

UNCITRAL
Code of Conduct for Judges
in International Investment
Dispute Resolution



UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Code of Conduct for Judges
in International Investment
Dispute Resolution



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Resolution adopted by the General Assembly on 7 December 2023

*[on the report of the Sixth Committee
(A/78/433, para. 13)]*

78/105. Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for Judges in International Investment Dispute Resolution with respective commentary of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Noting that the Commission, at its fiftieth session, in 2017, entrusted its Working Group III (Investor-State Dispute Settlement Reform) with a broad mandate to work on the possible reform of investor-State dispute settlement and to develop relevant solutions,

Believing that it would be desirable to develop a set of ethical standards for adjudicators responsible for resolving international investment disputes in the light of the concerns identified about the perceived or apparent lack of independence and impartiality of some adjudicators, which often gave rise to criticism about the legitimacy of the investor-State dispute settlement system,

Convinced that establishing and promulgating clear obligations on adjudicators with regard to, among other things, independence and impartiality, limitation on multiple roles, ex parte communication, confidentiality and disclosure, would be an appropriate response to the identified concerns,

Also convinced that the development of uniform standards that would apply to arbitrators involved in the resolution of international investment disputes would be highly desirable,

Mindful that the Working Group is continuing to consider whether to recommend a number of investor-State dispute settlement reform elements to the Commission, including the possible establishment of a standing mechanism to resolve international investment disputes and that a code of conduct for members of such a standing mechanism (referred to as “judges”) could form part of the rules governing that mechanism,

Mindful also that the Working Group is considering the development of a multilateral instrument to implement the investor-State dispute settlement reform elements, which could provide additional means to apply the Codes of Conduct,

Noting that the Commission adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution and accompanying commentary at its fifty-sixth session, and adopted, in principle, the Code of Conduct for Judges in International Investment Dispute Resolution and accompanying commentary at the same session, both after due deliberations,

Noting also that the preparation of the Code of Conduct for Arbitrators and the Code of Conduct for Judges, as well as their accompanying commentary, benefited from consultations with Governments and interested intergovernmental and non-governmental organizations, and joint work of the secretariats of the International Centre for Settlement of Investment Disputes and the Commission,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution, the text of which is contained in annex III to the report of the Commission on the work of its fifty-sixth session,¹ and for having formulated and adopted, in principle, the Code of Conduct for Judges in International Investment Dispute Resolution, the text of which is contained in annex IV to the same report;²

2. *Recommends* the use of the Code of Conduct for Arbitrators by arbitrators, former arbitrators, candidates and disputing parties, as well as administering institutions, with regard to international investment disputes;

¹ Official Records of the General Assembly, Seventy-eighth session, Supplement No. 17 (A/78/17), annex III.

² *Ibid.*, annex IV.

3. *Also recommends* the use of the Code of Conduct for Judges by standing mechanisms, where relevant;

4. *Further recommends* that Governments and other relevant stakeholders involved in the negotiation of international investment instruments and the enactment of legislation governing foreign investments make reference to the Code of Conduct for Arbitrators and the Code of Conduct for Judges, as appropriate;

5. *Requests* the Secretary-General to make all efforts to ensure that the Code of Conduct for Arbitrators and the Code of Conduct for Judges become generally known and available by disseminating them broadly to Governments and other interested bodies.

*45th plenary meeting
7 December 2023*

UNCITRAL

Code of Conduct for Judges in International Investment Dispute Resolution

Article 1. Definitions

For the purposes of the Code:

- (a) “Judge” means a person who is a member of a standing mechanism;
- (b) “Candidate” means a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
- (c) “Ex parte communication” means any communication concerning a proceeding before a standing mechanism by a Judge with a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the other disputing party or its legal representative.

Article 2. Application of the Code

The Code applies to a Judge, a Candidate or a former Judge in accordance with the rules of the standing mechanism.

Article 3. Independence and impartiality

1. A Judge shall be independent and impartial.
2. Paragraph 1 includes the obligation not to:
 - (a) Be influenced by loyalty to any disputing party or any other person or entity;
 - (b) Take instruction from any organization, government or individual regarding any matter addressed in a proceeding before the standing mechanism;
 - (c) Be influenced by any past, present or prospective financial, business, professional or personal relationship;

- (d) Use his or her position to advance any financial or personal interest he or she has in any disputing party, or in the outcome of a proceeding, before the standing mechanism;
- (e) Assume any function or accept any 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.

Article 4. Limit on multiple roles

1. 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 and impartiality or with the demands of the terms of office. In particular, a Judge shall not act as a legal representative or an expert witness in any other proceeding.
2. A Judge shall declare any other function or occupation in accordance with the rules of the standing mechanism. Any question regarding paragraph 1 shall be settled by the standing mechanism.
3. A former Judge shall not become involved in any manner in any proceeding before the standing mechanism, which was pending during his or her term of office.
4. A former Judge shall not act as a legal representative or an expert witness in any proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

Article 5. Duty of diligence

A Judge shall perform the duties of his or her office diligently in accordance with the terms of office.

Article 6. Integrity and competence

A Judge shall:

- (a) Conduct proceedings competently and in accordance with high standards of integrity, fairness and civility;
- (b) Possess the necessary competence and skills and make all reasonable efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties; and
- (c) Not delegate his or her decision-making function.

Article 7. Ex parte communication

Unless permitted by the rules of the standing mechanism, ex parte communication is prohibited.

Article 8. Confidentiality

1. Unless permitted by the rules of the standing mechanism, a Judge or a former Judge shall not:

- (a) Disclose or use any information concerning, or acquired in connection with, a proceeding before the standing mechanism;
- (b) Disclose any draft decision in a proceeding before the standing mechanism; or
- (c) Disclose the contents of the deliberations in a proceeding before the standing mechanism.

2. Unless permitted by the rules of the standing mechanism, a Judge shall not comment on a decision rendered in a proceeding before the standing mechanism, and a former Judge shall not comment on a decision rendered in a proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

3. The obligations in this article shall not apply to the extent that a Judge or a former Judge is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body.

Article 9. Disclosure obligations

1. A Candidate and a Judge shall disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.

2. Regardless of whether required under paragraph 1, a Candidate shall disclose all proceedings in which the Candidate is currently or has been involved in the past five years, including as an arbitrator, a legal representative or an expert witness.

3. Regardless of whether required under paragraph 1, the following information shall be disclosed by a Judge with regard to a proceeding which he or she is expected to adjudicate or is adjudicating:

- (a) Any financial, business, professional or close personal relationship in the past five years with:
 - (i) Any disputing party in the proceeding;
 - (ii) The legal representative of a disputing party in the proceeding;
 - (iii) Expert witnesses in the proceeding; and
 - (iv) Any person or entity identified by a disputing party as being related or as having a direct or indirect interest in the outcome of the proceeding, including a third-party funder; and
- (b) Any financial or personal interest in:
 - (i) The outcome of the proceeding;
 - (ii) Any other proceeding involving the same measure or measures; and
 - (iii) Any other proceeding involving a disputing party or a person or entity identified by a disputing party as being related.

4. For the purposes of paragraphs 1 to 3, a Candidate and a Judge shall make all reasonable efforts to become aware of such circumstances and information.

5. A Candidate shall make the disclosure to the standing mechanism in accordance with the rules of the standing mechanism.

6. A Judge shall make the disclosure in accordance with the rules of the standing mechanism as soon as he or she becomes aware of the circumstances and information mentioned in paragraphs 1 and 3. A Judge shall have a continuing duty to make further disclosures based on new or newly discovered circumstances and information.

7. A Candidate and a Judge shall err in favour of disclosure if he or she has any doubt as to whether a disclosure shall be made.

8. The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality.

Article 10. Compliance with the Code

Compliance with the Code shall be governed by the rules of the standing mechanism.

Annexes

Annex 1 (Candidates)

Declaration, disclosure and background information

1. I have read and understood the attached UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (the “Code of Conduct”) and I undertake to comply with it.
2. To the best of my knowledge, there is no reason why I should not serve as a Judge and I have no impediment arising from the Code of Conduct.
3. In accordance with article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[Insert relevant information]

4. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I understand that I shall make further disclosures based on new or newly discovered circumstances and information as soon as I become aware of such circumstances and information.

Annex 2 (Judges)

Declaration, disclosure and background information

1. I have read and understood the attached UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (the “Code of Conduct”) and I undertake to comply with it.
2. To the best of my knowledge, there is no reason why I should not serve as a Judge. I am impartial and independent and have no impediment arising from the Code of Conduct.
3. In accordance with article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[Insert relevant information]

4. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I understand that I shall make further disclosures based on new or newly discovered circumstances and information as soon as I become aware of such circumstances and information.

Commentary to the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution

1. At its fifty-sixth session in July 2023, UNCITRAL adopted the Code of Conduct for Judges in International Investment Dispute Resolution (the “Code”) and the accompanying commentary in principle. The Code has been prepared on the assumption that a standing multilateral mechanism may be established in the future (referred to as the “standing mechanism”).

Article 1. Definitions

Judge and Candidate

2. The statute of the standing mechanism or an accompanying instrument (referred to as the “rules of the standing mechanism”) would determine who is a permanent member of the standing mechanism (a “Judge”) and would be bound by the Code (for example, whether the Code may apply to an individual appointed on a non-permanent basis or an individual appointed for a specific dispute).

3. The standing mechanism’s selection process would determine when an individual becomes a “Candidate” and would thus be bound by the Code. The individual ceases to be a Candidate when he or she is not confirmed as a Judge. When confirmed as a Judge, the obligations as a Judge would apply.

Ex parte communication

4. Article 7 regulates ex parte communication by a Judge, which is defined in article 1, subparagraph (c). The term “ex parte communication” refers to any communication concerning a proceeding before the standing mechanism with a disputing party, its legal representative, affiliate, subsidiary or other related person (for example, a parent company of the disputing party or a third-party funder) and taking place without the other disputing party or its legal representative being present or having knowledge of the communication taking place. “Presence” in this context does not necessarily mean that the other party or its legal representative must be physically present during the communication. For example, if a Judge poses a

question via email to a disputing party copying the other disputing party, that disputing party would be considered “present” during the communication. On the other hand, a disputing party being merely aware of the communication should not be considered as having “knowledge”. For example, if a disputing party accidentally finds out that there was ongoing communication between a Judge and the other disputing party on an issue relating to a proceeding before the standing mechanism, that would not make the communication permissible retroactively. “Knowledge” in this context means that a disputing party or its legal representative is provided adequate notice and given an opportunity to take part in the communication.

Article 2. Application of the Code

5. The Code applies primarily to a Judge and a Candidate. It applies prior to the commencement of a proceeding before the standing mechanism, throughout such a proceeding as well as during the term of office of a Judge. However, the obligations in article 4, paragraphs 3 and 4 and article 8 survive the term of office of a Judge and apply to individuals who served as a member of the standing mechanism (“former Judge”).

6. The rules of the standing mechanism will determine how the Code would apply to a Judge, a Candidate and a former Judge, and address any incompatibility between the articles of the Code and other provisions on their conduct included in the rules of the standing mechanism or the underlying agreement.

Article 3. Independence and impartiality

7. Article 3, paragraph 1 requires a Judge to avoid any conflict of interest, whether it arises directly or indirectly. “Independence” refers to the absence of any external control, in particular the absence of relations with a disputing party that might influence a Judge’s decision. “Impartiality” refers to the absence of bias or predisposition of a Judge towards a disputing party or issues raised in proceedings before the standing mechanism.

Scope of the obligation

8. The obligation of independence and impartiality begins upon appointment and continues until the Judge ceases to exercise his or her functions. The obligation relates to the functions as a Judge of

the standing mechanism and is therefore not limited to proceedings that the Judge is adjudicating.

Paragraph 2 – Non-exhaustive list of obligations

9. Paragraph 2 clarifies the obligation in paragraph 1 by providing a non-exhaustive list of examples where a Judge could be found to lack independence or impartiality. The word “includes” in the chapeau emphasizes the illustrative nature of the list. Circumstances not listed in paragraph 2 may also implicate a Judge’s lack of independence or impartiality. Whether the circumstances listed therein actually amount to a breach of independence or impartiality would depend on the specific facts of the case.

10. The phrase “be influenced by loyalty” in subparagraph (a) refers to a sense of obligation or alignment towards a person or entity, which might arise from a number of external factors. The subparagraph does not regulate “loyalty” itself. Rather, it prohibits a Judge from allowing such loyalty to influence his or her conduct or judgment. In this regard, the mere fact of bearing similarities with another person, such as having graduated from the same school, having the same nationality or having served in the same law firm, would not in itself establish that a Judge is influenced by loyalty.

11. The phrase “any disputing party or any other person or entity” in subparagraph (a) captures a wide range of persons or entities to whom loyalty may be owed and is not limited to the disputing parties or “related” persons or entities (see para. 45 below). Therefore, it includes among others: (i) a person or entity that is not a party to the proceeding that the Judge is adjudicating but is a party to another proceeding before the standing mechanism; (ii) a person or entity that is not a party to the proceeding but has been given the permission to file a submission in the proceeding (a “non-disputing party”); (iii) a State or a regional economic integration organization that is a party to the underlying investment treaty but is not a party to the dispute (a “non-disputing Treaty Party”); (iv) another member of the standing mechanism; (v) third-party funders; (vi) expert witnesses; and (vii) legal representatives of the disputing parties.

12. Subparagraph (b) requires a Judge to exercise his or her independent judgment in resolving the dispute and not to be told what the outcome of the proceeding should be or how to address issues raised during the proceeding. The term “instruction” in subparagraph (b) refers to any order, direction, recommendation or guidance, which may be implicit and may originate from diverse private or public sources, including ministries, agencies, State-owned entities, business organizations or associations. The phrase “any matter

addressed in a proceeding before the standing mechanism” refers to factual, procedural or substantive issues considered in the course of those proceedings.

13. By contrast, subparagraph (b) would not prevent a Judge from: (i) complying with binding interpretations issued pursuant to the underlying investment treaty; (ii) taking into account the views of the Treaty Parties (including non-disputing Treaty Parties) on matters of interpretation; (iii) acting in accordance with the disputing parties’ agreement or in line with any guidance material provided by the standing mechanism; (iv) making reference to decisions by the standing mechanism, other courts or arbitral tribunals; and (v) considering the disputing parties’ arguments, non-disputing party submissions and expert findings. Depending on the structure and organization of the standing mechanism, a first-tier Judge referring to or relying on a binding judgment or interpretation of an appellate tier of the same standing mechanism would not be considered as taking instruction within the meaning of subparagraph (b).

14. Subparagraph (c) mentions the types of relationships that could influence a Judge’s conduct, which may have existed in the past, may be continuing or may be reasonably foreseen. The word “prospective” indicates that the independence or impartiality of a Judge should not be affected by a relationship that he or she can reasonably anticipate to arise in the future. The mere existence of such a relationship does not establish that a Judge lacks independence or impartiality. Rather, the relationship must have an impact on the Judge’s conduct, including judgments made and decisions taken.

15. Subparagraph (d) refers to the “use” of a Judge’s position to advance any financial or personal interest in a disputing party before the standing mechanism or in the outcome of a proceeding before the standing mechanism. Accordingly, it is the use of the Judge’s position to advance such an interest that is determinative. Whether the advancement was realized is irrelevant. Even if the advantage gained or sought was insignificant or *de minimis* (if the position was intentionally used to pursue that interest), it would lead to a breach of the obligation in paragraph 1.

16. The phrase “assume any function” in subparagraph (e) refers to taking on a professional responsibility (for example, becoming a board member of an entity closely affiliated with a disputing party), which would make it difficult to perform the Judge’s duty in an independent and impartial manner. The term “benefit” in the same subparagraph refers to any gift, advantage, privilege or reward. The possibility for a Judge to undertake any professional functions outside his or her terms of office is further conditioned upon the

obligation in article 4, paragraphs 1 and 2, including to declare any other function or occupation in accordance with the rules of the standing mechanism.

17. Subparagraph (*f*) indicates that an action taken or an omission by a Judge, which creates the appearance of a lack of independence or impartiality, may result in a breach of the obligation in paragraph 1 to be independent and impartial. The subparagraph emphasizes that a Judge must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias.

Article 4. Limit on multiple roles

Prohibition to exercise any political or administrative function

18. Paragraph 1 prohibits a Judge from carrying out any political or administrative function outside the standing mechanism. A Judge would be prohibited, for instance, from acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, giving speeches for a political organization or candidate and soliciting funds for or donating to a political organization or candidate. The limitation does not apply to political or administrative functions that a Judge might carry out within the standing mechanism, in accordance with the rules of the standing mechanism or with his or her terms of office. For example, a Judge would be able to serve as the president of the standing mechanism when elected through a vote (and cast such vote) or head a committee on finance and budget of the standing mechanism.

19. A Judge has an obligation not to engage in a professional occupation which is incompatible with his or her obligation of independence and impartiality or with the demands of the terms of office. In particular, pursuant to the second sentence of paragraph 1, a Judge is prohibited from concurrently acting as a legal representative or an expert witness in another proceeding, including those before the standing mechanism. While not expressly mentioned in the first paragraph, the terms of office may limit a Judge from concurrently acting as an arbitrator and may require a Candidate to resign from any duties as an arbitrator prior to being appointed as a Judge.

20. Paragraph 2 requires a Judge to make a declaration regarding any other function or occupation and do so in accordance with the rules of the standing mechanism. Upon the declaration, a determination will be made on whether such function or occupation is

prohibited under paragraph 1. For example, whether a Judge can act as an arbitrator in a proceeding outside the standing mechanism would be determined by the standing mechanism based on its rules as well as the terms of office.

21. Paragraphs 3 and 4 apply to former Judges and limit the functions that they can undertake after their term of office. Both limit former Judges from being involved in a proceeding before the standing mechanism.

22. Paragraph 3 relates to a proceeding that was initiated prior to the end of the Judge's term, regardless of whether the Judge adjudicated that proceeding. The scope of the prohibition is broad and covers any involvement including as an ad hoc judge, a legal representative, an expert witness, a third-party funder or an amicus curiae.

23. Paragraph 4 relates to a proceeding initiated 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 or an expert witness in a proceeding before the standing mechanism.

Article 5. Duty of diligence

24. The specific duties of a Judge under article 5 are to be found under the terms of office or in the rules of the standing mechanism.

Article 6. Integrity and competence

25. Subparagraph (a) lists elements commonly expected from a Judge. The term "civility" means being polite and respectful when interacting with participants in the proceeding. It is also associated with the Judge's demonstration of professionalism. With respect to subparagraph (b), the appointing authority within the standing mechanism would typically assess the skills and competence required of a Candidate before he or she becomes a Judge in accordance with the rules of the standing mechanism.

26. The obligation to not delegate decision-making functions in subparagraph (c) is without prejudice to the rules of the standing mechanism, for example, a rule which may provide to the Judge who serves as the president of the standing mechanism the authority to make decisions on certain issues and under certain conditions. The subparagraph also does not prevent a Judge from having a person, such as a law clerk, prepare portions of preliminary drafts of decisions

under his or her direction as long as the drafts are carefully reviewed by the Judge so that the final text represents the reasoning and determination of the Judge and not those of the law clerk.

Article 7. Ex parte communication

27. Article 7 prohibits ex parte communication as defined in article 1, subparagraph (c) (see para. 4 above), unless permitted by the rules of the standing mechanism.

Article 8. Confidentiality

28. Article 8 imposes an obligation of confidentiality. The obligations in paragraph 1 continue to apply indefinitely. They survive the term of office of a Judge, thus applying also to a former Judge. The obligations in paragraph 1 relate to any proceeding before the standing mechanism. They are not limited to proceedings that the Judge is adjudicating or has adjudicated. The Code does not address the extent to which a Judge or a former Judge might have access to information concerning a proceeding that he or she is not adjudicating, including draft decisions and contents of the deliberations of such proceeding. This would typically be addressed in the rules of the standing mechanism.

29. Paragraph 1, subparagraph (a) prohibits a Judge or a former Judge from disclosing or using any information concerning, or acquired in connection with, a proceeding before the standing mechanism. The term “disclose” refers to the sharing or circulation of information or material by making it available to anyone without the authorization to access the information or material, including by making it publicly available. The term “use” refers to availing oneself of such information or material outside the proceeding, possibly taking advantage of the access to such information or material. The subparagraph, however, does not limit the disclosure or use of information for the purposes of the proceeding and as such, members of the standing mechanism could discuss among themselves information provided by the disputing parties or otherwise acquired during the proceeding.

30. Paragraph 1, subparagraph (b) prohibits a Judge or a former Judge from disclosing any draft decision prepared in a proceeding before the standing mechanism. Paragraph 1, subparagraph (c) prohibits a Judge or a former Judge from disclosing the contents of the deliberations in a proceeding before the standing mechanism.

31. Paragraph 2 provides that a Judge should not comment on a decision made in a proceeding before the standing mechanism. The prohibition extends to a former Judge for a period of three years following his or her term of office. This is in line with article 4, paragraph 4, which prohibits a former Judge from acting as a legal representative or an expert witness in any proceeding before the standing mechanism for a period of three years.

32. The phrase “unless permitted by the rules of the standing mechanism” in paragraphs 1 and 2 foresees that the rules of the standing mechanism may provide further exceptions allowing a Judge or a former Judge to disclose or comment under certain circumstances.

33. Paragraph 3 provides for a general exception to the obligations in the two previous paragraphs of article 8. This is where: (i) a Judge or a former Judge is legally required to disclose the information in a court or other competent body; or (ii) a Judge or a former Judge must disclose the information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body.

Article 9. Disclosure obligations

34. Article 9 addresses the disclosure obligations of a Candidate and a Judge.

Standard and scope of disclosure

35. The standard and scope of disclosure in paragraph 1 is broad and covers any circumstances, including any interest, relationship or other matters likely to give rise to justifiable doubts as to the independence or impartiality of a Candidate or a Judge. Doubts are justifiable if a reasonable person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that a Candidate or a Judge may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.

36. The circumstances to be disclosed under paragraph 1 are not limited in time. For example, a circumstance which arose more than five years before a Candidate was contacted would need to be disclosed if it is likely to give rise to justifiable doubts. Similarly, a Candidate would need to disclose any publication or presentation that he or she has made seven years before the time of disclosure if it is likely to raise justifiable doubts as to his or her independence or impartiality.

Disclosure under paragraphs 2 and 3

37. Paragraphs 2 and 3 include a mandatory list of information that needs to be disclosed, regardless of whether it is likely to give rise to justifiable doubts under paragraph 1. In other words, the paragraphs do not merely extend the scope of disclosure required under paragraph 1 but provide a minimum disclosure requirement, which is independent of that required under paragraph 1. This is because information disclosed in accordance with paragraphs 2 and 3 may assist in identifying any potential conflict of interest. Paragraphs 1 to 3 combined require extensive disclosure on the part of a Candidate and a Judge as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraphs 2 and 3 and vice versa.

38. Paragraph 2 requires disclosure of all proceedings in which a Candidate is or has been involved in the past five years. This includes proceedings where he or she served as an arbitrator, a legal representative or an expert witness, as well as proceedings where the Candidate served other functions (for example, a domestic court proceeding within which the Candidate served as a judge).

39. Paragraph 3 requires a Judge to disclose certain information with regard to the proceeding that he or she is expected to adjudicate or is adjudicating. Therefore, references to the “proceeding” in the subparagraphs refer to a specific proceeding and not to all proceedings before the standing mechanism.

40. Subparagraph (a) requires disclosure of information related to potential conflicts arising from a financial, business, professional or close personal relationship that a Judge might have with other persons or entities involved in the proceeding. The information to be disclosed under subparagraph (a) is limited to relationships in the past five years.

41. “Business” relationship means any past or present connection related to commercial activities usually with a shared financial interest, either directly with the persons or entities listed in subparagraph (a) or indirectly through another person or entity, with or without their knowledge.

42. “Professional” relationship includes, for instance, where a Judge was an employee, associate or partner in the same law firm as another person involved in the proceeding. Such a relationship may also include prior involvement in the same project or case, for instance, as opposing counsel or co-arbitrator. By contrast, being a member of the same professional association or social or charitable organization

along with another person involved in the proceeding would usually not constitute a professional relationship.

43. “Close personal” relationship includes a relationship involving a degree of intimacy which is beyond that of a financial, business or professional relationship (for instance, where a Judge is a close family member or has a long-term friendship with the legal representative of one of the disputing parties). However, being in the same class in school, casual or social acquaintances or distant family ties would not necessarily establish a close personal relationship.

44. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the proceeding or in any other proceedings involving the same measure or measures, the same disputing party or a person or entity identified by a disputing party as being related. The phrase “financial interest” in subparagraph (b) does not include remuneration as a Judge or the reimbursement of expenses incurred during the proceeding.

45. The phrase “person or entity identified by a disputing party as being related” in subparagraphs (a)(iv) and (b)(iii) refers to, for instance, parent companies, subsidiaries or affiliates of a disputing party that have been identified by the disputing party as being related or relevant.

46. While not expressly referred to in subparagraph (b)(iii) as the subparagraph deals with a “proceeding” involving such a person or entity, if a Judge has any financial or personal interest in that person or entity, that would also need to be disclosed in accordance with subparagraph (a).

*Obligation to make all reasonable efforts and to disclose
in case of doubt*

47. Paragraph 4 requires a Candidate or a Judge to be proactive to the best of his or her ability to identify the existence of circumstances and information identified under paragraphs 1 to 3 to ensure proper disclosure. For example, this involves reviewing relevant documentation already in possession of a Candidate or a Judge, conducting relevant conflict checks or requesting the persons or entities involved in the proceeding to provide further information in case of doubt or if deemed necessary to conduct a proper assessment. Paragraph 7 requires a Candidate or a Judge to make a disclosure when he or she has a doubt as to whether the disclosure is required or not. A Candidate or a Judge must therefore err in favour of disclosure and ensure that the disclosure includes circumstances or information that

may, in the eyes of a disputing party, give rise to doubts as to his or her independence or impartiality.

Form and timing of the disclosure

48. Paragraphs 5 and 6 provide that a Candidate and a Judge must make the disclosure in accordance with the rules of the standing mechanism. For a Candidate, this would likely be before the confirmation as a Judge, and for a Judge, it would be as soon as he or she becomes aware of the circumstances and information mentioned in paragraphs 1 and 3. A Candidate and a Judge can make the disclosure using the respective forms in annexes 1 and 2. These are simplified forms and their use is not mandatory. In any event, a Candidate and a Judge should ensure that the relevant circumstances or information to be disclosed are conveyed in a comprehensive manner.

49. Paragraph 6 imposes a continuing obligation of disclosure on a Judge. If any new relevant circumstance or information within the scope of paragraphs 1 or 3 emerges or is brought to the attention of a Judge, he or she should disclose such circumstance or information promptly. A Judge should remain vigilant and be proactive with regard to his or her disclosure obligations during his or her term.

Failure to disclose

50. Paragraph 8 clarifies that non-compliance with the disclosure requirements in article 9 does not necessarily establish a lack of independence or impartiality in itself. Rather, it is the content of the disclosed or omitted information that determines whether there is a violation of article 3. Paragraph 8 should, however, not be understood as an invitation or permission to not comply with the disclosure requirements in article 9. Indeed, a failure to disclose may be factually relevant when establishing a breach of the obligation to be independent and impartial, taking into account the information that was not disclosed as well as other relevant circumstances.

Confidentiality and disclosure obligation

51. When a Candidate or a Judge is bound by confidentiality obligations and is not in a position to disclose all of the circumstances or information required in article 9, he or she should inform the appointing authority accordingly and make the disclosure to the extent possible to allow an assessment of his or her independence and impartiality. For example, with regard to the list of proceedings

in paragraph 2, a Candidate could: (i) redact certain information; (ii) disclose the region where the parties are located, the relevant industry or sector, the applicable rules; and (iii) indicate that he or she is bound by a confidentiality obligation and that the information subject to confidentiality relates to paragraph 2.

Article 10. Compliance with the Code

52. Article 10 addresses the compliance with the Code, which is governed by the rules of the standing mechanism. Sanctions for any breach of the Code may be provided in the rules of the standing mechanism.

53. One way to promote the adherence to the Code is to require a Candidate or a Judge to sign a declaration using the form in annexe 1 or 2.

