


Draft for discussion purposes only

**United Nations Commission on
 International Trade Law**
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**Draft code of conduct for judges 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 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 a draft code of conduct for judges in international investment dispute resolution with accompanying commentary for consideration by the Commission reflecting the deliberations of Working Group III. The draft code of conduct for arbitrators and the accompanying commentary is contained in A/CN.9/1148.

II. Draft code of conduct for judges and commentary

Article 1 – Definitions

For the purposes of the Code:

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

See A/CN.9/1030, para. 68.

Commentary to article 1

Judge and Candidate

3. The Code of Conduct for Judges in International Investment Dispute Resolution (the “Code”) has been prepared on the assumption that a standing multilateral mechanism may be established in the future to adjudicate international investment disputes (referred to as the “standing mechanism”).

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

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

Ex parte communication

6. Article 7 of the Code regulates communications by a Judge with a disputing party, its legal representative or other related person (for example, the parent company of the disputing party or a third-party funder), when the communication concerns a proceeding before the standing mechanism and when it takes place without the other disputing party or parties being present or having knowledge of the communication taking place. "Presence" does not mean that the other party (or its legal representatives) need to be physically present during the communication. For example, if an Arbitrator poses a question via e-mail to one of the disputing parties copying the other disputing party, that disputing party would be considered present in the communication. On the other hand, the other disputing party being merely aware of the communication should not be considered "having knowledge". For example, if a disputing party somehow found out that there was ongoing communication between the Arbitrator and the other disputing party on an issue relating to the IID, such a finding would not mean that the communication is allowed ex post. "Knowledge" means that a party is provided adequate notice and given an opportunity to take part in the communication (A/CN.9/1130, para. 67).

Article 2 – Application of the Code

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

See A/CN.9/1030, para. 74.

Commentary to article 2

7. The Code applies to individuals, a Judge or a Candidate. While the Code may apply in the context of proceedings before the standing mechanism, it may apply prior to the commencement of such a proceeding, throughout the proceeding as well as the term of office of a Judge (A/CN.9/1130, para. 74). Certain obligations of the Code survive the proceeding and the term of office (see articles 4 and 8). Accordingly, the Code also applies to former Judges.

8. The rules of the standing mechanism will address how the Code applies to a Judge or a Candidate. If the rules of the standing mechanism contain other provisions on the conduct of a Judge or a Candidate, the relationship between those provisions and the Code would need to be addressed.

Article 3 – Independence and Impartiality

1. A Judge shall be independent and impartial.
2. Paragraph 1 includes the obligation not to:
 - (a) Be influenced by loyalty to any disputing party or any other person or entity;
 - (b) Take instruction from any organization, government, or individual regarding any matter addressed in [the proceeding that the Judge is adjudicating][a proceeding before the standing mechanism];
 - (c) Be influenced by any past, present or prospective financial, business, professional or personal relationship;
 - (d) Use his or her position to advance any financial or personal interest he or she might have in any disputing party or in the outcome of [the proceeding that the Judge is adjudicating][a proceeding before the standing mechanism];
 - (e) Assume any function or accept any benefit that would interfere with the performance of his or her duties; or
 - (f) Take any action that creates the appearance of a lack of independence or impartiality.

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

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

(i) Any disputing party in the proceeding [which the Judge is adjudicating];

(ii) The legal representative(s) of a disputing party in the proceeding [which the Judge is adjudicating];

(iii) Expert witnesses in the proceeding [which the Judge is adjudicating]; and

(iv) Any person or entity identified by a disputing party as being related, or as having a direct or indirect interest in the outcome of the proceeding [which the Judge is adjudicating], including a third-party funder;

(b) Any financial or personal interest in:

(i) The outcome of the proceeding [which the Judge is adjudicating]; and

(ii) Any other proceeding involving the same measure(s).

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

5. A Candidate shall make the disclosure to the standing mechanism [in accordance with the rules of the standing mechanism] prior to confirmation as a Judge.

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

7. A Candidate and a Judge shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

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

See A/CN.9/1030, paras. 27-28, 35, 40-41, 46-47 and 68.

Note to the Commission

39. The Commission may wish to note that upon implementing the decisions by Working Group III, article 9 has been restructured to identify the contents of the disclosure obligation for a Candidate (paragraph 2) and for a Judge (paragraph 3) as well as the method of disclosure for a Candidate (paragraphs 5) and for a Judge (paragraph 6). The Commission may wish to confirm that this change of structure is appropriate.

40. With regard to paragraph 2 (which had been limited to disclosure of all “IID and related” proceedings), the Commission may also wish to confirm that the scope of disclosure should indeed be broad to cover “all proceedings” and not limited to proceedings relating to an international investment dispute. In that case, the Commission may wish to consider whether the functions carried out by a Candidate in that proceeding should be limited to that of an arbitrator, a legal representative or an expert witness.

41. With regard to paragraph 3, the Commission may wish to align the language with paragraph 2 requiring a Judge to disclose certain information rather than focusing on the information to be disclosed. Considering that the subparagraphs to paragraph 3 refer to the proceeding that a Judge is expected to adjudicate or is adjudicating, it is

further suggested that the chapeau makes reference to such proceeding rather than in each of the subparagraphs.

42. With respect to paragraph 5, the Commission may wish to consider inserting the phrase “in accordance with the rules of the standing mechanism”, which had been inserted in paragraph 6. The Commission may wish to further consider that the inclusion of that phrase may make the words “prior to confirmation as a Judge” unnecessary as the timing of the disclosure would likely be provided in the rules of the standing mechanism.

43. With respect to the second sentence of paragraph 6, the Commission may wish to confirm that the square-bracketed text could be deleted as the first sentence already mentions the timing of disclosure.

Commentary to article 9

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

Standard and scope of disclosure

45. The scope of disclosure in paragraph 1 (“likely to give rise to justifiable doubts”) is broad and covers any circumstances, including any interest, relationship or other matters, likely to give rise to justifiable doubts as to the independence or impartiality of a Candidate or a Judge. Under this standard, a doubt is 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 a Judge may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision (A/CN.9/1130, para. 22).

46. In contrast to paragraphs 2 and 3, the circumstances to be disclosed under paragraph 1 are not limited in time. For instance, a circumstance which arose more than five years before a Candidate was contacted would need to be disclosed if it is likely to give rise to justifiable doubts (A/CN.9/1130, para. 25). For example, under paragraph 1, a Candidate should disclose any publication or presentation that he or she has made more than seven or eight years ago, which might raise justifiable doubts as to his or her independence and impartiality (A/CN.9/1130 para. 33).

Disclosure under paragraphs 2 and 3

47. Paragraphs 2 and 3 include a list of information that needs to be disclosed, regardless of whether it gives rise to justifiable doubts under paragraph 1. In other words, the paragraphs do not merely extend the scope of disclosure required under paragraph 1 but require a minimum disclosure, 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 paragraph 2 and paragraph 3(a) is limited in time (within the past five years) (A/CN.9/1130, para. 25).

48. Paragraph 2 requires disclosure of all proceedings in which a Candidate is or has been involved in the past five years [as an arbitrator, legal representative or an expert witness]. [For example, this may include a domestic court proceeding involving an investment, within which the Candidate functioned as a judge.]

49. Paragraph 3 requires a Judge to disclose certain information relating to the proceeding that he or she is expected to adjudicate or is adjudicating.

50. Subparagraph (a) addresses disclosure of information related to potential conflicts arising from a financial, business, professional, or close personal relationship that a Judge might have with persons or entities involved in the proceeding within the past five years (A/CN.9/1130, para. 27).

51. “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.

52. “Professional” relationship includes, for instance, where a Judge was an employee, associate or partner in the same law firm as another person involved in the proceeding. Such a relationship may also include prior involvement in the same project or case, for instance, as opposing counsel or co-arbitrator. By contrast, being a member of the same professional association or social or charitable organization along with another person involved in the proceeding would likely not constitute a professional relationship.

53. “Close personal” relationship includes [to be elaborated].

54. The phrase “any person or entity identified by a disputing party as being related” in subparagraph (a)(iv) refers to, for instance, parent companies, subsidiaries or affiliates of a disputing party identified by that party. This subparagraph also requires the disclosure of a relationship with any person or entity identified by a disputing party as having a direct or indirect interest in the outcome of the proceeding, including a third-party funder. A Judge should invite the disputing parties to identify such persons or entities so as to allow him or her to make the necessary disclosure and to assess any potential conflict of interest.

55. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the proceeding or any other proceedings involving the same measure. Financial interest does not include remuneration as a Judge, or the reimbursement of expenses incurred during the proceeding.

56. Paragraphs 1 to 3 combined require extensive disclosure on the part of a Candidate or a Judge as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraphs 2 and 3 and *vice versa*. As noted, this is to identify any potential conflict of interest.

57. When a Candidate or a Judge is bound by confidentiality obligations and is not in a position to disclose the required circumstance or information, he or she should disclose as much as possible. For example, with regard to the list of proceedings in paragraph 2, a 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

58. Paragraph 4 requires a Candidate and a Judge to be proactive to the best of his or her ability to identify the existence of circumstances and information identified under paragraphs 1 to 3. In other words, paragraph 4 concerns the means to be deployed by a Candidate and a Judge to ensure proper disclosure. By way of illustration, the obligation under paragraph 4 could involve reviewing relevant documentation already in possession, conducting relevant conflict checks, or requesting the persons or entities involved in the proceeding to provide further information in case of doubt or if deemed necessary to conduct proper assessment.

Form and timing of disclosure by a Candidate and a Judge

59. Paragraph 5 provides how, and when a Candidate shall make the disclosure. It shall be made to the standing mechanism prior to confirmation as a Judge [in accordance with the rules of the standing mechanism].

60. Paragraph 6 provides how and when a Judge shall make the disclosure, which shall be in accordance with the rules of the standing mechanism (A/CN.9/1130, para. 47) and as soon as he or she becomes aware of the information and circumstances mentioned in paragraphs 1 and 3. It also provides a continuing obligation of

disclosure. If new relevant information within the scope of paragraphs 1 or 3 emerges or is brought to the attention of a Judge during the proceeding, he or she must disclose such information promptly and without delay. A Judge should therefore remain proactive and vigilant with regard to his or her disclosure obligations during the entire course of the proceedings. Annexes 1 and 2 provide an example of disclosure form to be used by a Candidate or a Judge.

61. Paragraph 7 requires a Candidate or a Judge to make a disclosure when there are doubts as to whether the disclosure is required or not.

Failure to disclose

62. Paragraph 8 clarifies that non-compliance with the disclosure requirements in article 9 does not in itself necessarily establish a lack of independence or impartiality. Rather, it is the content of the disclosed or omitted information that determines whether there is such a violation. This paragraph should, however, not be interpreted as an invitation or a permission to not disclose. Indeed, a failure to disclose may be factually relevant when establishing a breach of the obligation to be independent and impartial, taking into account the information that was not disclosed as well as other relevant circumstances (A/CN.9/1130, para. 42).

Article 10 – Compliance with the Code

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

See A/CN.9/1030, paras. 62 and 63

Commentary to article 10

63. Article 10 addresses the compliance with the Code, which is to be governed by the rules of the standing mechanism. Sanctions for any breach of the Code may also be provided in the rules of the standing mechanism (A/CN.9/1130, paras. 62 and 63).

64. One way to promote the adherence would be to require a Candidate or a Judge to sign a declaration upon appointment (see Annexes 1 and 2).

Annexes to the Codes of Conduct – Declaration and disclosure forms

Annex 1 (Candidates)

Declaration, Disclosure and Background Information

1. I acknowledge that I have read and understood the attached Code of Conduct and I undertake to comply with it.
2. To the best of my knowledge, there is no reason why I should not serve as a Judge, and I have no impediment arising from the Code of Conduct.
3. In accordance with Article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[INSERT AS RELEVANT]

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

Annex 2 (Judges)**Declaration and Disclosure**

1. I acknowledge that I have read and understood the attached Code of Conduct and I undertake to comply with it.
2. To the best of my knowledge, there is no reason why I should not serve as a Judge. I am impartial and independent and have no impediment arising from the Code of Conduct.
3. In accordance with Article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[INSERT AS RELEVANT]

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

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