UNCITRAL
Code of Conduct for Arbitrators in International Investment Dispute Resolution

UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution

UNITED NATIONS
Vienna, 2024

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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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;

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[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 Arbitrators in International Investment Dispute Resolution

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 or any constituent subdivision of a State or agency of a State or a regional economic integration organization submitted for resolution pursuant to an instrument of consent;

(b) "Instrument of consent" means:

(i) A treaty providing for the protection of investments or investors;

(ii) Legislation governing foreign investments; or

(iii) An investment contract between a foreign investor and a State or a regional economic integration organization or any constituent subdivision of a State or agency of a State or a regional economic integration organization,

upon which the consent to arbitrate is based;

(c) "Arbitrator" means a person who is a member of an arbitral tribunal or an International Centre for Settlement of Investment Disputes (ICSID) ad hoc Committee, who is appointed to resolve an IID;

(d) "Candidate" means a person who has been contacted regarding a potential appointment as an Arbitrator, but who has not yet been appointed;

(e) "Ex parte communication" means any communication concerning the IID by a Candidate or an Arbitrator 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;

(f) "Applicable rules" means the applicable arbitration rules and any law applicable to the IID proceeding; and

(g) "Assistant" means a person who is working under the direction and control of an Arbitrator to assist with case-specific tasks.

Article 2. Application of the Code

1. The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding, or a former Arbitrator. The Code may be applied in any other dispute resolution proceeding by agreement of the disputing parties.

2. If the instrument of consent contains provisions on the conduct of an Arbitrator, a Candidate or a former Arbitrator, the Code shall complement such provisions. In the event of any incompatibility between the Code and such provisions, the latter shall prevail to the extent of the incompatibility.

Article 3. Independence and impartiality

1. An Arbitrator 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 the IID proceeding;

(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 the IID proceeding;

(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. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in 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 instrument of consent.

2. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same measure(s) unless the disputing parties agree otherwise.

3. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same or related party (parties) unless the disputing parties agree otherwise.

4. For a period of one year, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same provision(s) of the same instrument of consent unless the disputing parties agree otherwise.

Article 5. Duty of diligence

An Arbitrator shall:

(a) Perform his or her duties diligently;

(b) Devote sufficient time to the IID proceeding; and

(c) Render all decisions in a timely manner.

Article 6. Integrity and competence

An Arbitrator shall:

(a) Conduct the IID proceeding 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

1. Unless permitted by the instrument of consent, the applicable rules, agreement of the disputing parties or paragraph 2, ex parte communication is prohibited.

2. Ex parte communication is permitted when a Candidate engages in a communication with a disputing party that has contacted him

or her regarding a potential appointment as a party-appointed Arbitrator for the purpose of determining the Candidate's expertise, experience, competence, skills, availability and the existence of any potential conflict of interest.

3. When permitted under this article, ex parte communication shall not, in any case, address any procedural or substantive issues relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate would arise in the IID proceeding.

Article 8. Confidentiality

1. Unless permitted by the instrument of consent, the applicable rules or agreement of the disputing parties, a Candidate, an Arbitrator or a former Arbitrator shall not:

(a) Disclose or use any information concerning, or acquired in connection with, the IID proceeding; or

(b) Disclose any draft decision in the IID proceeding.

2. An Arbitrator or a former Arbitrator shall not disclose the contents of the deliberations in the IID proceeding.

3. An Arbitrator or a former Arbitrator may comment on a decision rendered in the IID proceeding only if it was made publicly available in accordance with the instrument of consent or the applicable rules.

4. Notwithstanding paragraph 3, an Arbitrator or a former Arbitrator shall not comment on a decision while the IID proceeding is pending or the decision is subject to a post-award remedy or review.

5. The obligations in this article shall not apply to the extent that a Candidate, an Arbitrator or a former Arbitrator 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. Fees and expenses

1. Fees and expenses of an Arbitrator shall be reasonable and in accordance with the instrument of consent or the applicable rules.

2. Any discussion concerning fees and expenses shall be concluded with the disputing parties as soon as possible.

3. 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 to the disputing parties by the sole or presiding Arbitrator.

4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Article 10. Assistant

1 Prior to engaging an Assistant, an Arbitrator shall agree with the disputing parties on the role, scope of duties and fees and expenses of his or her Assistant.

2. An Arbitrator shall make all reasonable efforts to ensure that his or her Assistant is aware of and acts in accordance with the Code, including by requiring the Assistant to sign a declaration to that effect, and shall remove an Assistant who does not act in accordance with the Code.

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

Article 11. Disclosure obligations

1 A Candidate and an Arbitrator 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, the following information shall be disclosed:

(a) Any financial, business, professional or close personal relationship in the past five years with:

(i) Any disputing party;

(ii) The legal representative of a disputing party in the IID proceeding;

(iii) Other Arbitrators and expert witnesses in the IID 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 IID proceeding, including a third-party funder;

(b) Any financial or personal interest in:

(i) The outcome of the IID proceeding;

(ii) Any other proceeding involving the same measure(s); and

(iii) Any other proceeding involving a disputing party or a person or entity identified by a disputing party as being related;

(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;

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

(e) Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding.

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

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

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

6. If a Candidate or an Arbitrator is bound by confidentiality obligations and cannot disclose all of the required circumstances or information in this article, he or she shall make the disclosure to the extent possible. If a Candidate or an Arbitrator is unable to disclose circumstances that are likely to give rise to justifiable doubts as to his or her independence or impartiality, he or she shall not accept the appointment or shall resign or recuse himself or herself from the IID proceeding.

7. A Candidate and an Arbitrator shall make the disclosure prior to or upon appointment to the disputing parties, other Arbitrators in the IID proceeding, any administering institution and any other persons prescribed by the instrument of consent or the applicable rules.

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

Article 12. Compliance with the Code

1. An Arbitrator, a former Arbitrator and a Candidate shall comply with the Code.

2. A Candidate shall not accept an appointment and an Arbitrator shall resign or recuse himself or herself from the IID proceeding if he or she is not able to comply with the Code.

3. Any challenge or disqualification of an Arbitrator or any other sanction or remedy is governed by the instrument of consent or the applicable rules.

Annexes

Annex 1 (Candidates/Arbitrators)

Declaration, disclosure and background information

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators 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 an Arbitrator in this proceeding. I am impartial and independent and have no impediment arising from the Code of Conduct.

3. I attach my current curriculum vitae to this declaration.

4. In accordance with article 11 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[*Insert relevant information*]

5. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. 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 (Assistants)

Declaration

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code of Conduct") and I undertake to act in accordance with it.

2. I confirm that at the date of this declaration, I am not aware of any circumstance that would preclude me from acting in accordance with the Code of Conduct.

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

1. At its fifty-sixth session in July 2023, UNCITRAL adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code") and the accompanying commentary. The commentary provides guidance on the Code by clarifying the contents of the articles, addressing their practical implications and providing examples. It does not create any new obligation. It provides guidance for arbitrators, candidates and former arbitrators, as well as for disputing parties and States in applying the Code.

Article 1. Definitions

2. Article 1 provides the definitions of key terms used in the Code. As indicated in the chapeau, the definitions operate only in the application of the Code and are not intended to alter the meaning or scope of such terms in treaties, legislation, investment contracts or arbitration rules.

International investment dispute

3. The term "international investment dispute (IID)" in subparagraph *(a)* refers to a dispute between an investor and a State or a regional economic integration organization (REIO) on the basis of an instrument of consent to arbitrate. Accordingly, it does not include disputes between States. However, pursuant to article 2, paragraph 1, States may agree to apply the Code to arbitrators in a proceeding to resolve disputes between States (see para. 14 below). The phrase "IID proceeding" in the Code refers to the arbitral process of resolving an IID or the annulment procedure by an International Centre for Settlement of Investment Disputes (ICSID) ad hoc Committee.

4. The term "REIO" refers to an organization constituted by States to which they have transferred certain competence, including the authority to make decisions binding on them in respect of IID matters. A "constituent subdivision of a State or agency of a State or an REIO" may also be a party to the IID. However, the inclusion of that phrase in defining an IID is not intended to have any bearing on: (i) whether there is a legal relationship between a particular State or an REIO and a constituent subdivision or agency, including whether a particular entity is an agency of the State or the REIO; (ii) whether a measure of a constituent subdivision or an agency is attributable to

the State or the REIO; and (iii) whether a constituent subdivision or an agency has consented to arbitration. The term "constituent subdivision" includes a decentralized or federated organ of a State, such as a municipality or a provincial or regional entity. The term "agency" includes an entity that performs public functions on behalf of a State or an REIO or any of a State's constituent subdivision, regardless of whether the entity is private or public, is government-owned or has a distinct legal personality.

Instrument of consent

5. The term "instrument of consent" in subparagraph *(b)* refers to an instrument that forms the basis of consent of the disputing parties to submit their dispute to arbitration. Although the disputing parties may refer to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") in their consent to arbitration, the Convention does not contain the disputing parties' consent to arbitration, which is captured in a separate agreement. Accordingly, while the ICSID Convention may provide the framework for the settlement of an IID, it is not an "instrument of consent".

6. The phrase "investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO" in subparagraph *(b)*(iii) refers to an agreement made with regard to an investment that a foreign investor makes in the territory of a State or a State of an REIO (for example, a contract relating to a mining concession in State X concluded between an agency of State X and an investor with the nationality of State Y). Article 2, paragraph 1, however, provides the flexibility for the disputing parties to apply the Code also to arbitrators in a proceeding when the consent to arbitration is included in an investment contract concluded between a State and a domestic investor or any other type of contract (see para. 14 below).

7. The Code does not address the question of what constitutes an investment or who qualifies as an investor or a foreign investor under an instrument of consent.

Arbitrator and Candidate

8. The term "Arbitrator" refers to an individual appointed as a member of an arbitral tribunal or as a member of an ICSID ad hoc Committee established under article 52 of the ICSID Convention to resolve an IID. Whether the arbitration is ad hoc or administered by an institution or how an arbitrator is appointed is irrelevant. For

example, the term includes an arbitrator appointed by a disputing party or by an appointing authority on its behalf ("party-appointed Arbitrator"), a presiding arbitrator and a sole arbitrator.

9. The term "Candidate" refers to an individual contacted by a disputing party, an appointing authority or an arbitral institution with regard to a possible appointment as an Arbitrator for a specific IID proceeding. In the case of a Candidate for the role of presiding Arbitrator, the contact may also be initiated by a party-appointed Arbitrator.

10. A Candidate is bound by the Code as soon as he or she is contacted and ceases to be bound when he or she: (i) declines the consideration of an eventual appointment; (ii) is no longer considered for appointment; or (iii) is not eventually appointed as an Arbitrator. Upon becoming a member of an arbitral tribunal, the obligations as a Candidate also cease and the obligations as an Arbitrator commence. The time when a Candidate becomes a member of an arbitral tribunal may vary depending on practice and the applicable rules.[1]

Ex parte communication

11. Article 7 regulates ex parte communication by a Candidate or an Arbitrator, which is defined in article 1, subparagraph *(e)*. The term "ex parte communication" refers to any communication concerning the IID 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 an Arbitrator 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 an Arbitrator and the other disputing party on an issue relating to the IID, 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 (see paras. 49-50 below).

[1] See, for instance, ICSID Arbitration Rules, Rules 15 to 21.

Assistant

12. The term "Assistant" refers to an individual, who is assigned specific tasks by the Arbitrator to assist with the IID proceeding (for instance, an associate in the Arbitrator's firm or chamber). It does not include staff members of arbitral institutions (for example, tribunal secretaries, paralegals, clerks or registry assistants), because as employees of the institution, they are bound by institution-specific ethical obligations and/or by their respective terms of employment. The term also does not include tribunal-appointed experts, as they act in their independent capacity.

Article 2. Application of the Code

Scope of application

13. The Code applies primarily to an Arbitrator and a Candidate, prior to the initiation of an IID proceeding and throughout the proceeding. However, the obligations in article 4, paragraphs 2 to 4, and article 8, paragraphs 1 to 4 survive the proceeding. In other words, these obligations apply to individuals who served as a member of an arbitral tribunal or an ICSID ad hoc Committee ("former Arbitrator") (see art. 12, para. 1).

14. The second sentence of paragraph 1 recognizes that disputing parties may agree to apply the Code in a proceeding to resolve a dispute that does not fall under the definition of an IID (for example, a dispute between States or a dispute which does not pertain to investments). Accordingly, the disputing parties may agree to apply the Code to individuals other than Arbitrators with necessary adjustments.

Complementary nature of the Code

15. The application of paragraph 2 will largely depend on how the Code is made applicable, including by any rule in the instrument of consent addressing the relationship between the instrument of consent and the Code.

16. Where the instrument of consent contains provisions on the conduct of an Arbitrator, a Candidate or a former Arbitrator, and the Code is also otherwise made applicable, paragraph 2 in the Code applies. Pursuant to the first sentence of paragraph 2, if the relevant provisions of the instrument of consent and of the Code are not

incompatible, the provisions of the instrument of consent are complemented by the provisions of the Code. In that case, an Arbitrator, a Candidate or a former Arbitrator is expected to comply with the obligations in the instrument of consent as well as those in the Code. However, where the relevant provisions of the instrument of consent and of the Code are incompatible, for example, when an Arbitrator, a Candidate or a former Arbitrator cannot comply with both, then pursuant to the second sentence of paragraph 2, the provisions of the instrument of consent would prevail. Certain articles of the Code reflect this general principle (see the phrase "unless permitted by the instrument of consent" in articles 7 and 8).

Article 3. Independence and impartiality

17. Article 3, paragraph 1 requires an Arbitrator 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 an Arbitrator's decision. "Impartiality" refers to the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceeding.

18. Existing standards prepared by international bodies, such as the 2014 International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"), may provide useful guidance in this regard.

Temporal scope of the obligation

19. The obligation of independence and impartiality begins when an individual becomes an Arbitrator and continues until the Arbitrator ceases to exercise his or her functions. For example, the obligation will end: (i) when the Arbitrator resigns or is disqualified; (ii) when the proceeding is discontinued or terminated; or (iii) when the final award is rendered. However, the obligation will continue if the Arbitrator takes part in a post-award remedy proceeding involving the interpretation, correction or revision of the award.

Paragraph 2 – Non-exhaustive list of obligations

20. Paragraph 2 clarifies the obligation in paragraph 1 by providing a non-exhaustive list of examples where an Arbitrator 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 an Arbitrator'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.

21. 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 prevents an Arbitrator 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 an Arbitrator is influenced by loyalty.

22. 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 paras. 35 and 85 below). Therefore, the phrase includes, among others: (i) a person or entity that is not a party to the dispute but has been given the arbitral tribunal's permission to file a submission in the proceeding (a "non-disputing party"); (ii) a State or an REIO that is a party to the underlying investment treaty but is not a party to the dispute (a "non-disputing Treaty Party"); (iii) another member of the arbitral tribunal or the ICSID ad hoc Committee; (iv) third-party funders; (v) expert witnesses; and (vi) legal representatives of the disputing parties.

23. Subparagraph *(b)* requires an Arbitrator to exercise his or her independent judgment in resolving the IID 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" 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 the IID proceeding" refers to factual, procedural or substantive issues considered in the course of the proceeding.

24. By contrast, subparagraph *(b)* would not prevent an Arbitrator from, for example: (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 arbitral institution; (iv) making reference to decisions by other arbitral tribunals or courts; and (v) considering the

disputing parties' arguments, non-disputing party submissions and expert findings.

25. Subparagraph *(c)* mentions the types of relationships that could influence an Arbitrator'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 an Arbitrator should not be affected by a relationship that he or she can reasonably anticipate to arise in the future, including acting as a legal representative or an expert witness in another proceeding (see art. 4, paras. 2 to 4). The mere existence of a relationship listed in subparagraph *(c)* does not establish that an Arbitrator lacks impartiality or independence. Rather, the relationship must have an impact on the Arbitrator's conduct, including judgments made or decisions taken.

26. Subparagraph *(d)* refers to the "use" of an Arbitrator's position to advance any financial or personal interest in a disputing party or in the outcome of the proceeding. Accordingly, it is the use of the 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, it would lead to a breach of the obligation in paragraph 1, if the position was intentionally used to pursue that interest. The subparagraph, however, does not affect the legitimate expectation of an Arbitrator to be paid fees (see para. 84 below).

27. The phrase "assume any function" in subparagraph *(e)* refers to an Arbitrator 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 Arbitrator's duty in an independent and impartial manner (on the limits of a former Arbitrator undertaking functions as a legal representative or an expert witness, see art. 4, paras 2 to 4). The term "benefit" in the same subparagraph refers to any gift, advantage, privilege or reward.

28. Subparagraph *(f)* indicates that an action taken or an omission by an Arbitrator, 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 an Arbitrator 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

29. The Code addresses conflicts of interest in a number of ways, for example, by requiring an Arbitrator to be independent and impartial

(article 3) and to make disclosures (article 11). Considering that performing multiple roles in IID proceedings could give rise to conflicts of interest or the appearance thereof, article 4 limits an Arbitrator from undertaking certain other roles while acting as an Arbitrator and for a certain period of time after serving as an Arbitrator.

Temporal scope

30. Under paragraph 1, an Arbitrator is prohibited from acting as a legal representative or an expert witness while acting as an Arbitrator ("concurrently"). Under paragraphs 2 and 3, a former Arbitrator is prohibited from acting as a legal representative or an expert witness for a period of three years after acting as an Arbitrator and under paragraph 4, for a period of one year. The limitations in paragraphs 2 to 4 begin when an Arbitrator ceases to exercise his or her functions (see para. 19 above).

Limited roles

31. Article 4 limits an Arbitrator or a former Arbitrator from acting as a legal representative or an expert witness. In paragraph 1, the limitation applies to such functions in "any other proceeding", whereas the limitation in paragraphs 2 to 4 applies to those functions in "any other IID or related proceeding". The latter phrase includes any international or domestic proceeding directly related to the IID proceeding, such as a set-aside or enforcement proceeding (see para. 87 below). Article 4, however, does not limit an Arbitrator from performing other adjudicatory functions, such as acting as an arbitrator in another proceeding or serving as a judge (if permitted by the rules applicable to the judge).

Circumstances triggering the limitation

32. The limitations in article 4 apply only if the other proceeding: (i) addresses the same measure or measures; (ii) involves the same or related party or parties; or (iii) addresses the same provision or provisions of the same instrument of consent. The term "same" in the subparagraphs means identical and not merely similar.

33. However, even when the above-mentioned circumstances are not met, an Arbitrator should not act as a legal representative or an expert witness in another proceeding if that would lead to a breach of article 3.

The same measure or measures

34. The first circumstance triggering the limitation in paragraphs 1 and 2 is if the other proceeding deals with the same measure or measures. A "measure" includes any law, regulation, procedure, requirement, conduct or practice of a State or an REIO that allegedly affects the investor's protected rights in breach of an instrument of consent. For example, if three separate foreign investors initiate three separate proceedings with regard to a single regulation implemented by a State, an individual appointed as an Arbitrator in one of the IID proceedings would be prohibited from concurrently serving as a legal representative or an expert witness in the other two proceedings.

The same or related party or parties

35. The second circumstance triggering the limitation in paragraphs 1 and 3 is if the other proceeding involves the same or related party or parties. This includes a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities including any constituent subdivision of a State (see para. 85 below). For example, an Arbitrator may not concurrently act as: (i) a legal representative of the parent company of the investor claimant in another proceeding; or (ii) an expert witness in another proceeding involving a ministry or department of the State respondent.

The same provision or provisions of the same instrument of consent

36. The third circumstance triggering the limitation in paragraphs 1 and 4 is if the other proceeding addresses the same provision or provisions of the same instrument of consent. This means that the interpretation of the same provision is at issue and not merely that the same provision was the basis for initiating the proceeding. For example, an Arbitrator handling a claim based on article 13 of the Energy Charter Treaty on expropriation may not concurrently act as a legal representative in another proceeding addressing the same article. However, that Arbitrator may act as a legal representative in a proceeding addressing only article 10 of the Treaty on fair and equitable treatment even though both proceedings had been initiated based on article 26 of the Treaty. Furthermore, the limitation in paragraphs 1 and 4 is not triggered merely because the IID and the other proceeding both involve the ICSID Convention, as the Convention is not an instrument of consent (see para. 5 above).

37. As indicated by the phrase “unless the disputing parties agree otherwise” in the respective paragraphs, article 4 can be varied or waived by the disputing parties. In other words, the disputing parties can jointly vary or waive the limitations in article 4 depending on their level of concern (for example, the disputing parties may agree to lift the limit on multiple roles entirely or agree to a shorter or longer period than that prescribed in paras 2 to 4).

38. In paragraph 1, the phrase “disputing parties” refers to the parties to the proceeding that the Arbitrator is adjudicating (where the Arbitrator has been appointed and is requesting to act as a legal representative or an expert witness in the circumstances identified) or is expected to adjudicate (where a Candidate wishes to continue to work as a legal representative or an expert witness in the circumstances identified). In paragraphs 2 to 4, the same phrase refers to the parties to the proceeding that the former Arbitrator had adjudicated and not the parties to the proceeding in which the former Arbitrator is expected to act or is acting as a legal representative or an expert witness.

39. In paragraphs 2 to 4, the disputing parties are presumed to be capable of responding and are expected to respond to a proposal to vary or waive the limitations specified therein. However, there may be instances where it is impossible for a disputing party to respond, for example, if the disputing party has passed away or is under some other incapacity, or if it has ceased to exist in the case of a corporate entity. In such cases, the former Arbitrator must exercise reasonable diligence to identify if there is a person or entity that is legally authorized to act on that disputing party’s behalf. If no such person or entity can be identified, it can be understood that the former Arbitrator, in those limited circumstances, has obtained the agreement of the disputing parties, if the other disputing party or parties provided its/their agreement.

Disclosure requirement under article 11(2)(e)

40. The disclosure requirements in article 11, in particular paragraph 2, subparagraph *(e)* (“any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding”), would assist an Arbitrator in complying with article 4 and provide the disputing parties the opportunity to share their views prior to the Arbitrator taking on the concurrent appointment (see art. 12, para. 3 and paras. 43 and 89 below).

Article 5. Duty of diligence

Perform his or her duties diligently and devote sufficient time

41. Article 5 complements the requirements in the applicable rules and terms of appointment by requiring an Arbitrator to perform his or her duties diligently and to conduct the proceedings so as to avoid unnecessary delay and expense by adopting effective measures.

42. The phrase “devote sufficient time” in subparagraph *(b)* captures the requirement that an Arbitrator should be available to perform the duties attached to his or her functions. An Arbitrator should not take on additional cases or responsibilities if they would impede his or her ability to perform the duties in a diligent and timely manner or would cause delays in the proceeding. Should a Candidate anticipate not being able to fulfil this obligation, he or she should not accept the appointment as an Arbitrator pursuant to article 12, paragraph 2.

43. A Candidate would usually inform the disputing parties of his or her availability over a certain period of time (for example, 24 months) by indicating the number of IID and other proceedings as well as other activities, in which he or she has a substantial commitment. The disclosure required under article 11, paragraph 2, subparagraph *(e)* would assist the disputing parties in assessing the availability of the Arbitrator to devote sufficient time to the proceeding.

Render all decisions in a timely manner

44. Subparagraph *(c)* requires an Arbitrator to abide by any time frame in the instrument of consent, the applicable rules or as agreed by or with the disputing parties. An Arbitrator should also ensure that the proceeding is conducted in an efficient manner and that the award or any other decision is rendered within a reasonable period of time. Even though decisions are usually made by the arbitral tribunal as a whole, each Arbitrator has the duty to ensure that the arbitral tribunal renders decisions in a timely manner. The amount of time needed to render decisions may differ depending on the circumstances of the case, such as the complexity of the factual and legal issues that arise in the proceeding. The time required to meet the due process requirements, for example, to give the parties the opportunity to present their case, should also be taken into consideration.

Article 6. Integrity and competence

Necessary qualities in the conduct of the proceedings

45. Subparagraph *(a)* lists elements commonly expected from an Arbitrator and found in existing instruments.[2] The term "civility" means being polite and respectful when interacting with participants in the IID proceeding. It is also associated with the Arbitrator's demonstration of professionalism.

Necessary competence and skills of an Arbitrator and the obligations of a Candidate

46. The phrase "necessary competence" in subparagraph *(b)* should be understood in a broad sense to include, for instance, professional knowledge and experience in investment law and public international law as well as linguistic skills. Subparagraph *(b)* should be read in conjunction with article 12, paragraph 2, which requires a Candidate to accept an appointment only if he or she is able to comply with the Code, in other words, possesses the necessary competence and skills and is available to discharge the duties of an Arbitrator.

No delegation of decision-making functions

47. Decision-making is the core function of an Arbitrator and therefore cannot be delegated. However, subparagraph *(c)* does not prevent an Arbitrator from having his or her Assistant prepare portions of preliminary drafts of decisions or awards under his or her direction as long as the drafts are carefully reviewed by the Arbitrator so that the final text represents the reasoning and determination of the Arbitrator and not those of the Assistant (see para. 70 below).

48. The prohibition in subparagraph *(c)* is without prejudice to provisions in the applicable rules, which may give to the presiding Arbitrator the authority to make decisions on certain issues and under certain conditions.

[2] See e.g., ICSID Convention, article 14. See also ICSID, Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels.

Article 7. Ex parte communication

General prohibition

49. Paragraph 1 introduces a general prohibition on ex parte communication. Based on the definition provided in article 1*(e)* (see para. 11 above), the prohibition applies if the following three criteria are met: (i) there is a written or oral communication between a Candidate or an Arbitrator on the one hand and a disputing party, its legal representative, affiliate, subsidiary or other related person on the other; (ii) the communication concerns the IID; and (iii) the communication is made without the presence or knowledge of the other disputing party or parties or their legal representatives.

50. A communication not meeting all these criteria (for example, a phone call regarding a matter distinct from the IID or a meeting with a disputing party where the other parties' legal representative participated) would not be prohibited under article 7. If the other party was present via remote means or was otherwise on notice of the contents of the communication, such a communication would also not be prohibited. Furthermore, if the other disputing party or its legal representative was invited to take part in the communication or otherwise informed that the communication was taking place but did not take part or object to the communication taking place, such a communication would also not be prohibited. By contrast, the mere fact that the other disputing party or its legal representative became aware of the communication would not make the communication permissible, as the other disputing party would need to be informed prior to the communication and given an opportunity to take part. Further, if a communication takes place despite an objection by the other disputing party, while that communication might not fall under "ex parte communication" as the other disputing party had knowledge, it could result in a breach of due process requirements under the applicable rules.

Exception in paragraph 1 – Unless permitted by the instrument of consent, the applicable rules or agreement of the disputing parties

51. Where the instrument of consent or the applicable rules authorize ex parte communication as defined in article 1, subparagraph *(e)*, the prohibition in paragraph 1 does not apply.

52. Ex parte communication is also not prohibited if agreed by the disputing parties. For instance, when interviewing a Candidate for the role of a sole Arbitrator or presiding Arbitrator, the presence or

the knowledge of the other disputing party or its legal representative is required (in which case, the interview would not be prohibited as an ex parte communication). However, the disputing parties may agree that ex parte interviews are permissible. This also applies when a party-appointed Arbitrator (or a Candidate for that role) wishes to communicate with the disputing party that has appointed him or her or its legal representative concerning a Candidate for the role of a presiding Arbitrator.

Exception in paragraph 2 – Pre-appointment interview of a Candidate for the role of a party-appointed Arbitrator

53. Paragraph 2 permits a Candidate to take part in ex parte interviews with a disputing party or its legal representative for the role of a party-appointed Arbitrator. Such an interview may address the expertise, experience, competence, skills, willingness, availability and the existence of a possible conflict of interest of the Candidate as well as expected fees.

Absolute restriction regarding procedural or substantive issues relating to the IID

54. Even when ex parte communication is permitted under paragraphs 1 or 2, any substantial procedural aspects or issues of merit that can be anticipated to arise in the IID proceeding should not be discussed in accordance with paragraph 3. For example, a Candidate or an Arbitrator's views on the jurisdiction of the tribunal, the substance of the dispute or the merits of the claims are not to be discussed. As it is often difficult to anticipate the issues that might arise in the IID proceeding, a Candidate and an Arbitrator should refrain from discussing issues of jurisdiction or the merits.

55. The limitation in paragraph 3 would not prevent a Candidate from obtaining basic information about the dispute and sharing information about himself or herself, which would be necessary for the disputing parties to determine his or her competence and assess any potential conflict of interest. For instance, pre-appointment communications permitted under paragraph 2 may include a general description of the IID, including the identity of the disputing parties and their legal representatives as well as other Arbitrators or Candidates, if known. The legal basis of the dispute including the instrument of consent, applicable rules or other agreements between the disputing parties concerning the language, seat, timetable or any administrative aspects may also be discussed.

Article 8. Confidentiality

Obligation of confidentiality

56. Paragraph 1, subparagraph *(a)* prohibits a Candidate, an Arbitrator or a former Arbitrator from disclosing or using any information concerning, or acquired during, the IID proceeding. 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 IID proceeding, possibly taking advantage of having access to such information or material. In accordance with paragraph 1, subparagraph *(b)*, an Arbitrator or a former Arbitrator is also prohibited from disclosing any draft decision prepared in conjunction with the IID proceeding. The phrase "IID proceeding" in article 8 refers to the proceeding in which the individual is currently acting as an Arbitrator and in the case of a former Arbitrator, the proceeding in which he or she acted as one.

Exceptions to confidentiality

57. Paragraph 1 does not limit the disclosure or use of information for the purposes of the IID proceeding and as such, members of an arbitral tribunal could discuss among themselves information provided by the disputing parties or otherwise acquired during the proceeding. Paragraph 1 also does not hinder the disclosure of information required, for example, under article 11, paragraph 2, subparagraph *(c)* to provide basic information about IID proceedings in which an individual is or has been involved as an Arbitrator.

58. As provided for in article 8, paragraph 1, the obligation of confidentiality does not apply if disclosure or use of information is permitted by the instrument of consent, the applicable rules or agreement of the disputing parties. For instance, the instrument of consent or the applicable rules may foresee that an Arbitrator would make a draft of the award available to the disputing parties or the arbitral institution for comments. This exception, however, is not provided for in paragraph 2, which relates to the contents of the deliberations, including views expressed by other Arbitrators during the deliberations.

Commenting on a decision

59. Paragraph 3 indicates that an Arbitrator or a former Arbitrator may comment on a decision rendered during the IID proceeding

only if such decision was made publicly available in accordance with the instrument of consent or the applicable rules. Therefore, an Arbitrator or a former Arbitrator would not be permitted to comment on a decision that was made public in violation of such instrument or rules.

60. Paragraph 3 does not relieve an Arbitrator or a former Arbitrator from the obligations in paragraphs 1 and 2. In other words, paragraph 3 does not allow an Arbitrator or a former Arbitrator to make statements about, or discuss publicly, why the arbitral tribunal reached a decision in a particular IID proceeding or the manner in which that tribunal handled the merits of the case, as those aspects would be considered to be contents of the deliberations (see art. 8, para. 2). On the other hand, publishing or contributing to an academic article for educational purposes (for example, listing the legal issues dealt with in the proceeding, addressing the procedural aspects of the proceeding and describing the stated reasoning of the award) would be permitted under paragraph 3. In any event, comments by an Arbitrator or a former Arbitrator should not be of a nature that would lead to questioning the integrity of the IID proceeding or decisions rendered or the independence or impartiality of the Arbitrator or other members of the arbitral tribunal.

61. The ability to comment on a publicly available decision is nevertheless restricted by paragraph 4 when the IID proceeding is pending or when the decision is subject to post-award remedies or review. The phrase "post-award remedy" refers to a process involving the interpretation, correction or revision of the award, or the making of an additional award, by the arbitral tribunal, as well as an annulment process. The word "review" refers to a process where a disputing party seeks to set aside the award or where the enforcement of an award is being challenged.

General exception

62. Paragraph 5 provides for a general exception to the obligations in the previous paragraphs of article 8. This is where: (i) a Candidate, an Arbitrator or a former Arbitrator is legally required to disclose the information in a court or other competent body; or (ii) a Candidate, an Arbitrator or a former Arbitrator 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. For instance, paragraph 5 would address a situation where an Arbitrator is compelled to disclose confidential information in accordance with a subpoena issued by a domestic court.

Article 9. Fees and expenses

63. Article 9 relates to the fees of an Arbitrator as well as travel and other expenses incurred by the Arbitrator in the IID proceeding.

Reasonableness

64. Paragraph 1 provides that the fees and expenses shall be reasonable and in accordance with the instrument of consent or the applicable rules. This reflects the fact that some investment treaties and applicable rules provide that the fees and expenses of an Arbitrator shall be reasonable in amount, taking into account, among others, the complexity of the factual and legal issues that arise in relation to the IID, the amount in dispute, the time spent by the Arbitrator on the IID proceeding and any other relevant circumstances of the case.[3] Some applicable rules prescribe fixed rates and specific methods to calculate the expenses of an Arbitrator, whereas others provide for a process to determine the fees and expenses.[4]

Timing of the discussions

65. Pursuant to paragraph 2, discussions concerning fees and expenses shall be concluded as soon as possible. Such discussions are usually concluded prior to or immediately after the constitution of the arbitral tribunal and at the latest, during the first procedural meeting. This avoids a situation where an Arbitrator requests fees higher than originally contemplated at a later stage of the proceedings, which would put the disputing parties in an awkward position. However, the time frame for concluding the discussions differs depending on the applicable rules and whether the arbitral proceeding is administered by an institution.

66. During the discussions, the expected schedule of payment and methodology of calculating fees and expenses (for instance, the basis for calculation or rate of the fees or the different categories of expenses to be disbursed) would be confirmed. This, however, does not mean that the actual amount of fees and expenses would be determined or fixed during the discussions.

Proposal on fees and expenses

67. Paragraph 3 addresses how a proposal on fees and expenses should be communicated. Such a proposal is to be communicated

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[3] See for instance, UNCITRAL Arbitration Rules, article 41, paragraph 1.

[4] See for instance, UNCITRAL Arbitration Rules, article 41, paragraph 2.

through the administering institution if there is one. In ad hoc arbitration, such a proposal should be communicated by the sole Arbitrator or the presiding Arbitrator. Article 7 on ex parte communication applies to such communication (see paras. 49-55 above).

Maintenance and availability of accurate records

68. An Arbitrator is required to keep accurate records of time and expenses spent on the IID proceeding in accordance with paragraph 4. This is intended to minimize the likelihood of disputes regarding fees and expenses. Paragraph 4 further requires that the record should be provided when requesting the payment of fees or expenses or upon the request of any disputing party. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not directly to the disputing parties.

Article 10. Assistant

Engaging an Assistant

69. Before engaging an Assistant, an Arbitrator is required to consult the disputing parties and obtain their agreement to hire an Assistant as well as on the role and duties to be performed by the Assistant. For that purpose, an Arbitrator should provide to the disputing parties the name and affiliation of Assistant candidates and indicate the possible tasks to be performed by the Assistant. This would allow a disputing party to raise concerns about the proposed Assistant or tasks to be performed.

70. Tasks typically carried out by an Assistant include legal research, review of pleadings and evidence, case logistics, attendance at deliberations and other similar assignments. When an Assistant is tasked with preparing portions of preliminary drafts of decisions or awards, he or she should always perform such tasks upon instructions from and under the direction of an Arbitrator and should not exercise any decision-making function (see para. 47 above).

71. Paragraph 1 further requires an Arbitrator to obtain the agreement of the disputing parties on the anticipated fees and expenses of the proposed Assistant. This does not mean that the exact or total amount of fees and expenses of the Assistant need to be agreed at that stage – for example, the Arbitrator and the disputing parties may agree on the method of calculation of such fees and expenses.

Acting in accordance with the Code

72. While the Code does not apply to an Assistant (see art. 2, para. 1), an Arbitrator should ensure that his or her Assistant is informed about the Code. This obligation is incumbent on the Arbitrator engaging the Assistant and the Arbitrator could, for instance, require the Assistant to sign the declaration provided in annex 2. The Arbitrator should also oversee the activities of the Assistant throughout the proceedings and ensure that he or she acts in accordance with the Code (for example, articles 3, 5, 6, 7, 8 and 9). The requirement for an Assistant to act in accordance with the Code does not entail a different standard of compliance than that of an Arbitrator.

73. Paragraph 2 also requires an Arbitrator to remove an Assistant who does not act in accordance with the Code. For example, a disputing party concerned that the Assistant is not acting in accordance with the Code could raise the concern with the Arbitrator and request the Assistant to be removed or replaced. If the instrument of consent or the applicable rules provide specific sanctions with regard to an Assistant, those rules would apply. An Arbitrator who does not remove an Assistant as required in paragraph 2 may be subject to sanctions or other remedies provided for in the instrument of consent or the applicable rules (see art. 12, para. 3).

74. Paragraph 3 requires an Arbitrator to ensure that the Assistant keeps an accurate record of his or her time and expenses attributable to the IID proceeding.

Article 11. Disclosure obligations

75. Article 11 addresses the disclosure obligations of a Candidate and an Arbitrator. Disclosure allows the disputing parties to obtain information which in turn allows them to assess whether a Candidate is able to meet the requirements of independence and impartiality and whether an Arbitrator is independent and impartial. Based on the information provided, disputing parties may pose questions and express concerns that acting or continuing to act in the proceeding may be in breach of the Code, the applicable rules or any other agreement of the parties. Such breach may lead to a challenge, disqualification or other sanction or remedy (see para. 99 below).

Standard and scope of disclosure

76. 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 an Arbitrator. 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 an Arbitrator may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.

77. For instance, a Candidate should inform the disputing parties of any publications and presentations that he or she has made as well as any activities of his or her law firm or organization, which are likely to give rise to justifiable doubts about his or her independence or impartiality. Existing international standards, such as the 2014 IBA Guidelines, may provide useful practical guidance as to the types of circumstances that require disclosure under paragraph 1 (see para. 18 above).

78. The circumstances to be disclosed under paragraph 1 are not limited in time. For example, a circumstance, which arose more than five years before the Candidate was contacted, would need to be disclosed if it is likely to give rise to justifiable doubts.

Paragraph 2 and its relationship with paragraph 1

79. Paragraph 2 includes 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, paragraph 2 does not merely extend the scope of disclosure required under paragraph 1 but provides a minimum disclosure requirement, which is independent of that required under paragraph 1. This is because information disclosed in accordance with paragraph 2 may assist in identifying any potential conflict of interest. Paragraphs 1 and 2 combined require extensive disclosure on the part of a Candidate or an Arbitrator as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraph 2 and vice versa.

Scope of disclosure under paragraph 2

80. Subparagraph *(a)* requires disclosure of information related to potential conflicts arising from a financial, business, professional or close personal relationship that a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.

81. “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.

82. "Professional" relationship includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same law firm as another person involved in the IID proceeding. Such a relationship may also include 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 IID proceeding would usually not constitute a professional relationship.

83. "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 Candidate or an Arbitrator 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.

84. Subparagraph *(b)* requires disclosure of any financial or personal interest in the outcome of the IID 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 of fees or reimbursement of expenses incurred in the IID proceeding (see para. 26 above).

85. 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 that disputing party as being related or relevant. A Candidate or an Arbitrator should invite the disputing parties to identify such related persons or entities, which would allow him or her to make the necessary disclosure and to assess any potential conflict of interest.

86. Similarly, in accordance with subparagraph *(a)*(iv), a Candidate or an Arbitrator should invite the disputing parties to identify any person or entity that has a direct or indirect interest in the outcome of the proceeding, including a third-party funder. While not expressly referred to in subparagraph *(b)*(iii) as the subparagraph deals with a "proceeding" involving such a person or entity, if a Candidate or an Arbitrator has any financial or personal interest in that person or entity, that would also need to be disclosed in accordance with subparagraph *(a)*.

87. Subparagraph *(c)* requires disclosure of all IID and related proceedings in which a Candidate or an Arbitrator is or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness. The phrase "related proceedings" refers to any international or domestic proceeding directly linked with an IID proceeding, such as a set-aside or enforcement proceeding. A proceeding is not "related" merely because it involves the same disputing parties, addresses the same measure or measures or is based on the same instrument of consent. However, such a proceeding may need to be disclosed under paragraph 1 or other subparagraphs.

88. Subparagraph *(d)* requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed as an Arbitrator, a legal representative or an expert witness by one of the disputing parties or their legal representatives in the past five years. Subparagraph *(d)* addresses repeat appointments by the same party or its legal representative. It does not require disclosure of appointments made prior to five years, even if the Candidate or the Arbitrator continues to act as an Arbitrator, a legal representative or an expert witness in that proceeding. Such circumstances may nonetheless need to be disclosed under paragraphs 1 and 2, subparagraph *(c)* if the conditions therein are met and may also be prohibited under article 4.

89. Subparagraph *(e)* requires a Candidate or an Arbitrator to inform the disputing parties prior to taking on a new role, which would allow them to ask questions and to share any views that they may have that a Candidate or an Arbitrator acting concurrently as a legal representative or an expert witness in any other IID or related proceeding would violate articles 3 or 4.

90. Information to be disclosed under subparagraphs *(a)*, *(c)* and *(d)* of paragraph 2 is limited in time and covers certain relationships, proceedings or appointments within the past five years of disclosure.

Continuing obligation of disclosure

91. Paragraph 3 provides a continuing obligation of disclosure. If any new relevant circumstance or information within the scope of paragraphs 1 or 2 emerges or is brought to the attention of an Arbitrator during the IID proceeding, he or she should disclose such circumstance or information promptly. An Arbitrator should remain vigilant and be proactive with regard to his or her disclosure obligations during the entire course of the IID proceeding.

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

92. Paragraph 4 requires a Candidate or an Arbitrator 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 the possession of a Candidate or an Arbitrator, conducting relevant conflict checks or requesting the persons or entities involved in the IID proceeding to provide further information in case of doubt or if deemed necessary to conduct a proper assessment. Paragraph 5 requires a Candidate or an Arbitrator to make a disclosure when he or she has a doubt as to whether the disclosure is required or not. A Candidate or an Arbitrator 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.

Confidentiality and disclosure obligation

93. In accordance with paragraph 6, when a Candidate or an Arbitrator is bound by confidentiality obligations and is not in a position to disclose all of the circumstances or information required in article 11, he or she should disclose as much as possible to allow an assessment of his or her independence and impartiality by the disputing parties. For example, with regard to the list of proceedings in paragraph 2, subparagraph *(c)* (see para. 87 above), 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, subparagraph *(c)*. However, if a Candidate is unable to disclose circumstances or information that are likely to give rise to justifiable doubts as to his or her independence and impartiality, he or she should decline the appointment in accordance with paragraph 6.

Form and timing of the disclosure

94. Paragraph 7 provides when and to whom the disclosure shall be made. The disclosure must be made prior to or upon appointment to the disputing parties, the other Arbitrators, any administering institution and any other person as prescribed by the instrument of consent or the applicable rules. A Candidate or an Arbitrator can make the

disclosure using the form in annex 1. This form is a simplified one and its use is not mandatory. In any event, a Candidate or an Arbitrator should ensure that the relevant circumstances or information to be disclosed are conveyed in a comprehensive manner.

95. The phrase "prior to or upon" appointment in paragraph 7 does not mean that two separate disclosures are required, initially as a Candidate and again as an Arbitrator. One complete disclosure would suffice for the purposes of paragraph 7 and the timing of the disclosure will depend on the applicable rules, who receives the disclosure and at what stage of the IID proceeding the disclosure is made.

Failure to disclose

96. Paragraph 8 clarifies that non-compliance with the disclosure requirements in article 11 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 11. 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 any other relevant circumstances.

97. Upon disclosure, a Candidate or an Arbitrator may request the disputing parties to confirm that they have no objection with respect to the circumstances or information disclosed. In that case, it may be possible under the applicable rules for a disputing party to waive its rights to raise an objection (including to raise a challenge) under the same rules.

Article 12. Compliance with the Code

98. Article 12 addresses compliance with the Code. One way to promote adherence is to require a Candidate to sign a declaration or an Arbitrator to sign one upon appointment (see annex I). Another is through the obligation in paragraph 2 requiring a Candidate or an Arbitrator to decline an appointment or to resign, for example, when his or her impartiality or independence would be compromised and the conflict of interest cannot be eliminated, or when he or she lacks competence as required in article 6, subparagraph *(b)*. However, an Arbitrator would not need to resign or recuse himself or herself due to an inadvertent non-disclosure as long as all reasonable efforts were made (see art. 11, para. 8 and para. 96 above). Compliance with the

Code may also be sought by bodies or institutions established to monitor any breach or impose sanctions.

99. Paragraph 3 provides that the process and the standard of challenge, disqualification, sanction and remedy are governed by the instrument of consent or the applicable rules (including any domestic legislation, see art. 1, subpara. *(f)*). Any breach of the Code could be taken into account in that process.

100. Article 12 takes into account the possible development of an instrument which may modify the instrument of consent or the applicable rules and provide additional means to implement the Code and ensure compliance.

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