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Draft code of conduct for arbitrators in international investment dispute resolution and commentary

Note by the Secretariat

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I. Introduction

1. At its forty-third session in September 2022, Working Group III worked towards presenting two separate texts to the Commission for its consideration in 2023 – a code of conduct for arbitrators for adoption by the Commission, and a code of conduct for judges for adoption in principle, as adoption in principle would provide flexibility to revisit any pending issues and make any necessary adjustments once the deliberations on the standing mechanism had progressed (A/CN.9/1124, para. 204). At its forty-fourth [and forty-fifth] sessions in January [and March] 2023, the Working Group approved the draft code of conduct for arbitrators in international investment dispute resolution with accompanying commentary and the draft code of conduct for judges in international investment dispute resolution and requested the Secretariat to present them to the Commission for its consideration at the fifty-sixth session in 2023 (A/CN.9/1130 and A/CN.9/1131).

2. Accordingly, this note contains the draft code of conduct for arbitrators in international investment dispute resolution with accompanying commentary for consideration by the Commission reflecting the deliberations of Working Group III. The commentary provides guidance on the code of conduct by clarifying the contents of the articles, addressing their practical implications and providing certain examples. The commentary does not aim to create any new obligation. The code of conduct for judges and the accompanying commentary is contained in A/CN.9/1149.

II. Draft code of conduct for arbitrators and 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 of a State or agency of a State or an REIO 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 an REIO or any constituent subdivision of a State or agency of a State or an REIO],

upon which the consent to [resolve an IID][resolve a dispute through arbitration][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 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(parties) or its legal representative; and

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

See A/CN.9/1130, paras. 64-66.

Commentary to article 1

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1. Article 1 provides the definitions of key terms used in the Code of Conduct for Arbitrators in International Investment Dispute Resolution (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 and scope of such terms in treaties, legislation, investment contracts, or in the applicable arbitration rules.

International investment dispute

2. The term "international investment dispute (IID)" 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 (A/CN.9/1130, para. 65). Accordingly, it does not include disputes between States. However, pursuant to article 2(1), States may agree to apply the Code to arbitrators appointed in a proceeding to resolve disputes between States (see para. 14 below). The phrase "IID proceeding" used in the Code refers to the arbitral process of resolving an IID or the annulment procedure by an ICSID ad hoc Committee (see article 1(c)).

3. REIO refers to an organization constituted by States to which they have transferred certain competences, including the authority to make decisions binding on them in respect of IID matters.

4. [When contemplated by the instrument of consent,] a "constituent subdivision of a State or agency of a State or an REIO" may also be a disputing party to the IID and the reference in subparagraph (a) ensures that the Code would apply in those circumstances (A/CN.9/1124, paras. 205). [1] The term "constituent subdivision" includes any 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 its constituent subdivision, regardless of whether the entity is private or public, is government-owned or has a distinct legal personality. However, the inclusion of that phrase in the definition of the definition of the term "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 (A/CN.9/1124, paras. 206–207).

Instrument of consent

5. The term "instrument of consent" refers to instruments that form the basis of consent of the disputing parties to resolve a dispute through 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 included in a separate agreement. Accordingly, while the ICSID Convention provides a framework for the settlement of investment disputes, it is not an "instrument of consent" in the context of the Code.

6. An "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]" refers to an agreement entered into between a foreign investor on one hand and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO on the other, regarding an investment made in the territory of a State or a State of an REIO. For example, it may be 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. [The term, however, does not cover other types of contracts, for instance, those involving ordinary commercial transactions. However, article 2(1) provides the flexibility to the disputing parties to apply the Code to arbitrators or candidates in a proceeding even when the investment contract is concluded between a State and a domestic investor or a commercial contract (see para. 14 below).]

[1] For example, article 25(1) of the ICSID Convention states that the jurisdiction of ICSID shall extend to disputes involving not only a Contracting State but also any constituent subdivision or agency of a Contracting State designated by that State.

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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 or the ICSID Convention] (A/CN.9/1124, para. 206).

Arbitrator and Candidate

8. An "Arbitrator" is an individual appointed as a member of an arbitral tribunal to resolve an IID or as a member of an ICSID ad hoc Committee established under article 52 of the ICSID Convention. Whether the arbitration is administered by an institution or is being conducted ad hoc is therefore irrelevant. The term includes an arbitrator who is appointed by a disputing party [or by an appointing authority on its behalf] (referred to as a "party-appointed Arbitrator") and a presiding arbitrator as well as a sole arbitrator.

9. A "Candidate" is 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 a presiding Arbitrator, the contact may also be initiated by the party-appointed Arbitrators.

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 or an eventual appointment; (ii) is no longer considered for appointment; or (iii) is not eventually appointed as an Arbitrator. The obligation on confidentiality, however, continues (see article 8(1) and (3)). 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. In the ICSID context, an individual who is appointed has a short period of time within which to accept the appointment and becomes a member of the arbitral tribunal when he or she accepts the appointment [and the disputing parties are notified of the acceptance].[2]

Ex parte communication

11. Article 7 of the Code regulates ex part communication by a Candidate or an Arbitrator, which is defined in article 1(e). It 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 (see para. 53 below). "Presence" in this context does not mean that the other party or its legal representatives has to be physically present during the communication. For example, if an Arbitrator poses a question via e-mail to a disputing party copying the other disputing party, that disputing party would be considered to be present in the communication. On the contrary, a disputing party being merely aware of the communication should not be considered having "knowledge". For example, if a disputing party finds out that there was ongoing communication between the Arbitrator and the other disputing party on an issue relating to the IID, such knowledge would not make the communication permissible retrospectively. "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 (A/CN.9/1130, para. 67) (see also para. 53 below).

Assistant

12. The term "Assistant" refers to an individual, for instance, an associate in the Arbitrator's firm or chamber, who is assigned specific tasks by the Arbitrator to assist with the IID proceeding (A/CN.9/1124, para. 210). 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

[2] ICSID Arbitration Rules, rules 15 to 21.

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also does not include tribunal-appointed experts, as they act in their independent capacity.

Article 2 – Application of the Code

1. The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding. 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 or a Candidate, 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.

See A/CN.9/1130, paras. 71 and 72.

Commentary to article 2

Scope of application

13. As the Code applies to an Arbitrator or a Candidate, it may apply prior to the initiation of an IID proceeding and throughout the proceeding. Certain obligations of the Code survive the proceeding and apply to individuals who were a member of an arbitral tribunal or an ICSID ad hoc Committee (referred to as a "former Arbitrator") (see articles [4] and 8, see also para. 20 below).

14. The second sentence of paragraph 1 recognizes that disputing parties can 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 commercial dispute which does not pertain to an investment) (A/CN.9/1124, para. 217). Accordingly, disputing parties may agree to apply the Code to individuals other than Arbitrators with necessary adjustments (A/CN.9/1130, para. 72).

Complementary nature of the Code

15. The first sentence of paragraph 2 indicates that if the instrument of consent contains provisions regulating the conduct of an Arbitrator or a Candidate, those provisions apply as complemented by the articles of the Code. In that case, an Arbitrator or a Candidate is expected to comply with the obligations in those provisions as well as the articles of the Code.

16. The second sentence of paragraph 2 refers to a situation where the provisions in the instrument of consent and articles of the Code are incompatible. This means that the obligations contained in those provisions not merely differ but are inconsistent and irreconcilable with those of the Code, insofar as a Candidate or an Arbitrator would not be able to comply with those provisions and the articles of the Code at the same time. When the articles of the Code are incompatible with the provisions in the instrument of consent, those provisions prevail.

17. If the instrument of consent is silent with regard to conduct regulated in the Code, the articles of the Code will apply complementing the instrument of consent (A/CN.9/1130, para. 106). If the instrument of consent contains a stricter limitation on multiple roles (for example, a longer cooling-off period) than that provided for in article 4 of the Code, the provision in the instrument of consent will apply. By complying with that provision, a former Arbitrator would likely be complying with article 4. If the instrument of consent contains a more lenient limitation (for example, limitation on concurrent roles only with no cooling-off period), article 4 would complement the provision in the instrument of consent as a former Arbitrator would be in a position to comply with both provisions. Furthermore, if the instrument of consent requires an Arbitrator to not disclose or use "non-public" information concerning a proceeding, article 8 of the Code would complement that provision and an Arbitrator would be required to not disclose or use information regardless of whether it is public or not. Lastly, if the instrument of consent requires a narrower scope of disclosure than that required under article 11 of the Code, a Candidate and an Arbitrator would need to comply with both disclosure obligations.

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18. As certain articles of the Code (for example, articles 7 and 8) expressly deal with the relationship between the Code and the instrument of consent ("unless permitted by the instrument of consent"), a situation of "incompatibility" might be rare. This could occur, for example, where the instrument of consent requires disclosure of circumstances and information only within the recent three years and no further (in contrast to article 11) [or expressly permits the roles prohibited under article 4 of the Code]. In those instances, only the provisions of the instrument of consent would apply in accordance with article 2(2) as they prevail.

[The application of paragraph 2 would also depend on how the Code is implemented including any rule in the instrument of consent addressing the relationship between the instrument and the Code.]

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 might have 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.

See A/CN.9/1130, para. 78.

[Note: Possible replacement of the phrase "might have" in subparagraph (d) with "has" to be considered to avoid referring to a speculative interest.]

Commentary to article 3

Independence and impartiality

19. Article 3(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" means the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceeding.

Temporal scope of the obligation

20. The obligation to be independent and impartial begins when an individual becomes a member of an arbitral tribunal 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.

Non-exhaustive list in paragraph 2

21. 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" emphasizes the illustrative nature of the list. Circumstances not listed in paragraph 2 may also implicate an Arbitrator's lack of

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independence and impartiality (A/CN.9/1124, para. 227). Whether the circumstances listed therein actually amount to a breach of article 3 would also depend on the specific facts of the case.

22. The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") provide useful guidance in this regard. For example, situations addressed in the Red and Orange Lists of the IBA Guidelines could be problematic in the context of article 3 (A/CN.9/1130, para. 75).

23. [For example, situations addressed in the Red List of the IBA Guidelines are those considered to give rise to justifiable doubts about an Arbitrator's independence or impartiality, some of which are considered waivable by express consent of the parties, while others involve a relationship that is so close that, regardless of the particular facts, the resulting conflict is not waivable. Situations addressed in the Orange List are those that could be problematic and should be disclosed, although whether these situations give rise to justifiable doubts about a lack of impartiality or independence in a particular dispute will vary depending on the circumstances of the relationship.]

24. 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 aim to regulate "loyalty" itself. Rather, it prevents an Arbitrator from allowing such loyalty to influence his or her conduct or judgment (A/CN.9/1124, para. 228). 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, does not in itself establish that an Arbitrator is influenced by loyalty.

25. The phrase "any disputing party or any other person or entity" in subparagraph (a) captures a wide range of parties or entities to whom loyalty may be owed and is not limited to the disputing parties or "related" persons or entities (A/CN.9/1130, para. 76). Therefore, it includes loyalty to, among others: (i) a person 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 proceeding (referred to as 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 (referred to as 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 (A/CN.9/1124, para. 228).

26. 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 proceedings should be or how to address issues raised during the proceeding. The term "instruction" in subparagraph (b) refers to any order, direction, recommendation or guidance that 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 any factual, procedural or substantive issue considered in the course of the that proceeding.

27. By contrast, subparagraph (b) does not limit an Arbitrator from, for example: (i) complying with binding interpretations issued by a joint committee pursuant to a 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 guidance material provided by the arbitral institution; (iv) making reference to decisions by other arbitral tribunals; and (v) considering the disputing parties' arguments, non-disputing party submissions or expert findings.

28. Subparagraph (c) mentions the types of relationships that could influence an Arbitrator's conduct. Such a relationship may have existed in the past or could be a continuing one. [The word "prospective" indicates that an Arbitrator's independence or impartiality in the IID proceeding should not be affected by a relationship that he or she can reasonably anticipate undertaking in the future, including functioning as a legal representative or an expert witness.] The mere existence of such a relationship

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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 and decisions taken.

29. 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 interest that is determinative and whether the interest was realized or the extent of the interest is irrelevant. Even if the advantage gained was insignificant or de minimis, it would lead to a violation of article 3, 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 (A/CN.9/1124, para. 231).

30. The phrase "assume any function" in subparagraph (e) refers to taking on a professional responsibility, for example, becoming a board member of an entity closely affiliated with a disputing party, which would make it difficult to perform the Arbitrator's duty in an independent and impartial manner. The term "benefit" in the same subparagraph refers to any gift, advantage, privilege, or reward.

31. 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 to be independent and impartial in paragraph 1. The subparagraph emphasizes [requires] that an Arbitrator [must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias] [should make continued efforts to not create an impression of bias].

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 […], 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 […], 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 […], 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.]

See A/CN.9/1130, paras. 91 and 92.

Commentary to article 4

32. The Code aims to address conflicts of interest in a number of ways, for example, by requiring an Arbitrator to be independent and impartial (article 3) and to make certain 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 Arbitrators from undertaking certain other roles while functioning as an Arbitrator and for a certain period of time after serving as an Arbitrator.

Temporal scope and limited roles

33. Paragraphs 1 to 4 set forth the temporal scope of the prohibition. Under paragraph 1, an Arbitrator is prohibited from acting concurrently, whereas paragraphs

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2 to 4 prohibit an Arbitrator from acting as a legal representative or an expert witness for a period of […] years after serving as an Arbitrator.

34. Paragraphs 1 to 4 limit an Arbitrator from acting as a legal representative or an expert witness. In contrast to paragraphs 2 to 4, which is limited to "any other IID or related proceeding", paragraph 1 limits those roles in any other proceeding. Article 4, however, does not limit an Arbitrator from performing other adjudicatory functions, such as functioning as an arbitrator in another proceeding or as a judge (if permitted by the rules applicable to that judge).

Circumstances triggering the limitation

35. The limitation in paragraph 1 applies 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. In such circumstances, an Arbitrator would be prohibited from concurrently acting as a legal representative or an expert witness in the other proceeding (A/CN.9/1130, para. 91). The term "same" means identical and not merely similar.

36. Even when the circumstances in paragraph 1 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

37. The first circumstance triggering the limitation in paragraph 1 is if the other proceeding deals with the same measure or measures. Generally speaking, 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

38. The second circumstance triggering the limitation in paragraph 1 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. For example, an Arbitrator may not concurrently serve as legal representative of the parent company of one of the disputing parties in another proceeding.

The same provision or provisions of the same instrument of consent

39. The third circumstance triggering the limitation in paragraph 1 is if the other proceeding addresses the same provision or provisions in the same instrument of consent (A/CN.9/1124, para. 241). [This means that interpretation of the same provision is at issue and not that the same provision was the basis for initiating the arbitral 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, the Arbitrator may act as a legal representative in a proceeding addressing fair and equitable treatment based on article 10 of the Treaty even though both proceedings may have been initiated based on the same article 26 of the Treaty.] As the ICSID Convention is not an instrument of consent in the context of the Code (see para. 5 above), the limitation in paragraph 1 does not apply to another proceeding based on the same provision in the ICSID Convention.

Limitations on a former Arbitrator

40. Paragraphs 2 to 4 establish a period of time within which a former Arbitrator would be prohibited from acting as a legal representative or an expert witness in another IID or related proceeding (A/CN.9/1130, para. 91). [Include objective of the cooling-off period: The paragraphs aim to address …]. The limitation begins when an Arbitrator ceases to exercise his or her functions. This would vary depending on when

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the IID was concluded or when the Arbitrator ceased to exercise such functions (see para. 20 above) (A/CN.9/1130, para. 91).

Party autonomy

41. The phrase “unless the disputing parties agree otherwise” in paragraphs 1 to 4 means that the limitations prescribed in those paragraphs could be waived by the disputing parties. For paragraph 1, “disputing parties” refer to the parties in the proceeding that the Arbitrator is adjudicating and for paragraphs 2 to 4, they refer to the parties in the proceeding that the former Arbitrator adjudicated and not the parties in the proceeding where the former Arbitrator is expected to act or is acting as a legal representative or an expert witness.

Non-compliance and implementation

42. In accordance with article 12, compliance with article 4 would rely primarily on a self-judgment by the Arbitrator. The disclosure requirement in article 11, in particular subparagraph (2)(e), would assist the disputing parties to be aware of any non-compliance and to possibly seek any challenge or disqualification or any other sanction or remedy in accordance with the instrument of consent or the applicable rules (see para. 102 below).

Article 5 – Duty of diligence

An Arbitrator shall:

(a) Perform his or her duties diligently throughout the IID proceeding;

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

(c) Render all decisions in a timely manner.

See A/CN.9/1130, paras. 95-96.

[Note: Consider deleting the phrase “throughout the IID proceeding” in light of the definition of an “Arbitrator”, see also para. 44 below]

Commentary to article 5

Perform his or her duties diligently and devote sufficient time

43. Article 5 complements the requirements in the applicable arbitral rules and terms of appointment requiring an Arbitrator to conduct the proceedings so as to avoid unnecessary delay and expense.

44. Subparagraph (a) requires an Arbitrator to make all reasonable efforts to adopt effective measures to perform his or her duties without prescribing any specific means or methods. [While subparagraph (a) includes the phrase “throughout the proceedings”, this should not be understood as exonerating the duties required of a former Arbitrator, which survive the IID proceeding (for example, articles 4 and 8) (A/CN.9/1130, para. 95).]

45. The phrase “devote sufficient time” in subparagraph (b) captures the general requirement that an Arbitrator should be available to perform the duties attached to his or her functions, and 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 proceedings (A/CN.9/1124, para. 247). 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(2) (A/CN.9/1124, para. 247).

46. 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. [Include a reference to the disclosure requirement in article 11(2)(e) with regard to prospective appointments]

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Render all decisions in a timely manner

47. Subparagraph (c) requires an Arbitrator to make all reasonable efforts to abide by any time period in the instrument of consent, the applicable rules or as agreed upon by or with the disputing parties (A/CN.9/1130, para. 96). An Arbitrator should also make efforts to ensure that the proceeding is conducted in an efficient manner and that the award (or any other decision) is made 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 tribunal is able to render decisions in a timely manner (A/CN.9/1130, para. 96). The amount of time needed to render decisions can differ depending on the circumstances of the case, such as the complexity of the factual and legal issues that arise in the IID 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

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 [best][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.

See A/CN.9/1130, para. 101.

Commentary to article 6

Necessary qualities in the conduct of the proceedings

48. The elements listed in subparagraph (a) are commonly expected from any Arbitrator and are based on provisions found in existing instruments.[3] 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 (A/CN.9/1124, para. 250).

Obligations of a Candidate

49. Subparagraph (b) should be read in conjunction with article 12(2), which requires a Candidate to accept an appointment only if he or she possesses the necessary competence and skills and is available to discharge the duties of an Arbitrator. This is based on a self-assessment by the Candidate. The terms "necessary competence" should be understood in a broad sense to include, for instance, professional knowledge and experience as well as linguistic skills (A/CN.9/1124, para. 251).

No delegation of decision-making functions

50. Decision-making is the core function of an Arbitrator and therefore cannot be delegated (A/CN.9/1124, para. 248). However, this 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 draft is carefully reviewed by the Arbitrator so that the final text represents the reasoning and determination of the

[3] See e.g., ICSID Convention, article 14: "Persons designated to serve on the Panels shall be persons 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 ICSID, Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels.

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Arbitrator and not that of the Assistant (see article 10 and para. ** below) (A/CN.9/1130, para. 17).

51. The prohibition in subparagraph (c) is without prejudice to applicable arbitral rules, which may stipulate that certain decision-making functions can be delegated, for example, to the presiding Arbitrator (A/CN.9/1130, para. 99).

Article 7 – Ex parte communication

1. Unless permitted by the instrument of consent, the applicable rules, the 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.

See A/CN.9/1130, paras. 102 and 103.

Commentary to article 7

General prohibition

52. Paragraph 1 introduces a general prohibition on ex parte communication. Based on the definition provided in article 1, the prohibition applies if the following three criteria are met: (i) there is a written or oral communication between a Candidate or an Arbitrator and a disputing party, its legal representative, affiliate, subsidiary or other related person; (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 (A/CN.9/1130, para. 67).

53. 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 paragraph 1. If the other party was present via remote means or was otherwise on notice of the contents of the communication, this 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 not be prohibited. By contrast, the fact that the other disputing party or its legal representative became aware of the communication would not make the communication permissible. 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 (see para. 11 above), it could result in a breach of the due process requirements.

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

54. Where the instrument of consent or the applicable rules authorize ex parte communication as defined by article 1(e) of the Code, the general prohibition in paragraph 1 does not apply.

55. Ex parte communication is also not prohibited if agreed by the disputing parties. This covers a wide range of circumstances in which communications between an

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Arbitrator or a Candidate on the one hand and a disputing party or its legal representative on the other would be permissible, for instance, when interviewing a Candidate for the role of a sole arbitrator or the presiding Arbitrator. When conducting such an interview, the presence 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) or the disputing parties need to "agree" to the ex parte interview. Prior agreement of the disputing parties would also be required if 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 a presiding Arbitrator (A/CN.9/1130, para. 103).

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

56. Paragraph 2 permits a Candidate to take part in ex parte interview 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

57. Even when ex parte communication is permitted under paragraphs 1 or 2, any substantive procedural aspect 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 what issues may arise in the IID proceeding, a Candidate or an Arbitrator should refrain from discussing issues of jurisdiction or the merits other than to determine any potential conflict of interest.

58. The limitation in paragraph 3 would not prevent a Candidate from obtaining basic information about the dispute and sharing information about him or herself, which would be necessary for the disputing parties to determine his or her competence and assess any potential conflict of interest (A/CN.9/1124, para. 257). For instance, pre-appointment communications 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 other administrative aspects, may also be conveyed.

Article 8 – Confidentiality

1. Unless permitted by the instrument of consent, the applicable rules or the agreement of the disputing parties, a Candidate or an 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 shall not disclose the contents of the deliberations in the IID proceeding.

3. The obligations in paragraphs 1 and 2 shall survive the IID proceeding.

4. An Arbitrator may comment on a decision only if it is publicly available.

5. Notwithstanding paragraph 4, an 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.

6. 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

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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.

See A/CN.9/1130, paras. 106-110.

[Note: possibly revise paragraph 4 to clarify the meaning of "decision" as follows: An Arbitrator may comment on a decision [made in the IID proceeding] only if it is publicly available.]

Commentary to article 8

Obligation of confidentiality

59. Article 8 imposes an obligation of confidentiality on a Candidate and an Arbitrator. Paragraphs 1 and 2 list the extent of confidentiality and paragraph 3 provides the temporal scope, indicating that the obligations continue to apply indefinitely even after the IID proceeding (A/CN.9/1124, para. 272).

60. Paragraph 1(a) prohibits a Candidate or an Arbitrator from disclosing or using any information concerning the IID proceeding or acquired during the IID proceeding. In accordance with paragraph 1(b), an Arbitrator is also prohibited from disclosing any draft decision made in the IID proceeding. The term "disclose" refers to the circulation of information or material by making it available to anyone without 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 the access to such material (A/CN.9/1124, para. 262).

Exceptions to confidentiality

61. 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 would also not hinder disclosure of information required, for example, under article 11(2)(c) to provide basic information about the IID proceeding in which an individual had been involved as an Arbitrator. [Paragraph 1 does not address the admissibility of evidence provided by the disputing parties (A/CN.9/1124, para. 262).]

62. The obligation of confidentiality in paragraph 1 does not apply if disclosure or use of information is permitted by the instrument of consent, the applicable rules or the 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 (A/CN.9/1130, para. 106). This exception, however, does not apply to paragraph 2 which relate to the contents of the deliberation, including views expressed by other Arbitrators during the deliberation (A/CN.9/1130, para. 107).

Commenting on a decision

63. Paragraph 4 indicates that an Arbitrator may comment on a decision made during the IID proceeding, if such decision is publicly available. The phrase "publicly available" means that the decision was made public in accordance with the instrument of consent or the applicable rules. Therefore, an Arbitrator would not be permitted to comment on a decision that was made public in violation of such rules.

64. Notwithstanding paragraph 4, an Arbitrator remains bound by the obligation in paragraphs 1 and 2, which continue to apply after the proceedings. In other words, paragraph 4 does not allow an Arbitrator from making statements or discussing 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 such aspects would be the contents of the deliberations. On the other hand, publishing or contributing to an academic article for educational purposes, for example, listing the legal issues

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dealt with in the IID proceeding, addressing the procedural aspects of the proceeding and describing the stated reasoning of the award, would be permitted under paragraph 4 (A/CN.9/1130, para. 109). In any event, the comments by an Arbitrator should not be of a nature that would lead to questioning the integrity of the IID proceeding, decisions rendered or the independence or impartiality of the Arbitrator.

65. Pursuant to paragraph 5, the ability to comment on a publicly available decision is nevertheless restricted when IID the proceeding is ongoing 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 making of an additional award, by the arbitral tribunal. The word "review" refers to a process where a disputing party seeks to set aside [or annul] the award [and where the enforcement of an award is challenged].

General exception

66. Paragraph 6 provides for a general exception to the obligations in the remaining paragraphs of article 8. This is: (i) where a Candidate, an Arbitrator or [a former Arbitrator] is legally required and requested to disclose the information in a court or any other competent body; or (ii) where 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 6 would address a situation where an Arbitrator is compelled to disclose confidential information in accordance with a subpoena issued by a domestic court (A/CN.9/1130, para. 110).

Article 9 – Fees and expenses

1. Fees and expenses of an Arbitrator [should][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.

See A/CN.9/1130, paras. 114-116.

Commentary to article 9

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

Reasonableness

68. Paragraph 1 provides that the fees and expenses shall be "reasonable and in accordance with the instrument of consent or the applicable rules". This phrase reflects the fact that certain applicable rules and some recent treaties 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 the IID, the amount in dispute, the time spent by the Arbitrator and any other relevant circumstances of the case.[4] [Certain applicable rules prescribe fixed rates and specific

[4] UNCITRAL Arbitration Rules, article 41(1).

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methods to calculate the expenses of an Arbitrator, whereas other applicable rules provide for a process to determine the applicable fees and expenses.[5]]

Timing of the discussions

69. 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. This would avoid a situation where an Arbitrator requests fees higher than originally contemplated at a later stage of the proceedings, putting the disputing parties in an awkward position (A/CN.9/1130, para. 115). However, the time frame for concluding the discussions may differ depending on the applicable rules and whether the arbitral proceeding is administered by an institution.

70. Typically, such discussions would be held at the latest during the first procedural meeting (A/CN.9/1130, para. 115 and A/CN.9/1124, para. 276). During the discussions, the expected schedule and methodology for calculation (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

71. Paragraph 3 addresses how a proposal on fees and expenses should be communicated. Any such proposal is to be communicated through the administering institution if there is one. If not, the proposal is to be communicated by the sole Arbitrator or the presiding Arbitrator. The limitation on ex parte communication in article 7 applies to such proposals (A/CN.9/1124, para. 278).

Maintenance and availability of accurate records

72. Paragraph 4 reflects the usual practice of requiring an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding. This is intended to minimize the likelihood of disputes regarding fees and expenses (A/CN.9/1130, para. 115). Paragraph 4 requires that the record is to 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

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

See A/CN.9/1130, paras. 15-21.

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[5] 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.”

Commentary to article 10

Engaging an Assistant

73. Before engaging an Assistant, an Arbitrator is required to consult the 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 a candidate for Assistant and indicate the possible tasks to be performed by the Assistant (A/CN.9/1130, para. 16 and A/CN.9/1124, para. 210). This would allow a disputing party to raise concerns about the proposed Assistant or tasks to be performed.

74. Tasks typically carried out by an Assistant include legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments. While an Assistant may prepare preliminary drafts of decisions or awards, an Assistant 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. 50 above).

75. 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 (A/CN.9/1130, paras. 16-17).

Acting in accordance with the Code

76. While the Code does not apply directly to an Assistant, paragraph 2 provides that an Arbitrator should ensure that the Assistant is informed about the Code and acts in accordance with it (articles 3, 5, 6, 7, 8, 9 and 11). To ensure this, the Arbitrator should require the Assistant to sign a declaration to that effect (see Annex 2) (A/CN.9/1124, para. 224). The Arbitrator should monitor the Assistant throughout the proceedings to ensure that he or she acts in accordance with the Code. The obligation in paragraph 2 is incumbent on the Arbitrator engaging the Assistant. (A/CN.9/1130, para. 19). 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 (A/CN.9/1130, para. 19 and A/CN.9/1124, para. 224).

77. The second sentence of paragraph 2 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 also be subject to sanctions or other remedies provided for in the instrument of consent or the applicable rules (article 12(3)).

78. 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

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;

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(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 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);

(iii) Any other proceeding involving a disputing party; and

(iv) [Any other proceeding involving a person or an 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];

(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(s) 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, 2 and 3, a Candidate or 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 they have any doubt as to whether a disclosure shall be made.

6. 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.

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

See A/CN.9/1130, paras. 22-44 and 91.

Commentary to article 11

79. Article 11 addresses the disclosure obligations of a Candidate and an Arbitrator. The obligations therein are central to the Code as they assist in identifying any potential conflict of interest that could demonstrate a lack of independence and impartiality as set out in article 3 of the Code. It allows the disputing parties to obtain information which would allow them to assess whether a Candidate or an Arbitrator is able to meet the requirements of independence and impartiality. 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 arbitration rules or any other agreements by the parties, which may result in a process of challenge, disqualification or other remedies (see para. 102 below).

Standard and scope of disclosure

80. The scope of disclosure in paragraph 1 ("likely to give rise to justifiable doubts") is broad and covers any circumstances, including any interest, relationship

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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 any person, whether a disputing party or a third person, having knowledge of the relevant facts and circumstances, would reasonably 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 (A/CN.9/1130, para. 22).

81. 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 (A/CN.9/1130, paras. 33 and 103). The IBA Guidelines provide useful practical guidance as to the other types of circumstances that require disclosure under paragraph 1.

82. The circumstances to be disclosed under paragraph 1 are not limited in time. For instance, 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 (A/CN.9/1130, para. 25).

83. Paragraph 2 includes a mandatory list of information that needs to be disclosed, regardless of whether it gives rise to justifiable doubts. 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 such information may assist in identifying any potential conflict of interest. However, the information to be disclosed under subparagraphs (a), (c) and (d) of paragraph 2 is limited in time and covers certain relationships, proceedings and appointments within the past five years (A/CN.9/1130, para. 25).

84. Accordingly, paragraphs 1 and 2 combined require extensive disclosure on the part of a Candidate and 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

85. Subparagraph (a) addresses 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 (A/CN.9/1130, para. 27).

86. "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 the subparagraphs or indirectly through another person or entity, with or without their knowledge.

87. "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. 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 with another person involved in the IID proceeding would likely not constitute a professional relationship.[6]

88. "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.

[6] This is an example found in the Green List of the IBA Guidelines (non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view). Reference to this example only in the commentary and not others on the Green List does not mean that those relationships need to be disclosed under article 11(2) of the Code.

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However, being in the same class in school, casual or social acquaintances, or distant family ties would not necessarily establish a close personal relationship.

89. The phrase "person or entity identified by a disputing party as being related" in subparagraphs (a)(iv) [and (b)(iv)] refers to, for instance, parent companies, subsidiaries or affiliates of a disputing party identified by that party. A Candidate or an Arbitrator should invite the disputing parties to identify such related entities so as to allow him or her to make the necessary disclosure and to assess any potential conflict of interest. Similarly, a Candidate or an Arbitrator should invite the disputing parties to identify any person or entity that has a direct interest in the outcome of the proceedings, including any third-party funder.

90. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the IID proceeding or any other proceedings involving the same measure or the same disputing party. The phrase "financial interest" in subparagraph (b) does not include remuneration of fees or reimbursement of expenses incurred in the IID proceeding. [Subparagraph (b)(iv) requires the disclosure of any financial or personal interest in a proceeding, which involves a 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.]

91. 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, legal representative or an expert witness. The phrase "related proceedings" refers to any international or domestic proceeding directly related to an IID proceeding, such as a set-aside or enforcement proceeding, but not proceedings that merely deal with the same measure or are based on the same instrument of consent (A/CN.9/1130, para. 31).

92. 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 over the past five years. Subparagraph (d) addresses repeated appointments by the same parties or the legal representative. It does not require disclosure where the appointment was made prior to five years but the Candidate or the Arbitrator continues to serve as an arbitrator, legal representative or an expert witness. Such circumstances may nonetheless need to be disclosed under paragraphs 1 and 2(c) if the conditions are met (A/CN.9/1130, para. 32).

93. [The purpose of the disclosure prior to an Arbitrator accepting an appointment as a legal representative or an expert witness in any other IID or related proceeding in subparagraph (e) is to allow the disputing parties to know in advance, to ask questions, and to raise any concerns that they may have in terms of whether they believe that acting in the other capacity would violate article 3 of the Code. If an Arbitrator accepts the appointment as a legal representative or an expert witness, a disputing party may challenge the Arbitrator under the applicable rules. (A/CN.9/1130, para. 92)]

Continuing obligation of disclosure

94. 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 must disclose such circumstance or information promptly and without delay. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Confidentiality and disclosure obligation

95. When a Candidate or an Arbitrator is bound by confidentiality obligations and is not in a position to disclose the required circumstances or information, he or she should disclose as much as possible (A/CN.9/1092, para. 93). For example, with regard to the list of proceedings in subparagraph 2(c) (see para. 91 above), a

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Candidate could redact certain information and disclose the region where the claimant or the respondent is located, the relevant industry or sector, the applicable rules as well as the fact that he or she is bound by a confidentiality obligation. However, if a Candidate is unable to disclose circumstances that is likely to give rise to justifiable doubts, he or she should decline the appointment.

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

96. Paragraph 4 requires a Candidate and 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 would involve 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 proper assessment (A/CN.9/1130, para. 35). Paragraph 5 requires a Candidate and an Arbitrator to make a disclosure when there are doubts as to whether the disclosure is required or not.

Form and timing of the disclosure

97. Paragraph 6 provides when and to whom the disclosure shall be made. The disclosure shall be made prior to or upon appointment to the disputing parties, the other Arbitrators, the administering institution and any other person prescribed by the instrument of consent or the applicable rules. A Candidate and 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 and an Arbitrator should ensure that the relevant circumstance or information to be disclosed is conveyed in a comprehensive manner.

98. The phrase "prior to or upon" appointment in paragraph 6 does not imply that two separate disclosures are required, initially as a Candidate and again after becoming a member of the arbitral tribunal. One complete disclosure would suffice for the purposes of paragraph 6 and the timing of the disclosure will depend on who is receiving the disclosure and at what stage of the IID proceeding the disclosure is made.

Failure to disclose

99. Paragraph 7 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. However, paragraph 7 should not be understood as an invitation or a permission to not comply with the disclosure requirement 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 (A/CN.9/1130, para. 42).

100. Upon disclosure, a Candidate or an Arbitrator may request the disputing parties to confirm that they have no objection with respect to the circumstances disclosed. 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 (A/CN.9/1130, para. 43).

Article 12 – Compliance with the Code

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

2. A Candidate shall not accept an appointment and an Arbitrator shall resign or recuse him/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.

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See A/CN.9/1130, paras. 56-61.

Commentary to article 12

101. Article 12 addresses compliance with the Code. One way to promote adherence is to require an Arbitrator to sign a declaration upon appointment (see Annex 1). Another is through the obligation in paragraph 2 where a Candidate or an Arbitrator should decline an appointment or resign, for example, when his or her impartiality or independence would be compromised and the conflict cannot be eliminated, or his or her competence is lacking for the purposes of the IID proceeding. 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 according to article 11(4) (A/CN.9/1130, para. 58).

102. Paragraph 3 provides that the process and the standard of challenge, disqualification, sanctions, and remedies would be governed by the instrument of consent or the applicable rules. However, any breach of the Code could be taken into account in that process. [The term "applicable rules" in paragraph 3 includes a wide range of rules, including those found in domestic legislation applicable to the IID proceeding (A/CN.9/1130, para. 60).]

103. Article 12 takes into account the possible development of additional means to implement the Code and to ensure compliance through an instrument which may modify the instrument of consent or the applicable rules. Compliance of the Code may also be sought by bodies or institutions established to monitor any breach and impose sanctions (A/CN.9/1130, para. 60).

Annexes to the Code of Conduct

Annex 1 (Candidates/Arbitrators)

Declaration, Disclosure and Background Information

1. I have read and understood the attached Code of Conduct for Arbitrators in International Investment Dispute Resolution 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 AS RELEVANT]

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

Annex 2 (Assistants)

Declaration

1. I have read and understood the attached Code of Conduct for Arbitrators in International Investment Dispute Resolution 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.

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