shall resign or recuse him/herself from the IID proceeding in accordance with article 11(2).]

Form of the disclosure

102. Article 10(5) provides that disclosure of relevant information may be done using the form in the Annex to the Code prior to or upon [acceptance of the] appointment,

and shall provide it to the disputing parties, the other Arbitrators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. The form in the Annex is a simplified disclosure form and its use is not mandatory as long as the relevant information is conveyed in a similar comprehensive manner.

103. The terms “prior to” and “upon” [acceptance of the] appointment in paragraph 5 does not imply that two separate disclosures are required, once as a Candidate and another as an Arbitrator. One would suffice for the purposes of paragraph 5 and an Arbitrator would have a continuing duty to make further disclosures in accordance with paragraph 6.

Continuing obligation of disclosure

104. Article 10(6) provides a continuing obligation of disclosure. If new relevant information falling under paragraphs 1 or 2 emerge or are brought to the knowledge of an Arbitrator during the course of the IID proceeding, he or she must disclose such information promptly and without delay in accordance with paragraph 5. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Failure to disclose

105. Article 10(7) indicates that a failure to disclose does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code]. It is rather the content of the disclosed or omitted information that determines whether there is a [breach] [lack of impartiality or independence]. [Even though a breach of Article 10 is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a Candidate or Adjudicator’s duty of independence and impartiality under articles 3 of the Code.]

Waiver of the disputing parties

106. Article 10(8) provides the possibility for the disputing parties to waive their respective rights to raise an objection with respect to circumstances that were disclosed. A waiver would preclude that disputing party from raising the objection at a later stage. Each disputing party can waive their respective rights and need not be done jointly. [**Note to the Working Group:** *The Working Group may wish to consider whether the form or method of the waiver will need to be further elaborated in the Commentary.*] Furthermore, it should be understood that the waiver would only relate to the circumstances that were disclosed.

107. In practice, this would mean that the disputing party would not challenge an Arbitrator based on the disclosed circumstances at a later stage. For instance, if a Candidate informs the disputing parties that he or she has, within the past five years, worked as a counsel in the same law firm as the current legal representative of a disputing party, and both disputing parties agree nonetheless to the appointment of that Candidate, it would not be possible for any of the disputing parties to challenge that Arbitrator on the basis of the disclosed circumstance. However, as to circumstances that were not disclosed, for example, that he or she has maintained a close professional relationship with the law firm or the current legal representative, the waiver would not prevent a disputing party from raising a challenge.

Comment No. 13 by the European Union and its Member States:

The European Union and its Member States reserve their position on the paragraphs of the commentary related to Article 10(7) and (8) pending future discussions on the text of those paragraphs at the upcoming Working Group III session in Vienna in January 2023.

Disclosure obligation of Judges

[To be elaborated after discussion by the Working Group, see [A/CN.9/WG.III/WP.216](#), Appendix]

Article 11 – Compliance with the Code

1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code.

[2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]

3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].

4. An Adjudicator shall remove an Assistant who is in breach of the Code.

Commentary

[This section will be elaborated further following the discussion by the Working Group, particularly on enforcement of the Code. See [A/CN.9/WG.III/WP.216](#), paragraphs 67-69.]

108. Article 11 addresses compliance of the Code and mentions possible remedies for non-compliance.

Principle of voluntary compliance

109. Paragraph 1 requires an Adjudicator and a Candidate to comply with the obligations in the Code that are applicable to them. One way to ensure this adherence is to require Adjudicators to sign a declaration upon appointment or confirmation as found in the Annex.

Remedies for non-compliance

110. The Code does not contain rules on challenge, disqualification, removal or other sanctions in case of breach. Paragraph 3 clarifies that existing sanctions shall apply, if provided in the applicable rules or treaties. Candidates who are not appointed as an Adjudicator could potentially be subject to sanctions under, for example, the applicable rules of professional accreditation bodies.

111. Pursuant to Article 11(4), if an Assistant does not comply with the Code, the Adjudicator shall remove the Assistant from the IID proceeding. In practice, disputing parties who are concerned that an Assistant is not complying with the Code could raise these concerns with the Adjudicator and ask the Adjudicator to replace the Assistant. An Adjudicator who does not remove the Assistant would be in breach of paragraph 4 and may be subject to sanctions or remedies that may be provided for in the applicable rules or treaties pursuant to paragraph 3.

The United Nations Commission on International Law
Working Group III (Investor-State Dispute Settlement Reform)
Comments from the Government of the Republic of Korea
on the draft Commentary to the Code of Conduct

The Republic of Korea (“Korea”) would like to express its sincere gratitude to the UNCITRAL and ICSID Secretariats for the preparation of the draft Commentary to the Code of Conduct (“Code”) (collectively, “Commentary”). Reflecting upon the recent discussion of Working Group III at its 43rd Session, Korea understands that the Working Group will continue to discuss the Code using the draft provisions in document A/CN.9/WG.III/WP.216, but present to the 2023 Commission two separate Codes that respectively address the obligations of Arbitrators and Judges. With that, and while understanding that the two Codes would eventually require separate commentaries thereto, Korea hereby provides its initial observations on the draft Commentary, especially the parts pertinent to the obligations of Arbitrators, to the extent addressed at the recent session of the Working Group. The comments provided herewith are preliminary in nature and without prejudice to Korea’s final position. On the remaining parts of the Commentary not addressed in this submission, as well as any parts of the Code or the Commentary not yet discussed or settled within the Working Group, Korea respectfully reserves its position.

1. Commentary to Article 1 (Definitions)

On paragraph 6 of the Commentary, Korea suggests deleting the last sentence—“It usually includes any decentralized or federated organ such as a municipality or a regional entity”—since each State has its own way of structuring different levels of its government, and the interpretation of “any constituent subdivision or agency of a State or REIO” may vary depending on the context or case with its own governing definition. In our view, the sentence —“Any constituent subdivision or agency of a State or REIO’ should be read in accordance with Article 25 of the ICSID Convention and public international law on attribution of the State responsibility”—provides enough explanation in this regard, and thus the last sentence is not necessary.

On paragraph 7 of the Commentary, the qualifier at the end of the sentence, “made in the territory of that State,” raises a concern as it can be deemed substantive, exceeding the mandate of Working Group III. Korea notes that the terms provided in the Code “apply only in the context of the Code and are not intended to be self-standing definitions applicable to international investment disputes generally.”¹ However, there can be circumstances where there is no explicit territoriality requirement in the definition of investment. Furthermore, in investment contracts, the parties are free to come up with their own and agree on a definition of an investment, whether there be a territoriality requirement, and such an agreement should govern the interpretation of an “investment.” As such, Korea suggests that the phrase “made in the territory of that State” be deleted.

¹ Para. 3, Commentary to the Code of Conduct.

Paragraph 10 of the Commentary provides a list of roles not included in the term “Adjudicator.” Although the sentence reads, “It does not include,” which implicates that it is not intended to be a closed list, it would be helpful, for clarity, to confirm in the Commentary the non-exhaustive nature of the list.

Paragraph 11 of the Commentary, in part, explains “A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a Candidate.” From this reading, the confidentiality duty under Article 8 would apply only to a single and final Candidate who is yet to accept an appointment or be appointed by a party or institution—whether as a party-appointed arbitrator or presiding arbitrator—and not to any “ceased” Candidates, even if they were provided with information subject to the confidentiality obligation. Korea believes that the above is not in harmony with the purpose and intent of Article 8 and, as such, a clarification to this effect in the Commentary or further discussion within the Working Group to address this point would be necessary.

On paragraph 12 of the Commentary, as a few delegations pointed out at the 43rd session, it would be extra clear to add in the Commentary to the definition of “Assistant” what is meant by “a person”—*i.e.*, a natural person or a judicial entity—as commonly done in investment treaties, while Korea’s understanding, as aligned with the majority view, is that an Assistant is most likely to be a natural person in practice. As a minor technical suggestion, the definition of “Assistant” would read better if “related to a specific dispute” comes immediately after “certain tasks.”

On paragraph 14 of the Commentary, Korea suggests deleting the last sentence—“While an Adjudicator provides *terms of reference* to a tribunal-appointed expert . . .” (emphasis added)—since otherwise, it may create confusion in cases where terms of reference are not provided. Leaving the latter part of the sentence “Experts remain independent in their tasks, methodology and submissions” would do its job of ensuring an expert’s independence.

On paragraph 15 of the Commentary, in lieu of the phrase “the name, proposed tasks, hearing attendance, fees and expenses of the Assistant,” which can be deemed an exhaustive list, Korea supports the simpler language proposed by the distinguished delegation of Argentina at the 43rd session—“profiles, tasks, fees and expenses, and other roles.”

On paragraph 16 of the Commentary, taking into account the pertinent parts of the discussion at the 43rd session, Korea understands that “or knowledge” will be deleted from the Commentary in alignment with the text. With respect to the idea of including in the Commentary that the term “presence” would include physical and virtual presence as understood in the modern world, Korea generally agrees and suggests further clarifying in the Commentary what “presence” actually means in practice.

2. Commentary to Article 2 (Application of the Code)

On paragraph 18 of the Commentary, as to the word choice, Korea finds that placing “on” would allow the sentence to broadly capture both provisions that regulate the conduct of an Adjudicator or a Candidate and the provisions that simply speak to, even without any purpose to regulate, the conduct of an Adjudicator or a Candidate in an IID proceeding. To have those provisions continue to apply and the Code operate in a complementary nature, “on”

may better suit the intent in this sentence, but Korea can be flexible and welcomes to hear views of the Working Group.

On paragraph 19 of the Commentary, Korea understands from the 43rd session that the meaning of the term “inconsistency” is to be further clarified and, if needed, may be replaced with the term “incompatibility” in line with the Vienna Convention on the Law of Treaties. Once that is settled, Korea trusts that it would be explained in the Commentary. In the meantime, Korea is of the view that deletion of the term “clear” would still serve the purpose and, thus, suggests deleting “clear” because a conflict is a conflict whatsoever regardless of the extent.

On paragraph 20 of the Commentary, another point for consideration concerns the use of the phrase “assigning tasks.” The current language reads as if only the Adjudicator who assigns tasks to an Assistant has an obligation to ensure the Assistant is aware of and complies with the Code. However, in practice, there can be instances where an Adjudicator who first engages an Assistant to an IID proceeding is different from the Adjudicator who actually assigns and supervises the work of the Assistant. As such, Korea suggests revising the first sentence in paragraph 20 of the Commentary to address such instances or simplify the sentence to read, “Article 2(3) provides that an Adjudicator must ensure that an Assistant is aware of and complies with the Code.”

On paragraph 21 of the Commentary, guidance would be helpful on what to do with the declaration once signed by the Assistant, *e.g.*, transmit a copy to the disputing parties, arbitral institution, and other members of the tribunal and keep it in the case records, or attach it to a procedural order. In addition, the phrase “in breach of the Code” in the last sentence would need to be revisited in connection with Article 11(4) and revised to confirm that the Code binds an Adjudicator and a Candidate, but not an Assistant. On a minor note, for simplicity and to avoid redundancy, the second sentence may read the same by deleting “the obligations and standards of.” Thus it would read, “After the Assistant has signed the declaration, the Adjudicator should continue to ensure that the Assistant effectively complies with the Code during the course of his or her duties.” Here, again, Korea believes that the language “complies with” will be revisited once the discussion on Article 11(4) is finalized.

3. Commentary to Article 3 (Independence and Impartiality)

On paragraph 22 of the Commentary, Korea finds that it would be helpful to add references, if any, for the definitions of “independence” and “impartiality.”

On paragraph 23 of the Commentary, Korea can accept the texts in square brackets as they are but suggests adding a language that elaborates on the part that reads “extends until he or she ceases to exercise his or her functions.” In practice, an Adjudicator’s exercise of his or her functions concerning an IID proceeding may deem to have “ceased”—whether in whole or in part—for several reasons, including not only when the proceeding in which he or she is appointed to is concluded or terminated, but also when the proceeding is suspended or delayed. For the avoidance of any uncertainty and consistent practice with the Code, it would be useful to have the Commentary address such instances. For example, an Adjudicator in an IID proceeding that is paused for an indefinite period should continue to be

bound by the obligations under the Code unless otherwise agreed by, or the proceeding is officially terminated by, the disputing parties and/or the tribunal.

In relation to paragraph 25 as well as the Commentary as a whole,² “IID” and “IID proceeding” are both used and, perhaps on purpose, differently in each context. This may also be of a legal scrubbing issue that the Secretariat can effectively take care of, or once again review, throughout the Commentary. It would be important to ensure adequate and proper use of such terms in each context.

Regarding the bracketed texts, Korea considers that having the same nationality can still be a factor of loyalty though it may not be in and of itself a proof of loyalty. As such, in the Working Group’s consideration of the bracketed sentence, Korea proposes to insert “itself” or “alone” so it reads, “Having the same nationality as a disputing party or a legal representative *itself/alone* does not indicate loyalty to that disputing party” (emphasis added). Moreover, as flagged by several delegations at the 43rd session, Korea supports the idea that it would be helpful to include in the Commentary some examples of what “loyalty” means. Paragraph 26 of the Commentary defines “instruction” as “any form of order, direction, recommendation or guidance concerning the proceeding.” Given that “matters addressed in the IID [sic (proceeding)]” involve factual issues considered in the course of the IID proceeding, an “instruction” may also be in a (verbal or non-verbal) form of illustration or description of the facts, though not an explicit order, direction, recommendation or guidance. As such, it would be useful to reflect that in the Commentary.

On paragraph 27 of the Commentary, as expressed by several delegations at the 43rd session, Korea agrees that future relationships should also be considered in the article itself as well as in the Commentary. If there is consensus to delete “past or existing” in Article 3(2)(c), it would be desirable to explain in the Commentary that the “relationship” encompasses any relationships, whether past, existing, or future.

On paragraph 28, the list of examples for “benefit” appears to be a non-exhaustive list given the term “encompasses,” but it may be worth confirming so.

On paragraph 29, Korea wishes to ensure that the phrase “takes any action” captures both acts and omissions and that it is reflected in the Commentary.

4. Commentary to Article 4 (Limit on multiple roles)

On paragraph 31 of the Commentary, Korea finds it unclear whether the term “the disputing parties” of Article 4(1) refers only to the disputing parties in the present IID proceeding. If so, for the Adjudicator to act as a legal representative or an expert witness in another IID proceeding [within a period of three years following the conclusion of an IID proceeding], he/she would need to come back to the disputing parties in the previous IID proceeding and seek their agreement. Korea would appreciate any clarification in the Commentary to this extent.

In addition, in line with the article that provides, “Unless the disputing parties agree

² The relevant parts include, but not limited to, paragraphs 26, 28, 31, 36, 39, 62, 80, 88 and 91.

otherwise,” the Commentary should address for a clarity purpose, perhaps at the end of the second sentence, that such distinct obligations apply to the extent not agreed differently by the disputing parties.

In paragraph 33 of the Commentary, “the end of his or her functions” in the square bracketed texts, in line with “he or she ceases to exercise his or her functions” in paragraph 23 of the Commentary, would require a further explanation as to when is deemed as “the end”. In the alternative, the fact that the point of “conclusion of the IID proceeding” may vary by case or applicable rules can be addressed in the Commentary.

On paragraph 37 of the Commentary, Korea is of the view that “measure” is defined differently in various treaties and, therefore, suggests rephrasing the last sentence to reflect such practice and that “measure” shall be interpreted in accordance with the instrument upon which consent to adjudicate is based, instead of providing in the Commentary what “measure” generally is.

On a minor note on paragraph 37 of the Commentary, the last “s” in the subtitle “The same measures” should be bracketed—*i.e.*, “The same measure(s)” —so it is consistent with the subtitles for the subsequent paragraphs—*i.e.*, “The same or related party(parties)” and “The same provision(s) of the same treaty.”

On paragraph 39 of the Commentary, stating that “the provisions applicable to the IID must be identical and in the same treaty” is of concern as such provisions potentially include provisions on the consent to arbitrate or procedures for conducting an arbitration, for instance, Article 25 of the ICSID Convention as brought up at the 43rd session. Also, the fact that limitation of multiple roles under Article 4 is predicated upon a treaty only, when an IID can arise out of an investment treaty, legislation, or contract pursuant to its definition in Article 1, raises an issue, as pointed out in the Note. Korea looks forward to continuing the discussion on Article 4 and the third criteria, “the same provision(s) of the same treaty,” and the Commentary thereto.

5. Commentary to Article 5 (Duty of diligence)

On paragraph 54 of the Commentary, Korea proposes to insert “the specific circumstances such as” to precede “the complexity of the factual and legal issues that arise in the IID”. Accordingly, the sentence would foresee all potential circumstances, including the complexity of the issues involved, which can affect the amount of time needed for an Arbitrator to render decisions, *e.g.*, the amount of disputing parties’ submissions in the IID proceeding (regardless of the complexity of the IID).

Furthermore, Korea suggests elaborating on the last sentence to show that an Arbitrator should abide by the timelines or deadlines not only provided in the applicable rules, but also as agreed in the IID proceeding (whether between the disputing parties or within the tribunal). In case there are no timelines or deadlines provided either in the applicable rules or in the IID proceeding itself, the Working Group may wish to consider changing “the timelines or deadlines” to “any timelines or deadlines.”

6. Commentary to Article 6 (Integrity and competence)

On paragraph 58 of the Commentary, Korea can agree with keeping “civility” but with an adequate explanation as to what constitutes “civility,” along with some examples which can partly be incorporated from the current paragraph 59 of the Commentary concerning Article 6(1)(b).

7. Commentary to Article 8 (Confidentiality)

On paragraph 69, Korea supports keeping the texts in square brackets.

8. Commentary to Article 9 (Fees and expenses)

On paragraph 74 of the Commentary, Korea suggests adding a general statement that fees and expenses generally should be reasonable and inserting, for clarity, “in relation to the IID proceeding” at the end of the first sentence. Korea agrees with removing the square brackets and maintaining “reasonable.”

Concerning paragraph 76 of the Commentary, the second sentence explains that any proposal on fees and expenses is to be communicated “through the administering institution.” However, it is unclear from the explanation whether communicating a proposal on fees and expenses not through the administering institution, even when there is one, but directly to a disputing party constitutes a breach of the Code. Korea would appreciate it if there is clarification regarding this point.

In relation to paragraph 78 of the Commentary, Korea finds the terms “conclude” and “consult” as two completely different terms. While the second sentence provides that there is no need to determine or fix the actual amount of fees and expenses, the paragraph is silent on how much consultation is sufficient to satisfy the “conclude” element in Article 9(2). In light of this, Korea concerns that merely beginning a consultation on fees and expenses can be treated as having “concluded” any discussion on fees and expenses. As such, the Commentary should go beyond stating “must consult” and possibly specify that such discussion shall work out the details of fees and expenses to the extent possible, including the hourly rates of the arbitrator(s) and the Assistant, if any, and any applicable caps on the fees and expenses.

9. Commentary to Article 10 (Disclosure obligations)

On paragraph 86 of the Commentary, given that there is no temporal limit on the circumstances to be disclosed, changing “any past or present” to “any” might better serve the purpose. This will help avoid exclusion of any potential, future circumstances that may give rise to justifiable doubts on the independence or impartiality of the Arbitrator or Arbitrator Candidate. This is also in line with Korea’s comment to paragraph 27 of the Commentary.

Paragraph 89 of the Commentary provides in part “other persons or entities involved in the IID proceeding,” whereas a similar part in paragraph 92 provides “any entity identified by

a disputing party.” As “involved in the IID proceeding” and “identified by a disputing party” may have different connotations, Korea suggests using a consistent language in these paragraphs and throughout the Commentary to avoid any unnecessary confusion, since being an entity identified by a disputing party may not necessarily be an entity involved in the IID proceeding.

On paragraph 95 of the Commentary, Korea finds that the word choice of “should” renders the subsequent part of the sentence an obligation for the disputing parties. Article 10 concerns entities already identified by the disputing parties, not entities the disputing parties were obliged to identify. Since the Code regulates the conduct of an Adjudicator and a Candidate, not a disputing party, the first sentence may need to be revisited and adjusted as necessary.

On paragraph 99 of the Commentary, as to the word choice between “best” and “reasonable” in square brackets, Korea would prefer “best” given the importance of disclosing circumstances likely to give rise to justifiable doubts as to an Arbitrator’s independence or impartiality, and in consideration of other relevant parts in the Commentary and the Code.³

³ Article 6(1)(c) requires “best” efforts, and paragraphs 99 and 101 of the Commentary already uses the term “best”—“to the best of his or her ability” and “best efforts”.

This is an initial draft for comments until 14 October 2022. All comments on this initial draft should be communicated to the UNCITRAL and ICSID Secretariats with the subject “Comments on initial draft Commentary to the Code of Conduct”.
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Possible reform of investor-State dispute settlement (ISDS)

Commentary to the Code of Conduct

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[Singapore: Singapore's comments are tracked in this colour.]

I. Introduction

1. The following is an initial draft of the Commentary to the Code of Conduct (the “Code”) to assist the delegations during their deliberations on the Code (contained in document [A/CN.9/WG.III/WP.216](#)) at the forty-third session of Working Group III to be held in Vienna from 5 to 16 September 2022. It has been prepared with the ICSID Secretariat **and is an informal document for discussion purposes only**. Based on the deliberations at the forty-third session and reflecting decisions taken by the Working Group, the Commentary will be updated and presented to the forty-fourth session of the Working Group scheduled for January 2023.

2. The draft articles of the Code are reproduced below for information purposes only. The draft Code, along with notes identifying issues that require further consideration and decision by the Working Group, is found in document [A/CN.9/WG.III/WP.216](#). Accordingly, the Commentary will need to be elaborated further after the forty-third session.

II. Draft Commentary

Article 1 – Definitions

For the purposes of the Code:

- (a) “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;
- (b) “Arbitrator” means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;
- (c) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;
- (d) “Adjudicator” means an Arbitrator or a Judge;
- (e) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet [been appointed] [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
- (f) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];
- (g) “Ex parte communication” means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.

Commentary

3. Article 1 defines key terminology of the Code. These terms apply only in the context of the Code and are not intended to be self-standing definitions applicable to international investment disputes generally.

“International Investment Dispute”

4. The term “International Investment Dispute” (“IID”) in subparagraph (a) covers all types of IIDs regardless of, the legal basis of consent to adjudicate the dispute, and whether the proceedings are conducted under the auspices of a standing mechanism, administered by an arbitral institution, or ad hoc. By contrast, it does not cover [disputes between States or] disputes arising out of commercial contracts that do not arise out of an investment.

[Singapore: We agree that the words in square brackets, ie, “disputes between States or” should be retained.]

5. The term “IID” refers to the dispute itself, while the term “IID proceeding(s)” refers to the process of resolving an IID.

6. “Regional Economic Integration Organization (REIO)” means an organization constituted by States to which they have transferred competence in respect of IID matters, including the authority to make decisions binding on them in respect of such matters.¹ [“Any constituent subdivision or agency of a State or REIO” should be read in accordance with article 25 of the ICSID Convention and public international law on attribution of State responsibility. It usually includes any decentralized or federated organ such as a municipality or a regional entity.]

7. “Investment contract” refers to an agreement entered into between a foreign investor and a State [or any constituent subdivision or agency of that State] regarding an investment made in the territory of that State.

“Arbitrator”, “Judge”, “Adjudicator” and “Candidate”

8. Subparagraph (b) defines the term “Arbitrator” as any person appointed as a member of an arbitral tribunal, regardless of the nature of the arbitration (*ad hoc* or institutional).

9. The term “Judge” in paragraph (c) refers to any person who is a member of a standing mechanism that is established for the purpose of resolving IIDs. The term includes both permanent and *ad hoc* judges appointed to the standing mechanism.

10. The term “Adjudicator” in paragraph (d) is used to refer collectively to Arbitrators and Judges. It does not include mediators, conciliators, fact finders or expert witnesses.

11. Under paragraph (e), the term “Candidate” refers to any person being considered for appointment as an Arbitrator or a Judge. With respect to an Arbitrator, an individual effectively becomes a Candidate immediately upon being contacted by a disputing party or an arbitral institution about the possibility of an appointment to a specific case. A person ceases to be a Candidate and becomes an Arbitrator ~~[upon appointment as an Arbitrator], or upon acceptance of such appointment where the relevant institutional or procedural rules (eg, under the ICSID framework) so provide. [upon accepting the appointment as an Arbitrator]. [A person who has been appointed but has not yet accepted the appointment will be a Candidate. This is to reflect the practice of certain arbitral institutions. Under the ICSID framework for instance, such person would have twenty days to accept the appointment, at which time he or she becomes an Arbitrator.]~~ [Singapore: We have made these changes to capture discussions at the 43rd session.] A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a Candidate. With respect to a Judge, the time at which an individual becomes a Candidate will depend on the standing mechanism’s selection process. The individual ceases to be a Candidate and becomes a Judge upon confirmation in such role.

“Assistant”

12. The term “Assistant” defined in paragraph (f) refers to a person who is assigned certain tasks, for instance, an associate in an Arbitrator’s firm, chamber or practice, related to a specific dispute. Tasks typically carried out by such an Assistant could include factual

¹ ICSID Additional Facility Rules, Rule 1 (2022).

and legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments. An Assistant does not exercise decision-making functions on the merits of the IID. An Assistant may create preliminary drafts of awards, decisions or orders, but always on instructions from and under the direction of an Adjudicator.

13. The definition of Assistant for the purposes of the Code does not include staff of arbitral institutions or of a standing mechanism – for example, tribunal secretaries, paralegals, clerks, and registry assistants who are employed by the institution or a standing mechanism. This is because such persons do not work under the direction or control of an Adjudicator in the same manner as an Assistant and they are bound by institution-specific or standing mechanism-specific obligations or terms of employment.

14. Tribunal-appointed experts are also excluded from the definition of Assistant, as they are not employed by or under the control of an Adjudicator and have a different role in the IID. While an Adjudicator provides terms of reference to a tribunal-appointed expert, experts remain independent in their tasks, methodology and submissions.

15. The selection of Assistants and the tasks to be performed by them are usually addressed with the disputing parties prior to their engagement. This means that at the start of a proceeding, an Adjudicator should discuss the name, proposed tasks, hearing attendance, fees and expenses of the Assistant, and share the Assistant’s curriculum vitae with the disputing parties, which would give them a timely opportunity to raise any questions or concerns regarding the Assistant.

“Ex parte communication”

16. Ex parte communication in the context of an IID refers to a Candidate or an Adjudicator communicating with a disputing party or its legal representative without the presence or knowledge of the other disputing party. The term “other related person” is aimed at making the list of persons concerned an open one, to the extent that such person is relevant to the IID. Typically, the term would include a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities, as well as a third party funder. The definition of ex parte communication is to be read in conjunction with article 7 which sets specific provisions with regard to ex parte communication. [Singapore: Singapore recalls that at the WG’s 41st session, delegations discussed whether a third party funder would be caught within the scope of “other related person”. Singapore suggested that the commentary could clarify that a related person, in the context of ex parte proceedings, includes a third party funder, as a way forward. This drafting suggestion is specific to ex parte communications.]

Article 2 – Application of the Code

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| <ol style="list-style-type: none">1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code. |
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Commentary

Scope of application

17. According to article 2(1), the Code applies to individuals in an IID, namely an Adjudicator or a Candidate as defined in article 1. The second sentence clarifies that the disputing parties may also agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution. Examples could include an adjudicator appointed to resolve a State-to-State dispute, or an arbitrator appointed to resolve a commercial arbitration dispute. Such agreement between the disputing parties should be expressed ~~on~~ in writing, as there is no presumption that the Code applies in any dispute other than an IID.

Complementary nature of the Code [This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 16-19.]

18. Article 2(2) notes that if the investment treaty, legislation governing foreign investments or an investment contract upon which consent to adjudicate is based contains provisions [regulating][on] the conduct of an Adjudicator or a Candidate in an IID proceeding, such provisions would continue to apply and the Code would complement such provisions. This means that those provisions as well as the Code apply and hence an Adjudicator must comply with all such obligations at once.

19. The term “inconsistency” in paragraph 2 refers to situations of clear conflict between the provisions of the Code and other applicable provisions on conduct, namely where the two sets of provisions are irreconcilable or cannot be complied with at the same time.

[Note to the Working Group: The Working Group may wish to consider whether the Commentary should provide concrete examples, which may, however, be subject to different interpretation depending on the actual circumstance. For instance, the Working Group may wish to consider the situation where other applicable provisions on the conduct of adjudicators would request a declaration to be made within a specified timeframe before the constitution of the tribunal, while the Code remains silent on that aspect.]

Compliance of an Assistant with the Code

20. Article 2(3) provides that the Adjudicator assigning tasks to an Assistant must ensure that the Assistant is aware of and complies with the Code. [Provisions of the Code relevant to an Assistant are [contained in] articles [~~3~~, 5(1)(a) and (b), 6(1), 7, 8, 10, 11]].

[Singapore: Singapore proposes to adjust the references to articles which apply to assistants. In particular:

- Singapore does not think that an assistant has to be bound by Article 3 (Independence and Impartiality) as an assistant does not exercise decision making functions.
- We consider that only paragraphs 1(a) and (b) in Article 5 are applicable to assistants. In our view, the requirement to (c) Render all decisions in a timely manner; [(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and (d) Not delegate his or her decision-making function, are not relevant in the context of assistants.
- Paragraphs 2 and 3 in Article 6 are not applicable to assistants as they apply to Candidates.
- Singapore suggests including Article 7 as an assistant should not have *ex parte* communication with a disputing party. This is reflected in Singapore’s existing treaty practice, such as the CPTPP Code of Conduct for ISDS.
- Singapore suggests including Article 10 as it would be useful for disputing parties to know if an assistant has any potential conflict of interest. This is reflected in Singapore’s existing treaty practice, such as the CPTPP Code of Conduct for ISDS.]

~~20-21.~~ One way of ensuring that the Assistant is aware of and complies with the Code would be to have the Assistant sign a declaration stating that he or she has read the Code and will abide by its relevant terms. After the Assistant has signed the declaration, the Adjudicator should continue to ensure that the Assistant effectively complies with the obligations and standards of the Code during the course of his or her duties. The obligation in paragraph 3 is incumbent on the Adjudicator who shall remove an Assistant in breach of the Code (see article 11(4)).

Article 3 – Independence and Impartiality

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| <ol style="list-style-type: none">1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].2. Paragraph 1 includes the obligation not to:<ol style="list-style-type: none">(a) Be influenced by loyalty to a disputing party, a non-disputing party, a nondisputing Treaty Party, or any of their legal representatives;(b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;(c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];(d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;(e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or(f) Take any action that creates the appearance of a lack of independence or impartiality. |
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Commentary

Independence and impartiality 22. Article 3(1) provides that an Adjudicator shall be independent and impartial. “Independence” refers to the absence of any external control, in particular the absence of relations with a party that might influence an Adjudicator’s decision. “Impartiality” means the absence of bias or predisposition of an Adjudicator towards a disputing party or issues raised in the proceedings].

Temporal scope of the obligation

23. The obligation to be independent and impartial is a continuous one. [For Arbitrators, it starts upon appointment or confirmation and extends until he or she ceases to exercise his or her functions. This may differ depending on the case, for example, when the final award is issued, the IID is settled or otherwise discontinued, the Arbitrator resigns or is removed from the IID proceeding. If the Arbitrator is liable to continue to exercise his or her functions in the IID proceeding (for instance, if the tribunal was asked to correct or rectify the arbitral award after it has been issued or to consider the decision on remand by an appellate tribunal), the obligation would continue to apply.] Judges must remain independent and impartial until the end of their term of office.

Non-exhaustive list

24. Article 3(2) clarifies the meaning of “independence and impartiality” by providing a non-exhaustive list of examples of when an Adjudicator could be found to lack independence or impartiality.

25. For instance, subparagraph (a) provides that an Adjudicator shall not be influenced by loyalty to persons involved in the IID such as a disputing party or any of their legal representatives. [Having the same nationality as a disputing party or a legal representative does not indicate loyalty to that disputing party.] The term “non-disputing party” refers to an individual or entity that is not a party to the dispute but has been given the tribunal’s permission to file a written submission in the IID. The term “non-disputing Treaty Party” refers to a State or REIO that is a party to the treaty upon which consent to adjudicate the IID is based but is not a claimant or respondent in the case.

26. Subparagraph (b) provides that an Adjudicator shall not take any instructions regarding any matter addressed in the IID. This includes instructions from any organization (either private or public), government (including public entities and their emanations) or individual. “Instruction” means any form of order, direction, recommendation or guidance concerning the proceeding. “Matters addressed in the IID” means any factual, procedural or substantive issue considered in the course of the IID proceeding. By contrast, compliance by the Adjudicator with binding interpretations of a joint committee or referencing a decision by another arbitral tribunal would not be considered as taking instructions within the meaning of subparagraph (b).

27. Subparagraph (c) focuses on past or existing relationships that could influence an Adjudicator’s conduct, including the exercise of his or her judgment. For a violation to occur, such a relationship must have an impact on the Adjudicator’s conduct of the case or the decisions taken in the proceeding, including the final findings on the case.

Note to the Working Group

The below is a list of examples taken from the [IBA Guidelines](#) that could provide guidance as to the types of relationships that could be problematic in the context of subparagraph (c). Such a relationship in itself would not necessarily result in a violation of subparagraph (c), which would largely depend on the facts of the case.

- An Adjudicator (X) has previously given legal advice, or provided an expert opinion, in a dispute involving disputing party (Y) or one of its affiliates;
- X currently represents or advises Y or one of its affiliates;
- X currently represents or advises the lawyer or law firm acting as counsel for Y;
- X is a manager, director or member of the governing board of Y, or has a controlling interest in an affiliate of Y, and Y is directly involved in the matters raised in the IID;
- X’s law firm currently has a significant commercial relationship with the respondent State (Z), or a public entity of Z;
- X has a close family relationship with Y, or with a manager, director or member of the governing board of Y.

28. The term “function” in subparagraph (e) refers to a professional responsibility, [such as an appointment as adjudicator in another IID or non-IID]. The term “benefit” encompasses any gift, advantage, privilege or reward.

29. Subparagraph (f) indicates that if the Adjudicator takes any action which creates the appearance of a lack of independence or impartiality, it could result in a breach of the obligation in paragraph 1 to be “independent and impartial”. This stresses the fact that an Adjudicator must remain vigilant and be proactive in ensuring that he or she does not create any impression or apprehension of bias. [\[Singapore: Singapore typically uses the phrase](#)

“apprehension of bias” in our existing treaty practice, such as the CPTPP Code of Conduct for ISDS.]

30. The standard of appearance of a lack of independence or impartiality in subparagraph (f) is an objective one, based on a reasonable evaluation of the evidence by a third party. It is akin to the notion of justifiable doubts, as applied in a number of arbitration instruments including the ICSID Arbitration Rules,² the UNCITRAL Arbitration Rules,³ and the IBA Guidelines on Conflicts of Interest.⁴

Article 4 – Limit on multiple roles

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| <p><i>[Paragraphs applicable to Arbitrators only]</i></p> <p>1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:</p> <ul style="list-style-type: none">(a) The same measure(s);(b) The same or related party(parties); or(c) The same provision(s) of the same treaty. <p>2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.</p> <p><i>[Paragraphs applicable to Judges only]</i></p> <p>3. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.</p> <p>4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.</p> <p>5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.</p> <p>6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.</p> |
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Commentary

² Convention on the settlement of investment disputes between States and nationals of other States, Article 57.

³ UNCITRAL Arbitration Rules, Article 12(1) (2013): “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2.

Limitation on multiple roles [This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 27-31.]

31. Performing multiple roles in IIDs can give rise to conflicts of interest or the appearance thereof. Article 4 therefore sets forth distinct obligations for Arbitrators and Judges and prohibits them from undertaking certain other roles while functioning as an Arbitrator or a Judge.

32. Article 4 does not impose an absolute ban on multiple roles. Rather, the prohibition only applies [within a certain period of time (including concurrently) and] when the IID proceedings share some commonalities, and is limited to undertaking certain functions.

33. Paragraphs 1 and 2 set forth the temporal scope of the prohibition for Arbitrators. They are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding, where that proceeding meets the specified criteria [and for a period of three years following the end of his or her functions as an Arbitrator]. [Singapore: As set out in Singapore's intervention at the 43rd session, Singapore is not in favour of including a 3-year cooling off period. We note that this issue is tied to further discussions on the COC, and suggest revisiting this issue in the Commentary after the text of the COC has been finalised.] This means that an individual functioning as a legal representative or an expert witness in an IID proceeding would need to resign from that role before accepting an appointment as an Arbitrator.

Limited roles

34. Paragraph 1 only concerns the Arbitrator acting as a legal representative or an expert witness in another IID proceeding. It does not limit an Arbitrator from performing other adjudicatory function, such as acting as an arbitrator in another IID or non-IID proceeding. [While the paragraph does not address an Arbitrator performing the functions of a Judge, the terms of office of a Judge could require him or her to resign his duties as an Arbitrator prior to being appointed as a Judge.]

Criteria triggering the prohibition

35. The prohibition only applies if the other IID proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same treaty. When any of these criteria are met, the Arbitrator would be prohibited from acting as a legal representative or an expert witness in another IID proceeding.

36. The use of the term “same” throughout article 4 means that the elements under scrutiny in the IID must be identical. In other words, the threshold to trigger the prohibition is high.

The same measures

37. The first criteria triggering the prohibition under subparagraph 1(a) is if the other IID proceeding deals with “the same measure(s)”. This term refers to the measures that have given rise to the dispute. Generally speaking, measures include any law, regulation, procedure, requirement, or practice⁵ of the respondent State that allegedly affected the investor's investment or protected rights under the investment instrument.

The same or related party(parties)

38. The second criteria under subparagraph 1(b) relates to the “same or related party(parties)”. This includes a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities. By contrast, it does not include non-disputing parties, such as third-party funders or non-disputing Treaty Parties.

⁵ See for instance North American Free Trade Agreement, Article 201.

The same provision(s) of the same treaty

39. The third criteria refers to “the same provision(s) of the same treaty”. This means that for the prohibition to be triggered, the provisions applicable to the IID must be identical and in the same treaty.

[Note to the Working Group: This part would need to be supplemented following a discussion on the scope of the intended limitation. One question would be whether the prohibition in subparagraph (c) should be applied only to provisions in the same _____

“treaty” and not other instruments upon which consent to adjudicate is based. The term “treaty” might need to be qualified as the treaty upon which consent to adjudicate is based, to avoid for example, reliance on the ICSID Convention, to trigger the prohibition. Another question would be whether relying on the same provision allowing claims to be raised or providing the basis of the jurisdiction of the tribunal would trigger the prohibition in subparagraph (c), which could lead to a very broad limitation.]

Party autonomy [This section will be elaborated further following the discussion by the Working Group. See [A/CN.9/WG.III/WP.216](#), paragraph 24.]

40. The term “unless the disputing parties agree otherwise” in paragraph 1 means that the limitation of roles prescribed in article 4, paragraph 1 could be waived by the disputing parties. To allow the disputing parties to make an informed waiver, the Arbitrator should disclose relevant information about the role currently undertaken or to be undertaken, in accordance with article 10.

Another IID proceeding involving legal issues that are substantially so similar

41. Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding that involves “legal issues which are substantially so similar that accepting such a role would be in breach of article 3 (independence and impartiality). The prohibition in paragraph 2 would be triggered only if the role to be assumed by an Arbitrator concurrently [or undertaken within the three years after the IID proceeding] would amount to a lack of independence or impartiality in breach of article 3. This includes the creation of an appearance of a lack of independence or impartiality as mentioned in article 3(2)(f).

[Note to Working Group: The Working Group may wish to consider the relationship between articles 3(2)(f) and 4(2), which could be further elaborated in the Commentary.]

42. For example, article 4(2) would be breached if an Arbitrator accepts a role as a legal representative in another IID proceeding which does not fall under paragraph 1, but raises issues substantially so similar that accepting that role would create the appearance that the Arbitrator was not independent and impartial in the IID proceeding. This may also be the case when an Arbitrator is appointed as an expert witness in another IID proceeding to address a provision in an investment treaty very similar to that being addressed in the proceeding that he or she is functioning as the Arbitrator but based on a different investment treaty and involving different parties.

43. [The prohibition in paragraph 2 could be waived by the disputing parties if they so agree. This would mean that all of the disputing parties would waive their rights to raise an objection with respect to the Arbitrator being appointed as a legal representative or an expert witness in another specific IID proceeding raising substantially similar legal issues.]
[Singapore: As set out in Singapore’s intervention at the 43rd session, Singapore is not in favour of including paragraph 2 of Article 4. We note that this issue is tied to further discussions on the COC, and suggest revisiting this issue in the Commentary after the text of the COC has been finalised.]

Non-compliance with paragraphs 1 and 2 [This section will be elaborated further following the discussion by the Working Group. See A/CN.9/WG.III/WP.216, paragraphs 24-34.]
Prohibition to exercise any political or administrative function

44. Paragraph 3 prohibits a Judge from carrying out any “political or administrative function” outside the standing mechanism. A Judge would be prohibited, for instance, in acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches for a political organization or candidate, or [publicly] soliciting funds for or donating to a political organization or candidate. The limitation does not include administrative functions that a Judge might carry out in the context of a standing mechanism in accordance with the applicable rules of such mechanism or with his or her terms of office. For example, a Judge would be able to function as President elected through a vote or head a committee on financing of the standing mechanism.

45. A Judge would have an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of a full-time office. In particular, pursuant to paragraph 3, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.

Party autonomy with regard to Judges

46. In accordance with paragraph 4, before assuming any other function or occupation, a Judge should inform the [President of the] standing mechanism, which would determine whether such function or occupation would be prohibited under paragraph 3

47. In contrast to Arbitrators where the disputing parties can agree to waive limitations on multiple roles, whether a Judge could assume such function or occupation is to be determined by the standing mechanism. For example, if not prohibited under the terms of his or her office, whether a Judge can function as an Arbitrator in another IID proceeding outside the standing mechanism would be determined by the standing mechanism. If any such function or occupation has already been undertaken, the Judge should promptly inform the standing mechanism.

48. Paragraphs 5 and 6 apply to former judges and limit the role that they can undertake after their term of office. Paragraph 5 addresses IID proceedings before the standing mechanism that were initiated prior to the end of the Judge’s term. Paragraph 6 addresses IID proceedings before the standing mechanism initiated after the end of the Judge’s term.

49. Paragraph 5 prohibits a former Judge from being involved in any manner in an IID proceeding that was pending or which he or she had dealt with before the standing mechanism during his or her term. The scope of this prohibition is quite broad and covers any involvement including, but not limited to, acting as an ad hoc judge, legal representative, expert witness, third-party funder or amicus curiae. The prohibition is a continuing one.

50. Paragraph 6 addresses an IID proceeding brought before the standing mechanism after the Judge’s term of office. For a period of three years after his or her term of office, a former Judge would not be able to act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in a proceeding before the standing mechanism. This prohibition ceases to apply three years after the end of his or her term of office.

51. Paragraphs 5 and 6, however, do not limit a former Judge from being involved in an IID proceeding that is not before the standing mechanism.

Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

1. An Arbitrator shall:

- (a) Perform his or her duties diligently throughout the IID proceeding;
- (b) Devote sufficient time to the IID proceeding;
- (c) Render all decisions in a timely manner;

[(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and

- (e) Not delegate his or her decision-making function.

[Paragraph applicable to Judges only]

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.

Commentary

52. Article 5 addresses the Adjudicator's duty of diligence. It sets forth distinct provisions for Arbitrators and Judges, as such obligations of Judges are usually provided under their terms of office.

Perform his or her duties diligently

53. Article 5(1)(a) complements requirements in arbitral rules and terms of appointment requiring an Arbitrator to act diligently and expeditiously.

Render all decisions in a timely manner

54. The amount of time needed for an Arbitrator to render decisions can differ depending on the complexity of the factual and legal issues that arise in the IID. In particular, the time for making decisions should respect due process and the parties' ability to effectively present their case. To render decisions in a "timely manner" in accordance with article 5(1)(c), an Arbitrator should take these into consideration and abide by the timelines or deadlines in the applicable rules.

No delegation of decision-making functions

55. Article 5(1)(e) states that an Adjudicator should not delegate his or her decision-making function. Decision-making is the core function of an Arbitrator in an IID proceeding. However, an Arbitrator is not precluded from having his or her Assistant prepare a preliminary draft of a decision, provided that all relevant elements pertaining to that decision have been effectively reviewed and determined by the Arbitrator.

56. It is also without prejudice to applicable arbitral rules or procedural orders issued in the course of an IID proceeding which may stipulate that certain decision-making functions can be delegated, for example, to the presiding arbitrator.

Obligations applicable to a Judge

57. The availability of a Judge to perform his or her duties is addressed in paragraph 2. The modalities of such duties and availability are to be found under the terms of appointment of a Judge.

Article 6 – [Integrity and competence]

1. An Adjudicator shall:

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- (a) Conduct the IID proceedings in accordance with high standards of integrity, fairness[, civility] and competence;
 - (b) Treat all participants in the IID proceeding with civility; and
 - (c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

[Paragraph applicable to Arbitrator candidates only]

2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

[Paragraph applicable to Judge candidates only]

3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.

Commentary

Necessary qualities in the conduct of the proceedings

58. Article 6(1)(a) requires that an Adjudicator act with integrity, fairness, [civility] and competence. These are elements commonly expected from any Adjudicator, and are based on provisions found in existing instruments.⁶

59. [Article 6(1)(b) provides that an Adjudicator shall treat all participants in the proceeding with civility. “All participants” includes not only the disputing parties and their legal representatives but also other Adjudicators, witnesses, experts, non-disputing parties, clerks and interpreters. The term “civility” means being polite and respectful when interacting with those participants and is associated with the Adjudicator’s demonstration of professionalism.⁷]

Obligations of prospective arbitrators

60. Article 6(2) contains a distinct provision for prospective Arbitrators. It requires an Arbitrator candidate to accept an appointment only if he or she possesses the necessary competence, skills, and is available to discharge the duties of an Arbitrator. This is a self-assessment to be conducted by the candidate.

Obligations of prospective judges

61. A specific provision for prospective Judges is contained in paragraph 3. It provides that a Judge candidate shall possess the necessary competence and skills to fulfil the duties of a Judge. As a Judge is not appointed by the disputing parties, it is usually the appointing authority within the standing mechanism that would assess such skills and competence. In the selection process, particular consideration should usually be given to a candidate’s previous experience in handling IIDs, as well as his or her knowledge of public international law or international investment law.

Article 7 – Ex parte communication

[Paragraphs applicable to Arbitrators and Arbitrator candidates only]

1. Ex parte communication is prohibited except:

⁶ See e.g. ICSID Convention, Article 14: “Persons designated to serve on the Panels shall be persons

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| <p>(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;</p> <p>(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;</p> <p>(c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.</p> <p>2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.</p> <p>[Paragraph applicable to Judges and Judge candidates only]</p> <p>3. Ex parte communication is prohibited.</p> |
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Commentary

Principle – general prohibition

62. Article 7 introduces a general prohibition on ex parte communication for Adjudicators and Candidates. As defined in article 1, the prohibition relates to a communication (i) by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person; (ii) concerning the IID; and (iii) without the presence or knowledge of the other disputing party or parties. A communication not meeting these criteria, for example, a communication regarding a matter distinct from the IID, or an e-mail copying the other parties, would not fall under the definition of ex parte communication that is prohibited under article 7.

of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” [See also ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”] ⁷ See e.g. ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”

Exceptions

63. Article 7(1) sets forth a limited list of circumstances whereby ex parte communication would not be prohibited.

64. The first exception under Article 7(1)(a) concerns pre-appointment interviews. It covers communications by a candidate with a disputing party considering their nomination as party-appointed Arbitrator. Such communications may address the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of the Candidate as well as fee expectations and whether an Assistant will be requested. The disputing party or its legal representative may provide a general description of the IID, including the identity of the disputing parties, the other Arbitrators or Arbitrator candidates, expert witnesses or other interested parties. The terms of the consent to adjudication (treaty, contract or law), the applicable procedural rules, and any other agreements between the disputing parties concerning the applicable language, seat, or other similar administrative matters could also be communicated. Candidates may discuss publications and presentations they have made with the disputing parties. They may also discuss any activities of their law firm or organization which might raise a concern as to their independence or impartiality. It would be prudent to keep a record of the pre-appointment interviews to ensure that there is no dispute as to the content of these communications.

65. Subparagraph (b) addresses communication between a candidate for presiding arbitrator with the disputing parties or their legal representatives for the purpose of selecting the presiding Arbitrator. The notion of “presiding Arbitrator” includes a sole Arbitrator as well as the chair of an arbitral tribunal consisting of three or more Arbitrators. [Singapore: Singapore supports clarifying what the term “presiding Arbitrator” means.] Such communication is allowed only when the disputing parties have agreed to such ex parte communication.

[Note to the Working Group: The Working Group may wish to confirm that subparagraph 1(b) would allow an Arbitrator appointed by a disputing party (or an Arbitrator candidate to be appointed by a disputing party) to discuss with the disputing party or its legal representative the qualifications of a potential candidate for the presiding Arbitrator. Yet this would be subject to the agreement of the other disputing party and if that condition (the disputing parties so agree) is met, such a discussion might not fall under the definition of ex parte communication as the other disputing party would be aware of the communication. See document A/CN.9/WG.III/WP.216, paragraph 44.]

66. There may be circumstances where the applicable rules or treaty authorize ex parte communications; this would pre-empt the prohibition in article 7(1). In a similar vein, ex parte communication would not be prohibited if there is an agreement by the disputing parties to permit such communication.

Limit to the exceptions

67. Even when ex parte communication is permitted under article 7(1), matters pertaining to procedural or substantive aspects of the IID proceeding or those that can be anticipated to arise in the IID proceeding should not be discussed. For example, a Candidate or an Arbitrator’s prospective views on the jurisdiction of the tribunal, the substance of the dispute, or the merits of the claims should not be discussed.

Article 8 – Confidentiality

1. A Candidate and an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, ~~the an~~ IID proceeding unless:
 - (a) the information is publicly available [in accordance with the applicable rules or treaty,]; or
 - (b) permitted under the applicable rules or treaty or by agreement of the disputing parties.
2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].
3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].
4. An Adjudicator shall not disclose any draft decision in the IID proceeding.
5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].
6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

Commentary

68. Paragraph 1 sets forth a general prohibition not to disclose or use any information relating to the IID proceeding. It does not regulate the disclosure or use of such information for the purposes of the IID proceeding. For example, Adjudicators would be able to freely discuss among themselves information provided by the disputing parties.

69. The confidentiality obligation in paragraph 1 does not apply if the information is already publicly available [but only in accordance with the applicable rules or treaty. For example, if the information was made public in violation of the applicable rules or somehow “leaked”, the Candidate or the Adjudicator would be bound by the confidentiality obligation.] [Singapore: Singapore is of the view that the phrase in square brackets is useful and should be maintained.] Another exception to the confidentiality obligation would be if the disclosure is allowed for expressly in the applicable rules or treaty or by the agreement of all the disputing parties.

70. Paragraphs 2 to 4 elaborate further on the confidentiality obligation. An Adjudicator cannot disclose the contents of the deliberations in the IID proceeding including views expressed by other Adjudicators. Adjudicators are prohibited from disclosing earlier drafts of decisions and commenting on a decision which is not publicly available.

71. Paragraph 5 indicates that the obligation in article 8 is a continuing one and that an Adjudicator must abide by the obligation even after the proceedings. The same would apply to former Judges after their term of office.

72. Paragraph 6 provides for a general exception to the obligations in article 8 in two circumstances: (i) where the Adjudicator is legally required to disclose the information in domestic courts or requested to do so (for example, in a set aside or an enforcement proceeding) or any other competent body; and (ii) where the Adjudicator must disclose the information in a court or other competent body to protect his or her rights.

Article 9 – Fees and expenses

[Article applicable to Arbitrators and Arbitrator candidates only]

1. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated by the sole or presiding Arbitrator.
2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.
3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.
4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.
5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Commentary

73. Article 9 concerns the fees and expenses applicable in an IID and applies only to Arbitrators and Arbitrator candidates.

Fees and expenses

74. “Fees and expenses” in paragraph 1 refer to the fees of the arbitral tribunal including the respective fees of each Arbitrator, which is to be fixed with the disputing parties or by the institutional rules, as well as all [reasonable] travel and other expenses incurred by the Arbitrators. It does not cover the legal and other costs incurred by the disputing parties in relation to the IID proceeding, such as representation costs.

Proposal and discussions concerning fees and expenses

75. As indicated in paragraph 2, discussions concerning fees and expenses are usually concluded prior to or [immediately upon] the constitution of the arbitral tribunal.⁷

76. The term “proposal” in paragraph 1 generally refers to any proposal on fees and expenses made by an Arbitrator or the arbitral tribunal during or following such discussion. Any such proposal is to be communicated through the administering institution. In an ad hoc setting, the proposal should be communicated by the sole Arbitrator or the presiding Arbitrator, meaning that it would indeed be after the constitution of the arbitral tribunal.

Timing of the discussions

77. The rule in paragraph 2 is intended to avoid a situation where an Arbitrator would request different (higher) fees than originally contemplated or agreed to when the arbitral tribunal was formed, putting the disputing parties in the untenable position of having to refuse a request by the arbitral tribunal or having to agree to higher fees.

78. The term “conclude” in paragraphs 2 and 3 means that an Arbitrator, solely or jointly with the other members of the arbitral tribunal, must consult the disputing parties on any fees and expenses related to the IID proceeding and/or the Assistant. It does not mean that actual fees and expenses to be paid need to be already determined or fixed.

79. The applicable rules or treaty may prescribe the fees and expenses of an Arbitrator (see for example, ICSID Schedule of Fees and Memorandum on Fees and Expenses; ICC Memorandum on Fees). Alternatively, the applicable rules may provide a process for determining the applicable fees and expenses. For instance, article 41(3) of the UNCITRAL Arbitration Rules provides that “[p]romptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.”⁸ Where no such provision exists or the applicable rules or treaty are silent as to how and when these discussions should take place, paragraph 2 would be applicable. Unless the applicable rules or treaty contain a pre-determined rate or a specific method for the calculation of fees and expenses, such determination rests entirely within the disputing parties and the arbitrator(s).

Engaging the Assistant

80. The phrase “engaging any Assistant” in paragraph 3 should be understood in a broad sense, as an Assistant might be employed specifically for the purpose of the IID proceeding or might already be employed in the law firm to which the Arbitrator belongs. Paragraph 3 does not require the Arbitrator to discuss the fees and expenses of the Assistant with the disputing parties prior to contacting the Assistant to enquire about his or her availability to assist in the IID.

⁷ For instance, the 2022 ICSID Rules provide that requests regarding fees and expenses shall be made prior to the constitution of the arbitral tribunal (see Administrative and Financial Regulation 14(1)).

⁸ UNCITRAL Arbitration Rules, article 41(3): “Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.”

81. In practice, an Arbitrator may not have determined to engage an Assistant prior to or upon appointment. In such case, discussions related to fees and expenses of the Assistant should take place as soon as an Arbitrator foresees the need to engage an Assistant.

82. The express reference to Assistants in paragraph 3 should not be understood as prejudging the necessity or relevance of engaging Assistants in a particular IID proceeding. Such determination should be made on a case-by-case basis by the participants in the IID proceeding, taking into account elements such as the existence of an institution administering the IID proceeding.

Maintenance and availability of accurate records

83. Paragraph 4 requires an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding and to ensure that his or her Assistant, if any, does the same. This is common practice aimed at avoiding any dispute regarding fees and expenses. Paragraph 5 requires that the record maintained in accordance with paragraph 4 is made available. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not necessarily directly to the disputing parties. The phrase “requesting the disbursement of funds” in paragraph 5 refers to any request for the payment of fees or expenses incurred that are covered under article 9.

Article 10 – Disclosure obligations

[Article applicable to Arbitrators and Arbitrator candidates only]

1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.
2. The following information shall be included in the disclosure:
 - (a) Any financial, business, professional, or personal relationship in the past five years with:
 - (i) Any disputing party or an entity identified by a disputing party;
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and
 - (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];
 - (b) Any financial or personal interest in:
 - (i) The outcome of the IID proceeding;
 - (ii) Any other IID proceeding involving the same measure(s); and
 - (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;
 - (c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and

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- (d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.
3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].
 4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.
 5. A Candidate and an Arbitrator shall make the disclosure using the form in the Annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.
 6. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.
 7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code].
 8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.

Commentary

84. Article 10 addresses the disclosure obligations of a Candidate and an Arbitrator. Such obligations are central to the Code as they assist in identifying conflicts of interest and compliance with other obligations in the Code, mainly, the possible lack of independence and impartiality.

Standard of disclosure - “Any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality” [This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraph 59.]

85. The standard of disclosure in paragraph 1 is an objective one that stems from article 11 of the UNCITRAL Arbitration Rules which provides that “[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence”.

Scope of disclosure in accordance with paragraphs 1 and 2

86. The standard of disclosure in paragraph 1 is a broad one that covers any circumstances, including any past or present interest, relationship or other relevant matter, likely to give rise to justifiable doubts regarding the independence or impartiality of the Arbitrator or Arbitrator candidate. The circumstances to be disclosed are not limited in time, meaning that a circumstance which arose more than five years before the Candidate was contacted about the appointment would need to be disclosed in accordance with paragraph 1 if it is likely to give rise to justifiable doubts.

87. Paragraph 2 includes a list of matters that must be disclosed regardless of whether they give rise to justifiable doubts as contemplated in paragraph 1. Subparagraphs (a), (c) and (d), require disclosure of the relationships, proceedings and appointments within the past five years. The five-year time frame is calculated from the moment a Candidate is contacted for potential appointment by a disputing party or an appointing authority.

88. Information not falling within the scope of paragraph 2 may still need to be disclosed in accordance with paragraph 1. For example, if a particular personal relationship dates back to more than five years from the time of the appointment and would give rise to justifiable doubts, such relationship must be disclosed. At the same time, information listed in paragraph 2 must be disclosed even if it does not give rise to justifiable doubts as it may help identify possible conflicts of interest. For example, the Candidate's or Arbitrator's involvement in an unrelated IID may lead to the identification of conflicts of interest by other participants in the proceeding.

"Any financial, business, professional, or personal relationship"

89. Article 10(2)(a) addresses disclosures of information related to potential conflict arising from any financial, business, professional, or personal relationship a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.

90. "Business" relationship means any past or present connection related to commercial activities, either directly with the persons or entities listed in subparagraphs (2)(a)(i)-(iv), or indirectly through another person or entity, with or without the knowledge of such persons. It usually includes having shared financial interests, even if such interests do not specifically relate to an Arbitrator's or Candidate's professional activity.

91. "Professional" relationship in paragraph 2(a) refers to any past or present connection with another person relating to professional activities. It includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same firm as another person involved in the IID. It also includes involvement on the same projects or cases, for instance as opposing counsel or sitting as co-Arbitrator. By contrast, being a member of the same professional association or social or charitable organization as another person involved in the IID proceeding does not constitute a professional relationship for the purpose of paragraph 2(a). A Candidate or an Arbitrator who is an employee, associate or partner in a law firm is in principle considered to bear the identity of that law firm.⁹ Therefore, he or she would also need to disclose any relationship between any others involved in the IID and that law firm under Article 10(2)(a). For example, if a person in another office of that law firm represents an entity that is a subsidiary of one of the disputing parties in the IID, that relationship must be disclosed even if the Candidate or Arbitrator was not involved in that matter.

92. Article 10(2)(a)(i) concerns relationships with the disputing parties and any entity identified by a disputing party. This latter category includes for instance subsidiaries, affiliates, or parent entities, ~~State agencies and State owned enterprises~~. In practice, the disputing parties should, at the latest upon appointment of a Candidate or an Arbitrator, identify all relevant entities so that the Candidate or Arbitrator can check and assess any potential relationships. In accordance with Article 10(3), a Candidate and an Arbitrator should also make reasonable efforts to become aware of and identify any relationships even if a disputing party has not identified related entities or agencies. ~~For example, based on the knowledge of the State party to the dispute, the Candidate or Arbitrator should disclose any relationship with an agency or state owned company of that State.~~ If he or she subsequently acquires knowledge of a relationship with an entity that a disputing party has not identified pursuant to Article 10(2)(a)(i), he or she should disclose such relationship. [Singapore: We have made edits to track what a related person is in other parts of the Commentary, such as Article 4.]

"Any financial or personal interest"

93. The Candidate or Arbitrator's remuneration for work performed and reimbursement of expenses incurred in the IID proceeding is not considered a financial interest for the purpose of Article 10.

94. For the purpose of Article 10(2)(b), the term "same measures" is to be interpreted in the same manner as in Article 4.

⁹ See IBA Guidelines, General Standard 6(a).

95. The terms “identified by a disputing party” mean that the disputing parties should identify other entities having a direct or indirect interest in the outcome of the IID proceeding, if any. It does not mean however that disclosure is limited to those relationships with a disputing party’s entities that have been identified by a disputing party. Even in the absence or partial identification of a disputing party, if a Candidate or Arbitrator knows of such related entities, he or she would be subject to the disclosure obligation.

Involvement in other proceedings

96. The terms “any other proceeding” in paragraphs 2(b)(iii) cover any type of dispute involving a disputing party or an entity identified by a disputing party, including alternative dispute resolution methods such as mediation or conciliation proceedings. For example, this could be a commercial arbitration involving the parent company of a disputing party.

97. Paragraph 2(c) requires disclosure of the IID proceedings in which a Candidate or an Arbitrator has been involved in the past five years. The term “related proceedings” in this paragraph means any proceeding that is related to the IID but not covered by the definition in Article 1, including proceedings before domestic courts and tribunals to set aside, annul or enforce an IID award, judgment and challenge proceedings of an Adjudicator, other parallel proceedings brought before domestic courts or other arbitral tribunals related to the IID (for example based on a consent clause in a contract while the IID is based on a consent clause in a treaty), or other mediation or conciliation proceedings related to the IID.

98. Paragraph (2)(d) requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed either as a legal representative, expert witness or arbitrator by one of the disputing parties or their legal representatives over the past five years. While multiple appointments of arbitrators are not prohibited under the Code, multiple appointments from the same party, its legal representative or its affiliate entities are subject to disclosure as they could indicate a lack of independence or impartiality. For instance, if a Candidate or an Arbitrator has already been appointed over the past five years as Arbitrator on a number of occasions [*number to be determined by the Working Group*] by one of the parties or a subsidiary, affiliate or parent entity of a party, this could give rise to legitimate doubts as to his or her independence or impartiality. Consequently, the circumstances to be disclosed under subparagraph (d) are not limited to appointments made in the context of investment disputes, but all types of proceedings. This is informed by the use of the term “or any other proceeding”, which bears the same meaning as in paragraph 2(b)(iii).

Obligation to make reasonable efforts

99. The term “[reasonable] [best] efforts to become aware” in paragraph 3 means that a Candidate or Arbitrator must be proactive to the best of his or her ability to identify the existence of circumstances[, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or Arbitrator to ensure proper disclosure.

100. By way of illustration, the obligation under paragraph 3 could involve reviewing relevant documentation already in the possession of the Candidate or Arbitrator, conducting relevant conflict checks, or requesting the persons involved in the IID to provide further relevant information in case of doubt or if deemed necessary to conduct proper assessment.

101. A failure to become aware of a circumstance despite the Candidate or Arbitrator’s best efforts would not as such give rise to disqualification. [However, if such efforts reveal a conflict of interest, a Candidate shall not accept the appointment, or the Adjudicator shall resign or recuse him/herself from the IID proceeding in accordance with article 11(2).]

Form of the disclosure

102. Article 10(5) provides that disclosure of relevant information may be done using the form in the Annex to the Code prior to or upon [acceptance of the] appointment, and shall provide it to the disputing parties, the other Arbitrators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. The form in the Annex is a simplified disclosure form and its use is not mandatory as long as the relevant information is conveyed in a similar comprehensive manner.

103. The terms “prior to” and “upon” [acceptance of the] appointment in paragraph 5 does not imply that two separate disclosures are required, once as a Candidate and another as an Arbitrator. One would suffice for the purposes of paragraph 5 and an Arbitrator would have a continuing duty to make further disclosures in accordance with paragraph 6.

Continuing obligation of disclosure

104. Article 10(6) provides a continuing obligation of disclosure. If new relevant information falling under paragraphs 1 or 2 emerge or are brought to the knowledge of an Arbitrator during the course of the IID proceeding, he or she must disclose such information promptly and without delay in accordance with paragraph 5. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Failure to disclose

105. Article 10(7) indicates that a failure to disclose does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code]. It is rather the content of the disclosed or omitted information that determines whether there is a [breach] [lack of impartiality or independence]. [Even though a breach of Article 10 is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a Candidate or Adjudicator’s duty of independence and impartiality under articles 3 of the Code.]

Waiver of the disputing parties

106. Article 10(8) provides the possibility for the disputing parties to waive their respective rights to raise an objection with respect to circumstances that were disclosed. A waiver would preclude that disputing party from raising the objection at a later stage. Each disputing party can waive their respective rights and need not be done jointly. [**Note to the Working Group:** *The Working Group may wish to consider whether the form or method of the waiver will need to be further elaborated in the Commentary.*] Furthermore, it should be understood that the waiver would only relate to the circumstances that were disclosed.

107. In practice, this would mean that the disputing party would not challenge an Arbitrator based on the disclosed circumstances at a later stage. For instance, if a Candidate informs the disputing parties that he or she has, within the past five years, worked as a counsel in the same law firm as the current legal representative of a disputing party, and both disputing parties agree nonetheless to the appointment of that Candidate, it would not be possible for any of the disputing parties to subsequently challenge that Arbitrator on the basis of the disclosed circumstance. However, the waiver would not apply to any circumstance that was not disclosed. A disputing party is not precluded from raising a challenge for any circumstance not disclosed, as to circumstances that were not disclosed, for example, that he or she has maintained a close professional relationship with the law firm or the current legal representative, the waiver would not prevent a disputing party from raising a challenge. [**Singapore:** *We have suggested edits to make the intent clearer.*]

Disclosure obligation of Judges [To be elaborated after discussion by the Working Group, see A/CN.9/WG.III/WP.216, Appendix]

Article 11 – Compliance with the Code

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| <p>1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code.</p> <p>[2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]</p> <p>3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].</p> <p>4. An Adjudicator shall remove an Assistant who is in breach of the Code.</p> |
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Commentary

[This section will be elaborated further following the discussion by the Working Group, particularly on enforcement of the Code. See [A/CN.9/WG.III/WP.216](#), paragraphs 67-69.]

108. Article 11 addresses compliance of the Code and mentions possible remedies for non-compliance.

Principle of voluntary compliance

109. Paragraph 1 requires an Adjudicator and a Candidate to comply with the obligations in the Code that are applicable to them. One way to ensure this adherence is to require Adjudicators to sign a declaration upon appointment or confirmation as found in the Annex.

Remedies for non-compliance

110. The Code does not contain rules on challenge, disqualification, removal or other sanctions in case of breach. Paragraph 3 clarifies that existing sanctions shall apply, if provided in the applicable rules or treaties. Candidates who are not appointed as an Adjudicator could potentially be subject to sanctions under, for example, the applicable rules of professional accreditation bodies. If the applicable rules or treaties provide for specific challenge, disqualification, removal or other sanctions in relation to assistants, these sanctions could also apply to assistants.

111. Pursuant to Article 11(4), if an Assistant does not comply with the Code, the Adjudicator shall remove the Assistant from the IID proceeding. In practice, disputing parties who are concerned that an Assistant is not complying with the Code could raise these concerns with the Adjudicator and ask the Adjudicator to replace the Assistant. An Adjudicator who does not remove the Assistant would be in breach of paragraph 4 and may be subject to sanctions or remedies that may be provided for in the applicable rules or treaties pursuant to paragraph 3.

**SUBMISSION OF THE REPUBLIC OF TÜRKİYE
REGARDING THE DRAFT CODE OF CONDUCT**

October 14, 2022

Without prejudice

Türkiye respectfully submits its comments on the Draft Code of Conduct

- Within the framework of Article 4 of the Draft, a language specifying that arbitrators would not provide legal opinions in other cases could be inserted directly to the article's text or to the article's interpretation.
- In paragraph 6 of Article 8, the expression "The information to be disclosed shall be limited to the matters which are mandatory for the solution of the dispute in the relevant court." could be inserted next to the expression "to the extent that a Candidate or Adjudicator is legally compelled".
- With regard to Article 8 of the Draft, it may be considered to include an explanation in the article comments regarding what should be understood from the scope of the expression "legally compelled".

Commentary to the Code of Conduct – Comments by the United Kingdom

1. The United Kingdom thanks the UNCITRAL Secretariat for providing the draft Commentary to the Code of Conduct for consideration. The UK would like to express its continued support for work on the Code of Conduct in pursuit of agreeing the Code before the UNCITRAL Commission in Summer 2023.
2. The UK considers that the best way to progress discussions most effectively on the Code, with the aim of finalising it by Summer 2023, would be to consider the Code and its commentary simultaneously at this point. We note for instance, that the Commentary does not reflect that which was discussed in the 43rd session of Working Group III and developments in the Code which the Group agreed to explore and being able to consider the two together as changes are made would expedite the process.
3. However, the UK would like to provide the below comments on the Commentary. These comments are intended to provide a view on the Commentary and how it might be best utilised in relation to the provisions of the Code.

Purpose and Structure

4. The UK believes that the objective of the Commentary should be to provide clarity to users of the Code as to how it applies and how it must be complied with. In support of this, the UK believes it is important that the Commentary does not create new obligations or modify any of those contained within the Code.
5. The UK would also welcome clarity on the structure of the Commentary, given agreement to move towards two codes, one for Arbitrators and one for Judges. It will be important for us to understand how this will be done in practice, and how the Commentary aligns with the two codes in order for us to progress work, ie, will each Code have its own commentary or will a single commentary support the two?

Article 2

6. Should the Working Group continue to wish to apply the Code to Assistants as currently proposed, the UK thinks it is preferable to clarify which provisions of the Code are applicable to Assistants. The UK believes this could be achieved by saying, at the end in the first sentence of paragraph 20, “the relevant provisions of the Code” and by retaining the second sentence (the text within square brackets) at paragraph 20. For consistency between the Commentary and the Code, paragraph 3 of Article 2 should then require an Adjudicator to ensure than an Assistant complies with **relevant provisions of the Code**, as opposed to the Code at large. Similarly, the declaration referred to there would be qualified e.g. one could say “a declaration that he or she has read and will comply with those provisions”.
7. The UK’s initial view is that those provisions contained within the square brackets at paragraph 20 of the Code would be those relevant to Assistants, though we would welcome further discussion of this matter within the Working Group.

Article 4

8. The UK believes that there might be circumstances in which an Arbitrator acting concurrently (as a legal representative or expert witness) in disputes which relate to the same legal issues might be give rise to conflicts of interest or the appearance thereof. However, imposing a total ban on Arbitrators from acting concurrently in this manner in disputes relating to the same legal issues would have an overly chilling effect on the availability of arbitrators.

9. Therefore, the UK thinks that the appropriate balance is to stipulate that Arbitrators should not act concurrently (as legal representatives or expert witnesses) in disputes involving legal issues so substantially similar that accepting a role would be in breach of the independence and impartiality obligation in Article 3.
10. The UK believes the appropriate way to address this is to clarify the relationship between Articles 3 and 4. The existence of Article 4 does not and should not preclude the possibility that there may be other circumstances in which an Arbitrator accepting a concurrent appointment as a legal representative or expert witness might breach the independence and impartiality obligation in Article 3, including those involving the same legal issues. If such circumstances exist, the Arbitrator would not be able to accept that appointment without being in breach of the Code.
11. This relationship is best clarified through the Commentary as opposed to in the Code itself. To do so, the UK would propose that the following or similar language should be inserted in the Commentary for Article 4:

“For greater certainty Article 4 does not preclude the possibility that an Arbitrator, in acting concurrently as a legal representative or expert witness in another IID proceeding in circumstances other than those listed in sub-paragraphs (a) through (c) of paragraph 1, may nonetheless breach the obligation to be independent and impartial under article 3(1). If that is the case, the Arbitrator should not accept the appointment as a legal representative or expert witness in that other proceeding or, if thus acting already, will need to relinquish one of these roles.”

Comments: Commentary to the Code of Conduct
Submitted by the CCIAG and the USCIB
October 14, 2022

The Corporate Counsel International Arbitration Group (CCIAG)¹ and the United States Council for International Business (USCIB)² are grateful for the opportunity to comment, as observers in UNCITRAL Working Group III, on the first draft of the Commentary to the Code of Conduct. We commend the UNCITRAL and ICSID Secretariats for their considerable efforts preparing this document. In our comments below, we have endeavored to address the Commentary exclusively, not the Code. Our comments should thus be understood as without prejudice to our comments on the Code.

General comments

- It has been observed in the working group that the Commentary should be considered a non-binding document. If that is a correct expression of the working group’s views, we would recommend clarifying in the introduction to the Commentary that it is a non-binding document and clarifying what non-binding means.
- While we think it is important to clarify the import of the Commentary, we are candidly unsure if it will make a significant difference in practice. Whether the Commentary is framed as non-binding or binding, and whether these terms are defined or not, a prudent arbitrator is likely to act cautiously and consider the Commentary to be an authoritative interpretation of the Code that must be followed. Accordingly, the text of the Commentary warrants the same careful review and consideration by the working group as the Code itself.
- Because of the important role that the Commentary will likely play in practice, we consider it inadvisable to finalize the Code until the Commentary is final or nearly final. The alternative – finalizing the Code while the Commentary is only in rough form – would create a substantial risk of a mismatch between the two documents, with serious consequences. For example, it is likely that some delegations will have endorsed the Code based on their understanding of key provisions that the Commentary ultimately contradicts. This outcome can be prevented by considering and finalizing the two documents as a single package.

Article 3 – Independence and Impartiality

- Financial, business, professional, or personal relationships
 - We understand that the examples of financial, business, professional, or personal relationships listed on page 6 of the Commentary are taken from the IBA Guidelines on Conflicts of Interest in International Arbitration and are meant to provide guidance on the types of relationships that could create justifiable doubts

¹ The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution.

² USCIB is an association of international companies, law firms, and business associations from every sector of the economy, dedicated to promoting international trade and investment. As sole U.S. affiliate of the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and Business at OECD, USCIB presents informed business views and solutions to government leaders and policy makers worldwide.

regarding an arbitrator's independence or impartiality. We believe that it is essential for the commentary to provide a list of examples like this to facilitate the consistent and predictable application of the Code by arbitrators and disputing parties. However, we would raise several concerns with the list that has been provided.

- *First*, it is unclear how or why these 6 examples were chosen from among the 18 examples listed in the waivable and nonwaivable red lists in the IBA Guidelines. It would seem advisable for the working group – or a drafting committee in the working group – to interrogate *each* of the scenarios on the red lists to assess whether, depending on the facts of the case, each scenario is likely to give rise to justifiable doubts regarding an arbitrator's impartiality or independence. Otherwise, the commentary will have provided less clarity than the IBA Guidelines.
- *Second*, all 6 examples appear to have been chosen from the waivable red list, which begs the question whether these potential conflicts are indeed waivable. Based on the current text of Article 3 of the Code, the answer appears to be no. If that is correct, the commentary might confirm.
- *Third*, the first example listed – “An Adjudicator (X) has previously given legal advice, or provided an expert opinion, in a dispute involving disputing party (Y) or one of its affiliates” – may be an inaccurate paraphrasing of Example 2.1.1 on the waivable red list. Example 2.1.1 refers to the adjudicator having previously given legal advice or having previously provided an expert opinion “on the dispute,” not “a dispute,” to a party or one of its affiliates.
- Double-hatting
 - There has been discussion in the working group about moving Article 4(2) of the Code to the commentary to this article and adding an explanatory note to help users understand when two IID proceedings “involve[] legal issues which are substantially so similar” that acting as arbitrator in one and a legal representative or an expert witness in the other would breach Article 3.
 - In our view, this approach is totally unsatisfactory because it would result in a *de facto* complete ban on double-hatting in concurrent IID proceedings, which would severely compromise party autonomy and the arbitral pool. Even if the working group could precisely define “legal issues which are substantially so similar” in the commentary, it would not address the fundamental problem that at the time of the constitution of the tribunal, a candidate will be completely blind to the legal issues that may arise in the case, and as such, a prudent candidate will decline any double-hatting appointment. This would result in a *de facto* complete ban on double-hatting in concurrent cases, contrary to the description of the function of Article 4 in paragraph 32 of the Commentary.
 - As an alternative, we recommend clarifying in the commentary to this article that (a) an arbitrator's concurrent role as a legal representative or expert witness in another IID proceeding could give rise to a lack of independence or impartiality under Article 3(1), even if the concurrent role is not disciplined by Article 4; and (b) whether such a concurrent role breaches Article 3(1) depends on the facts and circumstances of each proceeding.

Article 4 (Limit on Multiple Roles)

- General comments
 - Paragraph 32 asserts that Article 4 of the Code does not impose a complete ban on double-hatting in concurrent IID proceedings. For the reasons discussed above, that is incorrect based on the current drafting of Article 4(2), and it should be remedied.
- Same measure(s)
 - Paragraph 37 states that the term “same measure(s)” “refers to the measures that have given rise to the dispute.” It may be more precise to define the term as follows: “refers to the measures alleged to constitute a breach of provisions in the instrument upon which consent to adjudicate is based.”
- Same or related party(ies)
 - The use of the term “includes” in the second sentence of paragraph 38 – “[Same or related party(ies)] includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities” – may create confusion by implying that “same or related party(ies)” is a broad category of persons. We would suggest replacing “includes” with “refers to.” With this change, the third sentence of paragraph 38 would be superfluous and could be deleted.
- Same provision(s) in the same treaty
 - In the Code or in this commentary, it should be clarified that “same provision(s)” refers to the same *substantive* provisions. If “same provision(s)” were interpreted, instead, to include provisions pertaining to jurisdiction and procedure as well, it would nullify the limiting function of “same provision(s)” and transform 4(1)(c) into a complete same treaty ban.

Article 7 – Ex parte communication

- The Code (including Article 7) applies to arbitrators – not disputing parties and legal representatives – and yet the commentary to Article 7 addresses the latter’s conduct. For example, the fourth sentence of paragraph 64 states: “The disputing party or its legal representative may provide a general description of the IID, including the identity of the disputing parties, the other Arbitrators or Arbitrator candidates, expert witnesses or other interested parties.” This statement appears to exceed the proper scope of the commentary.

Article 8 – Confidentiality

- Public information
 - We understand that the working group has decided to revise Article 8(1) of the Code as follows: “Unless permitted under the applicable rules or treaty or by the agreement of the parties, a Candidate or an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, the IID proceeding.” In practice, it may not be clear whether this rule permits an arbitrator to disclose public information concerning, or acquired in connection with, the IID proceeding, since the disclosure of public information is rarely if ever addressed in the applicable rules or by disputing parties. To remedy this ambiguity, we would recommend clarifying in the commentary that disclosure of public

information is permitted if it is “not inconsistent with” the applicable rules or the agreement of the parties.

- Exceptions to non-disclosure
 - The protection of confidential information that disputing parties disclose in IID proceedings is critically important to both sides. While it is nonetheless necessary to include the exception to non-disclosure of confidential information in Article 8(6) – allowing an arbitrator to disclose confidential information if the arbitrator “is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body – the commentary might offer additional comfort to disputing parties. For example, the commentary might call upon arbitrators to provide notice to the disputing parties first before disclosing confidential information in judicial proceedings in the circumstances set out in Article 6(1), to give the parties an opportunity to intervene in the proceedings to protect their interests. The commentary might also call upon arbitrators to take all reasonable steps to prevent public disclosure of confidential information in the circumstances set out in Article 6(1) (*e.g.*, by moving to submit the information under seal or subject to *in camera* review by the court).

Article 10 – Disclosure obligations

- Standard of disclosure under Article 10(1)
 - Article 10(1) of the Code provides: “A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.” Paragraph 85 of the Commentary explains that this provision sets out an objective standard for disclosure. However, the bracketed text – “including in the eyes of the disputing parties” – calls for a purely subjective analysis. Without prejudice to our comments on the bracketed text, which raises numerous concerns, it appears plain that the current drafting of paragraph 85 is inaccurate, or at least incomplete, in that it neglects the bracketed text.
- Financial, business, professional, or personal relationships
 - Paragraph 91 helpfully provides an example of a relationship that need not be disclosed as a business, professional, or personal relationship under article 10(2)(a) of the Code: “being a member of the same professional association or social or charitable organization as another person involved in the IID proceeding.” This example – which appears to be drawn from Example 4.3.1 on the IBA Guidelines’ green list – begs the question of whether the 8 other examples of relationships between arbitrators, counsel, or the disputing parties found on the green list need be disclosed under 10(2)(a) of the Code. Consistent with our comments on the commentary to Article 3, it would seem advisable for the working group (or a drafting committee in the working group) to interrogate *each* of the scenarios on the green list to assess whether, depending on the facts of the case, each scenario should be disclosed. Otherwise, the commentary will have provided less clarity than the IBA Guidelines.
 - Paragraph 91 also addresses the relationship between an arbitrator and his/her law firm. Citing General Standard 6(a) in the IBA Guidelines, the commentary states

that an arbitrator “who is an employee, associate or partner in a law firm is in principle considered to bear the identity of that law firm.” After this statement – which indeed reflects the IBA Guidelines – the commentary then diverges significantly from the Guidelines. Specifically, the commentary states: “Therefore, [the arbitrator] would also need to disclose any relationship between any others involved in the IID and that law firm under Article 10(2)(a). For example, if a person in another office of that law firm represents an entity that is a subsidiary of one of the disputing parties in the IID, that relationship must be disclosed even if the Candidate or Arbitrator was not involved in that matter.” The IBA Guidelines, by contrast, recognize that there are good reasons why an arbitrator should *not* be required to make a disclosure based on his/her law firm’s activities in certain circumstances.³ We commend the approach taken by the IBA Guidelines for its sensible and balanced approach to this difficult issue. In our view, the IBA Guidelines’ approach warrants discussion in the working group.

- Paragraph 92 calls on the disputing parties to identify “all relevant entities so that the Candidate or Arbitrator can check and assess any potential relationships.” Given that the Code does not apply to non-disputing parties, this language could be reframed, and instead, call on arbitrators to invite the disputing parties to provide such information.
- Financial or personal interest
 - Paragraph 95 notes that Article 10(2)(b)(iii) of the Code requires an arbitrator to disclose any financial or personal interest in any proceeding “identified by a disputing party.” Explaining this language, paragraph 95 states that “disputing parties should identify other entities having a direct or indirect interest in the outcome of the IID proceeding, if any.” As discussed above, however, the Code applies to arbitrators, not disputing parties. As an alternative, the commentary could call on arbitrators to invite the disputing parties to provide such information.
- Involvement in other proceedings
 - Paragraph 97 addresses Article 10(2)(c) of the Code – which requires disclosure of “[a]ll IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal

³ See IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6(a) (“The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator’s law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator’s firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator’s firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.”). See also *id.*, Explanation to General Standard 6 (“(a) The growing size of law firms should be taken into account as part of today’s reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator’s firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator’s firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.”)

representative or an expert witness” – but it omits the issue of confidentiality. A substantial percentage of arbitrators will be unable to disclose details of certain prior cases based on confidentiality restrictions. In such circumstances, the commentary should clarify that an arbitrator should disclose as much information as possible, such as the claimant’s industry or sector, the respondent’s region, and the applicable arbitral rules. Importantly, this approach to confidentiality under Article 10(2)(c) would not affect the arbitrator’s obligation to report confidential details of any prior cases that are “likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality” under Article 10(1).

- As discussed, we are refraining from commenting on the Code itself as part of this exercise, including reiterating concerns we have previously raised with Article 10(2)(c) of the Code. That said, paragraph 88 of the Commentary addresses the scope and purpose of Article 10(2)(c) in a manner that raises serious questions. Paragraph 88 states that information must be disclosed under Article 10(2)(c) because, “[f]or example, the Candidate’s or Arbitrator’s involvement in an unrelated IID may lead to the identification of conflicts of interest by other participants in the proceeding.” We do not recall this rationale from prior working group discussions. If indeed this provision is meant to help identify conflicts involving persons other than the arbitrator making the disclosure, it is unclear what kinds of conflicts are meant to be addressed. In practice, the provision seems likely to promote groundless challenges to arbitrators, counsel, or expert witnesses without providing any clear benefits.
- Paragraph 98 suggests that Article 10(2)(d) of the Code requires disclosure of proceedings over the last five years in which an arbitrator has been appointed as arbitrator, counsel, or expert witness by “the same party, its legal representatives or its affiliate entities.” It would be useful to clarify the reach of the term “affiliate entities,” particularly in the context of the respondent State. It should expressly include individual ministries/agencies of the respondent State as well as its state-owned enterprises.
- Waiver of the disputing parties
 - Paragraph 107 seems to suggest that a disputing party that does not expressly waive its right to raise an objection with respect to circumstances disclosed by an arbitrator can raise an objection later in the proceedings, which is not necessarily the case. The commentary might note that a disputing party’s failure to raise a prompt objection may itself constitute a waiver of the right to object under the applicable arbitral rules.

This is an initial draft for comments until 14 October 2022. All comments on this initial draft should be communicated to the UNCITRAL and ICSID Secretariats with the subject “Comments on initial draft Commentary to the Code of Conduct”.

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Possible reform of investor-State dispute settlement (ISDS)

Commentary to the Code of Conduct

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I. Introduction

1. The following is an initial draft of the Commentary to the Code of Conduct (the “Code”) to assist the delegations during their deliberations on the Code (contained in document [A/CN.9/WG.III/WP.216](#)) at the forty-third session of Working Group III to be held in Vienna from 5 to 16 September 2022. It has been prepared with the ICSID Secretariat **and is an informal document for discussion purposes only**. Based on the deliberations at the forty-third session and reflecting decisions taken by the Working Group, the Commentary will be updated and presented to the forty-fourth session of the Working Group scheduled for January 2023.

2. The draft articles of the Code are reproduced below for information purposes only. The draft Code, along with notes identifying issues that require further consideration and decision by the Working Group, is found in document [A/CN.9/WG.III/WP.216](#). Accordingly, the Commentary will need to be elaborated further after the forty-third session.

II. Draft Commentary

Article 1 – Definitions

For the purposes of the Code:

(a) “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;

(b) “Arbitrator” means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;

(c) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;

(d) “Adjudicator” means an Arbitrator or a Judge;

(e) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet **been appointed** [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and

(f) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];

(g) “Ex parte communication” means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.

DM: “been appointed” would be preferable in this scenario since, after accepting the appointment, the parties still have the opportunity to raise objections to the appointment.

Commentary

3. Article 1 defines key terminology of the Code. These terms apply only in the context of the Code and are not intended to be self-standing definitions applicable to international investment disputes generally.

“International Investment Dispute”

4. The term “International Investment Dispute” (“IID”) in subparagraph (a) covers all types of IIDs regardless of, the legal basis of consent to adjudicate the dispute, and whether the proceedings are conducted under the auspices of a standing mechanism, administered by an arbitral institution, or ad hoc. By contrast, it does not cover [disputes between States or] disputes arising out of commercial contracts that do not arise out of an investment.

5. The term “IID” refers to the dispute itself, while the term “IID proceeding(s)” refers to the process of resolving an IID.

6. “Regional Economic Integration Organization (REIO)” means an organization constituted by States to which they have transferred competence in respect of IID matters, including the authority to make decisions binding on them in respect of such matters.¹ [“Any constituent subdivision or agency of a State or REIO” should be read in accordance with article 25 of the ICSID Convention and public international law on attribution of State responsibility. It usually includes any decentralized or federated organ such as a municipality or a regional entity.]

7. “Investment contract” refers to an agreement entered into between a foreign investor and a State [or any constituent subdivision or agency of that State] regarding an investment made in the territory of that State.

“Arbitrator”, “Judge”, “Adjudicator” and “Candidate”

8. Subparagraph (b) defines the term “Arbitrator” as any person appointed as a member of an arbitral tribunal, regardless of the nature of the arbitration (*ad hoc* or institutional).

9. The term “Judge” in paragraph (c) refers to any person who is a member of a standing mechanism that is established for the purpose of resolving IIDs. The term includes both permanent and *ad hoc* judges appointed to the standing mechanism.

10. The term “Adjudicator” in paragraph (d) is used to refer collectively to Arbitrators and Judges. It does not include mediators, conciliators, fact finders or expert witnesses.

11. Under paragraph (e), the term “Candidate” refers to any person being considered for appointment as an Arbitrator or a Judge. With respect to an Arbitrator, an individual effectively becomes a Candidate immediately upon being contacted by a disputing party or an arbitral institution about the possibility of an appointment to a specific case. A person ceases to be a Candidate and becomes an Arbitrator [upon appointment as an Arbitrator] [upon accepting the appointment as an Arbitrator]. [A person who has been appointed but has not yet accepted the appointment will be a Candidate. This is to reflect the practice of certain arbitral institutions. Under the ICSID framework for instance, such person would have twenty days to accept the appointment, at which time he or she becomes an Arbitrator.] A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a Candidate. With respect to a Judge, the time at which an individual becomes a Candidate will depend on the standing mechanism’s selection process. The individual ceases to be a Candidate and becomes a Judge upon confirmation in such role.

“Assistant”

12. The term “Assistant” defined in paragraph (f) refers to a person who is assigned certain tasks, for instance, an associate in an Arbitrator’s firm, chamber or practice, related to a specific dispute. Tasks typically carried out by such an Assistant could include factual and legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments. An Assistant does not exercise decision-making functions on the merits of the IID. An Assistant may create preliminary drafts of awards, decisions or orders, but always on instructions from and under the direction of an Adjudicator.

13. The definition of Assistant for the purposes of the Code does not include staff of arbitral institutions or of a standing mechanism – for example, tribunal secretaries, paralegals, clerks, and registry assistants who are employed by the institution or a standing mechanism. This is because such persons do not work under the direction or control of an Adjudicator in the same manner as an Assistant and they are bound by institution-specific or standing mechanism-specific obligations or terms of employment.

¹ ICSID Additional Facility Rules, Rule 1 (2022).

14. Tribunal-appointed experts are also excluded from the definition of Assistant, as they are not employed by or under the control of an Adjudicator and have a different role in the IID. While an Adjudicator provides terms of reference to a tribunal-appointed expert, experts remain independent in their tasks, methodology and submissions.

15. The selection of Assistants and the tasks to be performed by them are usually addressed with the disputing parties prior to their engagement. This means that at the start of a proceeding, an Adjudicator should discuss the name, proposed tasks, hearing attendance, fees and expenses of the Assistant, and share the Assistant's curriculum vitae with the disputing parties, which would give them a timely opportunity to raise any questions or concerns regarding the Assistant.

“Ex parte communication”

16. Ex parte communication in the context of an IID refers to a Candidate or an Adjudicator communicating with a disputing party or its legal representative without the presence or knowledge of the other disputing party. The term “other related person” is aimed at making the list of persons concerned an open one, to the extent that such person is relevant to the IID. Typically, the term would include a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities. The definition of ex parte communication is to be read in conjunction with article 7 which sets specific provisions with regard to ex parte communication.

Article 2 – Application of the Code

1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.
2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall **[be construed as complementing]** [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.
3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code.

Commentary

Scope of application

17. According to article 2(1), the Code applies to individuals in an IID, namely an Adjudicator or a Candidate as defined in article 1. The second sentence clarifies that the disputing parties may also agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution. Examples could include an adjudicator appointed to resolve a State-to-State dispute, or an arbitrator appointed to resolve a commercial arbitration dispute. Such agreement between the disputing parties should be express on in writing, as there is no presumption that the Code applies in any dispute other than an IID.

Complementary nature of the Code

[This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 16-19.]

18. Article 2(2) notes that if the investment treaty, legislation governing foreign investments or an investment contract upon which consent to adjudicate is based contains provisions [regulating][on] the conduct of an Adjudicator or a Candidate in an IID proceeding, such provisions would continue to apply and the Code would complement such provisions. This means that those provisions as well as the Code apply and hence an Adjudicator must comply with all such obligations at once.

19. The term “inconsistency” in paragraph 2 refers to situations of clear conflict between the provisions of the Code and other applicable provisions on conduct,

namely where the two sets of provisions are irreconcilable or cannot be complied with at the same time.

[Note to the Working Group: The Working Group may wish to consider whether the Commentary should provide concrete examples, which may, however, be subject to different interpretation depending on the actual circumstance. For instance, the Working Group may wish to consider the situation where other applicable provisions on the conduct of adjudicators would request a declaration to be made within a specified timeframe before the constitution of the tribunal, while the Code remains silent on that aspect.]

Compliance of an Assistant with the Code

20. Article 2(3) provides that the Adjudicator assigning tasks to an Assistant must ensure that the Assistant is aware of and complies with the Code. [Provisions of the Code relevant to an Assistant are [contained in] articles [3, 5, 6, 8, 11]].

21. One way of ensuring that the Assistant is aware of and complies with the Code would be to have the Assistant sign a declaration stating that he or she has read the Code and will abide by its relevant terms. After the Assistant has signed the declaration, the Adjudicator should continue to ensure that the Assistant effectively complies with the obligations and standards of the Code during the course of his or her duties. The obligation in paragraph 3 is incumbent on the Adjudicator who shall remove an Assistant in breach of the Code (see article 11(4)).

DM: The adjudicator should submit the acceptance of its appointment being impartial and independent. If any objections arise, these should be resolved, and a decision regarding the appointment should be made, but the time to be impartial and independent is from the acceptance of the appointment.

Article 3 – Independence and Impartiality

1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].

2. Paragraph 1 includes the obligation not to:

(a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;

(b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;

(c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];

(d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;

(e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or

(f) Take any action that creates the appearance of a lack of independence or impartiality.

DM: Consider adding a paragraph stating that if any issues arise, during the course of the proceeding, which may affect or presume to affect the Adjudicator's independence and impartiality, the Adjudicator shall disclose this circumstance to the disputing parties.

Commentary

Independence and impartiality

22. Article 3(1) provides that an Adjudicator shall be independent and impartial. “Independence” refers to the absence of any external control, in particular the absence of relations with a party that might influence an Adjudicator’s decision. “Impartiality” means the absence of bias or predisposition of an Adjudicator towards a disputing party or issues raised in the proceedings].

Temporal scope of the obligation

23. The obligation to be independent and impartial is a continuous one. [For Arbitrators, it starts upon appointment or confirmation and extends until he or she ceases to exercise his or her functions. This may differ depending on the case, for example, when the final award is issued, the IID is settled or otherwise discontinued,

the Arbitrator resigns or is removed from the IID proceeding. If the Arbitrator is liable to continue to exercise his or her functions in the IID proceeding (for instance, if the tribunal was asked to correct or rectify the arbitral award after it has been issued or to consider the decision on remand by an appellate tribunal), the obligation would continue to apply.] Judges must remain independent and impartial until the end of their term of office.

Non-exhaustive list

24. Article 3(2) clarifies the meaning of “independence and impartiality” by providing a non-exhaustive list of examples of when an Adjudicator could be found to lack independence or impartiality.

25. For instance, subparagraph (a) provides that an Adjudicator shall not be influenced by loyalty to persons involved in the IID such as a disputing party or any of their legal representatives. [Having the same nationality as a disputing party or a legal representative does not indicate loyalty to that disputing party.] The term “non-disputing party” refers to an individual or entity that is not a party to the dispute but has been given the tribunal’s permission to file a written submission in the IID. The term “non-disputing Treaty Party” refers to a State or REIO that is a party to the treaty upon which consent to adjudicate the IID is based but is not a claimant or respondent in the case.

26. Subparagraph (b) provides that an Adjudicator shall not take any instructions regarding any matter addressed in the IID. This includes instructions from any organization (either private or public), government (including public entities and their emanations) or individual. “Instruction” means any form of order, direction, recommendation or guidance concerning the proceeding. “Matters addressed in the IID” means any factual, procedural or substantive issue considered in the course of the IID proceeding. By contrast, compliance by the Adjudicator with binding interpretations of a joint committee or referencing a decision by another arbitral tribunal would not be considered as taking instructions within the meaning of subparagraph (b).

27. Subparagraph (c) focuses on past or existing relationships that could influence an Adjudicator’s conduct, including the exercise of his or her judgment. For a violation to occur, such a relationship must have an impact on the Adjudicator’s conduct of the case or the decisions taken in the proceeding, including the final findings on the case.

Note to the Working Group

The below is a list of examples taken from the [IBA Guidelines](#) that could provide guidance as to the types of relationships that could be problematic in the context of subparagraph (c). Such a relationship in itself would not necessarily result in a violation of subparagraph (c), which would largely depend on the facts of the case.

- An Adjudicator (X) has previously given legal advice, or provided an expert opinion, in a dispute involving disputing party (Y) or one of its affiliates;
- X currently represents or advises Y or one of its affiliates;
- X currently represents or advises the lawyer or law firm acting as counsel for Y;
- X is a manager, director or member of the governing board of Y, or has a controlling interest in an affiliate of Y, and Y is directly involved in the matters raised in the IID;
- X’s law firm currently has a significant commercial relationship with the respondent State (Z), or a public entity of Z;
- X has a close family relationship with Y, or with a manager, director or member of the governing board of Y.

28. The term “function” in subparagraph (e) refers to a professional responsibility, [such as an appointment as adjudicator in another IID or non-IID]. The term “benefit” encompasses any gift, advantage, privilege or reward.

29. Subparagraph (f) indicates that if the Adjudicator takes any action which creates the appearance of a lack of independence or impartiality, it could result in a breach of the obligation in paragraph 1 to be “independent and impartial”. This stresses the fact that an Adjudicator must remain vigilant and be proactive in ensuring that he or she does not create any impression of bias.

30. The standard of appearance of a lack of independence or impartiality in subparagraph (f) is an objective one, based on a reasonable evaluation of the evidence by a third party. It is akin to the notion of justifiable doubts, as applied in a number of arbitration instruments including the ICSID Arbitration Rules,² the UNCITRAL Arbitration Rules,³ and the IBA Guidelines on Conflicts of Interest.⁴

Article 4 – Limit on multiple roles

[Paragraphs applicable to Arbitrators only]

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:

- (a) The same measure(s);
- (b) The same or related party(parties); or
- (c) The same provision(s) of the same treaty.

2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.

[Paragraphs applicable to Judges only]

3. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.

4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.

5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.

6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.

Commentary

² Convention on the settlement of investment disputes between States and nationals of other States, Article 57.

³ UNCITRAL Arbitration Rules, Article 12(1) (2013): “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2.

Limitation on multiple roles

[This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 27-31.]

31. Performing multiple roles in IIDs can give rise to conflicts of interest or the appearance thereof. Article 4 therefore sets forth distinct obligations for Arbitrators and Judges and prohibits them from undertaking certain other roles while functioning as an Arbitrator or a Judge.

32. Article 4 does not impose an absolute ban on multiple roles. Rather, the prohibition only applies [within a certain period of time (including concurrently) and] when the IID proceedings share some commonalities, and is limited to undertaking certain functions.

33. Paragraphs 1 and 2 set forth the temporal scope of the prohibition for Arbitrators. They are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding [and for a period of three years following the end of his or her functions as an Arbitrator]. This means that an individual functioning as a legal representative or an expert witness in an IID proceeding would need to resign from that role before accepting an appointment as an Arbitrator.

Limited roles

34. Paragraph 1 only concerns the Arbitrator acting as a legal representative or an expert witness in another IID proceeding. It does not limit an Arbitrator from performing other adjudicatory function, such as acting as an arbitrator in another IID or non-IID proceeding. [While the paragraph does not address an Arbitrator performing the functions of a Judge, the terms of office of a Judge could require him or her to resign his duties as an Arbitrator prior to being appointed as a Judge.]

Criteria triggering the prohibition

35. The prohibition only applies if the other IID proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same treaty. When any of these criteria are met, the Arbitrator would be prohibited from acting as a legal representative or an expert witness in another IID proceeding.

36. The use of the term “same” throughout article 4 means that the elements under scrutiny in the IID must be identical. In other words, the threshold to trigger the prohibition is high.

The same measures

37. The first criteria triggering the prohibition under subparagraph 1(a) is if the other IID proceeding deals with “the same measure(s)”. This term refers to the measures that have given rise to the dispute. Generally speaking, measures include any law, regulation, procedure, requirement, or practice⁵ of the respondent State that allegedly affected the investor’s investment or protected rights under the investment instrument.

The same or related party(parties)

38. The second criteria under subparagraph 1(b) relates to the “same or related party(parties)”. This includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities. By contrast, it does not include non-disputing parties, such as third-party funders or non-disputing Treaty Parties.

The same provision(s) of the same treaty

39. The third criteria refers to “the same provision(s) of the same treaty”. This means that for the prohibition to be triggered, the provisions applicable to the IID must be identical and in the same treaty.

[Note to the Working Group: *This part would need to be supplemented following a discussion on the scope of the intended limitation. One question would be whether the prohibition in subparagraph (c) should be applied only to provisions in the same*

⁵ See for instance North American Free Trade Agreement, Article 201.

“treaty” and not other instruments upon which consent to adjudicate is based. The term “treaty” might need to be qualified as the treaty upon which consent to adjudicate is based, to avoid for example, reliance on the ICSID Convention, to trigger the prohibition. Another question would be whether relying on the same provision allowing claims to be raised or providing the basis of the jurisdiction of the tribunal would trigger the prohibition in subparagraph (c), which could lead to a very broad limitation.]

Party autonomy

[This section will be elaborated further following the discussion by the Working Group. See [A/CN.9/WG.III/WP.216](#), paragraph 24.)

40. The term “unless the disputing parties agree otherwise” in paragraph 1 means that the limitation of roles prescribed in article 4, paragraph 1 could be waived by the disputing parties. To allow the disputing parties to make an informed waiver, the Arbitrator should disclose relevant information about the role currently undertaken or to be undertaken, in accordance with article 10.

Another IID proceeding involving legal issues that are substantially so similar

41. Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding that involves “legal issues which are substantially so similar that accepting such a role would be in breach of article 3 (independence and impartiality). The prohibition in paragraph 2 would be triggered only if the role to be assumed by an Arbitrator concurrently [or undertaken within the three years after the IID proceeding] would amount to a lack of independence or impartiality in breach of article 3. This includes the creation of an appearance of a lack of independence or impartiality as mentioned in article 3(2)(f).

[Note to Working Group: *The Working Group may wish to consider the relationship between articles 3(2)(f) and 4(2), which could be further elaborated in the Commentary.]*

42. For example, article 4(2) would be breached if an Arbitrator accepts a role as a legal representative in another IID proceeding which does not fall under paragraph 1, but raises issues substantially so similar that accepting that role would create the appearance that the Arbitrator was not independent and impartial in the IID proceeding. This may also be the case when an Arbitrator is appointed as an expert witness in another IID proceeding to address a provision in an investment treaty very similar to that being addressed in the proceeding that he or she is functioning as the Arbitrator but based on a different investment treaty and involving different parties.

43. [The prohibition in paragraph 2 could be waived by the disputing parties if they so agree. This would mean that all of the disputing parties would waive their rights to raise an objection with respect to the Arbitrator being appointed as a legal representative or an expert witness in another specific IID proceeding raising substantially similar legal issues.]

Non-compliance with paragraphs 1 and 2

[This section will be elaborated further following the discussion by the Working Group. See [A/CN.9/WG.III/WP.216](#), paragraphs 24-34.]

Prohibition to exercise any political or administrative function

44. Paragraph 3 prohibits a Judge from carrying out any “political or administrative function” outside the standing mechanism. A Judge would be prohibited, for instance, in acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches for a political organization or candidate, or [publicly] soliciting funds for or donating to a political organization or candidate. The limitation does not include administrative functions that a Judge might carry out in the context of a standing mechanism in accordance with the applicable rules of such mechanism or with his or her terms of office. For example, a Judge would be able to function as President elected through a vote or head a committee on financing of the standing mechanism.

45. A Judge would have an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of a full-time office. In particular, pursuant to paragraph 3, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.

Party autonomy with regard to Judges

46. In accordance with paragraph 4, before assuming any other function or occupation, a Judge should inform the [President of the] standing mechanism, which would determine whether such function or occupation would be prohibited under paragraph 3

47. In contrast to Arbitrators where the disputing parties can agree to waive limitations on multiple roles, whether a Judge could assume such function or occupation is to be determined by the standing mechanism. For example, if not prohibited under the terms of his or her office, whether a Judge can function as an Arbitrator in another IID proceeding outside the standing mechanism would be determined by the standing mechanism. If any such function or occupation has already been undertaken, the Judge should promptly inform the standing mechanism.

48. Paragraphs 5 and 6 apply to former judges and limit the role that they can undertake after their term of office. Paragraph 5 addresses IID proceedings before the standing mechanism that were initiated prior to the end of the Judge's term. Paragraph 6 addresses IID proceedings before the standing mechanism initiated after the end of the Judge's term.

49. Paragraph 5 prohibits a former Judge from being involved in any manner in an IID proceeding that was pending or which he or she had dealt with before the standing mechanism during his or her term. The scope of this prohibition is quite broad and covers any involvement including, but not limited to, acting as an ad hoc judge, legal representative, expert witness, third-party funder or amicus curiae. The prohibition is a continuing one.

50. Paragraph 6 addresses an IID proceeding brought before the standing mechanism after the Judge's term of office. For a period of three years after his or her term of office, a former Judge would not be able to act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in a proceeding before the standing mechanism. This prohibition ceases to apply three years after the end of his or her term of office.

51. Paragraphs 5 and 6, however, do not limit a former Judge from being involved in an IID proceeding that is not before the standing mechanism.

Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

1. An Arbitrator shall:
 - (a) Perform his or her duties diligently throughout the IID proceeding;
 - (b) Devote sufficient time to the IID proceeding;
 - (c) Render all decisions in a timely manner;
 - [(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and
 - (e) Not delegate his or her decision-making function.

[Paragraph applicable to Judges only]

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.

Commentary

52. Article 5 addresses the Adjudicator’s duty of diligence. It sets forth distinct provisions for Arbitrators and Judges, as such obligations of Judges are usually provided under their terms of office.

Perform his or her duties diligently

53. Article 5(1)(a) complements requirements in arbitral rules and terms of appointment requiring an Arbitrator to act diligently and expeditiously.

Render all decisions in a timely manner

54. The amount of time needed for an Arbitrator to render decisions can differ depending on the complexity of the factual and legal issues that arise in the IID. In particular, the time for making decisions should respect due process and the parties’ ability to effectively present their case. To render decisions in a “timely manner” in accordance with article 5(1)(c), an Arbitrator should take these into consideration and abide by the timelines or deadlines in the applicable rules.

No delegation of decision-making functions

55. Article 5(1)(e) states that an Adjudicator should not delegate his or her decision-making function. Decision-making is the core function of an Arbitrator in an IID proceeding. However, an Arbitrator is not precluded from having his or her Assistant prepare a preliminary draft of a decision, provided that all relevant elements pertaining to that decision have been effectively reviewed and determined by the Arbitrator.

56. It is also without prejudice to applicable arbitral rules or procedural orders issued in the course of an IID proceeding which may stipulate that certain decision-making functions can be delegated, for example, to the presiding arbitrator.

Obligations applicable to a Judge

57. The availability of a Judge to perform his or her duties is addressed in paragraph 2. The modalities of such duties and availability are to be found under the terms of appointment of a Judge.

Article 6 – [Integrity and competence]

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| <p>1. An Adjudicator shall:</p> <ul style="list-style-type: none">(a) Conduct the IID proceedings in accordance with high standards of integrity, fairness[, civility] and competence;(b) Treat all participants in the IID proceeding with civility; and(c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties. <p>[Paragraph applicable to Arbitrator candidates only]</p> <p>2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.</p> <p>[Paragraph applicable to Judge candidates only]</p> <p>3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.</p> |
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Commentary

Necessary qualities in the conduct of the proceedings

58. Article 6(1)(a) requires that an Adjudicator act with integrity, fairness, [civility] and competence. These are elements commonly expected from any Adjudicator, and are based on provisions found in existing instruments.⁶

⁶ See e.g. ICSID Convention, Article 14: “Persons designated to serve on the Panels shall be persons

59. [Article 6(1)(b) provides that an Adjudicator shall treat all participants in the proceeding with civility. “All participants” includes not only the disputing parties and their legal representatives but also other Adjudicators, witnesses, experts, non-disputing parties, clerks and interpreters. The term “civility” means being polite and respectful when interacting with those participants and is associated with the Adjudicator’s demonstration of professionalism.^{7]}

Obligations of prospective arbitrators

60. Article 6(2) contains a distinct provision for prospective Arbitrators. It requires an Arbitrator candidate to accept an appointment only if he or she possesses the necessary competence, skills, and is available to discharge the duties of an Arbitrator. This is a self-assessment to be conducted by the candidate.

Obligations of prospective judges

61. A specific provision for prospective Judges is contained in paragraph 3. It provides that a Judge candidate shall possess the necessary competence and skills to fulfil the duties of a Judge. As a Judge is not appointed by the disputing parties, it is usually the appointing authority within the standing mechanism that would assess such skills and competence. In the selection process, particular consideration should usually be given to a candidate’s previous experience in handling IIDs, as well as his or her knowledge of public international law or international investment law.

Article 7 – Ex parte communication

[Paragraphs applicable to Arbitrators and Arbitrator candidates only]

1. Ex parte communication is prohibited except:
 - (a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;
 - (b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;
 - (c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.
2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.

[Paragraph applicable to Judges and Judge candidates only]

3. Ex parte communication is prohibited.

Commentary

Principle – general prohibition

62. Article 7 introduces a general prohibition on ex parte communication for Adjudicators and Candidates. As defined in article 1, the prohibition relates to a communication (i) by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person; (ii) concerning the IID; and (iii) without the presence or knowledge of the other disputing party or parties. A communication not meeting these criteria, for example, a communication regarding a

of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” [See also ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”]

⁷ See e.g. ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”

matter distinct from the IID, or an e-mail copying the other parties, would not fall under the definition of ex parte communication that is prohibited under article 7.

Exceptions

63. Article 7(1) sets forth a limited list of circumstances whereby ex parte communication would not be prohibited.

64. The first exception under Article 7(1)(a) concerns pre-appointment interviews. It covers communications by a candidate with a disputing party considering their nomination as party-appointed Arbitrator. Such communications may address the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of the Candidate as well as fee expectations and whether an Assistant will be requested. The disputing party or its legal representative may provide a general description of the IID, including the identity of the disputing parties, the other Arbitrators or Arbitrator candidates, expert witnesses or other interested parties. The terms of the consent to adjudication (treaty, contract or law), the applicable procedural rules, and any other agreements between the disputing parties concerning the applicable language, seat, or other similar administrative matters could also be communicated. Candidates may discuss publications and presentations they have made with the disputing parties. They may also discuss any activities of their law firm or organization which might raise a concern as to their independence or impartiality. It would be prudent to keep a record of the pre-appointment interviews to ensure that there is no dispute as to the content of these communications.

65. Subparagraph (b) addresses communication between a candidate for presiding arbitrator with the disputing parties or their legal representatives for the purpose of selecting the presiding Arbitrator. The notion of “presiding Arbitrator” includes a sole Arbitrator as well as the chair of an arbitral tribunal consisting of three or more Arbitrators. Such communication is allowed only when the disputing parties have agreed to such ex parte communication.

[Note to the Working Group: The Working Group may wish to confirm that subparagraph 1(b) would allow an Arbitrator appointed by a disputing party (or an Arbitrator candidate to be appointed by a disputing party) to discuss with the disputing party or its legal representative the qualifications of a potential candidate for the presiding Arbitrator. Yet this would be subject to the agreement of the other disputing party and if that condition (the disputing parties so agree) is met, such a discussion might not fall under the definition of ex parte communication as the other disputing party would be aware of the communication. See document A/CN.9/WG.III/WP.216, paragraph 44.]

66. There may be circumstances where the applicable rules or treaty authorize ex parte communications; this would pre-empt the prohibition in article 7(1). In a similar vein, ex parte communication would not be prohibited if there is an agreement by the disputing parties to permit such communication.

Limit to the exceptions

67. Even when ex parte communication is permitted under article 7(1), matters pertaining to procedural or substantive aspects of the IID proceeding or those that can be anticipated to arise in the IID proceeding should not be discussed. For example, a Candidate or an Arbitrator’s prospective views on the jurisdiction of the tribunal, the substance of the dispute, or the merits of the claims should not be discussed.

Article 8 – Confidentiality

1. A Candidate and an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, an IID proceeding unless:
 - (a) the information is publicly available [in accordance with the applicable rules or treaty,]; or
 - (b) permitted under the applicable rules or treaty or by agreement of the disputing parties.

DM: Consider revising. Many adjudicators are invited to speak in events where issues related to those in dispute may arise. The duty of confidentiality should be directed to avoid that the Adjudicator comments on specific issues and matters related to a case in which he or she has sat as Adjudicator, but it should not prevent them from speaking, in general terms and without identifying any parties, of issues related to the dispute.

2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].
3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].
4. An Adjudicator shall not disclose any draft decision in the IID proceeding.
5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].
6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

DM: Even if publicly available, Adjudicators should refrain from referring to cases in which they have been appointed. This last part of section 3 does provide a loophole for adjudicators to discuss issues identifying the specific case in which they participated.

Commentary

68. Paragraph 1 sets forth a general prohibition not to disclose or use any information relating to the IID proceeding. It does not regulate the disclosure or use of such information for the purposes of the IID proceeding. For example, Adjudicators would be able to freely discuss among themselves information provided by the disputing parties.

69. The confidentiality obligation in paragraph 1 does not apply if the information is already publicly available [but only in accordance with the applicable rules or treaty. For example, if the information was made public in violation of the applicable rules or somehow “leaked”, the Candidate or the Adjudicator would be bound by the confidentiality obligation.] Another exception to the confidentiality obligation would be if the disclosure is allowed for expressly in the applicable rules or treaty or by the agreement of all the disputing parties.

70. Paragraphs 2 to 4 elaborate further on the confidentiality obligation. An Adjudicator cannot disclose the contents of the deliberations in the IID proceeding including views expressed by other Adjudicators. Adjudicators are prohibited from disclosing earlier drafts of decisions and commenting on a decision which is not publicly available.

71. Paragraph 5 indicates that the obligation in article 8 is a continuing one and that an Adjudicator must abide by the obligation even after the proceedings. The same would apply to former Judges after their term of office.

72. Paragraph 6 provides for a general exception to the obligations in article 8 in two circumstances: (i) where the Adjudicator is legally required to disclose the information in domestic courts or requested to do so (for example, in a set aside or an enforcement proceeding) or any other competent body; and (ii) where the Adjudicator must disclose the information in a court or other competent body to protect his or her rights.

Article 9 – Fees and expenses

[Article applicable to Arbitrators and Arbitrator candidates only]

1. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated by the sole or presiding Arbitrator.
2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.
3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.

4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.

5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Commentary

73. Article 9 concerns the fees and expenses applicable in an IID and applies only to Arbitrators and Arbitrator candidates.

Fees and expenses

74. “Fees and expenses” in paragraph 1 refer to the fees of the arbitral tribunal including the respective fees of each Arbitrator, which is to be fixed with the disputing parties or by the institutional rules, as well as all [reasonable] travel and other expenses incurred by the Arbitrators. It does not cover the legal and other costs incurred by the disputing parties in relation to the IID proceeding, such as representation costs.

Proposal and discussions concerning fees and expenses

75. As indicated in paragraph 2, discussions concerning fees and expenses are usually concluded prior to or [immediately upon] the constitution of the arbitral tribunal.⁸

76. The term “proposal” in paragraph 1 generally refers to any proposal on fees and expenses made by an Arbitrator or the arbitral tribunal during or following such discussion. Any such proposal is to be communicated through the administering institution. In an ad hoc setting, the proposal should be communicated by the sole Arbitrator or the presiding Arbitrator, meaning that it would indeed be after the constitution of the arbitral tribunal.

Timing of the discussions

77. The rule in paragraph 2 is intended to avoid a situation where an Arbitrator would request different (higher) fees than originally contemplated or agreed to when the arbitral tribunal was formed, putting the disputing parties in the untenable position of having to refuse a request by the arbitral tribunal or having to agree to higher fees.

78. The term “conclude” in paragraphs 2 and 3 means that an Arbitrator, solely or jointly with the other members of the arbitral tribunal, must consult the disputing parties on any fees and expenses related to the IID proceeding and/or the Assistant. It does not mean that actual fees and expenses to be paid need to be already determined or fixed.

79. The applicable rules or treaty may prescribe the fees and expenses of an Arbitrator (see for example, ICSID Schedule of Fees and Memorandum on Fees and Expenses; ICC Memorandum on Fees). Alternatively, the applicable rules may provide a process for determining the applicable fees and expenses. For instance, article 41(3) of the UNCITRAL Arbitration Rules provides that “[p]romptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.”⁹ Where no such provision exists or the applicable rules or treaty are silent as to how and when these discussions should take place, paragraph 2 would be applicable. Unless the applicable rules or treaty contain a pre-determined rate or a specific method for the

⁸ For instance, the 2022 ICSID Rules provide that requests regarding fees and expenses shall be made prior to the constitution of the arbitral tribunal (see Administrative and Financial Regulation 14(1)).

⁹ UNCITRAL Arbitration Rules, article 41(3): “Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.”

calculation of fees and expenses, such determination rests entirely within the disputing parties and the arbitrator(s).

Engaging the Assistant

80. The phrase “engaging any Assistant” in paragraph 3 should be understood in a broad sense, as an Assistant might be employed specifically for the purpose of the IID proceeding or might already be employed in the law firm to which the Arbitrator belongs. Paragraph 3 does not require the Arbitrator to discuss the fees and expenses of the Assistant with the disputing parties prior to contacting the Assistant to enquire about his or her availability to assist in the IID.

81. In practice, an Arbitrator may not have determined to engage an Assistant prior to or upon appointment. In such case, discussions related to fees and expenses of the Assistant should take place as soon as an Arbitrator foresees the need to engage an Assistant.

82. The express reference to Assistants in paragraph 3 should not be understood as prejudging the necessity or relevance of engaging Assistants in a particular IID proceeding. Such determination should be made on a case-by-case basis by the participants in the IID proceeding, taking into account elements such as the existence of an institution administering the IID proceeding.

Maintenance and availability of accurate records

83. Paragraph 4 requires an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding and to ensure that his or her Assistant, if any, does the same. This is common practice aimed at avoiding any dispute regarding fees and expenses. Paragraph 5 requires that the record maintained in accordance with paragraph 4 is made available. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not necessarily directly to the disputing parties. The phrase “requesting the disbursement of funds” in paragraph 5 refers to any request for the payment of fees or expenses incurred that are covered under article 9.

Article 10 – Disclosure obligations

[Article applicable to Arbitrators and Arbitrator candidates only]

1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.
2. The following information shall be included in the disclosure:
 - (a) Any financial, business, professional, or personal relationship in the past five years with:
 - (i) Any disputing party or an entity identified by a disputing party;
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and
 - (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];
 - (b) Any financial or personal interest in:
 - (i) The outcome of the IID proceeding;
 - (ii) Any other IID proceeding involving the same measure(s); and
 - (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;

(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and

(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.

3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].

4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

5. A Candidate and an Arbitrator shall make the disclosure using the form in the Annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.

6. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.

7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code].

8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.

Commentary

84. Article 10 addresses the disclosure obligations of a Candidate and an Arbitrator. Such obligations are central to the Code as they assist in identifying conflicts of interest and compliance with other obligations in the Code, mainly, the possible lack of independence and impartiality.

Standard of disclosure - “Any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality”

[This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraph 59.]

85. The standard of disclosure in paragraph 1 is an objective one that stems from article 11 of the UNCITRAL Arbitration Rules which provides that “[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence”.

Scope of disclosure in accordance with paragraphs 1 and 2

86. The standard of disclosure in paragraph 1 is a broad one that covers any circumstances, including any past or present interest, relationship or other relevant matter, likely to give rise to justifiable doubts regarding the independence or impartiality of the Arbitrator or Arbitrator candidate. The circumstances to be disclosed are not limited in time, meaning that a circumstance which arose more than five years before the Candidate was contacted about the appointment would need to be disclosed in accordance with paragraph 1 if it is likely to give rise to justifiable doubts.

87. Paragraph 2 includes a list of matters that must be disclosed regardless of whether they give rise to justifiable doubts as contemplated in paragraph 1. Subparagraphs (a), (c) and (d), require disclosure of the relationships, proceedings and appointments within the past five years. The five-year time frame is calculated from the moment a Candidate is contacted for potential appointment by a disputing party or an appointing authority.

88. Information not falling within the scope of paragraph 2 may still need to be disclosed in accordance with paragraph 1. For example, if a particular personal relationship dates back to more than five years from the time of the appointment and would give rise to justifiable doubts, such relationship must be disclosed. At the same time, information listed in paragraph 2 must be disclosed even if it does not give rise to justifiable doubts as it may help identify possible conflicts of interest. For example, the Candidate's or Arbitrator's involvement in an unrelated IID may lead to the identification of conflicts of interest by other participants in the proceeding.

“Any financial, business, professional, or personal relationship”

89. Article 10(2)(a) addresses disclosures of information related to potential conflict arising from any financial, business, professional, or personal relationship a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.

90. “Business” relationship means any past or present connection related to commercial activities, either directly with the persons or entities listed in subparagraphs (2)(a)(i)-(iv), or indirectly through another person or entity, with or without the knowledge of such persons. It usually includes having shared financial interests, even if such interests do not specifically relate to an Arbitrator's or Candidate's professional activity.

91. “Professional” relationship in paragraph 2(a) refers to any past or present connection with another person relating to professional activities. It includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same firm as another person involved in the IID. It also includes involvement on the same projects or cases, for instance as opposing counsel or sitting as co-Arbitrator. By contrast, being a member of the same professional association or social or charitable organization as another person involved in the IID proceeding does not constitute a professional relationship for the purpose of paragraph 2(a). A Candidate or an Arbitrator who is an employee, associate or partner in a law firm is in principle considered to bear the identity of that law firm.¹⁰ Therefore, he or she would also need to disclose any relationship between any others involved in the IID and that law firm under Article 10(2)(a). For example, if a person in another office of that law firm represents an entity that is a subsidiary of one of the disputing parties in the IID, that relationship must be disclosed even if the Candidate or Arbitrator was not involved in that matter.

92. Article 10(2)(a)(i) concerns relationships with the disputing parties and any entity identified by a disputing party. This latter category includes for instance subsidiaries, affiliates, parent entities, State agencies and State-owned enterprises. In practice, the disputing parties should, at the latest upon appointment of a Candidate or an Arbitrator, identify all relevant entities so that the Candidate or Arbitrator can check and assess any potential relationships. In accordance with Article 10(3), a Candidate and an Arbitrator should also make reasonable efforts to become aware of and identify any relationships even if a disputing party has not identified related entities or agencies. For example, based on the knowledge of the State party to the dispute, the Candidate or Arbitrator should disclose any relationship with an agency or state-owned company of that State. If he or she subsequently acquires knowledge of a relationship with an entity that a disputing party has not identified pursuant to Article 10(2)(a)(i), he or she should disclose such relationship.

“Any financial or personal interest”

93. The Candidate or Arbitrator's remuneration for work performed and reimbursement of expenses incurred in the IID proceeding is not considered a financial interest for the purpose of Article 10.

94. For the purpose of Article 10(2)(b), the term “same measures” is to be interpreted in the same manner as in Article 4.

¹⁰ See IBA Guidelines, General Standard 6(a).

95. The terms “identified by a disputing party” mean that the disputing parties should identify other entities having a direct or indirect interest in the outcome of the IID proceeding, if any. It does not mean however that disclosure is limited to those relationships with a disputing party’s entities that have been identified by a disputing party. Even in the absence or partial identification of a disputing party, if a Candidate or Arbitrator knows of such related entities, he or she would be subject to the disclosure obligation.

Involvement in other proceedings

96. The terms “any other proceeding” in paragraphs 2(b)(iii) cover any type of dispute involving a disputing party or an entity identified by a disputing party, including alternative dispute resolution methods such as mediation or conciliation proceedings. For example, this could be a commercial arbitration involving the parent company of a disputing party.

97. Paragraph 2(c) requires disclosure of the IID proceedings in which a Candidate or an Arbitrator has been involved in the past five years. The term “related proceedings” in this paragraph means any proceeding that is related to the IID but not covered by the definition in Article 1, including proceedings before domestic courts and tribunals to set aside, annul or enforce an IID award, judgment and challenge proceedings of an Adjudicator, other parallel proceedings brought before domestic courts or other arbitral tribunals related to the IID (for example based on a consent clause in a contract while the IID is based on a consent clause in a treaty), or other mediation or conciliation proceedings related to the IID.

98. Paragraph (2)(d) requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed either as a legal representative, expert witness or arbitrator by one of the disputing parties or their legal representatives over the past five years. While multiple appointments of arbitrators are not prohibited under the Code, multiple appointments from the same party, its legal representative or its affiliate entities are subject to disclosure as they could indicate a lack of independence or impartiality. For instance, if a Candidate or an Arbitrator has already been appointed over the past five years as Arbitrator on a number of occasions [*number to be determined by the Working Group*] by one of the parties or a subsidiary, affiliate or parent entity of a party, this could give rise to legitimate doubts as to his or her independence or impartiality. Consequently, the circumstances to be disclosed under subparagraph (d) are not limited to appointments made in the context of investment disputes, but all types of proceedings. This is informed by the use of the term “or any other proceeding”, which bears the same meaning as in paragraph 2(b)(iii).

Obligation to make reasonable efforts

99. The term “[reasonable] [best] efforts to become aware” in paragraph 3 means that a Candidate or Arbitrator must be proactive to the best of his or her ability to identify the existence of circumstances[, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or Arbitrator to ensure proper disclosure.

100. By way of illustration, the obligation under paragraph 3 could involve reviewing relevant documentation already in the possession of the Candidate or Arbitrator, conducting relevant conflict checks, or requesting the persons involved in the IID to provide further relevant information in case of doubt or if deemed necessary to conduct proper assessment.

101. A failure to become aware of a circumstance despite the Candidate or Arbitrator’s best efforts would not as such give rise to disqualification. [However, if such efforts reveal a conflict of interest, a Candidate shall not accept the appointment, or the Adjudicator shall resign or recuse him/herself from the IID proceeding in accordance with article 11(2).]

Form of the disclosure

102. Article 10(5) provides that disclosure of relevant information may be done using the form in the Annex to the Code prior to or upon [acceptance of the] appointment,

and shall provide it to the disputing parties, the other Arbitrators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. The form in the Annex is a simplified disclosure form and its use is not mandatory as long as the relevant information is conveyed in a similar comprehensive manner.

103. The terms “prior to” and “upon” [acceptance of the] appointment in paragraph 5 does not imply that two separate disclosures are required, once as a Candidate and another as an Arbitrator. One would suffice for the purposes of paragraph 5 and an Arbitrator would have a continuing duty to make further disclosures in accordance with paragraph 6.

Continuing obligation of disclosure

104. Article 10(6) provides a continuing obligation of disclosure. If new relevant information falling under paragraphs 1 or 2 emerge or are brought to the knowledge of an Arbitrator during the course of the IID proceeding, he or she must disclose such information promptly and without delay in accordance with paragraph 5. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Failure to disclose

105. Article 10(7) indicates that a failure to disclose does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code]. It is rather the content of the disclosed or omitted information that determines whether there is a [breach] [lack of impartiality or independence]. [Even though a breach of Article 10 is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a Candidate or Adjudicator’s duty of independence and impartiality under articles 3 of the Code.]

Waiver of the disputing parties

106. Article 10(8) provides the possibility for the disputing parties to waive their respective rights to raise an objection with respect to circumstances that were disclosed. A waiver would preclude that disputing party from raising the objection at a later stage. Each disputing party can waive their respective rights and need not be done jointly. [**Note to the Working Group:** *The Working Group may wish to consider whether the form or method of the waiver will need to be further elaborated in the Commentary.*] Furthermore, it should be understood that the waiver would only relate to the circumstances that were disclosed.

107. In practice, this would mean that the disputing party would not challenge an Arbitrator based on the disclosed circumstances at a later stage. For instance, if a Candidate informs the disputing parties that he or she has, within the past five years, worked as a counsel in the same law firm as the current legal representative of a disputing party, and both disputing parties agree nonetheless to the appointment of that Candidate, it would not be possible for any of the disputing parties to challenge that Arbitrator on the basis of the disclosed circumstance. However, as to circumstances that were not disclosed, for example, that he or she has maintained a close professional relationship with the law firm or the current legal representative, the waiver would not prevent a disputing party from raising a challenge.

Disclosure obligation of Judges

[*To be elaborated after discussion by the Working Group, see A/CN.9/WG.III/WP.216, Appendix*]

Article 11 – Compliance with the Code

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|--|
| 1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code. |
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[2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]

3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].

4. An Adjudicator shall remove an Assistant who is in breach of the Code.

Commentary

[This section will be elaborated further following the discussion by the Working Group, particularly on enforcement of the Code. See A/CN.9/WG.III/WP.216, paragraphs 67-69.]

108. Article 11 addresses compliance of the Code and mentions possible remedies for non-compliance.

Principle of voluntary compliance

109. Paragraph 1 requires an Adjudicator and a Candidate to comply with the obligations in the Code that are applicable to them. One way to ensure this adherence is to require Adjudicators to sign a declaration upon appointment or confirmation as found in the Annex.

Remedies for non-compliance

110. The Code does not contain rules on challenge, disqualification, removal or other sanctions in case of breach. Paragraph 3 clarifies that existing sanctions shall apply, if provided in the applicable rules or treaties. Candidates who are not appointed as an Adjudicator could potentially be subject to sanctions under, for example, the applicable rules of professional accreditation bodies.

111. Pursuant to Article 11(4), if an Assistant does not comply with the Code, the Adjudicator shall remove the Assistant from the IID proceeding. In practice, disputing parties who are concerned that an Assistant is not complying with the Code could raise these concerns with the Adjudicator and ask the Adjudicator to replace the Assistant. An Adjudicator who does not remove the Assistant would be in breach of paragraph 4 and may be subject to sanctions or remedies that may be provided for in the applicable rules or treaties pursuant to paragraph 3.

**Version Four of the Code of Conduct for Adjudicators in International Investment Disputes (July 2022) and its Draft Commentary
(August 2022)**

Proposals from Freshfields Bruckhaus Deringer LLP (14 October 2022)

We set out below our comments and proposals on Version Four of the Code of Conduct for Adjudicators in International Investment Disputes (July 2022) (the *Draft Code* when referring to the latest version of the draft, or the *Code* when referring to the code in general) and its Draft Commentary (August 2022) (the *Draft Commentary* when referring to the latest version of the draft, or the *Commentary* when referring to the commentary in general).

Reference to notes for the Working Group are to those found in Version Three of the Draft Code.

| Reference | Text in current draft | FBD comments |
|------------------------------|--|---|
| Article 1 Definitions | <p>For the purposes of the Code:</p> <p>(i) “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;</p> <p>(ii) “Arbitrator” means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;</p> <p>(iii) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;</p> <p>(iv) “Adjudicator” means an Arbitrator or a Judge;</p> | <ul style="list-style-type: none"> • As general comments, consider: <ul style="list-style-type: none"> • Defining “Regional Economic Integration Organization (REIO)”. Although the Draft Commentary refers to REIOs and states that “<i>It usually includes any decentralized or federated organ such as a municipality or a regional entity</i>”, adding a definition would clarify whether a particular REIO that is party to an International Investment Dispute (IID) is subject to the Code. By way of reference, Rule 1.2 of the Draft ICSID Mediation Rules defines REIOs as follows: “<i>Regional Economic Integration Organization or REIO means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of such matters</i>”. • For subparagraph 1(a), consider whether the scope should be extended to State-to-State investment disputes. The current wording applies only to disputes |

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| | <p>(v) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet [been appointed] [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and</p> <p>(vi) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];</p> <p>(vii) “Ex parte communication” means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.</p> | <p>between investors and a State or REIO. As such, the Code would not apply to BITs that contain exclusive State-to-State investment dispute arrangements, such as the Germany – Liberia BIT (1961) - albeit a minority amongst BITs and usually concluded pre-1969; and</p> <ul style="list-style-type: none"> For subparagraph 1(g), consider including third-party funders to the list of entities that may constitute “<i>related persons concerning the IID</i>”. |
| Article 2 Application of the Code | <p>1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.</p> <p>2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.</p> <p>3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code.</p> | <ul style="list-style-type: none"> For paragraph 2, consider how the Code is intended to interact with other rules applicable to Adjudicators. Indeed, in addition to any rules set out in the original instrument of consent to adjudication, there may be other rules that come into play regarding the conduct of Adjudicators. For example, there could be a subsequent agreement between the parties on a choice of seat which would have the effect of making certain domestic law provisions applicable to the tribunal. Clearly delineating the interaction between the Code and other codes of conduct/legislation can further improve certainty; and For paragraph 19 of the Draft Commentary, consider expanding the scope beyond situations of “<i>inconsistency</i>” (clear conflict) to include cases of inconsistency by <i>omission</i> and situations of <i>implied</i> conflict with other conduct obligations for Adjudicators (for example, if the law of the seat of the arbitration only creates a duty on Arbitrators to be impartial, but not independent). |

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| <p>Article 3</p> <p>Independence and Impartiality</p> | <p>1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].</p> <p>2. Paragraph 1 includes the obligation not to:</p> <p>(a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;</p> <p>(b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;</p> <p>(c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];</p> <p>(d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;</p> <p>(e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or</p> <p>(f) Take any action that creates the appearance of a lack of independence or impartiality.</p> | <ul style="list-style-type: none"> • As a general comment, consider that Article 3 does not expressly refer to the nationality of the Adjudicator as an issue in the context of independence and impartiality. It should be uncontroversial that nationality can be considered a potential source of bias or partiality (see, e.g. Articles 39 and 52(3) of the ICSID Convention). Indeed, the Draft Commentary acknowledges that holding the same nationality as a party or legal representative does not indicate loyalty. As such, consider expressly referring in Article 3(2)(a) to an obligation for an Adjudicator not to be influenced by one’s nationality. • For paragraph 2, consider: <ul style="list-style-type: none"> • Adding a reference in paragraph 26 of the Draft Commentary to any guidance or recommendation provided by arbitral institutions (such as the ICSID Secretariat) regarding compliance with applicable rules; • Removing the text in square brackets from subparagraph 2(c) “[or judgment]”. Indeed, what is key is the Adjudicator’s conduct during the proceedings, in deliberations, and in drawing up the award. Including the more expansive term “judgment” may provide opportunities for parties who wish to allege a lack of independence and impartiality on the part of an adjudicator merely as a strategic or dilatory tactic; and • Replacing the words “[any significant]” with “[a]” in subparagraph 2(d) for the reasons outlined in Note 23 for the Working Group. |

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| <p>Article 4</p> <p>Limitation on Multiple Roles</p> | <p><i>[Paragraphs applicable to Arbitrators only]</i></p> <p>1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:</p> <p style="padding-left: 40px;">(a) The same measure(s);</p> <p style="padding-left: 40px;">(b) The same or related party(parties); or</p> <p style="padding-left: 40px;">(c) The same provision(s) of the same treaty.</p> <p>2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.</p> <p><i>[Paragraphs applicable to Judges only]</i></p> <p>3. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.</p> <p>4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on</p> | <ul style="list-style-type: none"> • As general comments, consider: <ul style="list-style-type: none"> • Specifying what “<i>conclusion of the IID proceeding</i>” refers to. Indeed, the following stages might be considered to constitute “conclusion”: (i) the issuance of an Award, (ii) national setting-aside proceedings, (iii) ICSID annulment proceedings, (iv) Arbitrator resignations, and (iv) challenges to Arbitrators (whether successful or not). Hence, we suggest using a more precise wording or defining the term ‘Conclusion’; and • Whether specific mention should be made to <i>amicus curiae</i> submissions. For instance, there might be a question over whether an individual’s involvement in the preparation and submission of <i>amicus curiae</i> submissions would trigger the Article 4 restrictions. Paragraph 38 of the Draft Commentary does suggest the answer: “This includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities. By contrast, it does not include non-disputing parties, such as third-party funders or non-disputing Treaty Parties.”. However, the Code itself makes no reference to this point (nor does it define “party” or “<i>amicus curiae</i>”). • For paragraph 1, consider: <ul style="list-style-type: none"> • Limiting subparagraph (c) to cases involving the same substantive treaty provision(s) of the same treaty, and in any event clarifying whether the limitation on multiple roles also applies to disputes that involve the same substantive treaty provision but raise different legal issues; • Shortening the three-year time bar under paragraph 1 – Indeed, a three-year time limit may have the effect of impacting the pool of arbitrators available for selection, considering the length of investment treaty disputes, with ISDS proceedings taking 3.73 years on average (see A Zarate et al “Duration |

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| | <p>the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.</p> <p>5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.</p> <p>6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.</p> | <p>of Investor-State Dispute Settlement Proceedings”, Journal of World Investment & Trade 21 (2020), 300–335, p. 328);</p> <ul style="list-style-type: none"> • Expanding the limitation to apply to any counsel or expert capacity that an arbitrator may hold in another IID proceeding or in any other proceeding; and • Applying the provisions in paragraph 1 equally to disqualified / retired former arbitrators, as this seems desirable for parity, as raised for the Working Group in Note 30 for the Working Group. • For paragraph 2, consider narrowing or removing the standard defined as “<i>substantially so similar that accepting such a role would be in breach of article 3</i>”, which could be seen to be overly broad and difficult to assess by a Candidate. If a similar legal issue with a real threat to the Candidate’s independence and impartiality arises, other provisions of the Draft Code (such as Article 10.2(b)) should already require the Candidate to disclose such information. In that case, the scenario currently contemplated under paragraph 2 could simply be mentioned in the Commentary of Article 10. |
| <p>Article 5</p> <p>Duty of Diligence</p> | <p><i>[Paragraph applicable to Arbitrators only]</i></p> <p>1. An Arbitrator shall:</p> <ul style="list-style-type: none"> (a) Perform his or her duties diligently throughout the IID proceeding; (b) Devote sufficient time to the IID proceeding; (c) Render all decisions in a timely manner; | <ul style="list-style-type: none"> • As a general comment, consider whether Article 5, particularly 5(a)-(c), might lead to excessive challenges to arbitrators. For instance, compared to Article 57 of the ICSID Convention, the Draft Code’s provisions would significantly widen the scope for seeking the replacement of arbitrators (Article 57 of the ICSID Convention states: “<i>A party may propose to a Commission or 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. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.</i>” Article 14(1) of the ICSID Convention in turn provides: “<i>Persons designated to serve on the Panels shall be</i> |

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| | <p>[(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and</p> <p>(d) Not delegate his or her decision-making function.</p> <p><i>[Paragraph applicable to Judges only]</i></p> <p>2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.</p> | <p><i>persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”).</i></p> <ul style="list-style-type: none"> For subparagraph 1(d), consider reintegrating the reference to Assistants as they are the most likely persons Adjudicators would be tempted to delegate decision-making powers to, as follows: “<i>Not delegate his or her decision-making function, particularly to his or her Assistant</i>” (emphasis added). |
| <p>Article 6</p> <p>Integrity and Competence</p> | <p>1. An Adjudicator shall:</p> <p>(a) Conduct the IID proceedings in accordance with high standards of integrity, fairness [, civility] and competence;</p> <p>(b) Treat all participants in the IID proceeding with civility; and</p> <p>(c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.</p> <p><i>[Paragraph applicable to Arbitrator candidates only]</i></p> <p>2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.</p> <p><i>[Paragraph applicable to Judge candidates only]</i></p> <p>3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.</p> | <ul style="list-style-type: none"> For paragraph 1, consider: <ul style="list-style-type: none"> Deleting subparagraph (b) and keeping the text in square brackets “[civility]” in subparagraph 1(a); and Deleting subparagraph (c) as it is difficult to verify and creates an onerous burden on Adjudicators. |

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| <p>Article 7</p> <p>Ex Parte Communications</p> | <p><i>[Paragraphs applicable to Arbitrators and Arbitrator candidates only]</i></p> <p>1. Ex parte communication is prohibited except:</p> <p style="padding-left: 40px;">(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;</p> <p style="padding-left: 40px;">(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;</p> <p style="padding-left: 40px;">(c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.</p> <p>2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.</p> <p><i>[Paragraph applicable to Judges and Judge candidates only]</i></p> <p>3. Ex parte communication is prohibited.</p> | <ul style="list-style-type: none"> • As a general comment, consider extending the prohibition of <i>ex parte</i> communications to Assistants as they are extensions of Adjudicators. • For paragraph 1, consider: <ul style="list-style-type: none"> • Clarifying in the Commentary that “<i>availability</i>” encompasses discussions with a Candidate as to their willingness to sit as an Arbitrator; and • Confirming in relation to Note 44 for the Working Group that subparagraph (b) would allow an arbitrator appointed by a disputing party to discuss with the party or its legal representative the name and qualifications of a potential Candidate for presiding arbitrator, with the agreement of the other party as to the fact and potential scope of those <i>ex parte</i> communications. |
| <p>Article 8</p> <p>Confidentiality</p> | <p>1. A Candidate and an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, an IID proceeding unless:</p> <p style="padding-left: 40px;">(a) The information is publicly available [in accordance with the applicable rules or treaty,]; or</p> | <ul style="list-style-type: none"> • For paragraph 3, consider removing the text in square brackets “[<i>unless it is publicly available</i>]”. This wording may imply that an Adjudicator is free to comment on any decision that is publicly available, which would include, e.g., interim/procedural decisions in ICSID cases. This should be avoided (considering the possibility of an arbitrator’s comments being used to attack an award at the enforcement stage), and should in all events be prohibited while the proceeding is ongoing. If the mention is maintained, consider creating a duty of |

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| | <p>(b) Permitted under the applicable rules or treaty or by agreement of the disputing parties.</p> <p>2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].</p> <p>3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].</p> <p>4. An Adjudicator shall not disclose any draft decision in the IID proceeding.</p> <p>5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].</p> <p>6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.</p> | <p>discretion in relation to comments by Adjudicators on decisions even when they are public.</p> <ul style="list-style-type: none"> • For paragraph 6, consider: <ul style="list-style-type: none"> • Clarifying whether the mention “<i>in a court or other competent body</i>” should be understood as including an arbitral tribunal in other arbitration proceedings, and in any event providing examples in the Commentary; and • Limiting the information that can be disclosed to what is strictly required by the applicable law, as follows : “<i>The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body, to the extent required by the applicable law</i>” (emphasis added). |
| <p>Article 9</p> <p>Fees and Expenses</p> | <p><i>[Article applicable to Arbitrators and Arbitrator Candidates only]</i></p> <p>1. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated by the sole or presiding Arbitrator.</p> <p>2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion</p> | <ul style="list-style-type: none"> • For paragraph 2, consider: <ul style="list-style-type: none"> • Narrowing the scope of “<i>any discussion concerning fees and expenses</i>” by explaining in the Commentary that, in practice, it may be necessary to discuss issues around the determination of additional fees and expenses with the Candidate or Arbitrator; and • Defining “<i>before the constitution of the arbitral tribunal</i>” as “<i>any time before the first procedural hearing</i>”. |

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| | <p>concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.</p> <p>3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.</p> <p>4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.</p> <p>5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.</p> | |
| <p>Article 10 Disclosure</p> | <p><i>[Article applicable to Arbitrators and Arbitrator Candidates only]</i></p> <p>1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.</p> <p>2. The following information shall be included in the disclosure:</p> <p style="padding-left: 40px;">(a) Any financial, business, professional, or personal relationship in the past five years with:</p> <p style="padding-left: 80px;">(i) Any disputing party or an entity identified by a disputing party;</p> <p style="padding-left: 80px;">(ii) The legal representative(s) of a disputing party in the IID proceeding;</p> | <ul style="list-style-type: none"> • As general comments, consider: <ul style="list-style-type: none"> • Referring in the Commentary to the standard practice that Candidates should decline appointments in cases where a confidentiality obligation prevents them from disclosing a conflict. This would address situations where confidentiality obligations applicable to another case or role prevent a Candidate or Adjudicator from fully disclosing that case or role; • Making it clear that the items listed in Article 10(2) are not necessarily examples of circumstances likely to give rise to justifiable doubts as to independent or impartiality. It is only if there are such doubts that a disclosure obligation arises, and if such obligations arises, then the information in Article 10(2) (as applicable) should be included; • Imposing a duty on Adjudicators to disclose the fact that they are assisted by an Assistant. This is not currently expressly covered by the Draft Code; |

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| | <p>(iii) Other Arbitrators and expert witnesses in the IID proceeding; and</p> <p>(iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];</p> <p>(b) Any financial or personal interest in:</p> <p>(i) The outcome of the IID proceeding;</p> <p>(ii) Any other IID proceeding involving the same measure(s); and</p> <p>(iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;</p> <p>(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and</p> <p>(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.</p> <p>3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].</p> | <ul style="list-style-type: none"> • Regarding the relationship between Articles 11.2 and 10, consider that the obligation for Candidates not to “<i>accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code</i>” is already encompassed in Article 10; and • Regarding the relationship between Articles 10 and 4, consider requiring Candidates to expressly mention in their disclosure when a disclosure arises in relation to Article 4. • For paragraph 1, consider removing the words “[<i>including in the eyes of the disputing parties</i>]” in paragraph 1 which suggests a subjective standard that may be overly burdensome. Instead, consider applying the standard set by General Standard 2(c) of the IBA Guidance that “<i>Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision</i>”. The current wording suggests a very high (and subjective) threshold that is arguably inconsistent with the Draft Commentary to Article 3 in paragraph 30, which states that “<i>The standard of appearance of a lack of independence or impartiality in [Article 3(2)] subparagraph (f) is an objective one, based on a reasonable evaluation of the evidence by a third party.</i>”. • For paragraph 2, consider: <ul style="list-style-type: none"> • Clarifying what “<i>personal relationship</i>” is intended to encompass; • In subparagraph 2(b)(ii), modifying “<i>any other IID proceeding involving the same measure(s)</i>” to encompass all proceedings involving the same measure(s), as proceedings involving the same measures that are not IID proceedings (such as commercial arbitration proceedings or local |

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| | <p>4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.</p> <p>5. A Candidate and an Arbitrator shall make the disclosure using the form in the annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.</p> <p>6. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.</p> <p>7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of article 3 to 6 of the Code].</p> <p>8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.</p> | <p>proceedings) can also be relevant for the purposes of preventing a conflict of interest in this context; and</p> <ul style="list-style-type: none"> • Removing the obligation in subparagraph 2(c) that Arbitrators disclose “<i>All IID related proceedings</i>” in which the Candidate or Arbitrator is or has been involved in the past 5 years as an Arbitrator, legal representative or expert witness. This seems fairly onerous, since paragraph 87 of the Draft Commentary suggests that this is not limited to cases that give rise to justifiable doubts. Particularly, consider in this context how such a disclosure obligation will work in practice for those Arbitrators who also work as counsel. • Regarding the relationship between paragraphs 1 and 2, consider: <ul style="list-style-type: none"> • Explaining that a Candidate or Adjudicator must make disclosures required by paragraph 1 even if they do not fall within the terms of paragraph 2, as commented by the ICCA ISDS Watch Group on Version Three of the Draft Code, since the scope of paragraph 1 is wider than that of paragraph 2; and • In the alternative, amending paragraph 87 of the Draft Commentary to limit such involvement by Candidates and Arbitrators to cases that give rise to justifiable doubts as to independence and impartiality under paragraph 1, bearing in mind those cases regarding disputes not in the public domain or subject to confidentiality restrictions under the applicable arbitral rules or the arbitral contract. |

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| <p>Article 11</p> <p>Compliance with the Code</p> | <p>1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code.</p> <p>[2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]</p> <p>3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].</p> <p>4. An Adjudicator shall remove an Assistant who is in breach of the Code.</p> | <ul style="list-style-type: none"> For paragraph 3, consider deferring to the removal and remedy mechanisms already available under the applicable rules, as commented by the ASA on Version Three of the Draft that <i>“violations of the Code of Conduct would still be sanctioned under this alternative, because, to the extent the Code of Conduct applies in a given case, the duties it prescribes would have to be taken into account in applying the removal mechanisms in existing rules”</i>. <p>Thus, consider amending paragraph 3 to read: <i>“Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall apply”</i>.</p> |

31 August 2022

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Commentary on the Version Four of the Draft ICSID-UNCITRAL Code of Conduct for Adjudicators in International Investment Disputes

Mesdames,

I am thankful for the opportunity to review and provide comments on Version Four of the Draft Code of Conduct for Adjudicators in International Investment Disputes. This is a remarkable project which will certainly lead to innovations in the field of dispute resolution at large.

Having reviewed the Code of Conduct with best practices in international arbitration in mind, my comments are set out below.

I hope that you will find these suggestions useful in the revision stages to come.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Georges Affaki', written over a horizontal line.

Georges Affaki

1. Introduction

- 1.1. On 25 July 2022, ICSID and UNCITRAL released Version Four of the Draft Code of Conduct for Adjudicators in International Investment Disputes (the **Code of Conduct**), taking into consideration the comments submitted by stakeholders on Version Three published on 22 September 2021.
- 1.2. Bearing in mind recent developments in the field of investor-State dispute settlement, the likely transposition by tribunals and parties of all or some of the provisions of the Code of Conduct into other dispute resolution mechanisms, including international commercial arbitration, and the needs of parties, arbitrators, judges, and counsels, I suggest making the changes which would further trust and cooperation among the parties and tribunals. In that sense, the Code of Conduct should set realistic standards, and strive towards simplicity and clarity, in order to assist adjudicators in the fulfilment of their mission of rendering enforceable awards on the basis of the rule of law.
- 1.3. The final version of the Code of Conduct should be designated for a diverse community of adjudicators, both in terms of their background and in practice, without imposing unrealistic or burdensome disclosure standards. Specifically, the Code of Conduct should not create far-reaching disclosure requirements, which could trigger disputes and challenges on frivolous grounds. On the contrary, it should be an instrument to protect the legitimate expectations of all the actors in the arbitral proceedings, including counsels and the arbitrators.

2. Article 3 – Independence and impartiality

- 2.1. Article 3 of the Code of Conduct provides that:

“1. An adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].

2. Paragraph 1 includes the obligation not to:

- (a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;*
- (b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;*
- (c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];*
- (d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;*
- (e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or*

(f) Take any action that creates the appearance of a lack of independence or impartiality.”

- 2.2. As I proposed in my previous commentary on Version Three, the Code of Conduct should not impose overarching or imprecise duties on adjudicators.
- 2.3. Specifically, I note that Article 3 does not put forward a definition of ‘independence’ and ‘impartiality’. Article 3(2) refers to a non-exhaustive list of six circumstances which could potentially be covered by Article 3(1).
- 2.4. By imposing overarching and imprecise duties on adjudicators, the Code of Conduct generates disproportionate obligations at the expense of the adjudicators, but also at the expense of the parties and counsel. This results in the risk that the dispute resolution process would become excessively long and costly, due to the likelihood of the multiplication of challenges.
- 2.5. In this sense, the wording in brackets in Article 3(1) of the Code of Conduct is welcome insofar that it permits to determine a temporal scope of the duty of independence and impartiality of the adjudicators. The adjudicator’s duty of independence and impartiality will end at the conclusion of the IID proceedings or at the end of the adjudicator’s term of office. It is in line with international practice as the IBA Guidelines on Conflict of Interest to provide that the arbitrator’s duty ends when the final award has been rendered or when the proceeding has finally terminated.
- 2.6. I do agree with the wording in brackets in Article 3(2)(c) and Article 3(2)(d) which permits to specify the circumstances in the subparagraphs (c) and (d).
- 2.7. I also recommend that the Code of Conduct refers to the IBA Guidelines on Conflict of Interest in International Arbitration (2014) which are frequently applied in investor-State disputes. This would allow the adjudicators or candidates to have a tool at hand to assess their independence and impartiality. This will also allow the parties and their counsel to have a better understanding of circumstances, which could lead to the lack of independence or impartiality. In the same vein, it would limit the unnecessary multiplication of challenges when irrelevant.

3. Article 4 – Limit on multiple roles

3.1. Article 4 of the Code of Conduct states that:

“[Paragraphs applicable to Arbitrators only]

1. *Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:
 - (a) *The same measure(s);*
 - (b) *The same or related party(parties); or*
 - (c) *The same provision(s) of the same treaty.**
2. *[Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [for any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.
[Paragraph applicable to Judges only]*
3. *A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a judge shall not act as a legal representative or expert witness in another IID proceeding.*
4. *A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.*
5. *A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.*
6. *A former Judge shall not act as a legal representative of a disputing party or [third] [non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.”*

- 3.2. In my view, the legal issues previously or concurrently faced by adjudicators should not be considered to limit their role in a dispute. Indeed, adjudicators may encounter very similar legal grounds in the international investment disputes (the **IID**), and this should not raise any concern. Otherwise, a significant number of adjudicators could be excluded without any proper justification. Therefore, the wording “*legal issues which are substantially so similar that accepting such a role would be a breach of article 3*” in paragraph 2 should be deleted. This is all the more so in light of the fact that neither

Article 3 nor Article 4 explain which legal issues would be considered as “*substantially so similar*”.

- 3.3. The above logic also applies to the provision prohibiting an arbitrator from acting concurrently as a legal representative or an expert witness in another IID proceeding involving “[*t*]he same provision(s) of the same treaty”. As highlighted in the Commentary at para. 33, this provision could have significant effects on IID proceeding involving multilateral treaties.
- 3.4. More generally, as provided at para. 34 of the Commentary, the meaning and scope of the term “*same*” used throughout subparagraphs 1(a) to (c) of Article 4 and referring alternatively to “*measure(s)*”, “*party/parties*” and “*provision(s)*”, needs clarification.
- 3.5. In addition, I recommend deleting the reference to expert witness. As already explained in my Comments on Versions Two and Three, an expert can address specific legal issues and is not influenced by a factual background. Therefore, acting as an expert ought not necessarily give rise to doubts as to the independence or impartiality of the adjudicator.
- 3.6. As stated in my comments on Version Three, prohibiting double-hatting in absolute terms would be impractical and may exclude a significant number of adjudicators with potential dire consequences that outweigh what is necessary to limit conflicts of interest. In this regard, I believe that the wording in brackets in Article 4(2), which provides “*unless the disputing parties agree otherwise*”, is necessary.
- 3.7. I also believe that the wordings in brackets in paragraphs (1) and (2) of Article 4 are relevant additions insofar as they permit to limit the scope of the multi-roles’ limitation involving same proceedings which apply to adjudicators. A three-year limitation seems reasonable.
- 3.8. I also agree with the wording in brackets in paragraphs (3), (4) and (6) of Article 4, in that they should apply only to judges.
- 3.9. Finally, taking into consideration the purpose of Article 4, and in line with my comments on Article 3 (as submitted at para. 2.5 above), it would be relevant to refer to the IBA Guidelines on Conflict of Interest in International Arbitration (2014) to consider circumstances where multiple roles of the adjudicators should be limited.

4. Article 5 – Duty of Diligence

4.1. Article 5 of the Code of Conduct states that:

“[Paragraph applicable to Arbitrators only]

1. An arbitrator shall:

(a) Perform his or her duties diligently throughout the IID proceeding;

(b) Devote sufficient time to the IID proceeding;

(c) Render all decisions in a timely manner;

[(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and

(d) Not delegate his or her decision-making function.

[Paragraph applicable to Judges only]

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.”

4.2. Regarding the wording in brackets in Article 5(1)(d), I recommend they should be deleted, or at least be better particularised. Indeed, there is no indication of what could be the obligations that may impede the adjudicator “*to perform the duties under the IID proceeding in a diligent manner*”.

4.3. In order to determine the reasonable availability of the adjudicators, Article 5 of the Code of Conduct might state that, following their nomination, adjudicators would be invited to prepare a calendar of their availability for the expected duration of the proceeding. A helpful precedent in that respect is set by the practice of the International Court of Arbitration of the International Chamber of Commerce.

5. Article 6 – Integrity and competence

5.1. Article 6 provides that:

“1. An adjudicator shall:

a. Conduct the IID proceedings in accordance with high standards of integrity, fairness [, civility] and competence;

b. Treat all participants in the IID proceeding with civility; and

c. Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

[Paragraph applicable to Arbitrator candidates only]

2. A candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

[Paragraph applicable to Judge candidates only]

3. *A Candidate shall possess the necessary competence and skills to perform the duties of a Judge."*
- 5.2. In their comments on Version Three, various commentators have expressed concerns about Article 6(1)(b) which provides the duty to “[t]reat all participants in the IID proceeding with civility”. I agree. Indeed, the lack of civility appears as a bias notion. In this sense, as already explained in my comments on the Version Three, I maintain that the reference to the “civility” of the participants in Article 6(1)(a) as well as in the brackets in Article 6(1)(a) should be deleted, or at least be expressly excluded from being a ground to challenge an arbitrator.
 - 5.3. Article 6(1)(a) of the Code of Conduct might also potentially give rise to tactical challenges. The duty to “*display high standards of integrity, fairness and competence*” could be easily used by a party who disapproves of the decision issued by the adjudicator and seeks to obtain the setting aside or annulment of the decision based on those subjective grounds of integrity, fairness, and competence. Therefore, I suggest making it clear that Article 6 of the Code of Conduct does not give rise to independent grounds for challenges.
 - 5.4. Generally, it should be clearly stated that Article 6 should not give rise to independent grounds for challenges.

6. Article 7 – Ex parte communication

- 6.1. Article 7 provides that:

“[Paragraphs applicable to Arbitrators and Arbitrator candidates only]

1. *Ex parte communication is prohibited except:*

- (a) *To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;*
- (b) *To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflict of interest of a Candidate of presiding Arbitrator, if the disputing parties so agree;*
- (c) *If permitted by the applicable rules or treaty or by agreement of the disputing parties.*

2. *In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.*

[Paragraph applicable to Judges and judge candidates only]

3. *Ex parte communication is prohibited.”*

- 6.2. As already mentioned in my commentary on Versions Two and Three, I suggest that Article 7 of the Code of Conduct mandate counsel to keep a record of any pre-

appointment interview, in order to avoid any controversy about the content of the discussion between an independent adjudicator and a party's counsel.

7. Article 10 – Disclosure Obligations

7.1. Article 10 states that:

“[Article applicable to Arbitrators and Arbitrator Candidates only]

- 1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.*
- 2. The following information shall be included in the disclosure:*
 - (a) Any financial, business, professional, or personal relationship in the past five years with:*
 - (i) Any disputing party or an entity identified by a disputing party;*
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;*
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and*
 - (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];*
 - (b) Any financial or personal interest in:*
 - (i) The outcome of the IID proceeding;*
 - (ii) Any other IID proceeding involving the same measure(s); and*
 - (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;*
 - (c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and*
 - (d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.*
- 3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].*
- 4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.*
- 5. A Candidate and an Arbitrator shall make the disclosure using the form in the annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.*

6. *An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.*
 7. *The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of article 3 to 6 of the Code].*
 8. *The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.”*
- 7.2. Regarding Article 10, I note that it is now a steady feature in international arbitration to follow the IBA Guidelines on Conflict of Interest in International Arbitration (2014), which have become the unquestionable benchmark in the field of international arbitration in relation to the assessment of the existence of conflicts of interest likely to impede the proper conduct of the proceedings. In that regard, and in line with my comments on Article 3 and Article 4, I would suggest to generally refer to the IBA Guidelines on Conflict of Interest in International Arbitration (2014) for all the actors of the IID proceeding to assess which circumstances should lead or should have led to a disclosure obligation applicable to the adjudicators.
 - 7.3. Overall, I suggest keeping in mind a measure of proportionality between ‘necessary’ disclosure which prevents conflicts of interest and ‘extensive’ disclosure that could undermine the expeditiousness of the proceedings.
 - 7.4. Additionally, I believe that the Code of Conduct should ensure that the burden of detailed disclosure does not outweigh its benefits. In that sense, notwithstanding the fact that disclosure fosters transparency and reduces the risk of actual or apparent conflicts of interest, the perspective of a balanced and reasonable approach to disclosure obligations should be pondered to prevent disproportionate disclosure.
 - 7.5. Regarding the wording in brackets in Article 10(1), I believe that the language is unnecessary. Indeed, Article 10(1) already provides that “[a] *Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts*”. Adding to it that these circumstances should also be considered “*in the eyes of the disputing parties*” opens doors to subjectivity, which will increase the chance of unnecessary challenges. The UNCITRAL objective standard is adequate.
 - 7.6. Article 10.2(a) requires the adjudicator to disclose “*any professional ... relationship*” with the persons mentioned in Article 10.2(a)(i), 10.2(a)(ii), 10.2(a)(iii), and 10.2(a)(iv). I suggest that this obligation be limited to “*active*” professional relationships. In addition, I note that Article 10.2(a)(ii) does not specify whether relationships with the parties’ legal representatives should be extended to the partners, associates and other staff of the firm of the parties’ legal representatives, and to those members of the firm who may be located in other countries but not working on the case.

- 7.7. Drawing inspiration from the IBA Guidelines on Conflicts of Interest as well as from the ICC Note to the parties and to the arbitral tribunal, I propose to add the disclosure of a “*close*” personal relationship.
- 7.8. I do agree with the wording in brackets in Article 10(2)(iv) insofar as it is in line with international practice, notably with the practice as reflected in the IBA Guidelines on Conflict of Interest.
- 7.9. As currently drafted, Article 10.2(c) also raises the issue of confidentiality and potentially of professional secrecy as well if the arbitrator happens to practice as a regulated professional ascribed to professional secrecy. If the IID proceeding is *ad hoc* and/or confidential, adjudicators may be precluded from disclosing their involvement. Article 10.2 should therefore provide for an exception to the disclosure requirement to account for a confidentiality obligation.
- 7.10. I also agree with the wording in brackets in Article 10(7) insofar as the duty of independence and impartiality of the adjudicator and the duty of disclosure are two separate issues. It is in line with international practice.

This is an initial draft for comments until 14 October 2022. All comments on this initial draft should be communicated to the UNCITRAL and ICSID Secretariats with the subject “Comments on initial draft Commentary to the Code of Conduct”.

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Possible reform of investor-State dispute settlement (ISDS)

Commentary to the Code of Conduct

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I. Introduction

1. The following is an initial draft of the Commentary to the Code of Conduct (the “Code”) to assist the delegations during their deliberations on the Code (contained in document [A/CN.9/WG.III/WP.216](#)) at the forty-third session of Working Group III to be held in Vienna from 5 to 16 September 2022. It has been prepared with the ICSID Secretariat **and is an informal document for discussion purposes only**. Based on the deliberations at the forty-third session and reflecting decisions taken by the Working Group, the Commentary will be updated and presented to the forty-fourth session of the Working Group scheduled for January 2023.

2. The draft articles of the Code are reproduced below for information purposes only. The draft Code, along with notes identifying issues that require further consideration and decision by the Working Group, is found in document [A/CN.9/WG.III/WP.216](#). Accordingly, the Commentary will need to be elaborated further after the forty-third session.

II. Draft Commentary

Article 1 – Definitions

For the purposes of the Code:

(a) “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;

(b) “Arbitrator” means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;

(c) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;

(d) “Adjudicator” means an Arbitrator or a Judge;

(e) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet [been appointed] [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and

(f) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];

(g) “Ex parte communication” means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.

Commentary

3. Article 1 defines key terminology of the Code. These terms apply only in the context of the Code and are not intended to be self-standing definitions applicable to international investment disputes generally.

“International Investment Dispute”

4. The term “International Investment Dispute” (“IID”) in subparagraph (a) covers all types of IIDs regardless of, the legal basis of consent to adjudicate the dispute, and whether the proceedings are conducted under the auspices of a standing mechanism, administered by an arbitral institution, or ad hoc. By contrast, it does not cover [disputes between States or] disputes arising out of commercial contracts that do not arise out of an investment.

This places an unnecessary burden on the Adjudicator to agree with the parties on the involvement of every Assistant no matter how minor or temporary that role may be. I believe that Article 2 is sufficient to control the role of the Assistant.

I recommend using Capital Letters for the highlighted words, for consistency and to distinguish between the use of the defined meaning and the natural lingual meaning of the same

5. The term “IID” refers to the dispute itself, while the term “IID proceeding(s)” refers to the process of resolving an IID.

6. “Regional Economic Integration Organization (REIO)” means an organization constituted by States to which they have transferred competence in respect of IID matters, including the authority to make decisions binding on them in respect of such matters.¹ [“Any constituent subdivision or agency of a State or REIO” should be read in accordance with article 25 of the ICSID Convention and public international law on attribution of State responsibility. It usually includes any decentralized or federated organ such as a municipality or a regional entity.]

7. “Investment contract” refers to an agreement entered into between a foreign investor and a State [or any constituent subdivision or agency of that State] regarding an investment made in the territory of that State.

“Arbitrator”, “Judge”, “Adjudicator” and “Candidate”

8. Subparagraph (b) defines the term “Arbitrator” as any person appointed as a member of an arbitral tribunal, regardless of the nature of the arbitration (*ad hoc* or institutional).

9. The term “Judge” in paragraph (c) refers to any person who is a member of a standing mechanism that is established for the purpose of resolving IIDs. The term includes both permanent and *ad hoc* judges appointed to the standing mechanism.

10. The term “Adjudicator” in paragraph (d) is used to refer collectively to Arbitrators and Judges. It does not include mediators, conciliators, fact finders or expert witnesses.

11. Under paragraph (e), the term “Candidate” refers to any person being considered for appointment as an Arbitrator or a Judge. With respect to an Arbitrator, an individual effectively becomes a Candidate immediately upon being contacted by a disputing party or an arbitral institution about the possibility of an appointment to a specific case. A person ceases to be a Candidate and becomes an Arbitrator [upon appointment as an Arbitrator] [upon accepting the appointment as an Arbitrator]. [A person who has been appointed but has not yet accepted the appointment will be a Candidate. This is to reflect the practice of certain arbitral institutions. Under the ICSID framework for instance, such person would have twenty days to accept the appointment, at which time he or she becomes an Arbitrator.] A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a Candidate. With respect to a Judge, the time at which an individual becomes a Candidate will depend on the standing mechanism’s selection process. The individual ceases to be a Candidate and becomes a Judge upon confirmation in such role.

“Assistant”

12. The term “Assistant” defined in paragraph (f) refers to a person who is assigned certain tasks, for instance, an associate in an Arbitrator’s firm, chamber or practice, related to a specific dispute. Tasks typically carried out by such an Assistant could include factual and legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments. An Assistant does not exercise decision-making functions on the merits of the IID. An Assistant may create preliminary drafts of awards, decisions or orders, but always on instructions from and under the direction of an Adjudicator.

13. The definition of Assistant for the purposes of the Code does not include staff of arbitral institutions or of a standing mechanism – for example, tribunal secretaries, paralegals, clerks, and registry assistants who are employed by the institution or a standing mechanism. This is because such persons do not work under the direction or control of an Adjudicator in the same manner as an Assistant and they are bound by institution-specific or standing mechanism-specific obligations or terms of employment.

¹ ICSID Additional Facility Rules, Rule 1 (2022).

14. Tribunal-appointed experts are also excluded from the definition of Assistant, as they are not employed by or under the control of an Adjudicator and have a different role in the IID. While an Adjudicator provides terms of reference to a tribunal-appointed expert, experts remain independent in their tasks, methodology and submissions.

15. The selection of Assistants and the tasks to be performed by them are usually addressed with the disputing parties prior to their engagement. This means that at the start of a proceeding, an Adjudicator should discuss the name, proposed tasks, hearing attendance, fees and expenses of the Assistant, and share the Assistant's curriculum vitae with the disputing parties, which would give them a timely opportunity to raise any questions or concerns regarding the Assistant.

"Ex parte communication"

16. Ex parte communication in the context of an IID refers to a Candidate or an Adjudicator communicating with a disputing party or its legal representative without the presence or knowledge of the other disputing party. The term "other related person" is aimed at making the list of persons concerned an open one, to the extent that such person is relevant to the IID. Typically, the term would include a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities. The definition of ex parte communication is to be read in conjunction with article 7 which sets specific provisions with regard to ex parte communication.

Article 2 – Application of the Code

1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.
2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.
3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code.

I would prefer this as it gives a definitive function of the Code subject to no legal interpretive inquiry. This is more legally precise and certain.

Commentary

Scope of application

17. According to article 2(1), the Code applies to individuals in an IID, namely Adjudicator or a Candidate as defined in article 1. The second sentence clarifies that the disputing parties may also agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution. Examples could include an adjudicator appointed to resolve a State-to-State dispute, or an arbitrator appointed to resolve a commercial arbitration dispute. Such agreement between the disputing parties should be express on in writing, as there is no presumption that the Code applies in any dispute other than an IID.

Complementary nature of the Code

[This section will be elaborated further following the discussion by the Working Group. See document *A/CN.9/WG.III/WP.216*, paragraphs 16-19.]

18. Article 2(2) notes that if the investment treaty, legislation governing foreign investments or an investment contract upon which consent to adjudicate is based contains provisions [regulating][on] the conduct of an Adjudicator or a Candidate in an IID proceeding, such provisions would continue to apply and the Code would complement such provisions. This means that those provisions as well as the Code apply and hence an Adjudicator must comply with all such obligations at once.

19. The term "inconsistency" in paragraph 2 refers to situations of clear conflict between the provisions of the Code and other applicable provisions on conduct,

I recommend adding: "to the extent it applies to the Adjudicator that this Assistant is attached to".

The reason for this is due to the fact that Article 3 is expressly constrained to the Adjudicator, and it may well be argued that it excludes the Assistant.

namely where the two sets of provisions are irreconcilable or cannot be complied with at the same time.

[Note to the Working Group: The Working Group may wish to consider whether the Commentary should provide concrete examples, which may, however, be subject to different interpretation depending on the actual circumstance. For instance, the Working Group may wish to consider the situation where other applicable provisions on the conduct of adjudicators would request a declaration to be made within a specified timeframe before the constitution of the tribunal, while the Code remains silent on that aspect.]

Compliance of an Assistant with the Code

20. Article 2(3) provides that the Adjudicator assigning tasks to an Assistant must ensure that the Assistant is aware of and complies with the Code. [Provisions of the Code relevant to an Assistant are [contained in] articles [3, 5, 6, 8, 11]].

21. One way of ensuring that the Assistant is aware of and complies with the Code would be to have the Assistant sign a declaration stating that he or she has read the Code and will abide by its relevant terms. After the Assistant has signed the declaration, the Adjudicator should continue to ensure that the Assistant effectively complies with the obligations and standards of the Code during the course of his or her duties. The obligation in paragraph 3 is incumbent on the Adjudicator to remove an Assistant in breach of the Code (see article 11(4)).

I recommend adding: "(and his/her Assistant)".
Please see my comment on Article 2(3) above.

Article 3 – Independence and Impartiality

1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].

2. Paragraph 1 includes the obligation not to:

(a) Be influenced by loyalty to a disputing party, a non-disputing party, a disputing Treaty Party, or any of their legal representatives;

(b) Take instruction from any organization, government, or other authority regarding any matter addressed in the IID proceeding;

(c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];

(d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;

(e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or

(f) Take any action that creates the appearance of a lack of independence or impartiality.

I recommend removing this. This may well be interpreted that an Adjudicator can have a financial relationship with a party as long as it does not affect his/her conduct [judgment]. This contradicts with his/her independence mandated by Paragraph 1 above.

I support adding this

I recommend removing this. This will open the door for arguments on what is significant and what is not; a subjective matter in IID.

Moreover, This may well be interpreted that an Adjudicator can have a financial relationship with a party as long as it does not significant. This contradicts with his/her independence mandated by Paragraph 1 above.

Commentary

Independence and impartiality

22. Article 3(1) provides that an Adjudicator shall be independent and impartial. "Independence" refers to the absence of any external control, in particular the absence of relations with a party that might influence an Adjudicator's decision. "Impartiality" means the absence of bias or predisposition of an Adjudicator towards a disputing party or issues raised in the proceedings].

Temporal scope of the obligation

23. The obligation to be independent and impartial is a continuous one. [For Arbitrators, it starts upon appointment or confirmation and extends until he or she ceases to exercise his or her functions. This may differ depending on the case, for example, when the final award is issued, the IID is settled or otherwise discontinued,

the Arbitrator resigns or is removed from the IID proceeding. If the Arbitrator is liable to continue to exercise his or her functions in the IID proceeding (for instance, if the tribunal was asked to correct or rectify the arbitral award after it has been issued or to consider the decision on remand by an appellate tribunal), the obligation would continue to apply.] Judges must remain independent and impartial until the end of their term of office.

Non-exhaustive list

24. Article 3(2) clarifies the meaning of “independence and impartiality” by providing a non-exhaustive list of examples of when an Adjudicator could be found to lack independence or impartiality.

25. For instance, subparagraph (a) provides that an Adjudicator shall not be influenced by loyalty to persons involved in the IID such as a disputing party or any of their legal representatives. [Having the same nationality as a disputing party or a legal representative does not indicate loyalty to that disputing party.] The term “non-disputing party” refers to an individual or entity that is not a party to the dispute but has been given the tribunal’s permission to file a written submission in the IID. The term “non-disputing Treaty Party” refers to a State or REIO that is a party to the treaty upon which consent to adjudicate the IID is based but is not a claimant or respondent in the case.

26. Subparagraph (b) provides that an Adjudicator shall not take any instructions regarding any matter addressed in the IID. This includes instructions from any organization (either private or public), government (including public entities and their emanations) or individual. “Instruction” means any form of order, direction, recommendation or guidance concerning the proceeding. “Matters addressed in the IID” means any factual, procedural or substantive issue considered in the course of the IID proceeding. By contrast, compliance by the Adjudicator with binding interpretations of a joint committee or referencing a decision by another arbitral tribunal would not be considered as taking instructions within the meaning of subparagraph (b).

27. Subparagraph (c) focuses on past or existing relationships that could influence an Adjudicator’s conduct, including the exercise of his or her judgment. For a violation to occur, such a relationship must have an impact on the Adjudicator’s conduct of the case or the decisions taken in the proceeding, including the final findings on the case.

Note to the Working Group

The below is a list of examples taken from the [IBA Guidelines](#) that could provide guidance as to the types of relationships that could be problematic in the context of subparagraph (c). Such a relationship in itself would not necessarily result in a violation of subparagraph (c), which would largely depend on the facts of the case.

- An Adjudicator (X) has previously given legal advice, or provided an expert opinion, in a dispute involving disputing party (Y) or one of its affiliates;
- X currently represents or advises Y or one of its affiliates;
- X currently represents or advises the lawyer or law firm acting as counsel for Y;
- X is a manager, director or member of the governing board of Y, or has a controlling interest in an affiliate of Y, and Y is directly involved in the matters raised in the IID;
- X’s law firm currently has a significant commercial relationship with the respondent State (Z), or a public entity of Z;
- X has a close family relationship with Y, or with a manager, director or member of the governing board of Y.

28. The term “function” in subparagraph (e) refers to a professional responsibility, [such as an appointment as adjudicator in another IID or non-IID]. The term “benefit” encompasses any gift, advantage, privilege or reward.

29. Subparagraph (f) indicates that if the Adjudicator takes any action which creates the appearance of a lack of independence or impartiality, it could result in a breach of the obligation in paragraph 1 to be “independent and impartial”. This stresses the fact that an Adjudicator must remain vigilant and be proactive in ensuring that he or she does not create any impression of bias.

30. The standard of appearance of a lack of independence or impartiality in subparagraph (f) is an objective one, based on a reasonable evaluation of the evidence by a third party. It is akin to the notion of justifiable doubts, as applied in a number of arbitration instruments including the ICSID Arbitration Rules,² the UNCITRAL Arbitration Rules,³ and the IBA Guidelines on Conflicts of Interest.⁴

Article 4 – Limit on multiple roles

[Paragraphs applicable to Arbitrators only]

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:

- (a) The same measure(s);
- (b) The same or related party(parties); or
- (c) The same provision(s) of the same treaty.

2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.

[Paragraphs applicable to Judges only]

3. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature which is incompatible with his or her obligation of independence or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.

4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.

5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.

6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office before the standing mechanism for a period of three years following the end of his or her term of office.

Commentary

² Convention on the settlement of investment disputes between States and nationals of other States, Article 57.

³ UNCITRAL Arbitration Rules, Article 12(1) (2013): “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2.

Limitation on multiple roles

[This section will be elaborated further following the discussion by the Working Group. See document A/CN.9/WG.III/WP.216, paragraphs 27-31.]

31. Performing multiple roles in IIDs can give rise to conflicts of interest or the appearance thereof. Article 4 therefore sets forth distinct obligations for Arbitrators and Judges and prohibits them from undertaking certain other roles while functioning as an Arbitrator or a Judge.

32. Article 4 does not impose an absolute ban on multiple roles. Rather, the prohibition only applies [within a certain period of time (including concurrently) and] when the IID proceedings share some commonalities, and is limited to undertaking certain functions.

33. Paragraphs 1 and 2 set forth the temporal scope of the prohibition for Arbitrators. They are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding [and for a period of three years following the end of his or her functions as an Arbitrator]. This means that an individual functioning as a legal representative or an expert witness in an IID proceeding would need to resign from that role before accepting an appointment as an Arbitrator.

Limited roles

34. Paragraph 1 only concerns the Arbitrator acting as a legal representative or an expert witness in another IID proceeding. It does not limit an Arbitrator from performing other adjudicatory function, such as acting as an arbitrator in another IID or non-IID proceeding. [While the paragraph does not address an Arbitrator performing the functions of a Judge, the terms of office of a Judge could require him or her to resign his duties as an Arbitrator prior to being appointed as a Judge.]

Criteria triggering the prohibition

35. The prohibition only applies if the other IID proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same treaty. When any of these criteria are met, the Arbitrator would be prohibited from acting as a legal representative or an expert witness in another IID proceeding.

36. The use of the term “same” throughout article 4 means that the elements under scrutiny in the IID must be identical. In other words, the threshold to trigger the prohibition is high.

The same measures

37. The first criteria triggering the prohibition under subparagraph 1(a) is if the other IID proceeding deals with “the same measure(s)”. This term refers to the measures that have given rise to the dispute. Generally speaking, measures include any law, regulation, procedure, requirement, or practice⁵ of the respondent State that allegedly affected the investor’s investment or protected rights under the investment instrument.

The same or related party(parties)

38. The second criteria under subparagraph 1(b) relates to the “same or related party(parties)”. This includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities. By contrast, it does not include non-disputing parties, such as third-party funders or non-disputing Treaty Parties.

The same provision(s) of the same treaty

39. The third criteria refers to “the same provision(s) of the same treaty”. This means that for the prohibition to be triggered, the provisions applicable to the IID must be identical and in the same treaty.

[Note to the Working Group: *This part would need to be supplemented following a discussion on the scope of the intended limitation. One question would be whether the prohibition in subparagraph (c) should be applied only to provisions in the same*

⁵ See for instance North American Free Trade Agreement, Article 201.

“treaty” and not other instruments upon which consent to adjudicate is based. The term “treaty” might need to be qualified as the treaty upon which consent to adjudicate is based, to avoid for example, reliance on the ICSID Convention, to trigger the prohibition. Another question would be whether relying on the same provision allowing claims to be raised or providing the basis of the jurisdiction of the tribunal would trigger the prohibition in subparagraph (c), which could lead to a very broad limitation.]

Party autonomy

[This section will be elaborated further following the discussion by the Working Group. See A/CN.9/WG.III/WP.216, paragraph 24.]

40. The term “unless the disputing parties agree otherwise” in paragraph 1 means that the limitation of roles prescribed in article 4, paragraph 1 could be waived by the disputing parties. To allow the disputing parties to make an informed waiver, the Arbitrator should disclose relevant information about the role currently undertaken or to be undertaken, in accordance with article 10.

Another IID proceeding involving legal issues that are substantially so similar

41. Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding that involves “legal issues which are substantially so similar that accepting such a role would be in breach of article 3 (independence and impartiality). The prohibition in paragraph 2 would be triggered only if the role to be assumed by an Arbitrator concurrently [or undertaken within the three years after the IID proceeding] would amount to a lack of independence or impartiality in breach of article 3. This includes the creation of an appearance of a lack of independence or impartiality as mentioned in article 3(2)(f).

[Note to Working Group: The Working Group may wish to consider the relationship between articles 3(2)(f) and 4(2), which could be further elaborated in the Commentary.]

42. For example, article 4(2) would be breached if an Arbitrator accepts a role as a legal representative in another IID proceeding which does not fall under paragraph 1, but raises issues substantially so similar that accepting that role would create the appearance that the Arbitrator was not independent and impartial in the IID proceeding. This may also be the case when an Arbitrator is appointed as an expert witness in another IID proceeding to address a provision in an investment treaty very similar to that being addressed in the proceeding that he or she is functioning as the Arbitrator but based on a different investment treaty and involving different parties.

43. [The prohibition in paragraph 2 could be waived by the disputing parties if they so agree. This would mean that all of the disputing parties would waive their rights to raise an objection with respect to the Arbitrator being appointed as a legal representative or an expert witness in another specific IID proceeding raising substantially similar legal issues.]

Non-compliance with paragraphs 1 and 2

[This section will be elaborated further following the discussion by the Working Group. See A/CN.9/WG.III/WP.216, paragraphs 24-34.]

Prohibition to exercise any political or administrative function

44. Paragraph 3 prohibits a Judge from carrying out any “political or administrative function” outside the standing mechanism. A Judge would be prohibited, for instance, in acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches for a political organization or candidate, or [publicly] soliciting funds for or donating to a political organization or candidate. The limitation does not include administrative functions that a Judge might carry out in the context of a standing mechanism in accordance with the applicable rules of such mechanism or with his or her terms of office. For example, a Judge would be able to function as President elected through a vote or head a committee on financing of the standing mechanism.

45. A Judge would have an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of a full-time office. In particular, pursuant to paragraph 3, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.

Party autonomy with regard to Judges

46. In accordance with paragraph 4, before assuming any other function or occupation, a Judge should inform the [President of the] standing mechanism, which would determine whether such function or occupation would be prohibited under paragraph 3

47. In contrast to Arbitrators where the disputing parties can agree to waive limitations on multiple roles, whether a Judge could assume such function or occupation is to be determined by the standing mechanism. For example, if not prohibited under the terms of his or her office, whether a Judge can function as an Arbitrator in another IID proceeding outside the standing mechanism would be determined by the standing mechanism. If any such function or occupation has already been undertaken, the Judge should promptly inform the standing mechanism.

48. Paragraphs 5 and 6 apply to former judges and limit the role that they can undertake after their term of office. Paragraph 5 addresses IID proceedings before the standing mechanism that were initiated prior to the end of the Judge's term. Paragraph 6 addresses IID proceedings before the standing mechanism initiated after the end of the Judge's term.

49. Paragraph 5 prohibits a former Judge from being involved in any manner in an IID proceeding that was pending or which he or she had dealt with before the standing mechanism during his or her term. The scope of this prohibition is quite broad and covers any involvement including, but not limited to, acting as an ad hoc judge, legal representative, expert witness, third-party funder or amicus curiae. The prohibition is a continuing one.

50. Paragraph 6 addresses an IID proceeding brought before the standing mechanism after the Judge's term of office. For a period of three years after his or her term of office, a former Judge would not be able to act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in a proceeding before the standing mechanism. This prohibition ceases to apply three years after the end of his or her term of office.

51. Paragraphs 5 and 6, however, do not limit a former Judge from being involved in an IID proceeding that is not before the standing mechanism.

Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

1. An Arbitrator shall:
 - (a) Perform his or her duties diligently throughout the IID proceeding;
 - (b) Devote sufficient time to the IID proceeding;
 - (c) Render all decisions in a timely manner;
 - [(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and
 - (e) Not delegate his or her decision-making function.

[Paragraph applicable to Judges only]

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.

I recommend adding:
"avoiding unnecessary delay
or expense".

Commentary

52. Article 5 addresses the Adjudicator’s duty of diligence. It sets forth distinct provisions for Arbitrators and Judges, as such obligations of Judges are usually provided under their terms of office.

Perform his or her duties diligently

53. Article 5(1)(a) complements requirements in arbitral rules and terms of appointment requiring an Arbitrator to act diligently and expeditiously.

Render all decisions in a timely manner

54. The amount of time needed for an Arbitrator to render decisions can differ depending on the complexity of the factual and legal issues that arise in the IID. In particular, the time for making decisions should respect due process and the parties’ ability to effectively present their case. To render decisions in a “timely manner” in accordance with article 5(1)(c), an Arbitrator should take these into consideration and abide by the timelines or deadlines in the applicable rules.

No delegation of decision-making functions

55. Article 5(1)(e) states that an Adjudicator should not delegate his or her decision-making function. Decision-making is the core function of an Arbitrator in an IID proceeding. However, an Arbitrator is not precluded from having his or her Assistant prepare a preliminary draft of a decision, provided that all relevant elements pertaining to that decision have been effectively reviewed and determined by the Arbitrator.

56. It is also without prejudice to applicable arbitral rules or procedural orders issued in the course of an IID proceeding which may stipulate that certain decision-making functions can be delegated, for example, to the presiding arbitrator.

Obligations applicable to a Judge

57. The availability of a Judge to perform his or her duties is addressed in paragraph 2. The modalities of such duties and availability are to be found under the terms of appointment of a Judge.

Article 6 – [Integrity and competence]

I recommend adding:
"independence and impartiality".

1. An Adjudicator shall:
 - (a) Conduct the IID proceedings in accordance with high standards of integrity, fairness[, civility] and competence;
 - (b) Treat all participants in the IID proceeding with civility; and
 - (c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

[Paragraph applicable to Arbitrator candidates only]

2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

[Paragraph applicable to Judge candidates only]

3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.

Commentary

Necessary qualities in the conduct of the proceedings

58. Article 6(1)(a) requires that an Adjudicator act with integrity, fairness, [civility] and competence. These are elements commonly expected from any Adjudicator, and are based on provisions found in existing instruments.⁶

⁶ See e.g. ICSID Convention, Article 14: “Persons designated to serve on the Panels shall be persons

59. [Article 6(1)(b) provides that an Adjudicator shall treat all participants in the proceeding with civility. “All participants” includes not only the disputing parties and their legal representatives but also other Adjudicators, witnesses, experts, non-disputing parties, clerks and interpreters. The term “civility” means being polite and respectful when interacting with those participants and is associated with the Adjudicator’s demonstration of professionalism.^{7]}

Obligations of prospective arbitrators

60. Article 6(2) contains a distinct provision for prospective Arbitrators. It requires an Arbitrator candidate to accept an appointment only if he or she possesses the necessary competence, skills, and is available to discharge the duties of an Arbitrator. This is a self-assessment to be conducted by the candidate.

Obligations of prospective judges

61. A specific provision for prospective Judges is contained in paragraph 3. It provides that a Judge candidate shall possess the necessary competence and skills to fulfil the duties of a Judge. As a Judge is not appointed by the disputing parties, it is usually the appointing authority within the standing mechanism that would assess such skills and competence. In the selection process, particular consideration should usually be given to a candidate’s previous experience in handling IIDs, as well as his or her knowledge of public international law or international investment law.

Please see my comment on Article 1(g) above.

Article 7 – Ex parte communication

[Paragraphs applicable to Arbitrators and Arbitrator candidates only]

1. Ex parte communication is prohibited except:
 - (a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;
 - (b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;
 - (c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.
2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.

[Paragraph applicable to Judges and Judge candidates only]

3. Ex parte communication is prohibited.

Commentary

Principle – general prohibition

62. Article 7 introduces a general prohibition on ex parte communication for Adjudicators and Candidates. As defined in article 1, the prohibition relates to a communication (i) by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person; (ii) concerning the IID; and (iii) without the presence or knowledge of the other disputing party or parties. A communication not meeting these criteria, for example, a communication regarding a

of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” [See also ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”]

⁷ See e.g. ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: “All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.”

matter distinct from the IID, or an e-mail copying the other parties, would not fall under the definition of ex parte communication that is prohibited under article 7.

Exceptions

63. Article 7(1) sets forth a limited list of circumstances whereby ex parte communication would not be prohibited.

64. The first exception under Article 7(1)(a) concerns pre-appointment interviews. It covers communications by a candidate with a disputing party considering their nomination as party-appointed Arbitrator. Such communications may address the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of the Candidate as well as fee expectations and whether an Assistant will be requested. The disputing party or its legal representative may provide a general description of the IID, including the identity of the disputing parties, the other Arbitrators or Arbitrator candidates, expert witnesses or other interested parties. The terms of the consent to adjudication (treaty, contract or law), the applicable procedural rules, and any other agreements between the disputing parties concerning the applicable language, seat, or other similar administrative matters could also be communicated. Candidates may discuss publications and presentations they have made with the disputing parties. They may also discuss any activities of their law firm or organization which might raise a concern as to their independence or impartiality. It would be prudent to keep a record of the pre-appointment interviews to ensure that there is no dispute as to the content of these communications.

65. Subparagraph (b) addresses communication between a candidate for presiding arbitrator with the disputing parties or their legal representatives for the purpose of selecting the presiding Arbitrator. The notion of “presiding Arbitrator” includes a sole Arbitrator as well as the chair of an arbitral tribunal consisting of three or more Arbitrators. Such communication is allowed only when the disputing parties have agreed to such ex parte communication.

[Note to the Working Group: The Working Group may wish to confirm that subparagraph 1(b) would allow an Arbitrator appointed by a disputing party (or an Arbitrator candidate to be appointed by a disputing party) to discuss with the disputing party or its legal representative the qualifications of a potential candidate for the presiding Arbitrator. Yet this would be subject to the agreement of the other disputing party and if that condition (the disputing parties so agree) is met, such a discussion might not fall under the definition of ex parte communication as the other disputing party would be aware of the communication. See document A/CN.9/WG.III/WP.216, paragraph 44.]

66. There may be circumstances where the applicable rules or treaty authorize ex parte communications; this would pre-empt the prohibition in article 7(1). In a similar vein, ex parte communication would not be prohibited if there is an agreement by the disputing parties to permit such communication.

Limit to the exceptions

67. Even when ex parte communication is permitted under article 7(1), matters pertaining to procedural or substantive aspects of the IID proceeding or those that can be anticipated to arise in the IID proceeding should not be discussed. For example, a Candidate or an Arbitrator’s prospective views on the jurisdiction of the tribunal, the substance of the dispute, or the merits of the claims should not be discussed.

I recommend adding: "(and his/her Assistant)".

Please see my comment on Article 2(3) above.

Article 8 – Confidentiality

1. A Candidate and an **Adjudicator** shall not disclose or use any information concerning, or acquired in connection with, an IID proceeding unless:

(a) the information is publicly available [in accordance with the applicable rules or treaty,]; or

(b) permitted under the applicable rules or treaty or by agreement of the disputing parties.

-
2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].
 3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].
 4. An Adjudicator shall not disclose any draft decision in the IID proceeding.
 5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].
 6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

Commentary

68. Paragraph 1 sets forth a general prohibition not to disclose or use any information relating to the IID proceeding. It does not regulate the disclosure or use of such information for the purposes of the IID proceeding. For example, Adjudicators would be able to freely discuss among themselves information provided by the disputing parties.

69. The confidentiality obligation in paragraph 1 does not apply if the information is already publicly available [but only in accordance with the applicable rules or treaty. For example, if the information was made public in violation of the applicable rules or somehow “leaked”, the Candidate or the Adjudicator would be bound by the confidentiality obligation.] Another exception to the confidentiality obligation would be if the disclosure is allowed for expressly in the applicable rules or treaty or by the agreement of all the disputing parties.

70. Paragraphs 2 to 4 elaborate further on the confidentiality obligation. An Adjudicator cannot disclose the contents of the deliberations in the IID proceeding including views expressed by other Adjudicators. Adjudicators are prohibited from disclosing earlier drafts of decisions and commenting on a decision which is not publicly available.

71. Paragraph 5 indicates that the obligation in article 8 is a continuing one and that an Adjudicator must abide by the obligation even after the proceedings. The same would apply to former Judges after their term of office.

72. Paragraph 6 provides for a general exception to the obligations in article 8 in two circumstances: (i) where the Adjudicator is legally required to disclose the information in domestic courts or requested to do so (for example, in a set aside or an enforcement proceeding) or any other competent body; and (ii) where the Adjudicator must disclose the information in a court or other competent body to protect his or her rights.

Article 9 – Fees and expenses

[Article applicable to Arbitrators and Arbitrator candidates only]

1. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated by the sole or presiding Arbitrator.
2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.
3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.

4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.

5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Commentary

73. Article 9 concerns the fees and expenses applicable in an IID and applies only to Arbitrators and Arbitrator candidates.

Fees and expenses

74. “Fees and expenses” in paragraph 1 refer to the fees of the arbitral tribunal including the respective fees of each Arbitrator, which is to be fixed with the disputing parties or by the institutional rules, as well as all [reasonable] travel and other expenses incurred by the Arbitrators. It does not cover the legal and other costs incurred by the disputing parties in relation to the IID proceeding, such as representation costs.

Proposal and discussions concerning fees and expenses

75. As indicated in paragraph 2, discussions concerning fees and expenses are usually concluded prior to or [immediately upon] the constitution of the arbitral tribunal.⁸

76. The term “proposal” in paragraph 1 generally refers to any proposal on fees and expenses made by an Arbitrator or the arbitral tribunal during or following such discussion. Any such proposal is to be communicated through the administering institution. In an ad hoc setting, the proposal should be communicated by the sole Arbitrator or the presiding Arbitrator, meaning that it would indeed be after the constitution of the arbitral tribunal.

Timing of the discussions

77. The rule in paragraph 2 is intended to avoid a situation where an Arbitrator would request different (higher) fees than originally contemplated or agreed to when the arbitral tribunal was formed, putting the disputing parties in the untenable position of having to refuse a request by the arbitral tribunal or having to agree to higher fees.

78. The term “conclude” in paragraphs 2 and 3 means that an Arbitrator, solely or jointly with the other members of the arbitral tribunal, must consult the disputing parties on any fees and expenses related to the IID proceeding and/or the Assistant. It does not mean that actual fees and expenses to be paid need to be already determined or fixed.

79. The applicable rules or treaty may prescribe the fees and expenses of an Arbitrator (see for example, ICSID Schedule of Fees and Memorandum on Fees and Expenses; ICC Memorandum on Fees). Alternatively, the applicable rules may provide a process for determining the applicable fees and expenses. For instance, article 41(3) of the UNCITRAL Arbitration Rules provides that “[p]romptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.”⁹ Where no such provision exists or the applicable rules or treaty are silent as to how and when these discussions should take place, paragraph 2 would be applicable. Unless the applicable rules or treaty contain a pre-determined rate or a specific method for the

⁸ For instance, the 2022 ICSID Rules provide that requests regarding fees and expenses shall be made prior to the constitution of the arbitral tribunal (see Administrative and Financial Regulation 14(1)).

⁹ UNCITRAL Arbitration Rules, article 41(3): “Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.”

calculation of fees and expenses, such determination rests entirely within the disputing parties and the arbitrator(s).

Engaging the Assistant

80. The phrase “engaging any Assistant” in paragraph 3 should be understood in a broad sense, as an Assistant might be employed specifically for the purpose of the IID proceeding or might already be employed in the law firm to which the Arbitrator belongs. Paragraph 3 does not require the Arbitrator to discuss the fees and expenses of the Assistant with the disputing parties prior to contacting the Assistant to enquire about his or her availability to assist in the IID.

81. In practice, an Arbitrator may not have determined to engage an Assistant prior to or upon appointment. In such case, discussions related to fees and expenses of the Assistant should take place as soon as an Arbitrator foresees the need to engage an Assistant.

82. The express reference to Assistants in paragraph 3 should not be understood as prejudging the necessity or relevance of engaging Assistants in a particular IID proceeding. Such determination should be made on a case-by-case basis by the participants in the IID proceeding, taking into account elements such as the existence of an institution administering the IID proceeding.

Maintenance and availability of accurate records

83. Paragraph 4 requires an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding and to ensure that his or her Assistant, if any, does the same. This is common practice aimed at avoiding any dispute regarding fees and expenses. Paragraph 5 requires that the record maintained in accordance with paragraph 4 is made available. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not necessarily directly to the disputing parties. The phrase “requesting the disbursement of funds” in paragraph 5 refers to any request for the payment of fees or expenses incurred that are covered under article 9.

Article 10 – Disclosure obligations

[Article applicable to Arbitrators and Arbitrator candidates only]

1. A Candidate and an **Arbitrator** shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.
2. The following information shall be included in the disclosure:
 - (a) Any financial, business, professional, or personal relationship in the past five years with:
 - (i) Any disputing party or an entity identified by a disputing party;
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and
 - (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder];
 - (b) Any financial or personal interest in:
 - (i) The outcome of the IID proceeding;
 - (ii) Any other IID proceeding involving the same measure(s); and
 - (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;

I recommend adding: “(and his/her Assistant)”.

Please see my comment on Article 2(3) above.

(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and

(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.

3. [For the purposes of paragraphs 1 and 2,] A Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].

4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

5. A Candidate and an Arbitrator shall make the disclosure using the form in the Annex prior to or upon [acceptance of the] appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.

6. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.

7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code].

8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.

Commentary

84. Article 10 addresses the disclosure obligations of a Candidate and an Arbitrator. Such obligations are central to the Code as they assist in identifying conflicts of interest and compliance with other obligations in the Code, mainly, the possible lack of independence and impartiality.

Standard of disclosure - “Any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality”

[This section will be elaborated further following the discussion by the Working Group. See document [A/CN.9/WG.III/WP.216](#), paragraph 59.]

85. The standard of disclosure in paragraph 1 is an objective one that stems from article 11 of the UNCITRAL Arbitration Rules which provides that “[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence”.

Scope of disclosure in accordance with paragraphs 1 and 2

86. The standard of disclosure in paragraph 1 is a broad one that covers any circumstances, including any past or present interest, relationship or other relevant matter, likely to give rise to justifiable doubts regarding the independence or impartiality of the Arbitrator or Arbitrator candidate. The circumstances to be disclosed are not limited in time, meaning that a circumstance which arose more than five years before the Candidate was contacted about the appointment would need to be disclosed in accordance with paragraph 1 if it is likely to give rise to justifiable doubts.

87. Paragraph 2 includes a list of matters that must be disclosed regardless of whether they give rise to justifiable doubts as contemplated in paragraph 1. Subparagraphs (a), (c) and (d), require disclosure of the relationships, proceedings and appointments within the past five years. The five-year time frame is calculated from the moment a Candidate is contacted for potential appointment by a disputing party or an appointing authority.

88. Information not falling within the scope of paragraph 2 may still need to be disclosed in accordance with paragraph 1. For example, if a particular personal relationship dates back to more than five years from the time of the appointment and would give rise to justifiable doubts, such relationship must be disclosed. At the same time, information listed in paragraph 2 must be disclosed even if it does not give rise to justifiable doubts as it may help identify possible conflicts of interest. For example, the Candidate's or Arbitrator's involvement in an unrelated IID may lead to the identification of conflicts of interest by other participants in the proceeding.

“Any financial, business, professional, or personal relationship”

89. Article 10(2)(a) addresses disclosures of information related to potential conflict arising from any financial, business, professional, or personal relationship a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.

90. “Business” relationship means any past or present connection related to commercial activities, either directly with the persons or entities listed in subparagraphs (2)(a)(i)-(iv), or indirectly through another person or entity, with or without the knowledge of such persons. It usually includes having shared financial interests, even if such interests do not specifically relate to an Arbitrator's or Candidate's professional activity.

91. “Professional” relationship in paragraph 2(a) refers to any past or present connection with another person relating to professional activities. It includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same firm as another person involved in the IID. It also includes involvement on the same projects or cases, for instance as opposing counsel or sitting as co-Arbitrator. By contrast, being a member of the same professional association or social or charitable organization as another person involved in the IID proceeding does not constitute a professional relationship for the purpose of paragraph 2(a). A Candidate or an Arbitrator who is an employee, associate or partner in a law firm is in principle considered to bear the identity of that law firm.¹⁰ Therefore, he or she would also need to disclose any relationship between any others involved in the IID and that law firm under Article 10(2)(a). For example, if a person in another office of that law firm represents an entity that is a subsidiary of one of the disputing parties in the IID, that relationship must be disclosed even if the Candidate or Arbitrator was not involved in that matter.

92. Article 10(2)(a)(i) concerns relationships with the disputing parties and any entity identified by a disputing party. This latter category includes for instance subsidiaries, affiliates, parent entities, State agencies and State-owned enterprises. In practice, the disputing parties should, at the latest upon appointment of a Candidate or an Arbitrator, identify all relevant entities so that the Candidate or Arbitrator can check and assess any potential relationships. In accordance with Article 10(3), a Candidate and an Arbitrator should also make reasonable efforts to become aware of and identify any relationships even if a disputing party has not identified related entities or agencies. For example, based on the knowledge of the State party to the dispute, the Candidate or Arbitrator should disclose any relationship with an agency or state-owned company of that State. If he or she subsequently acquires knowledge of a relationship with an entity that a disputing party has not identified pursuant to Article 10(2)(a)(i), he or she should disclose such relationship.

“Any financial or personal interest”

93. The Candidate or Arbitrator's remuneration for work performed and reimbursement of expenses incurred in the IID proceeding is not considered a financial interest for the purpose of Article 10.

94. For the purpose of Article 10(2)(b), the term “same measures” is to be interpreted in the same manner as in Article 4.

¹⁰ See IBA Guidelines, General Standard 6(a).

95. The terms “identified by a disputing party” mean that the disputing parties should identify other entities having a direct or indirect interest in the outcome of the IID proceeding, if any. It does not mean however that disclosure is limited to those relationships with a disputing party’s entities that have been identified by a disputing party. Even in the absence or partial identification of a disputing party, if a Candidate or Arbitrator knows of such related entities, he or she would be subject to the disclosure obligation.

Involvement in other proceedings

96. The terms “any other proceeding” in paragraphs 2(b)(iii) cover any type of dispute involving a disputing party or an entity identified by a disputing party, including alternative dispute resolution methods such as mediation or conciliation proceedings. For example, this could be a commercial arbitration involving the parent company of a disputing party.

97. Paragraph 2(c) requires disclosure of the IID proceedings in which a Candidate or an Arbitrator has been involved in the past five years. The term “related proceedings” in this paragraph means any proceeding that is related to the IID but not covered by the definition in Article 1, including proceedings before domestic courts and tribunals to set aside, annul or enforce an IID award, judgment and challenge proceedings of an Adjudicator, other parallel proceedings brought before domestic courts or other arbitral tribunals related to the IID (for example based on a consent clause in a contract while the IID is based on a consent clause in a treaty), or other mediation or conciliation proceedings related to the IID.

98. Paragraph (2)(d) requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed either as a legal representative, expert witness or arbitrator by one of the disputing parties or their legal representatives over the past five years. While multiple appointments of arbitrators are not prohibited under the Code, multiple appointments from the same party, its legal representative or its affiliate entities are subject to disclosure as they could indicate a lack of independence or impartiality. For instance, if a Candidate or an Arbitrator has already been appointed over the past five years as Arbitrator on a number of occasions [*number to be determined by the Working Group*] by one of the parties or a subsidiary, affiliate or parent entity of a party, this could give rise to legitimate doubts as to his or her independence or impartiality. Consequently, the circumstances to be disclosed under subparagraph (d) are not limited to appointments made in the context of investment disputes, but all types of proceedings. This is informed by the use of the term “or any other proceeding”, which bears the same meaning as in paragraph 2(b)(iii).

Obligation to make reasonable efforts

99. The term “[reasonable] [best] efforts to become aware” in paragraph 3 means that a Candidate or Arbitrator must be proactive to the best of his or her ability to identify the existence of circumstances[, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or Arbitrator to ensure proper disclosure.

100. By way of illustration, the obligation under paragraph 3 could involve reviewing relevant documentation already in the possession of the Candidate or Arbitrator, conducting relevant conflict checks, or requesting the persons involved in the IID to provide further relevant information in case of doubt or if deemed necessary to conduct proper assessment.

101. A failure to become aware of a circumstance despite the Candidate or Arbitrator’s best efforts would not as such give rise to disqualification. [However, if such efforts reveal a conflict of interest, a Candidate shall not accept the appointment, or the Adjudicator shall resign or recuse him/herself from the IID proceeding in accordance with article 11(2).]

Form of the disclosure

102. Article 10(5) provides that disclosure of relevant information may be done using the form in the Annex to the Code prior to or upon [acceptance of the] appointment,

and shall provide it to the disputing parties, the other Arbitrators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. The form in the Annex is a simplified disclosure form and its use is not mandatory as long as the relevant information is conveyed in a similar comprehensive manner.

103. The terms “prior to” and “upon” [acceptance of the] appointment in paragraph 5 does not imply that two separate disclosures are required, once as a Candidate and another as an Arbitrator. One would suffice for the purposes of paragraph 5 and an Arbitrator would have a continuing duty to make further disclosures in accordance with paragraph 6.

Continuing obligation of disclosure

104. Article 10(6) provides a continuing obligation of disclosure. If new relevant information falling under paragraphs 1 or 2 emerge or are brought to the knowledge of an Arbitrator during the course of the IID proceeding, he or she must disclose such information promptly and without delay in accordance with paragraph 5. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Failure to disclose

105. Article 10(7) indicates that a failure to disclose does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code]. It is rather the content of the disclosed or omitted information that determines whether there is a [breach] [lack of impartiality or independence]. [Even though a breach of Article 10 is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a Candidate or Adjudicator’s duty of independence and impartiality under articles 3 of the Code.]

Waiver of the disputing parties

106. Article 10(8) provides the possibility for the disputing parties to waive their respective rights to raise an objection with respect to circumstances that were disclosed. A waiver would preclude that disputing party from raising the objection at a later stage. Each disputing party can waive their respective rights and need not be done jointly. [**Note to the Working Group:** *The Working Group may wish to consider whether the form or method of the waiver will need to be further elaborated in the Commentary.*] Furthermore, it should be understood that the waiver would only relate to the circumstances that were disclosed.

107. In practice, this would mean that the disputing party would not challenge an Arbitrator based on the disclosed circumstances at a later stage. For instance, if a Candidate informs the disputing parties that he or she has, within the past five years, worked as a counsel in the same law firm as the current legal representative of a disputing party, and both disputing parties agree nonetheless to the appointment of that Candidate, it would not be possible for any of the disputing parties to challenge that Arbitrator on the basis of the disclosed circumstance. However, as to circumstances that were not disclosed, for example, that he or she has maintained a close professional relationship with the law firm or the current legal representative, the waiver would not prevent a disputing party from raising a challenge.

Disclosure obligation of Judges

[*To be elaborated after discussion by the Working Group, see A/CN.9/WG.III/WP.216, Appendix*]

Article 11 – Compliance with the Code

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|--|
| 1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code. |
|--|

[2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]

3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].

4. An Adjudicator shall remove an Assistant who is in breach of the Code.

Commentary

[This section will be elaborated further following the discussion by the Working Group, particularly on enforcement of the Code. See A/CN.9/WG.III/WP.216, paragraphs 67-69.]

108. Article 11 addresses compliance of the Code and mentions possible remedies for non-compliance.

Principle of voluntary compliance

109. Paragraph 1 requires an Adjudicator and a Candidate to comply with the obligations in the Code that are applicable to them. One way to ensure this adherence is to require Adjudicators to sign a declaration upon appointment or confirmation as found in the Annex.

Remedies for non-compliance

110. The Code does not contain rules on challenge, disqualification, removal or other sanctions in case of breach. Paragraph 3 clarifies that existing sanctions shall apply, if provided in the applicable rules or treaties. Candidates who are not appointed as an Adjudicator could potentially be subject to sanctions under, for example, the applicable rules of professional accreditation bodies.

111. Pursuant to Article 11(4), if an Assistant does not comply with the Code, the Adjudicator shall remove the Assistant from the IID proceeding. In practice, disputing parties who are concerned that an Assistant is not complying with the Code could raise these concerns with the Adjudicator and ask the Adjudicator to replace the Assistant. An Adjudicator who does not remove the Assistant would be in breach of paragraph 4 and may be subject to sanctions or remedies that may be provided for in the applicable rules or treaties pursuant to paragraph 3.

I recommend using this wording as the applicable rules of the treaty shall apply irrespective of the Code as per Article 2(2) above, and this subjects the Code to the treaty which makes sense

Subject: My Comments on the 4th Draft of the Code of Conduct for Investment arbitrators in respect of the meaning of LEGAL REPRESENTATIVES

[External]

Dear All,

I have received from various sources the 4th edition of the draft Code of Conduct.

I commend you for your work.

I have however a critical comment on the notion of “legal representatives” which appears several times in the text.

This term, which do not appear in the initial definitions, seems to refer to “counsel, lawyers, advocates” that represent a party in a proceedings, in that they act on its behalf in procedural matters, signing the briefs, arguing at the hearing, etc.

However, the term “LEGAL representatives” is misleading. In civil law systems the “legal representative” is the person holding the organic position within a legal person/entity, typically a corporation, empowered by law and by the relevant corporate documents (charter, statute, by-laws, deliberations of the shareholder meeting or of the board of directors) to represent and engage it. It does not indicate an outside counsel empowered through a specific power of attorney to represent such entity in legal proceedings.

For the avoidance of doubts, I think you should consider revising the draft, possibly by adding “legal representative” in the definition, explaining there that these terms refer to “(legal) counsel, lawyers, advocates” empowered to and representing, or in any case acting on behalf of a party in one of the proceedings covered by the Code. The legal representative in question might even not have a power-of-attorney: since legal teams comprise usually several lawyers, all the lawyers of the team (“of record”?) should be covered by the term “legal representative” and should be bound by the relevant no-conflict rules.

I hope this may be useful

Sincerely

Giorgio Sacerdoti

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ICSID Arbitrator



Comments on the

Draft Code of Conduct for Adjudicators in International Investment Disputes

*Prepared jointly by the Secretariats of The International Centre for
Settlement of Investment Disputes (ICSID) and The United Nations
Commission on International Trade Law (UNCITRAL)*

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INTRODUCTION

Ex Curia International (www.excuriainternational.com) is a student led global organization working towards the goal of promoting and exploring ADR practices from all across the world. In keeping with our mandate, we recently constituted a research team which extensively studied and researched on *the Draft Code of Conduct for Adjudicators in International Investment Disputes* prepared jointly by the secretariats of The International Centre for Settlement of Investment Disputes (ICSID) and The United Nations Commission on International Trade Law (UNCITRAL). We do believe that with our participation in the legal community, it makes us important stakeholders of the Draft.

Purposively, we have collated our thoughts on the same in the form of the following recommendations on the Draft Code – from a neutral, non-partisan perspective.

The following comments have been compiled by a research panel constituted by the Ex Curia International, wherein ECI's stellar advisory board constituting of notable working professionals reviewed the comments. For the sake of convenience, prior to each recommendation, we have reproduced the Section as provided in the draft Code. Subsequently, we have provided our recommendations for the same and highlighted the key aspects of the same in yellow.

We hope that our comments will add value to the consultation process and encourage further discourse about the field.

Draft Code of Conduct for Adjudicators in International Investment Disputes

Article 3: Independence and Impartiality

1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].
2. Paragraph 1 includes the obligation not to:
 - a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;
 - b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;
 - c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];
 - d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;
 - e) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or
 - f) Take any action that creates the appearance of a lack of independence or impartiality.

Recommendation -

Article 3(1)

Clause 4 of The Arbitrator' Code of Ethics by the European Court of Arbitration,² which has been uploaded by ICSID on its website, imposes a duty on the arbitrator to remain impartial not only during the proceedings but also during two years subsequent to the final termination of the Arbitral Proceedings. However, Article 3(1) of the Draft Code of Conduct does not impose the duty of impartiality beyond the conclusion of the IID proceedings. **It is recommended that this provision should be made consistent with Clause 4 of the Code of**

² https://icsid.worldbank.org/sites/default/files/Arbitrators_Code_of_Ethics.pdf

Ethics by explicitly imposing the duty of impartiality on an arbitrator even subsequent to the conclusion of the IID proceeding.

Article 3(2)(b)

Article 3(2)(b) of the Draft Code of Conduct imposes an obligation on an Adjudicator to not take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding. The Draft Commentary to the Code of Conduct published by ICSID in August 2022³ interprets the term ‘instruction’ as given in this section to mean any form of order, direction, recommendation or guidance concerning the proceeding and interprets the phrase “Matters addressed in the IID” to mean any factual, procedural or substantive issue considered in the course of the IID proceeding. Rule 39 of the ICSID Arbitration Rules⁴ empowers the Arbitral Tribunal to appoint one or more independent experts to report to it on specific matters within the scope of the dispute. This has also been provided in Article 43 of the Arbitration (Additional Facility) Rules.⁵ This provision that encapsulates a prohibition on the taking of instruction regarding any matter addressed in the IID proceeding leaves some ambiguity regarding whether the opinion of an expert witness comes under the ambit of this provision. It is recommended that this provision be modified to include taking of instructions from experts.

Suggested Redraft -

Art 3(2)(b) - Take instruction from any organization, government, expert or individual regarding any matter addressed in the IID proceeding;

Article 3(2)(c)

Article 3(2)(c) of the Draft Code of Conduct imposes an obligation on an Adjudicator to not allow any past or present financial, business, professional or personal relationship to influence his or her conduct or judgment. However, this provision does not address the influence of a prospective future relationship with any of the parties on the conduct or judgement of the adjudicator. Clause 4 of The Arbitrator’ Code of Ethics by the European Court of Arbitration⁶

³ https://icsid.worldbank.org/sites/default/files/documents/Draft_Commentary_CoC.pdf

⁴ <https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/chapter-v-evidence#rule-8611>

⁵ <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility/partD.htm>

⁶ https://icsid.worldbank.org/sites/default/files/Arbitrators_Code_of_Ethics.pdf

also imposes a duty on the arbitrator to remain independent from the parties to the proceedings and from any party related to them and to not have any economic, personal or professional interest related to them during two years after the conclusion of the arbitration proceeding. In furtherance of the recommendation of explicitly imposing the duty of impartiality on an arbitrator even after the conclusion of the IID proceeding, and in consistence with the European Court of Arbitration's Arbitrators' Code of Ethics which, it is recommended that the provision be modified to include a duty to not allow 'prospect of a future relationship' from affecting an adjudicator's conduct or judgement.

Suggested Redraft -

Art 3(2)(c) - Allow any past or present or future contingent financial, business, professional or personal relationship to influence his or her conduct [or judgment];

Article 4: Limit on multiple roles

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:
 - (a) The same measure(s);
 - (b) The same or related party(parties); or
 - (c) The same provision(s) of the same treaty.
2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3.

Recommendation -

This provision of the Draft Code of Conduct prohibits an Arbitrator from acting concurrently and within a period of three years following the conclusion of the IID proceeding as a legal

representative or an expert witness in an IID proceeding or any other proceeding involving the same or related parties or substantially similar legal issues. However, the prohibition under this provision is only regarding *acting* as a legal representative or an expert witness in such proceedings and does not cover other forms of economic or professional associations that the arbitrator may have with the parties. Clause 4 of The Arbitrators' Code of Ethics by the European Court of Arbitration⁷ imposes a wider duty on the arbitrator by prohibiting him or her from becoming a partner, associate, colleague of a party or of its counsel or of a relative or close friend of any of them, or in any event having any economic, or professional, or personal interest related to any of them, or working himself/herself or any partner or associate of him/her, in the same office, corporation, entity or activity of any of them, or having acted, himself/herself or someone of his/her office or organisation, for his/her appointing person or legal entity related to it. This has been done to ensure the complete impartiality and independence of the arbitrator and of his conduct and judgement. **It is recommended that the given provision of the Draft Code of Conduct be made broader to incorporate prohibitions on other forms of associations that an arbitrator may have with the parties to the proceeding or any party related to them that have the potential of affecting the arbitrator's impartiality and independence.**

Article 5: Duty of diligence

[Paragraph applicable to Arbitrators only]

1. An Arbitrator shall:

- (a) Perform his or her duties diligently throughout the IID proceeding;
- (b) Devote sufficient time to the IID proceeding;
- (c) Render all decisions in a timely manner;
- (d) [Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and
- (d) Not delegate his or her decision-making function.:

[Paragraph applicable to Judges only]

⁷ https://icsid.worldbank.org/sites/default/files/Arbitrators_Code_of_Ethics.pdf

2. A Judge shall perform the duties of his or her office diligently consistent with the terms of office.

Recommendation –

This particular Article contains terms such as “sufficient time”, “duties” which are open to interpretation and varies on a case-by-case basis. **To add heft to the article, a suggested guidance note on standardised timelines (as far as possible) may be added.**

Article 6: [Integrity and competence]

1. An Adjudicator shall:
 - a) Conduct the IID proceedings in accordance with high standards of integrity, fairness [, civility] and competence;
 - b) Treat all participants in the IID proceeding with civility; and
 - c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

[Paragraph applicable to Arbitrator candidates only]

2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

[Paragraph applicable to Judge candidates only]

3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.

Recommendation -

Article 6(1)(b) may not be necessary if the additional wording of ‘civility’ is incorporated into Article 6(1)(a) as the conduct of the proceedings will necessarily include the treatment of all participants. Arbitrators should also be subject to the same selection process as judges as self-assessment of competence may be arbitrary.

Suggested Redraft -

Article 6 [Integrity and competence]

1. An Adjudicator shall:

(a) Conduct the IID proceedings in accordance with high standards of integrity, fairness [, civility] and competence; while treating all participants to the process with civility.

Article 10: Disclosure Obligations

1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [including in the eyes of the disputing parties,] as to his or her independence or impartiality.

Recommendation:

Article 10 addresses a situation where confidentiality obligations applicable to another case or role prevent a candidate or arbitrator from fully disclosing that case or role. We suggest that the commentary should refer to the standard practice that candidates decline appointments should a confidentiality obligation bar them from disclosing a conflict. A matter must be disclosed if it falls within Article 10(1) and (2).