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**United Nations Commission on
International Trade Law**
**Working Group III (Investor-State Dispute
Settlement Reform)**
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Possible reform of investor-State dispute settlement (ISDS)

Revised version of the draft Code of Conduct

The following provides a revised version of articles 1 to 8 of the draft Code of Conduct based on the discussions of the Working Group at its forty-first session. The previous version of the draft is contained in document [A/CN.9/WG.III/WP.209](#).

Article 1 – Definitions

For the purposes of this Code:

1. “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 pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;
2. “Adjudicator” means an Arbitrator or a Judge;
3. “Arbitrator” means a person who is a member of an arbitral tribunal, or a member of an ICSID ad hoc Committee, who is appointed to resolve an IID;
4. “Judge” means a person who is a member of a standing mechanism for IID settlement;
5. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet been appointed, or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
6. “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.

Article 2 – Application of the Code

1. This Code applies to [Adjudicators or Candidates in] an IID and may be applied [to/in] any other dispute by agreement of the disputing parties.
2. If the instrument upon which the consent to adjudicate is based contains provisions on ethics or a code of conduct for Adjudicators or Candidates in an IID,



this Code shall be construed as complementing such provisions or code. In the event of an inconsistency between an obligation of this Code and an obligation in the instrument upon which consent to adjudicate is based, the latter shall prevail to the extent of the inconsistency.

3. An Adjudicator shall take all reasonable steps to ensure that her or his Assistant is aware of and complies with this Code, including by requiring the Assistant to sign a declaration that they have read and will comply with the Code.

Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceedings or until the end of their term of office.

2. Paragraph 1 includes, in particular, the obligation not to:

(a) Be influenced by loyalty to a disputing party, a non-disputing party (including a non-disputing Treaty Party), or a legal representative of a disputing or non-disputing party;

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

(c) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgment;

(d) Use their position to advance any significant financial or personal interest they might have in one of the disputing parties, or the outcome of the case;

(e) Assume a duty or accept a benefit that could interfere with the performance of their duties; or

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

Article 4 – Limit on multiple roles¹

[Paragraphs applicable to Arbitrators only]

1. Unless the disputing parties agree otherwise, an Arbitrator in an IID proceeding 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 measures;

(b) The same or related parties; or

(c) The same provisions of the same treaty.

¹ A number of aspects related to Article 4 were discussed at an informal meeting held online on 20 January 2022. Among others, they included:

- Whether the introduction of a cooling-off period was appropriate and if so, when that time period should begin and the reasonable period of time;
- Whether to include a separate rule for the presiding arbitrator or to apply the same standard to all Arbitrators;
- Whether to extend the limitation to non-IID proceedings (such as commercial arbitration) and other means of dispute resolution (for example, mediation);
- The application of “the same provisions of the same treaty” in the context of multilateral treaties (for example, the Energy Charter Treaty);
- Whether it would be practical to administer the criterion of “substantially similar legal issues” in draft para. 2;
- Whether draft para. 2 could be included in the list in para. 1 to read: “(d) any other circumstance where accepting such a role would create the appearance of a lack of independence or impartiality.”

2. An Arbitrator in an IID proceeding 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 create the appearance of a lack of independence or impartiality.

[Paragraphs applicable to Judges only]

3. Judges shall not exercise any political or administrative function. They shall not engage in any other occupation of a professional nature which is incompatible with their obligation of independence or impartiality or with the demands of a full-time office. In particular, they shall not act as a legal representative or expert witness in another IID proceeding.

4. Judges shall declare any other function or occupation to the [President] of the standing mechanism and any question on the application of paragraph 1 shall be settled by the decision of the standing mechanism.

5. Former Judges shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which they had dealt with, before the end of their term of office.

6. As regards an IID proceeding initiated after their term of office, former judges shall not act as a legal representative of a disputing party or third party in any capacity in proceedings before the standing mechanism within a period of three years following the end of their term of office.

Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

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

[Paragraph applicable to Judges only]

2. Judges shall be available to perform the duties of their office diligently, consistent with their terms of office.

Article 6 – Other duties

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

[Paragraph applicable to Arbitrator candidates only]

2. Candidates shall accept an appointment only if they have the necessary competence and skills, and are available to fulfil their duties.

[Paragraph applicable to Judge candidates only]

3. Candidates shall possess the necessary competence and skills to fulfil their duties in order to be appointed or confirmed as a Judge.

Article 7 – Ex parte communication of a Candidate or an Adjudicator

1. “Ex parte communication” means any oral or written communication between a Candidate or Adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the opposing disputing party.
2. Other than as provided in paragraph 3, Candidates or Adjudicators shall not have any ex parte communication concerning the IID prior to the initiation of the IID proceeding and until the conclusion thereof.
3. It is not improper for Candidates or Adjudicators to have ex parte communications in the following circumstances:
 - (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 Adjudicator, if the disputing parties so agree;
 - (c) As otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.
4. Ex parte communications provided in paragraph 3 shall not address any procedural or substantive issues related to the IID proceeding or those that the Candidate or Adjudicator could reasonably anticipate to arise in the IID proceeding.

Article 8 – Confidentiality

1. Candidates and Adjudicators shall not disclose or use any information [which is not publicly available,] concerning, or acquired in connection with, an IID proceeding, except for the purposes of that proceeding, as permitted under the applicable rules or treaty, or with the consent of the disputing parties.
2. Adjudicators shall not disclose the contents of deliberations or any view expressed during the deliberations.
- [3. Unless a decision is publicly available, Adjudicators shall not comment on that decision in which they participated, prior to the conclusion of the IID proceeding.]
4. Adjudicators shall not disclose any draft of a decision prior to rendering it and any decision they have rendered, except as permitted under the applicable rules or treaty or with the consent of the disputing parties.
5. The obligations in Article 8 shall survive the conclusion of the IID proceeding and shall continue to apply indefinitely.
- [6. The obligations in Article 8 shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose non-public information in a court or other competent body or must disclose such information to protect his or her rights in a court or other competent body.]
