

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.

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)).

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.

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.

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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 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

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.