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ICSID

**International Centre for
Settlement of Investment Disputes**
WORLD BANK GROUP

Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two

Working Session: June 7, 2021

AGENDA & OBJECTIVES

- Review changes to version 2 of Code of Conduct
- Review possible means of implementation
- Determine next steps

VERSION TWO – OVERALL CHANGES

- Follow up from comments received in writing and at last session – Version two:
 - streamlines and simplifies the text throughout
 - re-orders some provisions
 - suggests that the preparation of a commentary would be useful

Article 1 Definitions

For the purposes of this Code:

1. “Adjudicator” means Arbitrator and Judge;
2. “Arbitrator” means a member of an *ad hoc* tribunal or panel, or member of an ICSID *ad hoc* Committee who is appointed to resolve an “International Investment Dispute” (IID);
3. “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, as agreed with the parties;
4. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for selection as a Judge, but who has not yet been confirmed in such role;
5. “International Investment Dispute” (IID) means a dispute arising pursuant to the investment promotion and protection provisions in an international treaty;
6. “Judge” means a judge appointed to a standing mechanism for IID settlement.

Article 2 Application of the Code

1. Articles 3 to 5, 6(1), 7(3) and 8 to 11 of this Code apply to Adjudicators in IID proceedings.
2. Adjudicators shall take reasonable steps to ensure that their Assistants are aware of, and comply with, the Code.
3. Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates from the date they are first contacted concerning a possible appointment.
4. Articles 7(3) and 8 of this Code continue to apply to Adjudicators after the conclusion of the IID proceeding.
5. [This Code shall not apply if the treaty upon which consent to adjudicate is based contains a Code of Conduct for proceedings initiated pursuant to that treaty.]

Article 3 Independence and Impartiality

1. Adjudicators shall be independent and impartial, and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension [APPEARANCE] of bias.
2. In particular, Adjudicators shall not:
 - (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor;
 - (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding;
 - (c) take instruction from any organization, government or individual regarding the matters addressed in the IID;
 - (d) allow any past or existing financial, business, professional or personal relationship to influence their conduct or judgement;
 - (e) use their position to advance any personal or private interest; or
 - (f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties.

Article 4 Limit on Multiple Roles

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].

Article 5 Duty of Diligence

1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner.
2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.

Article 6 Other Duties

1. Adjudicators shall:

- (a) display high standards of integrity, fairness, and competence;
- (b) make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties; and
- (c) treat all participants in the proceeding with civility.

2. Candidates should decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfil their duties.

Article 7 Communications with a Party

1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.
2. [The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate.]
3. An Adjudicator shall not have any ex parte contacts with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

Article 8 Confidentiality

1. Candidates and Adjudicators shall not:

- (a) disclose or use any non-public information concerning, or acquired in connection with, a proceeding except for the purposes of that proceeding;
- (b) disclose or use any information concerning, or acquired in connection with, a proceeding to gain personal advantage, advantage for others, or to adversely affect the interests of others.

2. Adjudicators shall not:

- (a) disclose the contents of deliberations or any view expressed by an Adjudicator during the deliberation;
- (b) disclose any decision, ruling or award to the parties prior to delivering it to them, unless the applicable rules or treaty so permits;
- (c) publicly disclose any decision, ruling or award in which they participated, except in accordance with the applicable rules or treaty.

3. The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.

Article 9 Fees and Expenses

1. Unless otherwise regulated by the applicable rules, any discussion concerning fees shall be concluded before constitution of the adjudicatory body.
2. Any discussion concerning fees shall be communicated to the parties through the entity administering the proceeding, or by the presiding Arbitrator if there is no administering institution.
3. Adjudicators remunerated on a non-salaried basis shall keep an accurate and documented record of their time devoted to the procedure and of their expenses, as well as the time and expenses of any assistant.

Article 10 Disclosure Obligations

1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

Article 10(2)

2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:

- (a) Any financial, business, professional, or personal relationship within [the past five years] with:
 - (i) the parties, and any subsidiary, affiliate or parent entity identified by the parties;
 - (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;
 - (iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and
 - (iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;
- (b) Any financial or personal interest in:
 - (i) the proceeding or its outcome; and
 - (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and
- (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.

Article 10(3)-(5)

3. Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.

4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information.

5. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not establish a breach of this Code.

Article 11 Enforcement of the Code of Conduct

1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code.
2. The disqualification and removal procedures in the applicable rules shall apply to breaches of Articles 3-8 the Code.
3. [Other options based on means of implementation of the Code]

MEANS OF IMPLEMENTATION

A. THROUGH INVESTMENT TREATIES

- a) Multilateral Instrument
- b) Treaty by Treaty

B. PARTY AGREEMENT

- a) In treaty
- b) Case-by-case basis

C. INCORPORATION IN PROCEDURAL RULES

- a) In declaration, rules or regulation

D. INCORPORATION INTO FRAMEWORK FOR STANDING MECHANISM

SANCTIONS

- Challenge / removal
- Other possibilities

NEXT STEPS

- Further revision and comment
- Forthcoming sessions