DRAFT CODE OF CONDUCT

Comments by State/Commenter

as of December 18, 2020

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STATES (Alphabetically)

Australia

Australia wishes to express its gratitude to both the ICSID Secretariat and the UNCITRAL Secretariat for their comprehensive work on the development of the draft Code of Conduct circulated on 1 May 2020. Australia appreciates the time and expertise invested in this exercise and we look forward to working constructively with the other members of UNCITRAL Working Group III to progress this draft. Australia offers the following preliminary comments on the draft without prejudice to its final position.

Multilateral instrument

- Australia would welcome a discussion about whether it might be desirable to include a code of conduct as part of a multilateral instrument on ISDS procedural reform to enable such a code to become binding in relation to states' networks of first-generation bilateral investment treaties.
- If the code were to be incorporated into a multilateral instrument it would be prudent to provide for some sort of review mechanism so that the code could be periodically updated in a flexible way.

Definitions (Article 1)

- Australia queries whether it is within the mandate of Working Group III to seek to develop a code which applies beyond treaty-based ISDS cases.
- Australia queries whether the definition of "investor-State dispute settlement" should clarify that it includes a dispute arising under any form of investment treaty, to ensure it captures, for example, investment chapters in free trade agreements. For example, the term "investment treaty" might be rephrased as "treaty with investment protection provisions".

Application (Article 2)

- Australia queries whether it could be useful for certain aspects of the code to also apply to tribunal-appointed experts, as is the case with the CPTPP Code of Conduct (paragraph 9), as well as to tribunal secretaries and registries.
- Australia considers that if parts of the Code are to apply to assistants it may be preferable to explicitly state this in Article 2. Australia also considers that it would be useful to specify which provisions assistants must comply with (as is the case with the CPTPP Code of Conduct (paragraph 9)), rather than simply referring to 'relevant provisions', as in the current draft.
- Australia would appreciate clarification as to whether it is intended that the only provisions relevant to candidates are those which explicitly refer to candidates (i.e. Articles 5, 7, 10 & 12).
- In Australia's view there are various broader questions regarding the applicability of the code that warrant further examination. For example, the temporal application of the code and the relationship between the code and other existing applicable codes or rules.

Duties and Responsibilities (Article 3)

- Australia notes that Article 3 of the current draft appears to suggest that an arbitrator must "at all times" be available. Australia considers more specificity would be useful to avoid the likelihood that it may be practically impossible for an arbitrator to be always available. For example, the CPTPP Code of Conduct (paragraph 5(a) provides that an arbitrator shall be "available to perform, and shall perform … [their] duties thoroughly, fairly, diligently and expeditiously..."

Independence and Impartiality (Article 4)

- Australia considers that it may be useful to include 'loyalty to a non-disputing Party' in the list in Article 4(2)(a), as is the case in the CPTPP Code of Conduct (paragraph 6(b)).

Conflicts of Interest: Disclosure Obligations (Article 5)

- Australia considers that the Code should explicitly clarify that, the duty for adjudicators to disclose any interest, relationship or matter that could reasonably be considered to affect the adjudicator's independence or impartiality under Article 5(1), is not limited to significant relationships within the last five years, to avoid any doubt created by Article 5(2)(a).
- Australia queries whether the obligation to provide a list of all relevant public speeches and all previous involvement in non-ISDS international arbitration cases could impose an onerous burden on potential candidates. Australia suggests that this obligation might be limited to speeches that may give rise to an issues conflict and previous cases which could reasonably be considered to affect their independence or impartiality.
- Australia would welcome a discussion about the appropriate disclosure requirements in relation to third party funders under this provision, including previous relationships with third party funders or appointments involving third party funders.
- Australia considers that it may beneficial for the code to attach a standardised initial disclosure statement as is the case with the CPTPP Code of Conduct (paragraph 4(b)).
- Australia considers that it would be useful for this provision to elaborate on the process in relation to disclosures, including timeframes and recipients, as is the case with the CPTPP Code of Conduct (paragraph 4 (b)&(c)).
- Australia considers that it may be helpful for this provision to expressly state that disclosure of an interest, relationship or matter is without prejudice as to whether a conflict of interest actually exists, as is the case with the CPTPP Code of Conduct (paragraph 4(f)).

Limit on Multiple Roles (Article 6)

- Australia notes the range of views on, so called, 'double hatting' and would welcome further discussion regarding this important and complex issue, including ways to overcome some of the potential challenges in relation to diversity (as broadly defined).
- Australia considers that it would be preferable for the code to go further than merely providing an obligation for adjudicators to disclose other roles. In particular, Australia considers that restrictions on multiple roles may be appropriate in circumstances of issues conflict.

- Australia notes that the CPTPP Code of Conduct (paragraph 3 (d)) provides an example of one possible approach to addressing the issue of double hatting.

Availability, Diligence, Civility and Efficiency (Article 8)

- Australia notes that different adjudicator roles may involve different time pressures related to a range of factors, such as, the complexity of the case and evidence and whether or not the adjudicator is acting as chair. In addition, the time pressures on adjudicators may extend beyond ISDS proceedings to other work, such as, commercial arbitration or public international law cases. Accordingly, Australia considers that disclosure of adjudicators' caseloads may be preferable to enable appointing parties to make their own assessments about adjudicator availability, rather than a strict limit on the number of cases that adjudicators are permitted to take on.
- Nevertheless, Australia would welcome a discussion as to whether there may be any value in providing non-mandatory general guidance on appropriate caseloads for adjudicators.

Confidentiality (Article 9)

- Australia notes that some modern investment treaties provide for a proposed decision or award to be provided to the disputing parties by the arbitral panel prior to it being delivered (e.g. CPTPP Article 9.23(10)). Australia considers that it would be prudent for the code to explicitly provide for this possibility.
- Australia queries whether the last element in Article 9(2) should be qualified so as to prohibit commenting on the *merits* of any decision or award (see paragraph 8(d) of the CPTPP Code of Conduct by way of illustration).

Pre-appointment interviews (Article 10)

- Australia considers that disclosure in relation to any pre-appointment interviews would usefully enhance transparency regarding arbitrator appointments.
- Australia would welcome a discussion of whether the code should permit pre-appointment interviews to concern the experience of a candidate, in addition to their availability and the absence of conflict.
- Australia would welcome a discussion as to whether this provision should also cover disclosure of any pre-appointment interviews with third party funders, including any mock arbitrations.

Enforcement of the Code of Conduct (Article 12)

- Australia considers that enforcement of the code should, if possible, include options other than voluntary compliance and disqualification. This would provide greater flexibility so that the sanctions imposed could be adjusted to be proportionate to the violation involved.
- Australia would welcome discussion of what sanctions might be applied to assistants if they do not comply with the code.

Bolivia [ESPAÑOL]

Article 1. Definitions
(Traducción propia)
Artículo 1. Definiciones
A los efectos de este Código:
(…) 4. "Solución de controversias inversor-estado" (ISDS por sus siglas en inglés) significa un mecanismo para resolver disputas que involucran a un inversionista extranjero y un Estado o una Organización Regional de Integración Económica (REIO por sus siglas en inglés), o cualquier subdivisión constituyente del Estado o una agencia del Estado o de la REIO, ya sea que surja de un tratado de inversión, ley nacional o un acuerdo de las partes en la controversia.
COMENTARIO
El numeral 4 del Art. 1, tendría que incluir una definición por negación, estableciendo aquellas disputas que no deberían ser consideradas como arbitrajes de inversión, por ejemplo: aquellas emergentes de contratos celebrados entre nacionales de un país extranjero y Empresas Públicas de un Estado. Empresas que, por su naturaleza, gozan de una personalidad diferenciada del Estado.

Basados en lo expuesto, se propone poner a consideración de los proyectistas, en el marco del proyecto de "Acuerdo de Inversiones para el Desarrollo entre el Estado Plurinacional de Bolivia y…", algunas definiciones que para el Estado boliviano no son sinónimo de inversión:

"i. Inversiones de portafolio;
ii. Participaciones de mercado;
iii. Reclamaciones pecuniarias derivadas exclusivamente de contratos comerciales para la venta de bienes o servicios por parte de una empresa nacional o en el territorio de una Parte a una empresa en territorio de la otra Parte;
iv. Notas de crédito bancarias;
v. Sentencias derivadas de acciones judiciales o administrativas;
vi. Extensiones de créditos con relación a transacciones comerciales;
vii. Títulos de deuda emitidos por un Gobierno y préstamos a un Gobierno" .

JUSTIFICACIÓN
Entre las gestiones 2016 y 2018, el Estado boliviano fue demandando por la Empresa Jindal Steel Bolivia en un arbitraje comercial administrado por la Cámara de Comercio Internacional. Demanda que, entre otros aspectos, alegó que Bolivia era co-reponsable del incumplimiento del contrato para la explotación del yacimiento siderúrgico del Mutún, por una relación de dependencia. Por su parte Bolivia expreso que: i) no es parte del Contrato de Riesgo Compartido. ii) no es parte del acuerdo arbitral. iii) no manifestó su consentimiento para un arbitraje ante la CCI.

Al respecto, el Tribunal determinó que Bolivia no es parte del contrato por lo que el Tribunal carece de competencia para conocer los reclamos incoados por la demandante; de manera particular señalo:

“352. (…) Una cosa es que ESM pretenda, como cualquier empresa pública, preservar los intereses del Estado y otra muy distinta que el Estado sea de facto parte de todos los contratos celebrados por las empresas públicas.” (pg. 102, Jindal Steel Bolivia S.A. c Estado Plurinacional de Bolivia, Empresa Siderúrgica del Mutún y Corporación Minera de Bolivia - Laudo sobre Jurisdicción y admisibilidad de 9 de noviembre de 2018.)

A raíz del caso, quedó sentado que las Empresas Publicas no se confunden en el Estado en cuanto a la responsabilidad de sus actos contractuales; aspecto que necesariamente debe tomarse en cuenta con el objeto de impedir que disputas vinculadas al ámbito comercial sean forzadamente llevadas al ámbito del arbitraje de inversiones.

Article 3. Duties and Responsibilities.
(Traducción propia)
Artículo 3. Deberes y Responsabilidades
En todo momento, los adjudicadores deberán:

(a) Ser independientes e imparciales, y evitar cualquier conflicto de intereses directo o indirecto, conducta inapropiada, parcialidad y apariencia de parcialidad;
(b) Mostrar los más altos estándares de integridad, equidad y competencia;
(c) Estar disponible y actuar con diligencia, cortesía y eficiencia;
(d) Cumplir con cualquier obligación de confidencialidad y de no divulgación.

COMENTARIO
En el Art. 3 se observa la inclusión de gradualidad de un posible conflicto de interés en la forma de “interés directo” e “interés indirecto”.

Por lo que se considera necesario que los mismos sean caracterizados e incorporados en el Art. 1 (Definiciones).

Article 4 Independence and Impartiality
(Traducción propia)
Artículo 4. Independencia e imparcialidad.
1. Los adjudicadores en todo momento serán independientes e imparciales.
2. En particular, los adjudicadores no deberán:
(a) Ser influenciados por el interés propio, la presión externa, consideraciones políticas, clamor público, la lealtad a una de las partes en el proceso o el temor a las críticas;
(b) Permitir que cualquier relación financiera, comercial, profesional, familiar o social pasada o actual influya en su conducta o juicio;
(c) Tomar medidas que creen la impresión que otros están en posición de influir en su conducta o juicio;
(d) Usar su posición para promover cualquier interés personal o privado; o
(e) Directa o indirectamente, incurrir en una obligación o aceptar un beneficio que interferiría, o parecería interferir, con el desempeño de sus deberes.

COMENTARIO

Se consulta si sería pertinente intentar definir los términos “independencia e imparcialidad”, en el marco del numeral 1.

El inc. c) del numeral 2 Art. 4 señala que los adjudicadores no deberán: “Tomar medidas que creen la impresión que otros están en posición de influir en su conducta o juicio”. La redacción previamente señalada, podría interpretarse como absoluta y restrictiva por lo que el Tribunal estaría impedido de convocar a amicus curiae.

Por lo tanto, se sugiere transmitir esta inquietud a los Proyectistas a fin de aclarar esta situación en una versión modificada del Proyecto de Código.

JUSTIFICACIÓN

Es preciso señalar que, en casos emblemáticos, el empleo de las presentaciones de los *amicus curiae* ha sido de vital importancia en los fallos del Tribunal. Por ejemplo: en el caso Philip Morris Brands Sàrl, Philip Morris Products S.A., Abal Hermanos S.A. contra la República Oriental del Uruguay **(CIADI N.° ARB/10/7)** el Tribunal Arbitral admitió y examinó la presentación de un informe de *amicus curiae* de la Secretaría del Convenio Marco de la OMS sobre el Control del Tabaco y la Organización Mundial de la Salud, quienes hicieron aportes sustanciales sobre las medidas de salud adoptadas por Uruguay.

Presentación que fuere admitida en el marco de lo previsto en Las Reglas de Arbitraje del CIADI — 37(2) — ***“Visitas e investigaciones; presentaciones de partes no contendientes”***, específicamente en su parágrafo 2 señala que: *“Después de consultar a ambas partes, el Tribunal puede permitir a una persona o entidad que no sea parte en la diferencia (en esta regla “parte no contendiente”) que efectúe una presentación escrita ante el Tribunal, relativa a cuestiones dentro del ámbito de la diferencia.*

Al determinar si permite dicha presentación, el Tribunal deberá considerar, entre otras cosas, en qué medida: (a) la presentación de la parte no contendiente ayudaría al Tribunal en la determinación de las cuestiones de hecho o de derecho relacionadas con el procedimiento al aportar una perspectiva, un conocimiento o una visión particulares distintos a aquéllos de las partes en la diferencia; […] El Tribunal deberá asegurarse de que la presentación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a cualquiera de las partes, y que ambas partes tengan la oportunidad de someter observaciones sobre la presentación de la parte no contendiente”.

Article 5. Conflicts of Interest: Disclosure Obligations
(Traducción propia)
Artículo 5. Conflictos de intereses: obligaciones de divulgación

1. Los candidatos y adjudicadores deberán evitar cualquier conflicto de intereses directo o indirecto. Ellos deberán revelar cualquier interés, relación o asunto que razonablemente pueda considerarse que afecte su independencia o imparcialidad. Con este fin, los candidatos y adjudicadores deberán hacer todos los esfuerzos razonables para tomar conciencia de tales intereses, relaciones y asuntos.
2. Las divulgaciones realizadas de conformidad con el párrafo (1) incluirán lo siguiente:
   (a) Cualquier relación profesional, comercial y otras relaciones significativas, en los últimos [cinco] años con:

(i) Las partes [y cualquier subsidiaria, empresa matriz o agencia relacionada con las partes];
(ii) Los abogados de las partes;
(iii) Cualquier adjudicador o experto presente o pasado en el proceso;
(iv) [Cualquier tercero con un interés financiero directo o indirecto en el resultado del procedimiento];

(b) Cualquier interés financiero directo o indirecto en:
(i) El procedimiento o su resultado; y
(ii) Un procedimiento administrativo, un procedimiento judicial local u otro procedimiento de panel o comité que implique cuestiones que puedan decidirse en el procedimiento ISDS;

(c) Todos los casos de ISDS [y otros casos de arbitraje [internacional]] en los que el candidato o el adjudicador ha estado o está actualmente involucrado como abogado, árbitro, miembro del comité de anulación, experto, [conciliador y mediador]; y

(d) Una lista de todas las publicaciones del adjudicador o candidato [y sus discursos públicos relevantes].

3. Los adjudicadores tendrán el deber continuo de divulgar de manera oportuna de conformidad con este artículo.

Los candidatos y los adjudicadores deben arriesgarse a favor de la divulgación si tienen alguna duda sobre si se debe hacer una divulgación. Los candidatos y adjudicadores no están obligados a revelar intereses, relaciones o asuntos cuya relación con su papel en el proceso sería trivial.

COMENTARIO

Consideramos que el artículo debería incluir un inciso para la divulgación de posibles relaciones de parentesco cercano (consanguíneo y político), y la divulgación de amistad estrecha con las partes o los abogados de las partes; o con una persona que pueda tener interés en el caso.

JUSTIFICACIÓN

Al margen de los vínculos comerciales y o interés económico señalados en el Art. 5 del Proyecto de Código, el comentario rescata de manera general algunos criterios adicionales establecidos por las Directrices IBA (International Bar Association)[1] sobre Conflictos de Intereses en Arbitraje Internacional 2014 (Adoptadas por acuerdo del Consejo de la IBA el jueves 23 de Octubre de 2014)[2], a saber:

"Parte II: Aplicación Práctica De Las Normas Generales (…)

[1] La International Bar Association (IBA) (Colegio de Abogados Internacional) es una organización internacional compuesta por operadores jurídicos, colegios profesionales de abogados y asociaciones de derecho de diferentes nacionalidades. La IBA influye sobre la reforma del derecho Internacional y da forma al futuro de la profesión del Derecho en todo el mundo.

[2] Las Directrices IBA sobre Conflictos de Interés en Arbitraje Internacional, han sido objeto de amplia aceptación en la comunidad arbitral internacional. Los árbitros utilizan las Directrices habitualmente a la hora de decidir sobre posibles nombramientos y revelaciones. Igualmente, las partes y sus abogados toman en cuenta con frecuencia las Directrices al evaluar la imparcialidad e independencia de los árbitros, y las instituciones arbitrales y los tribunales estatales también consultan a menudo las Directrices a la hora de considerar recusaciones de árbitros. Las Directrices buscan armonizar los diversos intereses de las partes, representantes legales, árbitros e instituciones
arbitrales, quienes tienen encomendada la responsabilidad de asegurar la integridad, reputación y eficiencia del arbitraje internacional. Estas Directrices no son normas jurídicas y no prevalecen sobre la ley nacional aplicable ni sobre las reglas de arbitraje que las partes hubieren elegido.

(...) 2.2.2. Un pariente cercano del árbitro tiene un interés económico significativo en el resultado de la controversia. 2.2.3. El árbitro, o un pariente cercano suyo, tiene una relación estrecha con una persona física o jurídica contra quien la parte que resulte perdedora en la disputa pudiera dirigir un recurso." (...) "(...) 3.3.6.Hay un vínculo de amistad personal estrecho entre el árbitro y el abogado de una de las partes. 3.3.7. Existe enemistad entre un árbitro y el abogado que comparece en el arbitraje."

Article 6 Limit on Multiple Roles
(Traducción propia)
Artículo 6 Límite de múltiples roles

Los jueces [se abstendrán de actuar] / [revelarán que actúan] como abogados, testigos expertos, juez, agente o en cualquier otro rol relevante al mismo tiempo que lo están [dentro de X años de]actuar sobre asuntos que involucran a las mismas partes, [los mismos hechos] [y / o] [el mismo tratado].

COMENTARIO
Se consulta si es pertinente detallar de manera más precisa las limitaciones o las reglas respecto a los roles que podría tener un juez, por ejemplo:

- Si una persona actúa simultáneamente como árbitro internacional y como abogado en procedimiento separados de ISDS.
- Superposiciones entre el trabajo de abogado y el juez.
- Superposiciones entre el trabajo de los abogados y el servicio como experto o como mediador.

Asimismo, se consulta sobre la pertinencia sobre si en caso de que de que exista la obligación de revelar los roles superpuestos, se permitiría que las partes tomen alguna decisión al respecto.

Article 8 Availability, Diligence, Civility and Efficiency
(Traducción propia)

Artículo 8 Disponibilidad, diligencia, civismo y eficiencia
1. Antes de aceptar cualquier nombramiento, los jueces deberán asegurarse de su disponibilidad para escuchar
caso y tomar todas las decisiones de manera oportuna. Una vez seleccionados, los adjudicadores estarán disponibles para desempeñar y desempeñarán sus funciones con diligencia y rapidez durante todo el procedimiento. Los adjudicadores se asegurarán de dedicar el tiempo y el esfuerzo necesarios al procedimiento y rechazar las obligaciones en competencia. Conducirán los procedimientos de manera que se eviten retrasos innecesarios.

2. [Los adjudicadores se abstendrán de participar en más de [X] procedimientos pendientes del ISDS al mismo tiempo para poder emitir decisiones oportunas.]

3. Los adjudicadores serán puntuales en el ejercicio de sus funciones.

4. Los jueces actuarán con cortesía, respeto y colegialidad hacia las partes y entre sí, y considerarán los mejores intereses de las partes.

COMENTARIO
Se consulta si es pertinente establecer una limitación del número de casos que un juez pueda atender simultáneamente.

Canada

1. Canada welcomes the development of the joint ICSID-UNCITRAL Code of Conduct for Adjudicators in Investor-State Dispute Settlement (referred below as the draft Code of Conduct). In Canada's view, the draft Code of conduct provides a good starting point for further work and discussions. As many countries have recognized, there is a need for more uniformity and clearer rules regarding the duties and responsibilities of arbitrators. The draft Code of Conduct reinforces existing rules by providing greater guidance, addresses new concerns that are not properly or sufficiently addressed in the existing rules and allows for a common code of conduct to apply across different treaties and arbitral rules. By promoting a common understanding of the duties and responsibilities of arbitrators, and greater disclosure obligations for arbitrators, the draft Code of Conduct is a first step in addressing the perception of lack of legitimacy and bias of arbitral tribunals in investment disputes. We would also expect that it would lead over time to fewer challenges to arbitrators or to awards, or at a minimum, allow these challenges to take place at an earlier stage in the arbitral process, and therefore lead to greater efficiency. As such, the draft Code of Conduct is a welcome contribution and a useful tool in Investor-State Dispute Settlement (ISDS) reform.

2. This submission sets out Canada's view on certain specific issues related to the draft Code of Conduct prepared by the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) and published on May 1, 2020.Subject to the specific comments and general observations set out below, Canada is of the view that the draft Code of Conduct properly sets out applicable principles and detailed provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency and civility.

3. At the outset Canada would like to make three overarching observations. First, we believe that further discussion is required on the implementation and enforcement of the draft Code of Conduct although we understand that the outcome will depend in part on other reform options that are still being discussed. Canada has included in its comments initial views regarding the enforcement of the draft Code of Conduct. In many respects the draft Code of conduct relies on the existing arbitral rules regarding disqualification of arbitrators to address failure to act in accordance with certain duties. Failure to comply with the draft Code of Conduct would in some instances provide evidence in support of the disqualification of arbitrators. Further discussion of the interplay between the applicable arbitral rules and other factors that may affect enforcement could lead to a better understanding of the limits that currently exist, whether more could be done and if so, by what mechanism. Additional consideration of different options that would promote

compliance with the draft Code of Conduct (for example through education of candidates and arbitrators, publication of challenges and disqualification decisions, etc.) is also desirable.

4. Second, further consideration is required with respect to the applicability of the draft Code of Conduct to a permanent tribunal. In October 2019, Working Group III considered the implementation of a code of conduct in the current ISDS regime and in the context of potential standing multilateral mechanisms for ISDS. General support was expressed for developing a code of conduct. It was also agreed that the work would identify aspects that would apply commonly to ISDS tribunal members as well as elements that would be distinct for *ad hoc* and permanent members (A/CN.9/1004*, paras. 51 and 68). While the guiding principles should be similar and many of the provisions in the draft Code of Conduct would equally apply to adjudicators in a permanent mechanism, in some respect the considerations differ. For example, enforcement of the draft Code of Conduct and timing and the nature of disclosures would raise different considerations in the context of a permanent mechanism. It may also be appropriate given the different context to impose additional obligations on the permanent adjudicators. In its comments, Canada has flagged some of the areas where differences could arise. The desirability of a separate code of conduct for permanent adjudicators could be considered in the course of further discussions on the draft Code of Conduct. It may be desirable to postpone a final decision regarding its applicability to a permanent mechanism until the structure and functioning of the permanent mechanism is more fully developed. This would enable a more informed discussion regarding whether the draft Code of Conduct is well adapted to the envisaged mechanism and whether adjustments, and therefore a separate more tailored code, are required. Canada does not believe however that the issue of the applicability of the draft Code of Conduct to members of a permanent mechanism should slow down progress on finalizing such code with respect to arbitrators.

5. Third, further clarification is required with respect to the relation between the draft Code Conduct and other applicable codes of conduct such as those included in bilateral investment treaties as well as the relation between the draft Code of Conduct and the IBA Guidelines on Conflict of Interest in International Arbitration which the parties often also refer to in investment arbitration. Although the issue will have to be addressed in the context of the consideration of the mechanism by which the draft Code of Conduct is implemented, early discussion of this issue may be beneficial.

Definitions and application of the Code (Article 1-2)

6. The proposed definition of "Investor-State dispute settlement" to which the code applies includes disputes arising under "an investment treaty, domestic law or an agreement by the parties to the dispute." We note that in previous discussions on reform in ISDS, such as those on transparency, the focus of concerns has been on investment treaty arbitration. Indeed, the UNCITRAL Transparency Rules were not made applicable to disputes under domestic law or contract. While concerns similar to those that are meant to be addressed by the draft Code of Conduct may arise in disputes other than those arising from investment treaties, the concerns may not be the same and therefore obligations set out in the code may not always be appropriate. Therefore, further discussion of the rationale for extending it beyond investment treaty arbitration would be welcome. If the scope is extended beyond investment treaty arbitration, it may be useful to clarify what investor state disputes under domestic law are meant to be captured.

7. A second issue related to the proposed scope of application of the draft Code of Conduct is its application to the existing ISDS mechanisms as well as to members of a permanent mechanism for the settlement of investor-State disputes. Canada recognizes that greater uniformity in rules is desirable. However, the applicable rules need to be adapted to each context. As noted above, some rules will very likely need to be modified for adjudicators appointed to a permanent mechanism and could justify a separate more tailored code.

8. Third, Canada also suggests specifying in Article 2 (2) the relevant provisions applicable to Candidates (Articles 5, 7, 10, 12). Finally, the potential application of the draft Code of Conduct to mediators/conciliators (with appropriate adjustments) should also be further considered.

Duties and Responsibilities (Article 3)

9. A general provision setting out the general duties and responsibilities of adjudicators provides useful guidance where specific situations are not addressed in the draft Code of Conduct. At the same time, the relationship between the duties and responsibilities set out in Article 3 and the subsequent provisions which elaborate upon them could be made more clear in the text. This could avoid certain repetitions such as Article 4(1).

Conflict of Interest: Disclosure Obligations (Article 5)

10. In order to avoid the impression that situations subject to disclosure obligations are necessarily conflicts of interest, it may be appropriate to modify the title to "conflict of interest and disclosure obligations".

Article 5 - General comments

11. Canada supports efforts to clarify the scope of disclosure obligations for adjudicators and candidates. In considering the scope of the disclosure obligations to include in Article 5, it is important to ensure that the burden of detailed disclosure is not such that it makes it impractical for individuals in the legal or business community to serve as arbitrators and as a result prevents the parties from choosing the best qualified arbitrators. It should also be clear that the disclosure of information pursuant to Article 5 is not necessarily indicative of a potential conflict or lack of independence and impartiality. At the same time, while it is useful to specify certain required disclosures in Article 5, we agree with the approach proposed in the draft Code of Conduct which is not to provide an exhaustive list of circumstances that merit disclosure. As a general matter, we welcome further discussion and the possible inclusion of practical guidelines regarding situations in which potential conflicts would arise (for example repeat appointments) and the parties' ability to waive such conflicts. Such guidance could be provided either in the Code of Conduct or in the commentary to the Code of conduct.

Specific comments on article 5(1)-5(4)

12. Canada suggests adding to Article 5(1) a reference to the timing of disclosure. While this would depend on the applicable arbitral rules (for example for ICSID proceedings this would be done through the arbitrators' declarations upon acceptance of their appointments) and the specific situation in which the disclosure may become necessary (such as when an issue arises subsequently), this could be accommodated with language such as "as soon as possible in view of

the information available to the arbitrator at the time or in accordance with the applicable rules". The timing issue is only partially addressed by Article 5(3) which covers the continuing duty of disclosure. In addition to timing, the recipients of the disclosures, i.e. the parties to the proceedings, could also be specified recognizing that, depending on the applicable rules, it would be done through the administering authority or another entity (in the case of a permanent mechanism for example).

13. With respect to disclosure of professional or business relationships in article 5(2), Canada agrees that providing for disclosure of the relationships in the past 5 years is reasonable. Of course, a relationship that existed before the five-year threshold and could reasonably affect the adjudicators' independence or impartiality would still be subject to a duty of disclosure in accordance with paragraph 1.

14. Regarding the disclosure in article 2(a)(i), Canada agrees that the disclosure should be extended to relations with subsidiaries, parent companies or agencies related to the parties. This would provide the parties a more accurate indication of the existence of potential conflicts of interest. Given complex corporate structures at issue in investment arbitrations, it is possible that arbitrators may not be aware of these relationships but they would be subject to an obligation to make reasonable efforts to become aware of such interests as specified in article 5(1).

15. Further, Article 2(a)(ii) could specify that relationships with the parties' counsel include not only relationship with individual counsel representing a party but also with the law firm of the parties' counsel. Previous appointments by counsel and the law firm of a party should be included in this disclosure to address concerns about repeat appointments.

16. With respect to article 2(a)(iii), we question the rationale and need to specify the relation to "present or past adjudicators or experts in the proceeding" as well as the broad scope of this obligation. To the extent arbitrators have sat together on previous arbitrations, or heard from the same experts in previous arbitrations, it would not raise a conflict issue. If there is some other relationship that may raise a conflict (for example if in the context of a previous arbitration one of the arbitrators acting as counsel hired the expert of one of the parties in the proceeding), this would fall under the general rule and should obviously be disclosed. An issue could also arise if an arbitrator is appointed to an *ad hoc* committee sitting in annulment of an award rendered by a co-arbitrator in another on-going dispute. In this respect, more specific guidelines addressing these different situations could be useful.

17. The disclosure of any relationship with a third party with a direct or indirect financial interest in the outcome of the dispute as provided in Article 2(a)(iv) is essential to ensuring the appearance of impartiality and independence. In order for this provision to be effective it must be accompanied by a requirement (in the treaty or in arbitral rules) that the parties to ISDS proceedings disclose the existence of such third party funding.

18. Regarding the disclosure in article 2(b), it would be useful to confirm that the reference to "any direct or indirect financial interest" in other proceedings does not arise simply by virtue of

receiving remuneration as arbitrator or adjudicator in other proceedings. On its own, this situation is unlikely to give rise to conflicts or interests.

19. Even if the disclosure of all ISDS cases in which the candidate or adjudicator has been or is involved requires the disclosure of information that is already publicly available, it would nevertheless have the benefit of making the information easily available to all, including states and parties with more limited resources and could be done in a way that would not be too demanding of candidates and arbitrators. Moreover, in some cases, the information is not always accessible, in particular when an adjudicator or candidate was retained in a case in an advisory capacity (not as counsel of record or testifying expert) or when the fact of an arbitration is kept confidential. In order to maintain the balance between the burden of disclosure and the relevance to potential conflict issue, we would favour limiting Article 5(2)(c) to investment disputes under an international agreement (ISDS cases and state to state investment disputes) given the potential commonality of issues. An adjudicator's role in other international arbitration such as a contract based commercial arbitration would only be disclosed if it could reasonably be considered to affect their independence and impartiality (for example if the adjudicator was previously involved as counsel in a commercial arbitration arising out of the same measure, the same facts at issue in the proceedings or involving the same party). Similarly, it may be preferable not to extend the disclosure to all cases where the candidate or adjudicator acted as mediator or conciliator (given the different nature of the role) recognizing that disclosure may however be required in certain circumstances.

20. To the extent that the disclosure of all publications by the adjudicator requires the disclosure of information that is already publicly available, and given its limited value added, the inclusion of this provision should be measured against the additional burden imposed on candidates and adjudicators and the risk that it deters good candidates from expressing their views on the law. As a practical matter, we would consider it sufficient for adjudicators and candidates to make publicly available, for example on their web page, a list of their principal publications. With that in mind, we note that extending the disclosure, to "relevant speeches" may have some benefits but that it may be challenging for certain candidates and adjudicators to identify what constitutes a relevant speech and to ensure that they disclose all of their (often numerous) speaking engagements. We would welcome further discussion and input on whether the proposed provision is likely to raise practical difficulties.

21. Finally, the timing and nature of the disclosure would have to be adapted in the context of a permanent mechanism. Adjudicators would only be able to disclose any relations with the parties and financial interests in proceedings once they are assigned to a specific arbitration. Depending on how adjudicators are assigned to the specific case, concerns about repeat appointments would be different than in the current ad hoc arbitration system and therefore the scope of disclosure in Article 5(2)(a) and (b) may require adjustment. Further, Article 5(2)(c) and (d) would also need to take into account the permanent nature of the mechanism and any additional prohibition on multiple roles or outside employment that would apply to the permanent adjudicators.

Limit on Multiple roles (Article 6)

22. The disclosure of ISDS cases involving the adjudicator or candidate provided for in Article 5(c) is the first necessary step to ensure that the parties are made aware of, and have an opportunity to object to a candidate or adjudicator's incompatible role. Canada also supports the inclusion of a provision limiting the ability of adjudicators to act in incompatible roles during and for a certain period of time after their appointment. Article 6 has to be considered in light of the particular mechanism being considered. For example, a strict and broad prohibition on also acting as counsel, witness, expert or agent in other investment disputes is essential in a permanent mechanism. In the context of ad hoc appointments, Canada believes that the same rationale applies and that arbitrators should refrain from accepting new mandates as counsel, witness, experts or agents in investment disputes. The practice of adjudicators acting in multiple often incompatible roles creates an appearance of bias that undermines the legitimacy of ISDS arbitration. Some concerns have been expressed with respect to how such a prohibition could impact efforts aimed at increasing diversity in the arbitrator pool. In Canada's experience, it is not necessarily the case. However, we welcome further discussion as to whether, in the context of ad hoc appointments, some flexibility (for example by allowing the parties to waive the prohibition on multiple roles upon disclosure) is justified.

23. In terms of the scope of the prohibition, Canada's view is that it should be extended to all investment disputes under an international agreement and not only disputes under the same treaty, involving the same parties or the same facts. Many treaties contain similarly worded provisions and the interpretation of one treaty can influence the interpretation of another. The prohibition does not need not be extended to arbitrators acting as an independent adjudicator or judge. Further, in Canada's view the prohibition could be limited to the duration of the proceedings.

24. The following language could be considered: "Upon selection, [except where otherwise agreed by the parties] an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under an international agreement." Language allowing the parties to agree otherwise where they do not see a conflict of interest could be included in the provision.

Integrity, Fairness and competence (Article 7)

25. Article 7 provides some useful clarification regarding the adjudicators' duties. At this time, we have no specific comment or suggestion on the text. With respect to the required knowledge and qualifications of arbitrators, Canada notes that the draft Code of Conduct does not address the issue but leaves it to arbitral rules and treaties. Canada recognizes that states may chose to emphasize different requirements in their treaties or in particular cases in the context of the existing ad hoc arbitration system. In the context of appointments to a permanent mechanism states could however certainly agree to certain minimum requirements such as expertise in international law and go further in imposing a duty of continuous training.

Availability, Diligence, Civility and Efficiency (Article 8)

26. Article 8 provides some useful clarification regarding the adjudicators' duties which should assist in addressing concerns about delays and costs in ISDS. Certain time limits are also being considered in certain treaties and arbitral rules and could complement this provision. Canada does not believe however that Article 8(3) is necessary as the number of cases on which an adjudicator

is appointed is not necessarily indicative of workload, capacity and availability at any given time. It is therefore preferable to rely on the arbitrators' general obligation described in Article 8(1).

Confidentiality (Article 9)

27. Canada supports the addition of this provision addressing the arbitrators' confidentiality duties. However, in our view, Article (1)(c) should be clarified to limit the disclosure of adjudicators' deliberations and views except in an order, decisions or awards. Instead of the language currently in brackets in Article 9(2), which prevents arbitrators from making any comment on a decision in which they participated, we suggest specifying that arbitrators should not make public statements or comments regarding the merits of a *pending* tribunal proceeding. After the decision is issued, some commentary may be acceptable but arbitrators should nevertheless exercise appropriate restraint.

Pre-appointment Interviews (Article 10)

28. Canada supports the introduction of a provision that provides common guidance to the parties and candidates on acceptable practices for pre-appointment interviews. In order to ensure the respect of the provision by the parties, the following additional text in paragraph 1 could be added: "candidates shall not accept appointments where such discussions have taken place". In Canada's view, this would be an effective way of ensuring the respect of the provision without needing to disclose the content of interview with candidate. In Canada's view the bracketed language in paragraph 2 is unnecessary and may give rise to practical difficulties. It may be difficult to determine what constitutes a pre-appointment interview subject to disclosure and whether it would extend, for example, to that a general discussion not related to a particular case.

Fees and Expenses (Article 11)

29. The proposed provision addresses some of the existing issues that have arisen in respect of fees and expenses of arbitrators. Notwithstanding the fact that different arbitral rules contain their own provisions dealing with fees and expenses, it may be useful to reiterate in the Code of Conduct the arbitrators' duty to ensure that their fees and expenses are reasonable and justified.

Enforcement of the Code of Conduct (Article 12)

30. Canada supports the inclusion of a clear obligation on adjudicators and candidates to comply with the applicable provisions of the draft Code of Conduct. An important question in this regard is whether it is sufficient to provide for the application of the disqualification and removal procedures in the applicable rules (as set out in Article 12(2)).

31. As a starting point, non-compliance with the code should be taken into account in the context of disqualification and removal of arbitrators under the different arbitral rules. While the applicable arbitral rules contain their own standards for disqualification and removal, a breach of the provisions of the draft Code of Conduct which contain an elaboration on the arbitrators' duties (for example to be independent and impartial) should lead to disqualification or removal. On the other hand, not every failure to comply with the draft Code of Conduct will necessarily lead to disqualification or removal. It is possible to contemplate for example that minor or non-intentional failure to disclose certain of the elements in Article 2 do not affect an arbitrator's independence or

impartiality and should not result in disqualification. However, failure to comply with the draft Code of Conduct should be taken seriously and bear consequences.

32. Non-compliance with the code should be brought to the attention of the administering and appointing authorities. Depending on the breaches at issue, in addition to reputational effects, it could have an effect on suspension of payment to arbitrators (for example for failure to act diligently and efficiently as per Article 8) and the appointing authority should consider non-compliance with the code of conduct in making in subsequent appointments. Further, improved publicity on challenges to arbitrators because of non-compliance with codes of conduct (whether it leads to a disqualification or a resignation of the arbitrator) and publication of disqualification decisions would contribute to compliance with the code of conduct. This increased publicity would also encourage respect of the code after the function or terms of an arbitrator or adjudicator was terminated. Beyond this, Canada notes that the mechanisms necessary to ensure the enforcement of the code of conduct should be considered together with the decision regarding the mechanism by which the draft Code of Conduct is implemented.

33. Finally, in order to promote compliance, seminars and training could be provided to candidates to explain the draft Code of Conduct and the scope of their obligations.

Chile

This document includes the comments of the Republic of Chile to the draft Code of Conduct submitted for comments by the ICSID and UNCITRAL Secretariats on 1 May 2019. This document is not exhaustive, nor does it represent a final position of the Republic of Chile. The numbers of the provisions referred to correspond to the numbering presented in the draft code.

Article 1 - Definitions

For the purpose of this Code:

1. "Adjudicators" means individuals appointed to resolve investor- State disputes, including arbitrators howsoever appointed, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;

(…)

COMMENT

- It may be worth clarifying that the code has been drafted to apply to the ISDS context.
- To clarify that the term adjudicators includes party appointed adjudicators, the adjudicators appointed by an arbitral institution or through any other mechanism, we propose to include at the end of the sentence the words "*howsoever appointed"*.

Article 2 - Application of the Code

1. This Code applies to all persons serving as adjudicators in ISDS proceedings. ~~Adjudicators shall take appropriate steps to ensure that their~~ ~~a~~Assistants to adjudicators ~~are aware of, and~~ shall also comply with, the ~~relevant~~ provisions of this Code, to the extent relevant.

(…)

COMMENT

- Although we are aware of the importance to have a code of conduct that solely and comprehensively regulates the obligations of adjudicators, we believe that their assistants also ought to be bound by the Code. The language used in this Article makes the adjudicator responsible for the behavior of its assistant instead of making the assistants directly responsible for their conduct.
- Considering that the Tribunal should only accept an assistant that has been previously consented to by the Parties, we propose that when the Parties receive a request to approve an assistant, the assistant be asked first to sign an affidavit confirming that he/she will also comply with the Code.

Article 3 - Duties and Responsibilities

- No comments on Article 3.

Article 4 - Independence and Impartiality

1. Adjudicators shall at all times be independent and impartial.
2. In particular, adjudicators shall not:

(a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party or non-disputing Treaty Party to the proceedings, or fear of criticism;

(b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;

(c) Take action that creates the impression that others are in a position to influence their conduct or judgement;

(d) Use their position to advance any personal or private interests; or

(e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties.

(f) Enter into a relationship or acquire a business or financial interest that is likely to affect his or her independence and impartiality or that might reasonably create an appearance of impropriety, bias or dependence.

COMMENT

- We suggest including a reference in paragraph (a) to non- disputing Treaty Party, considering the participation of States as non-disputing parties under the proposed amendments to the ICSID Rules.
- We suggest incorporating an Article 4(f), according to which, during the proceeding, the adjudicator shall avoid entering into new relationships or acquire financial or business interests that could affect or appear to affect its independence or impartiality. We recognize that this has already been included in paragraph (b) for past or ongoing relationships but suggest the same be included for forward looking situations.
    - With this addition, we also seek to prevent situations in which arbitrators resign mid-way because of a conflict of interest created by a superseding circumstance that could have been avoided. It was a question that was raised by several delegations during the

discussions in working group III. We look forward to discussing this or other ways of addressing this issue.

Article 5 - Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality or that might create an appearance of bias or dependence, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.

2. Disclosures made pursuant to paragraph (1) shall include the following:

(a) Any professional, business and other significant relationships, within the past [five] years with:

(i) The parties [and any direct or indirect subsidiaries or parent- companies ~~or agencies related~~ of ~~to~~ the parties];

(ii) The parties' counsel;

(iii) Any present or past adjudicators or experts in the proceeding;

(iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];

(b) Any direct or indirect financial interest in:

(i) The proceeding or in its outcome; and

(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be relevant for the underlying dispute to be decided in the ISDS proceeding; and

(c) All ISDS [and other ~~[~~international] arbitration~~]~~ cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator.~~]; and~~

(d) ~~A list of all publications by the adjudicator or candidate [and their relevant public speeches].~~

3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.

4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made.

~~Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial~~.

5. The disclosure of the information does not, in and of itself, create a presumption for the existence or appearance of a conflict.

COMMENT

- Considering that the disqualification standard under ICSID Convention Articles 57 and 14(1), do not require proof of actual dependence or bias, but instead "it is sufficient to establish the appearance of dependence or bias" (see, e.g. *BlueBank v. Venezuela*, Decision on Disqualification, 2013), we believe it is important that these same terms be reflected in Art. 5(1), for the code to be a useful tool in preventing conflicts of interest that could give rise to a challenge after the proceeding has been initiated and thus increasing the duration and cost of proceeding.
- We propose to include "prior to accepting his or her appointment or, if thereafter, as soon

as he or she learns of them" in paragraph 1 in order to make clear when the disclosure shall take place.

- We agree with the proposal to include a 5-year period for the disclosure of information under Art. 5(2).
- We suggest omitting the term "agencies related to the parties" included under 5.2.(ii), considering that this term may not be sufficiently precise and may impose too big of a burden on adjudicators, and/or would be hard to enforce. Instead we propose to refer to "direct or indirect" subsidiaries of the Parties, which may be a concept more commonly used in different legal systems and easier to identify.
- We consider indispensable that the adjudicators disclose any link with third parties with direct or indirect interests, including in particular, third party funders, as set forth under 5(2)(a)(iv).
- As to Art. 5(2)(b)(ii), we consider that it will be rare for administrative or domestic court proceedings "to involve questions that may be decided in the ISDS proceeding". In particular, "questions" is a term that may be understood in multiple ways. We therefore suggest an amendment that seeks to provide more clarity, and which attempts to acknowledge that administrative or local proceedings most often include questions of fact relevant to the underlying dispute, but this is not necessarily the same as the legal issue to be decided by the tribunal in an ISDS proceeding.
- With regard to Art. 5(2)(c), we agree that adjudicators should disclose their participation in all ISDS proceedings, as well as all international arbitration, but not necessarily all domestic cases, EXCEPT, if the domestic cases relate to the Parties to the proceeding. We understand that those situations are covered by Art. 5(2)(a). If this is not the case, then we believe an additional sentence could be added to confirm that the adjudicator should disclose all local or international proceedings in which he or she is involved in any capacity, in which one of the Parties to the proceeding is also involved.
- With regard to Art. 5(2)(d), we suggest including this disclosure requirement relating to the publications and speeches, in a different Article, as a way to minimize a potential chilling effect on scholars.
    - In particular, we consider that by including a duty to make disclosures under Art. 5, with other elements that have in the past served as basis for successful challenges, may not be sending the appropriate message, and could also inadvertently prevent necessary academic discussion from flourishing. Academic Publications, studies and empirical analysis of the issues commonly discussed in ISDS, have been an important engine for the development of international investment law, and even for potential changes in ISDS cases.
    - The situation with regard to publication and speeches is complex, and this should be acknowledged by incorporating it in a different article.
- We suggest deleting the last sentence of Article 5(4), as this appears to be obvious, but at the same time may serve as a mechanism for adjudicators to justify not disclosing information. If a party brings something to the attention of the other party and the tribunal or the members of the tribunal it is because it does not consider it to be trivial. Therefore, we believe this sentence will give rise to many arguments, as to what could or could not be considered "trivial" adding more uncertainty to what needs to be disclosed, instead of assisting in the proper implementation of the code.

- We suggest including an additional sentence to reinforce what is already in the commentary, which is that by disclosing the information, the adjudicator is not accepting that there is a potential conflict of interest or other situation, but merely complying with the disclosure obligations set forth in the code.

Article X - Additional recommended disclosures
Candidates and adjudicators should provide a list of all publications and shall make all reasonable efforts to update such publications on an ongoing basis for the duration of the proceeding.

COMMENT

- Consistent with our argument set forth above relating to 5(2)(d), we propose a new article to be incorporated as Article 6 or 5.a, which would incorporate a list of elements that the code recommends being disclosed.

Article 6 - Limit on Multiple Roles

Adjudicators shall [refrain from acting concomitantly]/[~~disclose that they act~~] as counsel, expert witness, judge, ~~agent~~ or in any other relevant role on any other pending or new ISDS proceeding.~~the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].~~

COMMENT

- Consistent with the codes of conduct incorporated in its recent treaties, as well as modern international investment law, Chile proposes to ban multiple roles in ISDS proceedings for the duration of the proceeding, for proceedings arising out of the same treaty or any other international agreement.
- The ban should apply to wearing two or more hats for cases running simultaneously.
- We also suggest that "agent" may not be understood by all ISDS users in the same way, so we would suggest deleting this term.

Article 7 - Integrity, Fairness and Competence

1. Adjudicators shall have the highest standards of integrity and fairness. They shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.
2. An adjudicator shall not engage in ex parte contacts concerning the proceeding.
3. Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties. Candidates shall ~~ould~~ only accept appointments for which they are competent.
4. Adjudicators shall not delegate their decision-making function to any other person.

COMMENT

- Consistent with the rest of the provision, we believe that Art. 7(3), second sentence, should also refer to "shall", instead of "should".

Article 8 - Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, adjudicators shall ensure their availability to hear the

case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently ~~and expeditiously~~ throughout the proceeding, which includes, without limitation, performing a comprehensive and thorough review of the full record of the case and evidence adduced by the Parties; and to participate constructively in hearings and deliberations.

2. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.

~~32.~~ [~~Adjudicators shall refrain from presidingserving in more than~~ [~~8X~~] ~~pending ISDS proceedings at the same time so as to issue timely decisions.~~]

3. Adjudicators shall perform their duties expeditiously and be punctual in the exercise of their functions.

4. While serving in any pending ISDS proceedings, adjudicators shall not accept subsequent obligations that would prevent them from complying with their duties under this Article-

5. Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.

COMMENT

- Draft Art. 8.1. refers to the adjudicators' obligations to perform their duties diligently. We understand that the criteria of diligence, differs from the notions of acting in a punctual or expeditious manner, which refer more to a temporal question.
    - We understand that the duty to act diligently is broader and incorporates other questions, such as requiring arbitrators to make a comprehensive and thorough review of the full record of the case and of all the evidence presented to the Tribunal. We propose an amendment in this sense, which seeks to reflect a concern that was raised by a number of States during the UNCITRAL Working Group III discussions.
    - We understand that the duty to act expeditiously would be better placed in Art. 8(3), in conjunction with the duty to be punctual.
- We also understand that pursuant to Art.8(1), arbitrators shall agree to prioritize their adjudicator work over competing demands when they accept an appointment.
- With regard to the original Art. 8(2), it may prove extremely difficult to set a number of cases an adjudicator can hear simultaneously, in any capacity as the number of cases an arbitrator can diligently manage, depend on many factors, as set forth in the comments to the draft code. For this reason, and subject to additional information we do not suggest adopting an absolute limitation on the number of cases at this time.

Article 9 – Confidentiality

1. Adjudicators shall not:

(a) Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;

(b) Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and

(c) Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.

2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering

it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated, unless and until the decision, ruling or award becomes public].

COMMENT

- We agree that adjudicators shall not comment on any decision, ruling or award in which they participated, and thus suggest deleting the brackets in Art. 9.2. but we also propose additional language in order to ensure that adjudicators may comment on decisions in which they have participated once they become public.

Article 10 - Pre-appointment Interviews

~~1.~~ Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings. ~~[If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]~~

COMMENT

- Subject to further information, we suggest omitting Art. 10.2, which requires disclosing the existence of the pre-appointment interview and, based on the draft comments to the code, we understand it would also require disclosing the content of the interview. This could prove burdensome and unnecessary considering that Art. 10.1, already sets forth what can and what cannot be discussed during the pre-appointment interview.

Article 11 - Fees and Expenses

COMMENT

- No comments

Article 12 - Enforcement of the Code of Conduct

1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.
2. The disqualification and removal procedures in the applicable rules shall continue to apply.
3. [Other options based on means of implementation of the code]

COMMENT

As to the enforcement of the code, we offer the following comments:

- We believe *monetary, disciplinary or reputational* sanctions could prove useful, but not all types of sanctions may be appropriate for all obligations. In this sense, enforcement of the code may be an issue that we would like to revisit once there is a second or third draft of the code.
- In the meantime we consider that added transparency and greater insights into the adjudicators conduct and track record, may not only encourage self-regulation and voluntary compliance with the provisions of the Draft Code, but may also be an adequate enforcement mechanism.

- For example, with regard to reputational sanctions, in the ICSID Rules Amendment process, at some point it was being considered giving some publicity to the compliance or lack thereof with the timeframes for the issuance of awards and decisions provided in the new rules. That mechanism, if finally adopted, could also serve the purpose of ensuring for example compliance with the obligations set forth in Art. 3(c) and Art. 8 relating to the duty to act with diligence, and efficiency.

As to the implementation of the code, we offer the following comments:

- For ICSID cases, we understand that the current proposal is that a finalized agreed code could be appended to the declaration signed by individual arbitrators when they accept the appointment (current Rule 6), and hence incorporated into the process through this mechanism.
- For non-ICSID cases, the parties could adopt it on a case by case basis, by requesting arbitrators to commit to acting consistently with the code when they accept their appointments, and thus the code should be proposed in the seeking acceptance letters to arbitrators.

- Finally, we believe that incorporating a final and agreed code of conduct in a Multilateral Investment Reform Agreement or Multilateral Treaty on ISDS Reform, could be an excellent implementation option.

Colombia

COMMENTS BY THE REPUBLIC OF COLOMBIA ON THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR STATE DISPUTE SETTLEMENT[3]

INTRODUCTION

Colombia is of the view that the development of a code of conduct is a viable option for Investor State Dispute Settlement (ISDS) reform and the ongoing process to amend the ICSID's rules of procedure and therefore attaches high importance to it. In fact, and as Colombia pointed out since 2017 and in its submission of June 2019 in preparation for the thirty-eighth session of UNCITRAL Working Group III[4], standards on independence, impartiality and conflicts of interest of arbitrators and decision makers, reflected in a code of conduct, should be part of the minimum standards or core provisions an UNCITRAL ISDS model for implementing reforms should contain.

The importance Colombia attaches to the conduct of adjudicators of investor-State disputes, has been reflected in its model BIT (2017). Since then, it has pursued the inclusion of specific provisions regarding the conduct of arbitrators in its negotiations of International Investment Agreements (IIAs).

[3] These comments are made to the draft Code of Conduct as released by the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) on May 1, 2020. Colombia might make further comments, depending on future developments in the process to amend the ICSID's rules of procedure and the Investor-State Dispute Settlement Reform discussions underway in the context of UNCITRAL Working Group III.

[4] https://undocs.org/en/A/CN.9/WG.III/WP.173

In the same spirit, Colombia coincides with the general idea provided by the document "*Background information on a Code of Conduct*" published by the General Assembly of United Nations on July 31 2019[5]. Indeed we believe that a code of conduct should aim at providing a uniform approach to requirements applicable to investor-States dispute adjudicators and giving more concrete content to broad ethical notions and standards used in the applicable instruments, including the ICSID Convention, IIAs and applicable arbitration rules.

Finally, Colombia hereby thanks the Secretariats of ICSID and UNCITRAL for the draft text of the Code of Conduct for Adjudicators (and the useful commentary notes in each proposed article) and presents its comments to it. These comments are sent with the purpose of contributing to the enrichment and efficacy of the draft text.

SPECIFIC COMMENTS

A. Article 1 - Definitions

Paragraph 2 *"Assistants" means persons working under the direction and control of the adjudicators, who assist them with case-specific tasks, including research, review of documents, drafting and other relevant assignments as agreed in the proceeding*."

Colombia finds that this definition is too broad and potentially gives assistants substantive competences they should not have. Although it is uncontroversial that adjudicators, specifically arbitrators, can be assisted in *administrative and logistical* case-specific tasks, we find inappropriate that a person replaces them in important tasks that should be performed by the adjudicator himself, more so in the case of arbitrators. Such tasks include drafting and reviewing documents.

When Colombia gives its consent to international arbitration, it does so under the premise that disputes will be resolved by an expert adjudicator, chosen by the parties, or elected in accordance with the respective rules. We expect that such expert adjudicator reviews all the documents submitted by each party and that based on such information, drafts an award that reflects its conclusion. In other words, we expect arbitrators to perform their duties personally.

We believe that the process of reviewing documents is essential to arrive to a decision regarding a dispute. The greater or lesser attention put on a particular set of documents, could determine the outcome of a case. If such documents are not reviewed by the adjudicator personally, and instead he or she relies on a summary elaborated by an assistant, relevant information could be lost. The same can be said regarding drafting the award, or procedural orders deciding on

[5] https://undocs.org/en/A/CN.9/WG.III/WP.167

important issues such as those related to jurisdiction or the balance between each party procedural rights. The process of drafting organizes and crystalizes thought.
Well known cases where the role of an assistant was questioned [6]serve as examples of potential complex issues. Such issues have been discussed by doctrine as well[7]. Regardless of the outcome of the specific cases mentioned, for Colombia, it is clear that the purpose of ISDS is not to make the life of busy arbitrators easier, so that they can accommodate an unrealistic amount of cases in their schedule. Our citizens expect that these high-profile cases that relate to our natural resources and public utilities, among others, and compromise large sums of public funds, are decided by the arbitrators of the case, with their full attention and compromise.

The wording of paragraph 2 of this draft article as it is now, allows for a grey zone, where assistants can review documents and draft awards, without concrete limits. Therefore, we suggest eliminating the following wording from this paragraph: "*review of documents, drafting*". We also suggest adding the words "*administrative and logistical*" before "*case-specific tasks*".

Paragraph 4 *"Investor-State dispute settlement" (ISDS) means a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute*
Since this definition is so broad, it will have to be analyzed again later, when the real scope of application of this draft code is clear, in connection with its possible effects in terms of enforceability.

B. Article 2 - Application of the Code

Paragraph 2 - *Candidates must comply with the relevant provisions of the Code as soon as they are contacted in relation to a possible appointment.*
This language does not take in to account that first contacts often relate to availability. If an arbitrator is not available, it is unnecessary to ask for disclosures. Therefore, we propose adding the following text following the word appointment: "*in accordance with the applicable arbitration rules*."

C. Article 4 - Independence and Impartiality

[6] For example, in its Defense on Appeal of the Yukos awards (PCA Cases No. AA 226, 227 and 228), the Russian Federation argued before the District Court in The Hague in the Netherlands that the assistant to the Tribunal was in fact a fourth arbitrator. https://www.italaw.com/sites/default/files/case-documents/italaw9633.pdf
[7] Constantine Partasides. The Fourth Arbitrator?. The Role of Secretaries to Tribunals in International Arbitration. *Arbitration International*. Volume 18, Issue 2, 1 June 2002, Pages 147–163, https://doi.org/10.1023/A:1015787618880

Paragraph 2 (a) and (b) – *In particular, adjudicators shall not (a) be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism; (b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement.*
There is no objective way to enforce these provisions and therefore, we recommend trying to find a less subjective language or including a similar provision as a consideration.

D. Article 5 - Conflicts of Interest: Disclosure Obligations

Paragraph 2 - *Disclosures made pursuant to paragraph (1) shall include the following:*

We propose adding "*,among others,*" after "*shall include*" to the *chapeau* paragraph 2. Although the list included comprises extensive disclosure obligations, we consider that there could be exceptional circumstances that should obviously be disclosed, but nevertheless are not included in the list because they are too specific, yet important in some circumstances. The inclusion of the wording "*among others*" avoids excluding such extraordinary situations.

Regarding the bracketed text included in the list of paragraph 2, we support the underlined language as follows:

(a) Any professional, business and other significant relationships, within the past [five] years with:
    (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];
    (ii) The parties' counsel;
    (iii) Any present or past adjudicators or experts in the proceeding;
    (iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];
(b) Any direct or indirect financial interest in:
    (i) The proceeding or in its outcome; and
    (ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;
(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and
(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

E. Article 6 - Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

As explained in the clear commentary to the draft Code of Conduct, the issue of double hatting raises different challenges that can be addressed through policies that have contradicting outcomes.

On the one hand, an absolute ban apparently solves immediately the problem, but effectively closes the door to new talent that can´t live exclusively from performing a single role. So, indirectly, by reducing the pool of new talent, a ban on double hatting enhances the importance of the exclusive group of individuals that are repeatedly appointed, and therefore can demonstrate more experience than the rest of the pack.

On the other hand, benefitting a disclosure approach, allows the parties to challenge arbitrators, but then, the decision on whether those challenges will be accepted, remains out of their reach, in the hands of adjudicators that probably share some sentiments and strategic interests of collegiality with the challenged arbitrator.

Colombia favors for now a prohibition approach but is open to a transition approach to open the pool of new talent, as opposed to a system that perpetuates the structural dominance of a few exceptional men and women adjudicating the third part of investor-State disputes[8]. We also favor autonomy of the parties, and suggest adding "*unless the parties agree otherwise*" to the text of the article.

It is for these reasons, that we agree for now with the following underlined suggestions to article 6:

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within 3 years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty], [unless the parties agree otherwise].

F. Article 8 - Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and

[8] Langford Malcolm, Behn Daniel and Lie Runar, Journal of International Economic Law, Article "*The Revolving Door in International Investment Arbitration".* 2017, 20, 301–331

refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.
2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]
3. Adjudicators shall be punctual in the exercise of their functions.
4. Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.

Colombia fully agrees with the general intention set forth in this article and highlights its importance, especially regarding the need of rendering awards within a reasonable timeframe.

Regardless of the complexity of an investor-State arbitration case, we believe that the busy schedule of an individual is no excuse for delaying a decision expected by millions of citizens of a country and the investors as well. One of the advantages of arbitration is that it is an expeditious way of solving disputes. In this respect, we also believe that some arbitration rules could be more ambitious in this respect, and that secretariats administering arbitration proceedings, should play a more active role demanding results. It is inconvenient for either of the parties to pressure a Tribunal to render a delayed award, as such conduct could have negative consequences, even if such consequences could be admittedly subconscious. Secretariats, as impartial actors, should have a more active role demanding arbitrators to comply in a timely manner with their duties.

In consequence, Colombia supports the bracket included in paragraph 2, and propose a limitation of 10 cases as follows: *.[Adjudicators shall refrain from serving in more than 10 pending ISDS proceedings at the same time so as to issue timely decisions.]*

On a final note, we highlight that this limitation also relates to our comments regarding the definition of assistants and the limited role they should have in assisting an arbitral tribunal. If an arbitrator is disproportionally adjudicating a large amount of complex cases, publishing and attending conferences, it is highly probable that besides being very efficient, he or she also has a lot of substantive help. And, as mentioned before, we expect adjudicators, specially arbitrators, to perform their duties personally. Arbitrators are not a brand stamped on awards. They are highly praised individuals by the international community, that trusts them with an extraordinary responsibility, because of their trajectory and accomplishments. Yet, they are human beings with a limited amount of time in their hands.

G. Article 9 - Confidentiality

Paragraph 2 - *Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated].*

Colombia supports the text in brackets included in paragraph 2. It is highly inconvenient for either party to have an arbitrator commenting on their decisions. Any comment can be interpreted in support or not of a particular part of the decision, generating unfair and unnecessary consequences on the parties and possible challenges against the decision. Even if the decision is final, loosing parties could lose confidence in the outcome of a case, which is not good for the legitimacy of the system as a whole.

H. Article 10 - Pre-appointment Interviews

Paragraph 2 *[If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]*

Colombia agrees with the text of this paragraph.

I. Article 11- Fees and Expenses

Paragraph 2 *Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.*

Colombia proposes adding the following text [*if they have one*], since not all arbitrators decide to have an assistant.

J. Article 12

The scope of this article generates multiple questions, and rightly so, because it depends on further progress on other issues being discussed. Colombia is eager to read other contributions regarding sanctions and implementation of the Code, that inform our position.
In general terms, we believe some form of sanctions, other than recusal, should be considered, perhaps even related to fees.

III. CONCLUSION

Colombia believes that the Draft Code of Conduct for Adjudicators in Investor State Dispute Settlement is a well achieved serious attempt to condense complex issues in one document and praises the Secretariats of ICSID and UNCITRAL for its fruitful work.
The draft code as it is now, can and must be improved. Colombia is hopeful that the collective efforts of all the participants in this deliberation process will produce excellent results. In fact, just having these discussions, has brought light to important issues that needed careful consideration.

Costa Rica

Article 1
Regarding definition 4. “Investor-State dispute settlement”, Costa Rica believes that clarifying the term “constituent subdivision of the State or an agency of the State” would benefit the interpretation of what this term encompasses, i.e., does this include autonomous institutions?

Article 2
Costa Rica considers this could be an opportunity to broaden the scope of application and guarantee independence beyond appointed arbitrators. Thus, it considers that candidates should also comply with all provisions of this Code.

Article 3
No comment.

Article 4
No comment.

Article 5
Regarding subparagraph 2(a), Costa Rica agrees with the 5-years term.

Costa Rica supports the proposed text in brackets in 2(a)(i), given that there have been multiple cases where the figure of subsidiaries has been discussed in connection to the disclosure requirement. This coincides with Costa Rica´s comments in Working Paper # 4 on the Proposals for Amendment of the ICSID Rules, regarding Article 3 of the Arbitration Rules.

Similarly, Costa Rica supports the proposed text in brackets in 2(a)(iv). This coincides with what was expressed by Costa Rica in Working Paper # 4 on the Proposals for Amendment of the ICSID Rules, regarding Article 3 of the Arbitration Rules.

Regarding subparagraph 2(c), Costa Rica suggests eliminating [and other [international] arbitration] so that the text refers to “All ISDS cases”. The bracketed text could prevent domestic legal proceedings from becoming a conflict of interest when these could be relevant for the disclosure obligations and for the Parties. Notwithstanding, we support the inclusion of [conciliator and mediator].

Costa Rica also proposes to include language in this article that makes reference to a candidate’s obligation to disclose any interest, relationship, or matter that is likely to affect the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding.

Article 6
Costa Rica considers that the language [disclose that they act] sufficiently conveys the objective of this article. Additionally, Costa Rica supports the elimination of [withing X years of] and considers the inclusion of [the same facts] [or] [the same treaty] to be more suitable.

Article 7
Regarding paragraph 2., Costa Rica considers that the prohibition for not engaging with ex parte contacts should be limited only after the Tribunal has been constituted.

Article 8
Costa Rica considers that this provision merits further examination. Costa Rica suggests eliminating the proposed text in brackets in paragraph 2, nonetheless, we propose to set the obligation for candidates to disclose the number of active cases in which they are appointed.

Article 9
Regarding paragraph 2, Costa Rica suggests that the language of the text in brackets could benefit from clarification and preciseness. This would make it easier to establish whether the obligation to abstain from commenting refers to a duty the adjudicators have prior to the ruling or award, or if it remains once the award is published. In case of the latter, it is important to determine if there is a term, or if this is a permanent and ongoing obligation.

Article 10
Costa Rica suggests eliminating the proposed text in brackets in paragraph 2.

Article 11
Costa Rica suggests the following language for paragraph 1, so that it reads as follows: “The fees will be decided before the constitution adjudicatory body and may not be discussed thereafter. The fees shall be communicated to the parties through the entity administering the proceeding.”

Article 12
Costa Rica considers that this information should be included under Article 2 - Application of the Code in its entirety, and Article 12 could then be eliminated.

El Salvador [ESPAÑOL]

La Misi6n Permanente de El Salvador ante las Naciones Unidas y los Orga rusmos Internacionales con sede en Viena saluda muy atentamente a la Secretaria de la Comisi6n de las Na ciones Unidas para el Derecho Mercantil Internacional (CNUDMI) y tiene el honorde bacer referenda al "Proyecto de C6digo de Conducta para arbitros y otras personas que ejercen funciones de adjudicaci6n en la soluci6n de controversias entreinversionistasy Esta dos " elaborado por la Secretar(a de la Comisi6n de las Naciones Unidas para el Derecbo Mercantil Intern acional (CNUDMI) y la Secretarfa de(Centro Internacional de Ar reg lo de Diferencias relativas a lnversiones (CIADI).

Al re s pecto, la Secretaria J uridica de la Presidencia de El Salvador expone que, por el momento, no posee observaciones respecto al articulado del proyecto de instrumento, con excepci6n de! articulo 1 denominado "Definiciones", sobre el cual considera que, si bien clicba dispo s ici6n menciona y desarrolla cuat ro conceptos, a lo mejor pudiera evaluarse la posibilidad de agregar algunos conceptos adicionales, tales como:

l Que es un Arbitraje Ad Hoc?
lQue es el Tribunal Arbitral?
lQue es el Arbitr a je Interna cional?
lQue se entenderfa por Laudo Arbitral?

La Misi6n Permanente de El Salvador antelas Nacione s Unidas y los Orga nis mos Int e rnacionales en Viena hace propicia la ocasi6n para reiterar a la Secretaria de la Comisi6n de las Naciones Unida s para el Der echo Mercantil Interna cional, las muestras de su mas alta consideraci6n.

European Union and its Member States

General Comments from the European Union and its Member States:

The European Union and its Member States would like to express their gratitude to the Secretariats of ICSID and UNCITRAL for their remarkable work on this draft code of conduct.

Throughout both the ICSID rules amendment process and deliberations within UNCITRAL Working Group III, the European Union and its Member States have been advocating for a reform that, *inter alia*, provides appropriate safeguards for the independence and impartiality of arbitrators and adjudicators, including through a binding code of conduct applicable to all investor-state dispute settlement proceedings.

With regard to the deliberations within UNCITRAL, at the thirty-eighth session of Working Group III in October 2019, "[i]t was mentioned that *relevant distinctions might need to be made* between the rules in a code of conduct for *ad hoc* arbitrators and for adjudicators/judges in a permanent body. […] It was suggested that the Working Group should, in any event, make efforts to develop *in parallel* standards applicable to arbitrators and adjudicators/judges" (A/CN.9/1004*, para. 55, emphasis added). In addition, Working Group III requested that the preparatory work on a code of conduct should "identify aspects that would apply *commonly* to ISDS tribunal members as well as those that would be *distinct* for *ad hoc* and permanent members and accordingly, provide different options" (A/CN.9/1004*, para. 68, emphasis added).

Nevertheless, the current text of the draft code of conduct does not differentiate between *ad hoc* arbitrators and permanent adjudicators. It uses the comprehensive term "adjudicator" for both categories (see draft Article 1, para. 1, and paras. 6 and 15 of the commentary) and applies the same provisions to both categories, without making differentiations. While a few exceptions that are relevant for permanent adjudicators are mentioned in the commentary, there are no differences reflected in the text of the draft Articles (see paragraph 9 of the commentary).

As it will be explained in detail below, a number of provisions of this draft code of conduct appear to be difficult to apply to permanent adjudicators appointed by the Parties to a standing mechanism, who would be employed full-time for long, non-renewable terms of office, with fixed salaries and no outside activities (hereinafter "permanent adjudicators", see A/CN.9/WG.III/WP.159/Add.1).

The European Union and its Member States therefore invite the UNCITRAL Secretariat to differentiate more clearly between rules on ethics that would apply to *ad hoc* arbitrators and rules that would apply to permanent adjudicators. This could be done by differentiating clearly within the code of conduct among those parts or chapters that apply to *ad hoc* arbitration and those that apply to a permanent mechanism. The rules applicable to permanent adjudicators could draw inspiration in particular from existing rules on ethics adopted by international courts and tribunals with full-time adjudicators.

With regard to the ICSID reform process, the European Union and its Member States suggested that pending the availability of a code of conduct, the acceptance of appointment should include a specific commitment to comply with existing relevant ethic rules, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. This proposal, which was also supported by other ICSID Members, has regrettably not been taken up by the ICSID Secretariat in the most recent version of the draft revised ICSID Rules.

Further comments to particular provisions are incorporated in bold in the text of the commentary to this draft code of conduct, differentiating, where relevant, between comments that relate to permanent adjudicators and comments that concern *ad hoc* arbitrators.

Comment No. 1 from the European Union and its Member States:

Footnote 5 in the commentary of this draft code of conduct suggests that "candidates" for permanent adjudicators could refer to adjudicators who are members of a standing mechanism before they are selected to *hear a specific case*.

Conversely, the European Union and its Member States consider that in the context of a standing mechanism, the obligations on "candidates" should apply to individuals who are under consideration for selection *to become permanent adjudicators*. After they have become permanent adjudicators, they would have a continuous obligation to comply with the code of conduct, including before they are selected *to hear a specific case*.

In addition, the definition of "candidates" may also need to cover individuals who apply directly for selection to become permanent adjudicators if the applicable selection process allows for this possibility. The European Union and its Member States therefore suggest inserting the words "or are otherwise aware that they are under consideration" between "have been proposed or contacted" and "for selection and potential appointment" in draft Article 1(3).

Comment No. 2 from the European Union and its Member States:

The rules of the code of conduct should apply also to State-to-State investment dispute settlement, and *mutatis mutandis* also to other amicable settlement mechanisms, such as mediation, conciliation or fact finding proceedings. This change should be reflected in all relevant provisions of this draft code of conduct, including draft Articles 1 and 2 (definitions and scope of application).

Comment No. 3 from the European Union and its Member States:

The European Union and its Member States suggest to review the code of conduct at the end of the discussions to assess which of its provisions should apply to assistants and which should rather not apply.

Comment No. 4 from the European Union and its Member States:

In line with comment No. 1 above, it is suggested to insert the words "or are otherwise aware that they are under consideration" between "as soon as they are contacted in relation to" and "a possible appointment".

Comment No. 5 from the European Union and its Member States:

- *on a permanent adjudicators:*

In a permanent mechanism, the competence of adjudicators would be ensured through relevant statutory provisions and the selection procedures. Adjudicators would be subject to a continuing obligation to maintain their knowledge and competence throughout their terms of appointment, but it would not be possible for disputing parties to challenge an adjudicator for alleged lack of competence.

- *on ad hoc arbitrators:*

The European Union and its Member States suggest to reflect and investigate further on whether it is appropriate to address issues of competence in a code of conduct for ad hoc arbitrators and the possible consequences of doing so (e.g. whether there would be a risk of abusive challenges of adjudicators for alleged lack of competence).

Comment No. 6 from the European Union and its Member States on permanent adjudicators:

A "duty of availability" does not seem suitable for full-time adjudicators who would not have other occupations. Rules on conduct for permanent adjudicators should rather draw from similar provisions of international courts. For instance, Article 23(3) of the Statute of the International Court of Justice provides that: "Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court."

Comment No. 7 from the European Union and its Member States:

The European Union and its Member States suggest to refer to "any applicable confidentiality and non-disclosure obligations" (emphasis added) in subparagraph (d) of draft Article 3.

Comment No. 8 from the European Union and its Member States on permanent adjudicators:

Rules on permanent adjudicators appointed by the Treaty Parties and not the disputing parties should also provide that adjudicators shall not be influenced by loyalty "to a Party" under subparagraph (a) of paragraph 2 of draft Article 4.

Comment No. 9 from the European Union and its Member States:

Draft paragraph 1 of Article 5 should make it more explicit that adjudicators have to disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality regardless of the specific time or form that such interest, relationship or matter might have occurred.

Comment No. 10 from the European Union and its Member States on *ad hoc* arbitrators:

The suggested wording in draft Article 5(2)(a) would require disclosure of relationships that have existed within the previous five years. Depending on the case, there may be earlier relationships that could have a bearing on the existence of a conflict. "At least" five years therefore should be a minimum for disclosure.

Comment No. 11 from the European Union and its Member States on permanent adjudicators:

The European Union and its Member States consider that the disclosure obligations included in paragraphs 1, 3 and 4 (first sentence) are sufficient in the context of a permanent mechanism. In case of full-time adjudicators with no other professional activities, case- related conflicts of interested will be less frequent. Hence, extensive disclosure obligations for every single case may not be necessary. In this scenario, case-related conflicts of interests would be covered through the general obligations of draft Article 5(1), (3) and (4) (first sentence) which would warrant disclosure and potential recusals.

Comment No. 12 from the European Union and its Member States on *ad hoc* arbitrators:

In order to ensure that the relevant information listed in draft paragraph 2 of Article 5 is provided, disclosures should be made through a standardised form annexed to the code of conduct with the possibility to add or enclose any document, and in accordance with any other procedures established by the parties. The 'Declaration' forms currently used in ICSID proceedings could serve as a model.

Comment No. 13 from the European Union and its Member States:

The second sentence of paragraph 4 of draft Article 5 should be deleted. The European Union and its Member States consider that it should not be for the adjudicators to decide what is trivial,

but rather for the disputing parties, appointing authority or co-arbitrators (as applicable in an *ad hoc* system), or by the Court and its president (in a permanent mechanism) to assess whether the information disclosed is trivial for potential challenges or removals of the adjudicators.

Comment No. 14 from the European Union and its Member States:

It would be useful to set out in more detail to whom the disclosures shall be made (to the disputing parties, the Parties, the Secretariat, the co-adjudicators, the Court, the president of the Court, etc.). Again, this could be different depending on whether draft Article 5 applies to a permanent mechanisms or to *ad hoc* arbitration.

Comment No. 15 from the European Union and its Member States:

A ban on double-hatting would have the important advantage of reducing the concerns on conflicts of interests. However, as stated in paragraph 68 of this commentary, in the traditional ISDS system, many arbitrators are appointed only once, and requesting any potential arbitrator to withdraw from other cases may hinder entrance of new adjudicators in the arbitration system, and thus be an obstacle to increase gender and geographical diversity, an important goal recognised by UNCITRAL Working Group III and by a majority of ICSID Members in the ICSID discussions. Arbitral Women reports that in a recent survey of 353 registered ICSID cases from 2012-2019, out of 1,055 appointments, only 152 were appointments of 35 women (just 14.4 %) and only two female arbitrators together comprise 45.3% of appointments of women.

A standing mechanism could both address concerns of conflicts of interests by having full- time adjudicators with no outside activities and increase gender and geographical representation by including diversity requirements for the selection of permanent adjudicators in its statute. Examples can be found in several existing statutes and implementing acts of international courts (see, for instance, Article 36(8) of the Rome Statute of the International Criminal Court and the Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6), paras. 20(b) and (c)).

Comment No. 16 from the European Union and its Member States <u>on permanent adjudicators</u>:

As stated in paragraph 73 of this commentary, draft Article 6 is not suitable for permanent adjudicators who would be employed full-time with salary and benefits sufficient to address income foregone by not taking on other work. Full-time adjudicators would not be permitted to have other simultaneous work, in line with the rules and practice of existing international courts. For instance, Articles 16 and 17 of the Statute of the International Court of Justice provide for incompatibility rules for judges of the International Court of Justice. More recently, the International Court of Justice has decided that its sitting Members would not act as arbitrators in investor-state dispute settlement or in commercial arbitration. Similarly, Article 40(2) and (3) of the Statute and Article 10 of the Code of Judicial Ethics of the International Criminal Court provide for similar incompatibility requirements.

A code of conduct for permanent adjudicators should also include detailed rules of conduct applicable to permanent adjudicators at the end of their term of office, including the prohibition to exercise specific duties or professions for a specified period of time after the end of their term of office. Inspiration could be drawn from the Codes of Conduct included in EU Agreements for investor-State dispute settlement and Practice Direction VIII of the International Court of Justice, which provides that: "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court […] appear as agent, counsel or advocate in a case before the Court."

Comment No. 17 from the European Union and its Member States on *ad hoc* systems:

As signalled by the commentary to the draft code of conduct, in the current context of ad hoc arbitration, such a rule would require a precise identification of the roles that cannot be played concomitantly and of a time limit. Given the importance of the concerns at stake, the European Union and its Member States would welcome a dedicated discussion among ICSID Members on this aspect.

Comment No. 18 from the European Union and its Member States:

The European Union and its Member States refer to their comment No. 5 above.

Comment No. 19 from the European Union and its Member States on permanent adjudicators:

The European Union and its Member States reiterate their comment No. 6 above on the "duty of availability" for permanent adjudicators.

Comment No. 20 from the European Union and its Member States:

- *on a permanent mechanism:*

Paragraph 2 of draft Article 8 is not necessary and therefore not appropriate for a permanent mechanism, where the allocation of cases would be managed through the rules of the permanent mechanism.

- *on ad hoc arbitration:*

The European Union and its Member States suggest analysing further the possibility to limit the number of cases adjudicators may hear simultaneously, in view of setting out possible limitations.

Comment No. 21 from the European Union and its Member States on permanent adjudicators:

Draft Article 10 would not be applicable in the context of a permanent mechanism staffed with adjudicators appointed by the Contracting Parties who would be employed full-time and would have a continuing duty to disclose conflicts of interests.

Rules on ethics for permanent adjudicators should not include this draft provision.

Comment No. 22 from the European Union and its Member States <u>on permanent adjudicators</u>:

The European Union and its Member States agree that draft Article 11 would not be applicable in the context of a permanent mechanism with full-time adjudicators. Permanent adjudicators would not receive any fees by the disputing parties for their time worked on a case. They would receive a predetermined, fixed salary paid from the budget of the standing mechanism comparable to the remuneration of judges in other international courts.

Rules on ethics for permanent adjudicators should not include this draft provision.

Comment No. 23 from the European Union and its Member States <u>on permanent adjudicators</u>:

Rules on recusal, disqualification and removal of permanent adjudicators would need to be addressed in the Statute establishing the permanent mechanism. Such Statute would also include rules on the implementation of the ethics obligations on former adjudicators, i.e. permanent adjudicators at the end of their term of office.

Comment No. 24 from the European Union and its Member States:

Monetary sanctions might be difficult to implement in general, however, it may be easier to consider potential financial sanctions in the context of a permanent mechanism, in which adjudicators are employed full-time and would receive a fixed salary and probably also a pension.

Comment No. 25 from the European Union and its Member States:

- *<u>on permanent adjudicators:</u>*

Reputational sanctions might be difficult to implement in general, however, they would not be needed in the context of a permanent mechanism, in which adjudicators could be removed from the mechanism in case of severe and repeated violations of the code of conduct.

- *<u>on ad hoc arbitrators:</u>*

The possibility of having consequences tied to non-compliance with e.g. time limits has been subject to discussions among ICSID Members in the context of the current rules amendment process. While recognizing the inherent difficulties with the implementation of 'reputational'

sanctions, European Union and its Member States would welcome further reflections on this matter.

Comment No. 26 from the European Union and its Member States:

It is not desirable that an advisory centre be entrusted with the role of compiling a list of adjudicators who are found to have violated the provisions of the code. This is not the role of an advisory centre.

Comment No. 27 from the European Union and its Member States:

- *on a permanent mechanism:*

A Court and its president would undoubtedly have the responsibility of enforcing the Code with respect to violations of the Code by permanent adjudicators, in line with the rules and practices of existing international courts (e.g. Articles 18 and 24 of the Statute of the International Court of Justice).

- *on ad hoc arbitration:*

It could be possible that a permanent mechanism may have the responsibility of enforcing the Code also with respect to violations of the Code by ad hoc arbitrators, but the fact that only the Parties to the Court are financing its activities would need to be factored in.

Comment No. 28 from the European Union and its Member States:

- *on a permanent mechanism:*

Only the rules of the code of conduct and of the Statute establishing the permanent mechanism would apply to permanent adjudicators in the scenario of an international (or "a-national") Court.

- *on ad hoc arbitration:*

In the context of *ad hoc* arbitration, the question of the relationship of a code of conduct with other existing rules would require further analysis.

Comment No. 29 from the European Union and its Member States:

- *on a permanent mechanism:*

The European Union and its Member States support the inclusion of a code of conduct for permanent adjudicators into a multilateral instrument on ISDS reform, which would apply to permanent adjudicators of a standing mechanism.

- *on ICSID arbitration:*

The European Union and its Member States support making a binding code of conduct for *ad hoc* arbitrators integral part of the ICSID rules. The acceptance of the appointment as ICSID arbitrator could include a commitment to comply with the code of conduct.

Israel

Definitions (Article 1)

- Israel queries whether it could be useful for certain aspects of the code to also apply to former adjudicators, as it is common in several of its dispute settlement mechanisms in various FTAs.

- For the purpose of discussion on that matter, Israel offers the following definition that could be added after paragraph 1:

""Former Adjudicator", means a natural person who served as an adjudicator in investor-state dispute settlement proceedings."

Application (Article 2)

- Israel considers that the code should apply to former adjudicators. For that purpose, Israel suggests inserting the following text after paragraph 2 of this article:
  "A Former Adjudicator shall observe the duties established in this code, *mutatis mutandis*."
  Alternatively, Israel considers that it may be useful to hold a discussion on the specific articles that should apply to former adjudicators following which they will be specified in a dedicated paragraph in this article.

- Israel considers that a discussion should be held between the Working Group members on the specific articles of the code that should apply to assistants.

Independence and Impartiality (Article 4.(2)(b))

- Israel considers that the word "ongoing" in this paragraph is not sufficiently clear and suggests that the term "existing" would be used as clearer alternative.
- Israel considers that foreseeable relationships should not be allowed to influence the conduct or judgment of adjudicators and would suggest that a discussion will be held for the purpose of finding the appropriate phrasing for that purpose.

Conflicts of Interest: Disclosure Obligations (Article 5)

- Israel considers that any conflicts that creates an appearance of affecting independence or impartiality should be disclosed and avoided. For this purpose, Israel suggests the following text to replace paragraph 1:

  "1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect or create an appearance of affecting their independence or

impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of direct or indirect interests, relationships and matters."

- Paragraph (2) – Israel considers that the following text should be entered as the chapeau of paragraph (2) before subparagraph (a):

"2. Without limiting the generality of the obligation in paragraph 1, Disclosures made pursuant to paragraph (1) shall include the following:"

- Paragraph (2)(a) – Israel considers that the disclosure obligations specified in paragraph (2)(a) regarding relationships should encompass a similar scope as in article 4(2)(b), as those relationships may also lead to conflicts of interest. Therefore, Israel suggests to add the words: " financial, professional, family, social" after the word business in this paragraph.

- Israel considers that the 5-year period would be adequate for several types of relationships. However, Israel would suggest to hold a discussion in the Working Group regarding this time-bar for the purpose of discussing whether there should be relationships that existed beyond the 5-year time limit that merit disclosure as well.

- Israel supports the bracketed text in sub-paragraph (2)(a)(i).

- Israel considers that relationships with the parties' counsel and their law firms should be disclosed. Therefore, Israel suggest adding the words "and their law firms, where applicable" after the word "counsel" in sub- paragraph (2)(a)(ii).

- Israel considers it consistent with its suggestion to apply the relevant articles of the code to former adjudicators to replace the word "past" with the word "former" in sub-paragraph (2)(a)(iii).

- Israel supports the bracketed text in sub-paragraph (2)(a)(iv).

- Israel sees great importance in maintaining arbitrator's impartiality also with regards to any significant relationship with a third party funder involved in the proceeding, and suggests adding an additional sub- paragraph 5(2)(a)(v) to that effect.

- Israel supports the bracketed texts in paragraph (c) but objects to the bracketed word "international" in the same paragraph as it considers that all arbitration appointments should be disclosed.

- Israel does not support the bracketed text in paragraph (d).

- Israel considers that it might be useful to add to the text of this article language which will ensure that disclosures would not inherently warrant recusal, amelioration or disqualification such as prescribed by the CPTPP Code of Conduct (paragraph 4(f)). For reference, Israel would like to provide the following text it incorporates in codes of conduct it incorporates in

annexes to its FTAs regarding this issue:

"This Annex does not determine whether or under what circumstances the Parties will disqualify a candidate, or an arbitrator from being appointed to or serving as a member of an Arbitral Tribunal, on the basis of disclosures made"

Limit on Multiple Roles (Article 6)

- Israel supports certain bracketed textual options for this article and would like to offer additional changes to the text of the article as follows:
- "Adjudicators shall disclose that they act as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are

acting on matters that involve the same parties, the same subject matter or the same treaty."

Availability, Diligence, Civility and Efficiency (Article 8)

- Israel objects to the bracketed text in paragraph 2, and would like to suggest the following text instead:

"2. Before accepting any appointment, Adjudicators shall provide a list of pending ISDS and other arbitration proceedings, which they are serving on at that time."

Confidentiality (Article 9)

- Israel considers that this article should apply to Former Adjudicators. Israel suggests to add language for this purpose in paragraphs 1 and 2.
- Israel supports the bracketed text in paragraph 2.

Pre-appointment interviews (Article 10)

- Israel considers that disclosure of pre appointment interview of a candidate should occur prior to his or her appointment.
- Israel considers that further discussion is necessary regarding the shared information from the pre-appointment interviews. Specifically, Israel considers that specific language additions should be considered in order to allow the non-disclosure of ensure that only non-privileged information from such an interview designated by the candidate as privileged can and should be shared from such an interview.

Korea

. Introduction

The Republic of Korea ("Korea") would like to express sincere appreciation for the recent joint work of the United Nations Commission on International Law (UNCITRAL) Secretariat and the International Centre for Settlement of Investment Disputes (ICSID) Secretariat in preparation of the draft Code of Conduct ("the draft Code"). Korea is of the view that having such draft, in its nature, significantly attributes to continuation and advancement of the ongoing discussions on Investor-State Dispute Settlement (ISDS) reform at UNCITRAL Working Group III ("the Working Group"). This will further help the Working Group crystalize each of the reform options and decide upon which options to finalize and, ultimately, to adopt.

The Code of Conduct for adjudicators in ISDS is one of the reform options that Korea has demonstrated its interest as part of the ISDS reform project at the Working Group. Given the broad consensus reached within the Working Group on the significance and necessity of having a code of conduct, especially to regulate the conduct of the adjudicators in the ISDS regime, Korea finds that the UNCITRAL and ICSID Secretariats' work on the draft Code is timely and important.

Korea hopes to further take part in and meaningfully contribute to the work on the Code. As such, Korea hereby provides in this submission the following comments for the Working Group's consideration, and welcomes the views of the member States of the Working Group as well as all other stakeholders. The observations and comments provided herewith are preliminary in nature and without prejudice to Korea's final position.

II. Comments

1. Article 1 (Definitions)

Paragraph 1 defines "adjudicators" as "arbitrators, members of international *ad hoc*, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes". Its commentary explains that it is "intended to apply to all levels of proceeding" and provides a non-exclusive list of examples (*i.e.*, "including first instance, annulment and potential appeal, *ad hoc* or institutional proceedings, whether akin to arbitration or to proceedings in a multilateral standing body or mechanism"). One suggestion for consideration to this regard is the possibility that there may be other types of adjudicators in ISDS proceedings that are not fully captured by the text as provided in paragraph 1. To this extent, Korea suggests adding a catch-all phrase such as "or others with adjudicative authority for the settlement of investor-State disputes" or "or others with decision-making authority for the settlement of investor-State disputes" .

When reflecting Korea's proposals as provided, the amended paragraph 1 may look like the following subject to further amendment by the Working Group:

Article 1

Definitions

For the purpose of this Code:

1. *"Adjudicators" means arbitrators, members of international* ad hoc*, annulment or appeal committees, and judges on a permanent mechanism or others with adjudicative authority for the settlement of investor-State disputes;*

In addition, Korea would like to seek views, or any relevant background information, with respect to how this definition, particularly the phrase "or any constituent subdivision of the State or an agency of the State or the REIO", would apply in relation to Articles 4-6, and 8 of the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts that provide guidance as to what constitutes or attributes to a State conduct. For instance, these draft articles do not contain either the term "constituent subdivision" or "agency", and instead use the term "organ". Further elaboration in the commentary would also help understand the definition.

2. Article 4 (Independence and Impartiality)

Regarding subparagraph (c) of paragraph 2, Korea proposes to amend "Take action" to "Act in a way" as the latter term has a nuance of also covering omissions (or inactions). Actions as well as omissions can all be the means that create certain impressions.

3. Article 5 (Conflicts of Interest: Disclosure Obligations)

Korea understands that the number of years, *i.e.*, five, in subparagraph (a) of paragraph 2—"within the past [five] years with"—was arbitrarily selected. The commentary further provides that "the existence of relationships at earlier times is presumed to be too remote to create a conflict." Having such a temporal condition may be helpful in that it provides the candidates and adjudicators a guidance as to how far back their disclosure obligation applies. In addition, by imposing a certain limit, a temporal one, to the disclosure obligation, it would help minimize the number of challenges that may arise from the disclosure obligation as intended by the drafters. Five may be a plausible number but, at the same time, it may not be the best, or ideal, number. The commentary indeed notes that "a relationship that existed before the five-year threshold but could reasonably affect the adjudicators' independence or impartiality would still be subject to a duty of disclosure in accordance with paragraph 1," and the chapeau in paragraph 2 expressly states that it is not providing an exhaustive list. Nevertheless, Korea finds that more clarity should be provided in order to avoid any possible misinterpretation of the timeframe provided in paragraph 2, subparagraph (a), for example, that candidates and adjudicators are only required to disclose relevant information pertaining to the past five years only. Accordingly, Korea suggests amending "within the past five years" to "within a minimum of the past five years". The chapeau in subparagraph (a) would then read as "Any professional, business and other significant relationships, within the past five years with:".

Regarding subparagraph (c) of paragraph 2, Korea would like to point to the fact that it neither lists appeal committee nor judges on a permanent mechanism unlike in Article 1, paragraph 1, where it provides a definition of adjudicators. At the latest webinar on the draft Code of Conduct, it was explained that some of the details of the draft Code, including how the Code of Conduct applies to or relates to judges on a permanent mechanism and the enforcement of the Code of Conduct, will be determined once there is a final framework on ISDS reform. When refining the Code after having agreed on a framework, it would then become necessary to maintain consistency throughout the texts of the Code. For instance, when listing the roles in the context of Article 5, paragraph 2(c), it then would be necessary to add "or appeal" between "annulment" and "committee", and add "judge on any permanent mechanism before "expert", in parallel with the listed roles in Article 1.

In terms of whether to include "conciliator and mediator" as part of the condition, Korea notes that circumstances vary under which disclosure of serving as a conciliator and/or mediator in a separate case "can create a conflict that could be perceived as affecting their independence and impartiality."[9] To this regard, Korea prefers to make the "conciliator and mediator" requirement optional or have it conditionally applied only where relevant.

[9] Commentary para. 45 to Article 5 Paragraph 1.

Regarding subparagraph (d) of paragraph 2, Korea suggests adding "relevant" in between "all publications" to avoid having to impose a kitchen-sink type of disclosure requirement, potentially resulting in disclosure of information irrelevant to the case or dispute at issue. Korea agrees to include in the disclosure requirement any relevant public speeches.

When incorporating these points, the amended paragraph 2 may look like the following, subject to further amendment by the Working Group:

2. Disclosures made pursuant to paragraph (1) shall include the following:
(a) Any professional, business and other significant relationships, within the minimum of the past five years with:
(i) The parties . . .
(c) All ISDS and other international arbitration cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment or appeal committee member, judge on any permanent mechanism, expert, [conciliator and mediator]; and
(d) A list of all relevant publications by the adjudicator or candidate and their relevant public speeches.
The texts in square brackets are for further discussion at the Working Group.

4. Article 6 (Limit on Multiple Roles)

Korea, among several other delegations, previously expressed at the Working Group its concern over the issue of double-hatting that can potentially create conflicts of interests. In that vein, Korea finds that this Article is specifically relevant and serves the purpose of regulating double-hatting as expressly noted in the commentary. This Article would not only help ensure adjudicators' independence and impartiality, but also have the effect of urging them to commit sufficient time and efforts to settlement of the dispute at every stage of the proceedings and deliberations as well as in the process of rendering an award.
In the meantime, Korea takes into consideration the possibility that "[a] ban on double-hatting also constrains new entrants to the field, as few counsel are financially able to leave their counsel work upon receiving their first adjudicator nomination."[10] As such, regulating double-hatting too broadly may rather deter its objective. By taking note of such a concern, and to further reflect Korea's interest, Korea suggests an amendment of this Article to the effect of the following, subject to further amendment by the Working Group:

1. During the course of the proceedings, adjudicators shall refrain from acting as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are acting on matters that involve any of the same parties [unless otherwise agreed upon by the parties].
2. Adjudicators shall disclose that they act as counsel, expert witness, judge, agent or in any other relevant role as they are [within X years of (to be determined upon reaching agreement within the Working Group)] acting on matters that involve the same facts and/or the same treaty.

The texts in square brackets are for further discussion at the Working Group.

[10] Commentary para. 68.

In the meantime, Korea is of the view that the disclosure obligation as provided in Article 6 can be incorporated into Article 5 (Conflicts of Interest: Disclosure Obligations), which mainly and expressly stipulates disclosure requirements.

Moreover, it is not entirely clear from a literal reading of the text of Article 6 whether the intent behind this Article is specifically to address the issue of conflicts of interest or to collectively address all sorts of issues that arise from adjudicators playing multiple roles. That is, whether it is to address not only independence and impartiality but also availability, efficiency, diligence. To clarify the purpose of this Article as indicated in the commentary, Korea proposes to retitle this Article as the following, and invites views thereto of the Working Group: "*Conflicts of Interest: Limit on Multiple Roles*".

5. Article 7 (Integrity, Fairness and Competence)

Paragraphs 1-4 of this Article requires adjudicators to maintain integrity, fairness and competence, whereas for candidates only competence is required. Korea is of the view that it is equally important to ensure integrity, fairness and competence in ISDS whether an individual is a candidate or an adjudicator. In light of this, Korea suggests to make the second sentence in paragraph 3—"Candidates should only accept appointments for which they are competent"—a separate paragraph, *e.g.*, the fifth paragraph of this Article, and impose the same responsibilities on candidates. When incorporating this point, the newly added and amended paragraph 5 may look like the following, subject to further amendment by the Working Group:

5. Candidates should only accept appointments for which they are competent and able to ensure the highest standards of integrity and fairness.

As a minor additional point, paragraph 2 provides *ex parte* "contacts" whereas the commentary para. 75 states *ex parte* "communications". For consistency purpose, Korea prefers and thereby suggests to use the term "communications" instead of "contacts" in paragraph 2 of Article 7.

6. Article 8 (Availability, Diligence, Civility and Efficiency)

This Article is particularly closely connected to Article 6 (Limit on Multiple Roles) and, thus, they should be discussed in conjunction. The two Articles may have a differing objective, such that Article 6 gears towards avoiding conflict of interest, whereas Article 8 appears to focus on ensuring adjudicators' availability and diligent rendering of an award. In any matter, it is unclear from a literal reading of this Article whether the intent is to regulate adjudicators serving only as adjudicators in other ISDS cases or also from serving as counsel, expert witness, judge, agent, etc., as Article 6 specifies. Only upon reading the commentary it becomes clear that this Article is intended to regulate adjudicators serving as adjudicators in other ISDS cases. As such, it would be helpful to make the intent more explicit in the text itself. In addition, any consideration of the adjudicators' role(s) in other ISDS proceedings should not be limited only to their role as an adjudicator. That is, whether they have served or are serving as counsel, expert witness, judge, agent, or other relevant positions should deserve equal consideration.

Regarding the first sentence in paragraph 1, Korea believes it would be more appropriate to replace "adjudicators" with "candidates" as this sentence pertains to the pre-appointment phase,

where it is the candidate that decides whether to accept appointment as an adjudicator. Commentary paragraph 79 also speaks to this effect: "Article 8 requires candidates to ensure their availability". Ensuring one's "availability to hear the case and render all decisions in a timely manner" is a significant factor that should be taken into account when appointing an adjudicator. Having such a requirement in a candidate before he/she accepts any appointment would in effect also guarantee the availability of the candidate, upon acceptance of appointment, as an adjudicator throughout the proceeding.

As mentioned above, Korea's interest in the regulation of double-hatting primarily lies with its interest to ensure adjudicators' availability and diligence throughout the entire proceedings. Concerning paragraph 2 in square brackets, Korea agrees with the commentary that "introducing a specific number [of cases an adjudicator can hear simultaneously] would be controversial" and that various factors should be examined to determine whether an adjudicator can or cannot hear multiple cases. As other paragraphs sufficiently capture the importance and requirement of ensuring adjudicators' availability, diligence, civility and efficiency in ISDS proceedings, paragraph 2 in square brackets may be unnecessary, though Korea remains flexible to this regard.

7. Article 9 (Confidentiality)

Paragraph 2 prohibits adjudicators from disclosing any decision, ruling or award to the parties prior to delivering it to them or to publicly disclose them before they are in the public domain. The commentary elaborates by providing that decisions can be disclosed "once they are in the public domain, but not otherwise". The commentary further notes that this is a practice "observed by most adjudicators". In practice, there are also investment treaties that allow the disputing parties to request the tribunal to issue a draft award for the parties' review.[11] Upon a disputing party's request, the tribunal is required to transmit its proposed decision or award to the disputing parties, and the disputing parties can submit comments to any aspect of the decision or award for the tribunal's consideration.

Paragraph 2, along with its commentary, does not appear to address this circumstance. The current text may rather disallow such practice. One way to address this may be by inserting a language after the first sentence of paragraph 2 that reads as, or to the effect of, the following: "unless otherwise prescribed in the treaty or agreed by the disputing parties".

When reflecting these points, the newly added and amended paragraph 5 may look like the following subject to further amendment by the Working Group:

2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them unless otherwise prescribed in the treaty or agreed by the disputing parties. They shall

[11] *See* Korea-US FTA, paragraph 11(a) of Article 11.20 and Comprehensive and Progressive Agreement for Trans-Pacific Partnership, paragraph 10 of Article 9.23: "In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the date the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the date the 60-day comment period expires."

not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated].

The texts in square brackets are for further discussion at the Working Group.

8. Article 10 (Pre-appointment Interviews)

With respect to Article 10, primarily, Korea would like to seek further explanation as to what constitutes a pre-appointment interview as referred to in this Article. As the commentary provides, "[p]re-appointment interviews are not used by all counsel" and States may have different approaches as to the adjudicator selection process. As such, what falls into the category of a pre-appointment interview may vary by States and their practices. Per the commentary, the objective of Article 10 appears to be to ensure that "the interview stays within the proper scope and would reinforce confidence of all parties that no inappropriate information was shared with a candidate". The adjudicators can receive inappropriate information not only through a separately arranged interview, whether conducted in-person, by phone, or by other means, but also through e-mails, phone calls, or other means that are not necessarily scheduled or formatted as an interview. Therefore, in order to properly address the objective of Article 10, it would be necessary to first define the term "pre-appointment interview" as used in the context of this Article.

In the meantime, Korea appreciates the objective as a meaningful one and paragraph 1 alone appears to reflect such an objective. When determining whether to additionally require disclosure of any pre-appointment interview as prescribed in paragraph 2, a consideration may be given to how this obligation pertains to the level of required transparency in a proceeding. That is, whether the process of selection and appointment of arbitrators is regarded part of the proceedings subject to transparency obligation, whether pursuant to the relevant investment treaty or a separate agreement between the disputing parties. This analysis would also depend on the notion of a pre-appointment interview.

9. Article 11 (Fees and Expenses)

Korea supports the idea of having this article. When the disputing parties, as the cost-bearers, are informed of any discussions pertaining to fees or of the estimated rate prior to the commencement of an arbitral proceeding, they will be able to make an informed decision as to whether to appoint the candidate as an adjudicator and thereby accept the fees or rate of the adjudicator. To that extent, communication of any discussions pertaining to fees to the parties would be helpful.

In addition, the communication should not be required to be made through "the entity administering the proceeding" as there can be cases without any administering entity. To this extent, Korea suggests adding "if applicable" after "through the entity administering the proceeding" so that such a channel of communication can apply only when an administering entity exists. As such, this paragraph can be edited as the following, subject to further amendment by the Working Group:

1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding, if applicable.

10. Article 12 (Enforcement of the Code of Conduct)

Korea understands from both the commentary and the second webinar on the draft Code of Conduct that "[t]he tools available for enforcement of the code will depend largely on how the code will be implemented", and that the enforcement issues will settle once there is a final framework on ISDS reform. As the discussion on the draft Code of Conduct evolves, it would be important to bear in mind, reiterating the relevant part in the commentary, that "[t]he relationship of the code with existing codes of conduct in investment treaties and other instruments that could simultaneously apply to adjudicators in the same dispute might also need consideration". Relatedly, if multiple codes of conduct become to exist in parallel, it would be necessary to pursue consistency among different codes of conduct for the effective implementation and enforcement of not only the Code, but also the reformed ISDS regime as a whole.

Mexico

Definitions (Article 1)

- We understand that there might be differences between ethical rules and obligations applicable to adjudicators and other participants of an ISDS. However, such differences might not merit a separate code of conduct.

  In particular, it is not clear the reasons why some (the "relevant") provisions of this Draft Code might be applicable to *"Assistants",* but not to experts or to members of the secretariats and staff of arbitral institutions, mutatis mutandis.

  In this regard, articles 3, 5.2(a), 5.2(b), 5.2(c), 5.2(d), 5.3, 5.4, 7.2; and 9 could be applicable to experts, while articles 8.4 and 9 of the Draft Code could be applicable to staff members.

  Accordingly, Mexico suggests analysing whether the scope of the Draft Code could be extended to experts and staff members, as well.

Application (Article 2)

- The term *"relevant"* in articles 2.1., and 2.2., create ambiguity as to which obligations apply and who will determine the existence of such *"relevance".*

  Such ambiguity is particularly noted in article 2.2, since there are provisions in the Draft Code that contain an explicit reference to *"Candidates",* while other provisions do not make such a reference. In this regard, it is not clear if the term *"relevant provisions"* should be construed as comprising only those provisions where there is an explicit mention to *"Candidates"* or if it could potentially apply to other provisions of the Draft Code, where such reference is not made.

To avoid such ambiguity, we suggest either identifying explicitly the provisions that would specifically apply to assistants and candidates in paragraphs 2.1 and 2.2 or eliminate the phrase "relevant provisions"

As mentioned in the comment to article 1, we suggest to analyse if the scope of the Draft Code could be extended to experts and staff members, as well.

Independence and Impartiality (Article 4)

- Regarding paragraph 4(1), the requirements to adjudicators related to the characteristics of being independent, independent, free from any conflict of interest, high standards of integrity, competence, as well as the obligation to act under the principles of diligence, civility and efficiency, respecting their obligations confidentiality, grants legal certainty to all participants in the arbitration process. However, these principles and characteristics have to be consistent in the whole document, because, for example, with respect to competence, there is a discrepancy between Article 7(1).

- Article 4.1(c) bounds adjudicators to avoid any action that may have a negative impact in their independence or presumption of independence. However, an arbitrator should also be pro-active and vigilant in such matters, particularly when the action of third persons might affect such independence or presumption of independence.

  In this regard, Mexico suggests to include an obligation for arbitrators to make every effort to prevent or discourage others from representing themselves as being in a position to influence the arbitrator, as in 6(d) of the CPTPP.

  Article 4.2(a) should also preclude "loyalty to a non-Party", as in 6(b) of the CPTPP.

Conflicts of Interest: Disclosure Obligations (Article 5)

- Paragraph 5(1) refers to the necessity to avoid conflicts of interest and lack of independence and impartiality. However, the obligations established in article 3(a) also include the necessity to avoid impropriety and bias.

  In this regard, we see no reason to avoid mentioning impropriety and bias in paragraph 5(1), particularly if it is intended that proof of their existence have consequences in the process (by way of challenge, disqualification or replacement of an arbitrator).

  Additionally, the current draft of article 5(1) does not seem to be appropriate to cover the avoidance of *"appearance of bias",* which is mentioned in article 3(a). In this regard, it must be noted that the existence of a mere *"appearance of bias"* might not *"reasonably be considered to affect* [an adjudicator's] *independence or impartiality"* and, in consequence, a different standard should be used.

For the reasons stated above, Mexico suggests a text, such as the following:

"I. *Candidates and adjudicators shall be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias. To this end, they shall:*

a. *disclose any past or present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of bias; and,*
b. *make all reasonable efforts to become aware of such interests, relationships or matters."*

- Regarding paragraph 5.2(a), Mexico suggests to include the word *"personal"* as follows: *"professional, business and **personal** relationships with..."*

- Finally, Mexico supports the need to include any relationship with subsidiaries, parent-companies or agencies related to the parties and of any third party with a direct or indirect financial interest in the outcome of the proceeding.

- On article 5(4), Mexico is not sure on the need of the sentence *"Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial",* since the applicable standards are already established in paragraph (1).

  Moreover, this standard (triviality) competes with the standards of *"reasonableness"* and *"likeness"* proposed in the first paragraph.

  Finally, Mexico suggests including a provision whereby it is stated that disclosure of an interest, relationship or matter is without prejudice to whether a conflict of interest exist.

Limit on Multiple Roles (Article 6)

- Mexico considers that, although It is important to avoid "double-hatting", provisions in this regard shall be drafted carefully, in order not to substantially limit the availability of experienced arbitrators to participate in an arbitral tribunal, especially when other characteristics are usually requested (language, specialty, experience in arbitration), as in the practice usually happen.

In this regard, Mexico suggests that the obligation:

a) Only refer to "refrain from acting" and not "to disclosure that they act", because this was already covered by article 5.2(c)) and;
b) Subsists only for the duration of the proceeding; and,

Applies to matters that involve the same parties, the same facts and under the same.

Article 7 Integrity, Fairness and Competence

- On Article 7.1, Mexico reiterates its comment on article 3(b). If *"fairness"* adds something to integrity, independence, and impartiality, then it might be added, but its content must be perfectly ascertained.

  In this regard, the structure and content of paragraph 1 create confusion, for it seems to establish two different requirements: (i) to display the highest standards of integrity and

fairness; and (ii) to treat the parties with equality and grant them a reasonable opportunity to present their case.

- Mexico strongly supports article 7.2, to prevent any situation that could cast doubt on the independence and impartiality of adjudicators.

- On paragraph 7.3, it is important to guarantee that arbitrators act with competence during the proceeding. Despite this, it is not clear how would the obligation to maintain and enhance their knowledge and skills be oversee. Maybe such decision strictly corresponds to arbitrators.

  Moreover, it still remains the question of how can a candidate determine if he is competent or incompetent to accept an appointment.

- Finally, Mexico proposes to add an obligation for an arbitrator to consider only those issues raised in the tribunal proceeding and necessary to make a decision, order or award, as in 5(e) of the CPTPP.

Availability, Diligence, Civility and Efficiency (Article 8)

- On article 8.1, Mexico suggests to ascertain if competence would hold a closer relation to *"diligence"* than to *"integrity"*. If this is the case, perhaps we could add it to the second sentence (Upon selection, adjudicators shall be available to perform and shall perform their duties diligently, expeditiously and with competence throughout the proceeding).

- On article 8(2), Mexico opposes to limit the number of cases an arbitrator might be able to undertake. In this regard, it would suffice that the arbitrator is able to fulfil its duties according to paragraphs 1 and 3, and without breaching the provision of article 7.4 and, to this end, arbitrators should also disclose their caseloads, in order for the Parties to assess the adjudicator's availability.

- On article 8(4), Mexico queries what does collegiality and "best interests of the parties" means? There is no explanation to this obligation on the commentary and, perhaps, it may be necessary to better ascertain the scope of this provision.

Pre- appointment interviews (Article 10)

- Mexico supports the inclusion of paragraph 10.1 as long as

a) Pre-appointment interviews also cover discussions concerning the qualifications, knowledge and experience of arbitrators (competence); and,
b) The obligation of paragraph 10(2) is also included, to guarantee that both Parties access the information generated during such interviews.

Implementation of the Code

Mexico supports positively to incorporate the code into investment treaties and other instruments of consent or to be made part of a multilateral instrument on ISDS reform to enable such a code to become binding in relation to states' networks of old international investment agreements.

Singapore

Singapore's comments on structure: There are certain provisions that apply regardless of whether the ISDS tribunal is appointed on an ad-hoc basis or a permanent basis, as well as those that apply to either but not both situations. We acknowledge that it may be more expedient, at this stage, to set out all applicable standards in a single Code. For conceptual clarity, we suggest grouping the provisions such that the definitions and the provisions that can apply to both situations (eg, the current Articles 1-5, 7, 9) are set out in Part I, the provisions that only apply to ad-hoc ISDS tribunals (eg, the current Articles 6, 8, 10, 11) are set out in Part II, and those that only apply to a permanent standing mechanism are set out in Part III.

Article 3: Duties and Responsibilities

At all times, adjudicators shall:

(a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias, and appearance of impropriety or apprehension of bias;

(b) Display the highest standards of integrity, fairness and competence;

(c) Be available and act with diligence, civility and efficiency;

(d) Comply with any confidentiality and non-disclosure obligations.

Singapore: On Article 3, please see our comments for Article 4 below.

Article 4: Independence and Impartiality

1. Adjudicators shall at all times be independent and impartial.

2. In particular, adjudicators shall not:

   (a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism;

   (b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;

   (c) ~~Take action~~ Act in a manner that creates an appearance of impropriety, an apprehension of bias or the impression that others are in a position to influence their conduct or judgement;

(d) Use their position to advance any personal or private interests; or

(e) ~~Directly or indirectly, incur~~ Incur an obligation or directly or indirectly accept a benefit that would interfere, or appear to interfere, with the performance of their duties.

Singapore: In relation to paragraph 2(c), we think it should be elaborated that adjudicators should not act in a manner that gives rise to an appearance of impropriety or an apprehension of bias, because the *perception* of independence and impartiality is also important. See *eg*, CPTPP ISDS Code of Conduct at paragraph 6(a). We have also suggested edits in Article 3 to this effect.

In relation to paragraph 2(e), we think that the phrase "directly or indirectly" should only apply to the case of accepting a benefit. An obligation is either incurred or not; we think the distinction between directly or indirectly would not apply to obligations.

Article 5: Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.

…

Singapore: Our suggested edits at paragraph 1 are intended to ensure the disclosure of matters that may give rise to an appearance of impropriety or an apprehension of bias.

In terms of the disclosures required in paragraph 2(a), we are generally supportive of the suggestion at (i) on disclosure of relationships with the parties' subsidiaries and parent companies, though we would like to clarify what the intent is behind including "agencies". We are also supportive of the suggestion at 2(a)(iv) to provide for disclosure of any relationship with third parties with financial interests in the matter. On paragraph 2(c), we are in favour of disclosure of other non-ISDS international arbitrations as well as involvement in any mediations and conciliations.

We note the Secretariats' comment that the application of paragraph 2 to a standing body or mechanism may need to be considered further. We agree. In particular, we observe that the phenomenon of repeat appointments, which is meant to be addressed by paragraph 2(c), may not be an issue in the case of a standing body or mechanism, as the members making up said body would presumably have undergone rigorous vetting, and have had to relinquish any roles as experts or counsel.

Article 6: Limit on Multiple Roles

Adjudicators shall, for the duration of the proceeding, [refrain from acting]/[disclose that they act] as [counsel, expert witness, judge, agent or in any other relevant role] at the same time ~~as~~

~~they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].~~

Singapore: Singapore recognises that one of the key criticisms against ISDS in recent years has revolved around the lack of independence or conflicts of interest on the part of arbitrators that arise from double-hatting. Singapore supports the development of solutions to address this issue and welcomes views from other delegates as to whether there should be an outright prohibition on *simultaneous* double-hatting. A prohibition on double-hatting, if the WG decides to proceed in this direction, should be limited to: (i) cases where the adjudicators play different roles simultaneously, and (ii) roles that are more likely to give rise to a clear conflict of interest, *ie*, counsel, or party-appointed expert or witness. See *eg*, CPTPP ISDS Code of Conduct at paragraph 3(d).

However, if the WG takes the view that simultaneous double hatting should simply be disclosed, we would be grateful for clarification on how this would interact with the general disclosure obligations in Article 5, subparagraphs 2(a) and (c) above.

In any case, Singapore does not support a prohibition against taking on a different role *before the current appointment* as this may be unduly restrictive. We also observe that the fact that an adjudicator has acted in another role in another matter involving the same treaty may not be problematic, provided that it does not involve the same parties, the same facts, or the same issues in dispute.

A possible middle-ground alternative, if there is no consensus regarding either an outright prohibition or allowing double-hatting to continue per *status quo*, would be to consider imposing limits, such as a maximum number of pending ISDS cases that an adjudicator can be involved in a different role at any one point in time, along the lines of Article 8.2.

Article 8: Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, ~~adjudicators~~ candidates shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. ~~They shall conduct the proceedings so as to avoid unnecessary delays.~~

2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]

…

Singapore: We note that paragraph 3 already sets out the requirement for adjudicators to exercise their functions in a timely manner. Thus, the last line of paragraph 1 is superfluous.

As for paragraph 2, more empirical study on the feasibility of this option would be helpful.

Article 9: Confidentiality

1. Adjudicators and former adjudicators shall not:

   (a) Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;

   (b) Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and

   (c) Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.

…

Singapore: In our view, the duty of confidentiality should extend to former adjudicators as well. See *eg*, CPTPP ISDS Code of Conduct at paragraph 8.

Article 10: Pre-appointment ~~**Interviews**~~ **Communications**

1. Any pre-appointment ~~interview~~ communications with a candidate shall be limited to discussion concerning the expertise, experience and availability of the ~~adjudicator~~ candidate, and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.

2. [If, pursuant to paragraph 1, any ~~pre-~~party communicates with a prospective adjudicator before his or her appointment ~~interview occurs~~, ~~it~~ the contents of such communication shall be fully disclosed to all parties upon such appointment ~~of the candidate~~.]

Singapore: In our view, this rule should apply to all pre-appointment communications, and not just interviews, in order to achieve the stated objective of reinforcing the confidence of all parties that no inappropriate information is shared with candidate(s). We have made edits to such effect. We also think that the discussion with the candidate can extend to their expertise and experience. See, *eg*, Guideline 8 of the IBA Guidelines on Party Representation in International Arbitration.

In paragraph 2, we suggest that it be explicitly set out that it is the "contents of the communication" that have to be fully disclosed. Otherwise, there is ambiguity as to whether disclosure of "it" refers to the communications, or merely the *fact* that such communications took place.

Article 11: Fees and Expenses

1. ~~Any~~ If there are no pre-determined rates or methods set out in the applicable rules, any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding.

…

Singapore: We note the Secretariats' intent for this rule to operate if the issue of fees is not dealt with in the applicable arbitration rules. We think it would be clearer to set out this intent in the

wording of the article for avoidance of doubt, lest the COC be interpreted as providing an overriding flexibility for parties to discuss fees even when this is already pre-determined under institutional rules.

Article 12: Enforcement of the Code of Conduct

1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code. For greater certainty, every adjudicator and candidate continues to be bound by any [other] codes of conduct in the applicable treaty or rules.

2. The disqualification and removal procedures in the applicable rules shall ~~continue~~ apply to ~~apply~~ non-compliance of this Code of Conduct.

3. [Other options based on means of implementation of the code]

Singapore: We note the Secretariats' comment that the relationship between this Code and other existing codes of conduct, which could simultaneously apply, also requires consideration. We agree, and also highlight that there may be a need for a "deconflicting provision" to be inserted in this Article to deal with the situation where this Code and other applicable codes have differing standards on an issue. This is an important discussion especially if the WG wishes to implement sanctions. For now, we have suggested a provision to the effect that this code and other codes simultaneously apply.

We suggested the edits to paragraph 2 to reflect the idea that disqualification and removal procedures applied by different administering institutions can be used to enforce against any violations of this Code, with which we agree.

Singapore's other comments for the Secretariats' consideration: There may also be utility in including provisions to the effect of rules 15-17 of the Code of Conduct for Members of Tribunal, Appeal Tribunal and Mediators in the EU-Singapore Investment Protection Agreement, *ie*, that former members of the permanent mechanism must not be involved in disputes that were pending before them before the end of their term, and must not for a period of [X] years, act as representatives of any of the disputing parties in investment disputes before the permanent mechanism. Such provisions would, of course, only be applicable to adjudicators on any permanent mechanism.

Switzerland

I. GENERAL COMMENTS

In Switzerland's view, the Draft Code of Conduct jointly prepared by ICSID and UNCITRAL provides a good basis on which to build but at the same time raises some issues, which are commented below.

UNCITRAL Working Group III (WGIII) decided to undertake preparatory work on a code of conduct with ICSID and that such work would encompass the implementation of a code of conduct in the current ISDS regime and in the context of potential standing multilateral

mechanisms for ISDS. However, Switzerland is of the opinion that the current drafting is better suited to an ad hoc ISDS arbitration system than a permanent multilateral body or mechanism for ISDS. Therefore, additional work is needed for the second case.

II.COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT TEXT

Article 4 – Independence and Impartiality

Article 4 rightly enumerates the specific behaviours expected from adjudicators to ensure independence and impartiality. We do however have a wording suggestion with respect to para. 2 (e). We propose to consider replacing the term "incur" by the term "assume" as underlined below:

In particular, adjudicators shall not: (…)
(e) Directly or indirectly, assume an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties

Article 5 – Conflicts of Interest: Disclosure Obligations

In our view the Draft Code of Conduct should encompass extensive disclosure obligations. In this respect we allow ourselves to make the following comment.

With respect to para. 2 letter (a) numbers (i) and (iv), we suggest to include any subsidiaries, parent-companies or agencies related to the parties as well as any third party with a direct or indirect financial interest in the outcome of the proceeding.

Article 6 – Limit on Multiple Roles

In the context of ad hoc ISDS arbitration, Switzerland is of the view that the code should contain an obligation to disclose the overlapping roles with a possibility for the parties to challenge the adjudicator. The lack of diversity was identified by WGIII as one of the concerns with respect to the current ISDS regime; creating an outright ban on double-hatting would enhance the lack of diversity rather than remedy it. The application of such a provision in the context of a permanent multilateral investment body or mechanism needs to be further considered.

Article 7 – Integrity, Fairness and Competence

Para. 2 prohibits *ex parte* communications concerning the proceedings, which is an important principle. However, in the context of party-appointed adjudicators, it is generally accepted that it is subject to some very limited exceptions at the beginning of a case. In particular when an adjudicator confers with his or her nominating party about the selection of a presiding adjudicator, including discussing the relevant background, expertise, experience and availability of different candidates, these communications are not considered improper nor grounds for challenging the adjudicator or the award. For the sake of clarity, this could be specified, by adapting para. 2 as underlined below:

During the proceeding, an adjudicator shall not engage in ex parte contacts concerning such proceeding.

Article 8 – Availability, Diligence, Civility and Efficiency

From Switzerland's perspective the inclusion of para. 2 appears somewhat problematic. Introducing an absolute limitation on the number of cases an adjudicator can hear simultaneously would not properly respond to the concerns regarding duration of proceedings. The number of cases an adjudicator can diligently manage depends on a plurality of factors, including the complexity of the case, the capacity of the individual, and the role played by the adjudicator.

Article 9 – Confidentiality

With respect to para. 1 letter (a), there may be situations in which the adjudicator may be required to disclose an information by a court order; or the adjudicator is sued by a party, hence may need to disclose certain information to protect his/her rights. In this respect we would like to suggest to add the underlined language, in line with commonly accepted exceptions to duty of confidentiality:

Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding or save and to the extent that disclosure may be required by legal duty or to protect or pursue a legal right;

Turkey

1) Article 1 / Definitions

Turkey suggests that drafters may reconsider whether the scope of the draft code may extend to secretaries. The code of conduct could apply to secretaries to some extent that provide administrative functions and assist in the proceedings as part of their regular work for the institution. This may be important when considering the confidentiality obligations. Thus, it may be expanded particularly to those participating in deliberations and providing intermediary roles between parties and tribunals.

2) Article 5 / Conflicts of Interest: Disclosure Obligations

According to the Article 5/1, candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality.

In this regard, disclosures made pursuant to paragraph (1) shall include inter alia, any professional, business and other significant relationships, within the past [five] years with the parties [and any subsidiaries, parent-companies or agencies related to the parties].

Turkey would like to emphasize that the term "parties" should be interpreted to include controlling shareholders of the parties. Because the ones who direct the company determine the strategy of the company (in other word "the party" in an arbitration proceeding), and also choose

the arbitrator are controlling shareholders. Therefore, adjudicator should disclose any interest, relationship or matter also with controlling shareholders.
Turkey supports the draft rule, as set out in the 4th paragraph, candidates and adjudicators should act in favour of disclosure if they have any doubt as to whether a disclosure should be made. In this regard, if they have any doubt as to conflict of interest, adjudicators and candidates should also disclose any interest, relationship or matter even with any shareholders in addition to controlling shareholders in order to avoid any suspicion.
Turkey is not sure whether the Article 5.2.A might put disclosure requirement to adjudicators in an extensive manner, in particular with reference to their public speeches, as well as "all" not related publications.

3) Article 6 / Limit on Multiple Roles
Turkey suggests that in terms of double hatting, an obligation to disclose the overlapping roles should be made to allow the parties to challenge the adjudicator if they find the overlapping roles objectionable instead of outright ban. An outright ban may cause exclusion a greater number of persons than necessary to avoid conflicts of interest and would interfere with the freedom of choice of adjudicators and counsels by States and investors. Therefore; Turkey suggests the regulation of double hatting instead of full restriction. Thus, within the given option the Article 6 may be preferred as "Adjudicators shall disclose that they act as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties or the same facts or the same treaty].

4-) Article 9 / Confidentiality
Turkey suggests that this paragraph should be added to the Article 9: "Adjudicators shall refrain from disclosing all matters and correspondences related to decision, order or award during the process." As the obligation of confidentiality is regulated for the adjudicators, and the subject of the correspondence is not clearly mentioned in the text, it will be useful to add aforementioned paragraph.

5-) Article 12 / Enforcement of the Code of Conduct
Turkey is wondering about how to enforce the Code, making binding it for all parties. This might be done by making a reference in the ICSID Arbitration Rules. In addition, there might be some sanctions for the breach of the code given by ICSID Arbitration Center. There is a gap as to whether these rules will be applied immediately to existing arbitration cases.

United Kingdom

Draft Code of Conduct for Arbitrators in Investor-State Dispute Settlement: Comments by the United Kingdom on the proposed investor-state dispute settlement reforms

1. The UK welcomes the work of the UNCITRAL and ICSID Secretariat on the draft code of conduct which sets out options for a code of conduct for arbitrators. The UK would like to express its continued support of this work and thanks the Secretariats for their work on the current draft and its consideration of the issues and challenges raised.

2. The UK supports high ethical standards for arbitrators and believes that a code of conduct is an important step in the ISDS reform process, which will help to increase trust in tribunals and strengthen the fairness and integrity of the process as a whole.

3. The UK is pleased with the code of conduct and would like to express our broad support for the draft as it stands. We would like to provide some comments on a few of the issues raised within the commentary on the code of conduct and feel confident that the Working Group will be able to agree a final code of conduct from this draft.

Articles 1 – 4

4. The UK supports the current drafting of articles 1 - 4 and looks forward to further discussion of these articles in Working Group III, with a view to reaching swift agreement on these points.

Article 5 – Conflicts of Interest: Disclosure Obligations

5. The UK supports strong disclosure obligations of relevant information for arbitrators in ISDS proceedings. The UK believes the current drafting of Article 5 includes a broadly balanced set of obligations and supports the inclusion of point 2(a)(iv) in Article 5 which requires the disclosure of any third party with direct or indirect financial interest in the outcome of the proceeding.

6. The UK would ask the working group to consider the value of the inclusion of the requirement for arbitrators to disclose all publications and public speeches as part of a code of conduct. It would be fair to assume that these publications or speeches where relevant would already be in the public domain and could be found by Counsel, even if arbitrators choose to disclose these voluntarily.

Article 6 – Limit on Multiple Roles

7. The UK considers that it is important to place limits on the number of roles an individual can play in order to prevent conflicts of interest, but that this should be done in a way that does not unduly limit the number of arbitrators available. The UK continues to support provisions that prevent arbitrators acting as counsel or as party-appointed expert or witness in any pending or new arbitration under the same agreement, for the duration of the first proceedings – so called ‘double hatting’. The UK believes this strikes an appropriate balance between ensuring arbitrators remain independent and impartial while not placing an undue burden on arbitrators or overly limiting the pool of eligible arbitrators. The UK believes the drafting in the code of conduct should reflect this approach.

8. The UK considers that overly strict double hatting rules/regulations would create additional unintentional impacts and affect the diversity and availability of arbitrators, while also preventing the most experienced arbitrators from taking on cases they are qualified and capable of handling alongside other commitments. Strengthening other

independence and impartiality requirements within the code of conduct would be a more effective approach.

Article 7 – Integrity, Fairness and Competence

9. The UK supports the promotion of integrity, fairness and competence for arbitrators within the ISDS process and believe that arbitrators overseeing ISDS cases should have expertise, but notes that listing explicit qualifications or experience requirements may inadvertently limit flexibility in certain cases.

10. The UK already supports the inclusion of guidelines that arbitrators must follow within treaty texts. If an ad-hoc tribunal method were to continue, references to a code of conduct should be made in new treaty texts as well as implemented via ICSID rules and other arbitral institutions to ensure broad implementation of the rules.

Article 8 – Availability, Diligence, Civility and Efficiency

11. The UK welcomes the commitments made in Article 8 on the availability, diligence, civility and efficiency of arbitrators, however the UK believes that there should not be an absolute limit on the number of cases an arbitrator can handle at any given time as per the suggested drafting in Paragraph 2. This could again create a barrier of entry to newer, less experienced arbitrators who may need multiple cases to make arbitration a full-time role. Instead, other commitments around availability or efficiency, for example, will require that an arbitrator has the capacity to properly service all their cases and can be held accountable to those commitments.

Article 9 – Confidentiality

12. The UK supports the drafting of Article 9 and believes that strong confidentiality requirements are important for arbitrators within ISDS proceedings, while also not reducing the transparency of the process.

13. The UK does not support the wording in square brackets in Paragraph 2. As the commentary notes, the practice is already observed by most arbitrators and we believe the current wording is unnecessarily broad. The UK believes that the parts of the code of conduct which hold arbitrators to high standards of impartiality have the same indirect effect without creating possible unintended consequences and unnecessarily undermining arbitrators.

Articles 10 and 11 – Pre-appointment interviews and Fees and Expenses

14. The UK supports the current drafting of articles 10 and 11 and looks forward to further discussion of these articles in Working Group III, with a view to reaching swift agreement on these points.

Article 12 – Enforcement of the Code of Conduct

15. The UK supports obliging arbitrators to comply with and follow the code of conduct and believes that the applicable disqualification and removal procedures should continue to apply.

United States

COMMENTS SUBMITTED BY UNITED STATES OF AMERICA
NOVEMBER 30, 2020

General

The United States congratulates the Secretariats of UNCITRAL and ICSID for their excellent and thorough work on the development of the draft "Code of Conduct for Adjudicators in Investor-State Dispute Settlement." We also appreciate the many hours devoted to explaining the draft Code and the rationale behind the provisions, which have helped our own review.

In general, the United States supports the substance of the scope and contents of the draft Code, and appreciates the efforts by the two Secretariats to synthesize best practices and address concerns identified during the UNCITRAL Working Group III deliberations and ICSID rules amendment process. The United States submits these initial comments to refine further the draft Code so that it will provide clearer rules for adjudicators and the necessary flexibility and optionality for sovereign states. Clearer rules can help to address existing concerns about perceived and actual bias of adjudicators, while respecting the desire for party autonomy in the selection of adjudicators for *ad hoc* proceedings. Clearer rules can also enhance the legitimacy of the investor-State dispute settlement (ISDS) process when States make the sovereign choice to incorporate ISDS in their practice. Before commenting on specific articles, we make several general observations below.

Code as Default Standard

The United States believes that the draft Code should lay the groundwork for establishing default standards for adjudicator conduct, incorporating best practices and lessons learned from existing international and domestic guidelines on adjudicator ethics. Nevertheless, the United States believes that it is important to retain flexibility so that States in their sovereign capacity have the option to decide to apply different standards for adjudicators in their international investment agreements (IIAs) or other governing instruments, such as statutes or contracts, in which States choose to consent to ISDS. To facilitate this policy flexibility, the Code once final should clarify that any provisions regarding adjudicator conduct included in a specific IIA (or other governing instrument forming the basis for an arbitral agreement) will prevail over inconsistent provisions in the Code itself, or will supplement the Code if the Code is silent on a matter

Relationship of Code to Existing International Ethical Guidelines

The United States has frequently referred to the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") as a framework for assessing potential conflicts. The United States has referred to the IBA Guidelines in draft procedural orders, and those standards have been incorporated in arbitration provisions with Mexico in our most recent IIA,

the U.S.-Mexico-Canada Agreement (USMCA). Under the USMCA provisions, arbitrators appointed to a USMCA ISDS proceeding must comply with the IBA Guidelines, not take instruction from any government, and not serve as counsel or party-appointed expert in any other proceedings under the USMCA for the duration of the proceedings.

For purposes of further development of the draft Code, it may be useful to keep in mind provisions of the IBA Guidelines, even though they were not developed by governments and were designed to apply primarily, though not exclusively, to commercial disputes. Over time, the IBA Guidelines have been used to guide issues of arbitrator conflicts for international arbitration and helpful experience has been gained in their application. As such, they can serve as a useful guidepost by which to consider the proposed rules in the draft Code and may also provide examples of practice that can help to clarify or explain the Code in subsequent drafts. The United States recommends that, as appropriate, the draft Code draw and expand upon those elements of the IBA Guidelines that have been used frequently or have inspired corresponding provisions in the draft Code.

Role of Commentary to the Code

The United States also recommends that a new version of the Commentary be developed with each revised version of the draft Code, with a final Commentary once the text of the Code itself is finalized. On the current draft Commentary, while the discussion of the policy choices accompanying the draft Articles is useful for evaluating the proposals at this stage, once the provisions are settled, it will be important to provide a new accompanying Commentary to the Code that focuses on explaining how the provisions should operate and the policy that guides them, including discussion of any disqualification decisions or other frameworks that are relevant to their operation or meaning.

For example, it might be useful to include specific examples, similar to the "red" and "green" list items that are provided in the IBA Guidelines, that would illustrate the outer bounds of provisions. Absent such illustrations, the Articles in the final Code could have the unintended consequence of promoting unnecessary or experimental challenges as a way to identify where the lines are drawn on these matters. We have flagged in our comments to the individual Articles aspects of the existing discussion that would be useful to include in a final Commentary or where such discussion, if it were included in a final version, may create confusion and should be deleted. Finally, the United States appreciates that the Code drafters may not intend this initial version of the Commentary to serve the function of a *travaux* and the Working Group should confirm the role of the initial Commentary when the draft Code is discussed next. Such a clarification will help address the likelihood that lawyers will cite to drafts of the Commentary as if they were *travaux* if it supports their interpretation of the Code. Future Commentaries should be developed subject to guidance from the Working Group.

Enforcement and Implementation

The United States considers it premature to take positions on the enforcement and implementation of the Code until the substance of the obligations of the draft Code is complete. We have, however, some initial considerations on the need for flexibility in both enforcement and implementation, which are briefly discussed below.

Specific Articles

The following comments from the United States address the specific articles in the draft Code. In some cases, the U.S. comments respond to policy questions posed by the Commentary discussion accompanying each article; in others, the comments are intended to help clarify the meaning of the provision with which we agree in substance. Suggested text is provided on occasion to clarify a particular comment.

As a drafting convention, to the extent that a particular provision of the Code is intended to be mandatory, we recommend the use of "shall" for consistency and clarity. Where the Code is intended to be discretionary, we recommend the use of "may" or "should."

In developing these comments, the United States drew as appropriate from relevant provisions in the IBA Guidelines, the USMCA, and the Code of Conduct for United States Judges.

Article 1 – Definitions

Overall: The definitions set out a useful framework for identifying who and what types of disputes will be covered by the Code.

Article 1.1: The definition of "adjudicator" should be revised to clarify that only an adjudicator appointed or selected to resolve an investor-State dispute is covered. Suggested clarifying edit:

> "Adjudicators" means individuals appointed to resolve investor-State disputes, including arbitrators, members of international *ad hoc*, annulment or appeal committees, and judges on a permanent mechanism;

Article 1.3: The definition of "candidate" should be clarified so that individuals who are proposed or contacted for selection are included in the definition regardless of whether they are confirmed. Suggested clarifying edit:

> "Candidates" means persons who have been proposed or contacted for selection and potential appointment as adjudicator regardless of whether they are ultimately confirmed in this role;

Article 2 – Application of the Code

Overall: The application provision should clarify the default relationship between the Code and similar provisions regarding conduct or qualifications of adjudicators in any IIA, statute or other binding agreement that governs the dispute. In the event of an express or implicit conflict between the governing document and the Code, or if the governing document provides greater detail on issues or terms contained in the Code, the governing document should prevail. If the

governing document is silent on an issue, or incorporates the Code by reference without any modification, the Code should be applied without modification.

Article 2.2: The candidate's duty to comply with the Code should be mandatory. The United States observes that paragraph 24 of the Commentary reads "should comply" whereas draft Article 2.2 makes clear that "Candidates *must comply* with the relevant provisions of the Code as soon as they are contacted in relation to a possible appointment." (Emphasis added).

Article 3 – Duties and Responsibilities

Overall: The United States has several observations on this article, which covers the fundamental "duties and responsibilities" of adjudicators to the parties and the proceeding:

- The phrase "at all times" should be deleted because it is not clear that all duties survive the conclusion of a proceeding. Certain duties, such as non-disclosure and confidentiality obligations, clearly continue after an appointment and the end of the proceedings themselves. It may be clearer to state that point expressly in the obligations themselves. The Commentary could also reinforce the duty that adjudicators have at all times to continue to comply with any domestic (or international) professional ethics rules and codes that apply.

- Article 3(a): This subparagraph should be revised to include an obligation to avoid the appearance of a lack of independence, or the appearance of partiality or impropriety, and not just independence, impartiality, or impropriety, to parallel the obligation to avoid bias or the appearance of bias. It might also be useful to create a separate subparagraph (a), so as to highlight the importance of compliance with high standards of ethical conduct for each of the standards and duties in that subparagraph. Suggested language:

  At all times, adjudicators shall:
  (a) Be independent and impartial and avoid the appearance of a lack of independence or impartiality;
  (b) Avoid any direct or indirect conflicts of interest;
  (c) Avoid any impropriety, bias or the appearance of impropriety or bias;

- Future Commentary to accompany this article could include illustrative examples of the types of conduct that are or are not appropriate, so as to provide guidance to facilitate the application and enforcement of the Code, while recognizing that it is not possible to list all potential scenarios.
-

Article 4 – Independence and Impartiality

Overall: It may be useful to include as an obligation that adjudicators decline an appointment when they have misgivings about their ability to be independent or impartial, as is the case with the IBA Guidelines, to reinforce the importance of arbitrators being proactive when their independence and impartiality cannot be guaranteed or would clearly be questioned.

Clarification in the Commentary may be useful for terms that may not have a common meaning, such as "public clamor" and "fear of criticism."

Finally, the United States notes that this article should expressly prohibit arbitrators from taking any instruction from an organization or government or any other person regarding the dispute. An example of such a prohibition is the language in USMCA Article 14.D.6(5)(b). The ICSID Arbitrator Declaration contains a similar obligation.

Article 5 – Conflicts of Interest: Disclosure Obligations

Overall: The United States welcomes the broad disclosure requirements, which will be crucial to address the potential conflicts of interest for adjudicators in ISDS proceedings and foster confidence in the decision-makers and their decisions. Greater transparency about arbitrator relationships and experience can dispel the perception that arbitrators may have "ulterior motives" when accepting appointments. Having a common set of disclosure requirements will also standardize the types of information available about candidates, which can facilitate their selection as adjudicators over time. The draft Code's disclosure requirements should seek to enhance existing standards of disclosure and not fall below those that already exist, such as the IBA Guidelines, IIA-based codes, or national codes, such as the Code of Conduct for United States Judges.

While broad disclosure is important, not all instances of disclosure indicate potential bias. As such, Article 5 itself should make clear, as the draft Commentary in paragraph 42 states, that disclosure does not, in itself, create a presumption of the existence or appearance of a conflict. Article 5 should also clarify that, depending on the circumstances, a candidate's failure to disclose an item for which disclosure is required may not necessarily give rise to grounds for disqualification. Such a clarification, whether in the Code itself or in the accompanying Commentary, may be especially important regarding obligations where it has not been the current practice of adjudicators to track certain relationships or activities. Particularly in the early years of the Code's implementation, due consideration should be given to the potential for immaterial failures of disclosure as a result of a large volume of potentially relevant information, human error, and new recordkeeping requirements. Additionally, as discussed below in comments to Article 5.2(c), individual disclosure requirements may need to take account of any confidentiality obligations that arise from prior arbitration appointments or other privileged relationships. Finally, the disclosure obligation should be paired with an express provision allowing the parties to explicitly waive any conflicts in writing, as is the case with the IBA Guidelines and IIA-based codes.

The Commentary for this Article will be extremely important and should include examples to illustrate the meaning of certain terms so as to discourage unfounded challenges. Such guidance could include, where appropriate, citations to challenge decisions issued by institutions that were used to develop the draft Code's standards. For example, for terms that are meant to set limits on disclosure, such as "indirect" or "trivial," clear guidance and the use of examples in the Commentary will be helpful to avoid confusion and uncertainty about when disclosure is required.

Below are additional comments on the specific provisions of this Article:
Article 5.1: This article should make clear that candidates and arbitrators must disclose anything that could reasonably be perceived as bearing on their independence and impartiality. Perceptions can affect the legitimacy of individual ISDS decisions, and thus, the ISDS mechanism itself. Other existing codes in IIAs similarly directly refer to perceptions of independence and impartiality. Such an inclusion would reflect more accurately the discussion in the Commentary at paragraph 45, which states that "relationships or matters that can create a conflict that could be perceived as affecting their independence and impartiality" fall (or should fall) within the scope of Article 5.1. Suggested language:

> Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality, or the appearance of their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships, and matters.

Article 5.2(a): With respect to the bracketed language regarding the time frame for disclosures, a five-year time frame strikes an appropriate balance between the need to have visibility into past relationships, but not requiring disclosure of contacts that may be too remote to be relevant. The language "other significant relationships" should be clarified in the Commentary, perhaps with examples, to provide guidance to adjudicators on what other types of relationships (e.g., personal) should be disclosed.

- Article 5.2(a)(i): The language in brackets should be retained, and "affiliates" should be added to the list of corporate entities for which information should be disclosed. The language "agencies related to the parties" is ambiguous in scope. Our understanding of the intent of this language is that it refers only to agencies of a host State government, and not to other "agents" of a disputing party in general. If so, the language should be retained and modified to make this limitation explicit.

- Article 5.2(a)(iv): The language in brackets should be retained and at a minimum should cover third-party funders, consistent with the proposed ICSID Arbitrator Declaration. With respect to the more general reference to "any third party with a direct or indirect financial interest in the outcome of the proceeding," commentary as to the types of relationships, not otherwise addressed by Articles 5.2(a)(i) and 5.2(b), that this provision is meant to cover would be useful. Finally, examples in the Commentary of what constitutes a "direct or indirect financial interest" with respect to third-party funders or other third parties in subparagraph (iv) would be useful.

Article 5.2(b): This article should include examples in the Commentary of what constitutes a "direct or indirect financial interest" for purposes of the proceeding and its outcome, as well as the kinds of proceedings listed in clause (ii).

Article 5.2(c): The United States supports having a broad scope of coverage for disclosing an adjudicator's involvement in other international arbitration cases and supports including the language currently in brackets to identify an adjudicator's past experience. Disclosure of an

adjudicator's role in past arbitrations not only identifies any potential or actual conflicts, but also should help demonstrate an adjudicator's qualifications and experience. In taking on broader coverage, however, this article should also consider that disclosure of one's role as counsel, arbitrator or expert in commercial arbitration cases may be precluded by the confidentiality obligations of the arbitration. For example, it is common in commercial arbitration cases for the names of the parties, any details of the dispute, and sometimes the fact of the arbitration itself to be confidential. In these cases, the information that an arbitrator can provide may need to be redacted or otherwise made generic to allow the arbitrator to disclose the role that she served in but not the details that are confidential.

To the extent that this article is designed to capture a candidate's repeat appointments outside the five-year window in Article 5.2(a), the article should include a separate disclosure requirement specifically for repeat appointments of an adjudicator to serve as counsel, arbitrator, annulment committee member, or expert in prior proceedings by the parties or their counsel, including disclosure of the involvement of third-party funders in cases of repeat appointments. To address the unusual case in which a previous appointment by one of the parties, counsel, or third-party funder cannot be disclosed, language should be considered that would require an adjudicator to decline an appointment when disclosure of even the existence of a prior repeat appointment is precluded by confidentiality.

Article 5.2(d): The United States supports requiring candidates and adjudicators to disclose their publications and relevant public speeches because such information can provide an important opportunity for parties to learn about an adjudicator's expertise and qualifications. As paragraph 60 of the Commentary notes, a "specific duty of disclosure of relevant publications will provide the parties with the knowledge of the writings of a nominated or prospective adjudicator and will therefore enhance the opportunities of the parties to learn comprehensively about the adjudicator's work." We agree with the Commentary and further note that there are a number of benefits to the disclosure of publications and speeches, such as the assessment of the candidate's qualifications, the range of issues with which the candidate may be familiar, and possibly even the candidate's analytical style. We rely on this information in our own research of the suitability of potential candidates, and in our experience, many candidates and adjudicators already maintain lists of their publications and relevant public speeches.

We recognize that a candidate's publications and relevant public speeches may reveal a predisposition on individual questions of law and, in certain limited circumstances, the predisposition may be so firmly held that the candidate or adjudicator is unable to approach argument on the subject impartially and with an open mind. In such a case, a candidate or adjudicator will have effectively prejudged the legal question, thus creating an issue conflict, as noted in paragraph 59 of the Commentary. As that paragraph also notes, however, "[p]roving the existence of an issue conflict is difficult," and challenges based on issue conflicts are rarely accepted. We further note that the IBA Guidelines include on the "Green List" a previously expressed "legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration" but where "this opinion is not focused on the case" in question. In light of this background, we recommend the Working Group have further

discussions on the circumstances in which a candidate or adjudicator's publications or relevant public speeches may give rise to an issue conflict.

Finally, the language regarding "relevant public speeches" in brackets should be included as part of the disclosure obligation. However, it would be useful to have further discussion by the Working Group to clarify and provide guidance on what is meant by "relevant."

Article 5.3: This article should include text to require additional disclosures be made as they become known.

Article 5.4: As noted in the general comments, Commentary to this article should provide examples and guidance on the meaning of "trivial" so as to clarify better the scope of disclosures that are not required. In addition, alternative terms with a more commonly understood legal meaning, such as "immaterial," could be used.

Article 6 – Limits on Multiple Roles

Overall: A provision that addresses the multiple roles that an individual can serve in adjudication should strike a balance between ensuring impartiality and independence, on the one hand, and not unduly restricting party autonomy when selecting arbitrators and limiting the pool of arbitrators in terms of diversity and availability, on the other. Requiring disclosure of multiple roles goes a long way towards striking this balance and it should be the baseline for addressing concerns about an adjudicator's multiple roles. As such, the United States supports retaining the language in brackets requiring disclosure of multiple roles that an adjudicator is simultaneously holding on matters involving the same parties. Such a provision could alternatively be included in Article 5, along with the other disclosure requirements, and could further promote the interests of party autonomy by allowing the disputing parties to decide whether to waive expressly any conflicts that might arise from multiple roles.

As the various sets of other bracketed language in Article 6 demonstrate, the degree to which multiple roles should be limited is likely an issue for which governments in their sovereign capacities may have different policy and political preferences. As such, it may be difficult to devise a default standard that goes beyond disclosure for a Code that is intended to apply universally to all arbitrations under a large number and broad range of IIAs. Instead, it may be more useful for further discussion and the facilitation of the adoption of a Code to consider a "disclosure only" requirement, in addition to considering multiple options with respect to applicable standards as currently reflected in the language of the final clause of Article 6 ("same parties, [the same facts] [and/or] [the same treaty]").

Of course, ultimately, countries will always have the choice to adopt different approaches to limits on multiple roles in their individual IIAs. For example, countries may decide that the appearance of partiality or lack of independence would justify limiting multiple roles when an adjudicator is serving multiple roles under the same treaty. The United States and Mexico reached agreement on such an approach in the USMCA. Specifically, USMCA Article 14.D.6(5)(c) prohibits an arbitrator during any proceedings from "act[ing] as counsel or party-

appointed expert or witness in any pending arbitration under the annexes" of Chapter 14, the USMCA investment chapter.

We would have concerns about the inclusion of an outright ban on multiple roles for *ad hoc* proceedings. Such a ban would unduly restrict a disputing party's ability to select the arbitrator with the most appropriate expertise for a given dispute and risk categorically ruling out qualified and experienced legal professionals who may seek to serve as both counsel and adjudicators in *ad hoc* proceedings. We note, however, that these impacts could be mitigated if disputing parties were able to waive such a ban.

Regardless of the manner in which any such policy choices may be reflected, the Commentary discussing any limitations on multiple roles should illustrate what types of "other relevant roles" are intended to be captured by this phase, to limit confusion on when a particular role might create a concern about independence or impartiality.

Article 7 – Integrity, Fairness, and Competence

Overall: This article provides useful standards for ensuring that adjudicators are even-handed and possess the characteristics typically considered essential to promote the legitimacy of the adjudication. The question of what is required to be competent, however, may be better left to another aspect of reform, such as selection criteria, rather than as an element of the Commentary that will accompany the Code. As such, the Commentary on adjudicator competence should focus on the importance of competence but remain flexible enough so that the competence of adjudicators in an *ad hoc* context can be tailored to the specific needs of a particular dispute.

Additionally, the United States observes that paragraph 77 of the draft Commentary lists a number of suggested qualities that adjudicators should possess. The United States has some concern that this list of qualities, separated by an "and," suggests that an adjudicator should possess all such qualities (which is highly unlikely for a single individual). The United States is also concerned that other valuable experience or expertise is not listed. For example, certain experience might be relevant for specific types of claims, such as judicial or other adjudicative experience in a case involving an allegation of denial of justice. Another example might be experience relevant to the ability to manage a case, such as prior experience as an arbitrator or judge in a domestic or international court. The United States would suggest that, to the extent that criteria on competence remain in any future version of the Commentary, this language in paragraph 77 be changed from "and" to "or" or otherwise make clear that the list of qualities is illustrative and non-exhaustive.

Article 7.1: Examples to illustrate the level of conduct desired should be included to clarify what is meant by requiring the "highest standards" of integrity and fairness, given that many other codes governing conduct of international and domestic adjudicators set the bar at "high standards" for the relevant conduct.

Article 7.2: The prohibition on *ex parte* communications should be consistent with other underlying rules that may allow these types of contacts for limited purposes, so long as instances of such communications are disclosed, or to facilitate the selection of the chair by the party-appointed arbitrators.

Article 7.3: The language regarding an arbitrator's duty to accept appointments only if qualified should be consistent with the rest of Article 7 and be changed from "should" to "shall." Moreover, it may be preferable to express the obligation as one to decline appointments for which the adjudicator lacks competence, rather than obligate the adjudicator to accept "only appointments for which they are competent."

Article 8 – Availability, Diligence, Civility, and Efficiency

Overall: This article usefully highlights the importance for adjudicators to manage any proceeding efficiently and effectively. Several of the provisions, however, could benefit from revision, as they may be either overly prescriptive or, alternatively, too vague in describing the desired conduct. As drafted, they set out standards that regulate conduct too rigidly or do not lend themselves to an objective assessment.

Article 8.1: Consistent with other articles in the Code that apply to both candidates and adjudicators, this provision should also refer to candidates as well as adjudicators.

Article 8.2: To promote timely consideration and resolution of a dispute, this article should establish a functional regulation to set the expectation of good time management by adjudicators, rather than a numerical one restricting the number of proceedings in which adjudicators may participate. It may be difficult to identify the right number to fit all adjudicators, given the circumstances of specific proceedings and the different abilities of adjudicators to manage their time effectively and efficiently. This article should also apply to candidates as well as adjudicators. Suggested language:

> Candidates and adjudicators shall not accept any appointment when they cannot reasonably expect to meet timelines of both the newly initiated proceeding and any pending proceedings in which they currently serve, including reasonable timelines for preliminary or other phases of the proceeding and any timelines fixed by scheduling order or applicable rules for issuing a decision or award.

Article 8.3: This article should be deleted or revised to require adjudicators to use "best efforts" to comply with deadlines, and where they cannot, state the specific special circumstances justifying that inability and a revised timeline for when compliance will occur. Alternatively, the article could be framed as a hortatory duty, as it may be preferable to have case management objectives addressed in specific procedural orders or the institutional rules governing the proceeding itself.

Article 8.4: The language, "and shall consider the best interests of the parties" should be deleted from this article, as it is vague and not readily subject to an objective assessment of compliance. Moreover, that language may conflict with the adjudicator's task as defined in the IIA or other instrument of consent to dispute settlement. The latter instrument presumably will instruct the adjudicator to resolve the dispute in accordance with some body of governing law and not in accordance with the adjudicator's subjective view of what could be considered to be "the best interests of the parties."

Article 9 – Confidentiality

Overall: The duty to respect confidentiality is an important one; however, it should not unduly limit the ability of adjudicators to comment publicly about general experience and observations once the proceeding is complete when doing so would not breach the confidentiality of the parties' information or the deliberations, or as otherwise set forth in any relevant order or other legal authority.

Article 9.1(a): This article should be revised to permit an adjudicator to use or disclose non-public information by agreement of the parties.

Article 9.2: The language in brackets precluding adjudicators from commenting on any "decision, ruling, or award in which they participated" should be retained. As noted in paragraph 82 of the Commentary, adjudicators already observe this common practice. Additionally, we note that many IIAs permit sharing the draft award at the request of the disputing parties. As such, the prohibition on disclosing awards to the parties before they are final is an example of when a specific provision in an IIA should prevail over an inconsistent provision of the Code. Including language in the Commentary could be useful to highlight this existing exception.

Article 10 – Pre-appointment interviews

Overall: Clearer guidance regarding the conduct of pre-appointment interviews is welcome and can help dispel the perception that discussions between candidates in advance of appointment are conducted in a way that compromises an adjudicator's independence and impartiality. The article, however, could be drafted to consider the practical needs of interviews for adjudicator selection.

Article 10.1: This article may be too narrowly drawn as a practical matter. Some discussion of the case is necessary for candidates to gauge their competence for the dispute, whether they may have any conflicts, and whether they will have the time to devote to the matter.

Article 10.2: This article should require only disclosure of the fact of the interview, which is more feasible than having a standard that may be difficult to define for recording the contents of the interview, although it should not preclude further disclosure of the contents if there are grounds for seeking more information. As such, the United States does not object to the requirement in Article 10.2 to disclose the fact of any pre-appointment interview upon the appointment of a candidate. Paragraph 84 of the Commentary, however, purports to require *parties* to record such interviews. As the draft Code will not be binding on parties, this language should be revised in any future version of the Commentary, preferably simply to note the adjudicator's duty to disclose the fact of the interview with a representation that such interview was appropriate and in the bounds of Article 10.

Article 11 – Fees and Expenses

Overall: This article introduces important predictability and accountability regarding the setting of adjudicator fees.

Article 11.1: The article appropriately requires the agreement on adjudicator fees at the beginning of a proceeding and the sharing of that information through appropriate channels,

which should be flexible to accommodate different *ad hoc* and institution-administered proceedings.

Article 11.2: The article should require an appropriate level of disclosure and recording of adjudicators' time, so that parties can be assured that the time is being spent efficiently, but also to avoid unnecessary litigation or second-guessing of how a tribunal reached a decision.

Article 12 – Enforcement

Overall: The draft article regarding enforcement sets out the two main existing methods of enforcement: voluntary compliance and disqualification. As the draft Commentary at paragraph 88 notes, however, some of the questions on enforcement will also depend on how the Code is ultimately implemented, and several options for implementation are set out in the Commentary at paragraph 97. Until the obligations of the Code are finalized, specific comments on enforcement and implementation are premature. Further discussion of these topics is likely to be more productive once the text of the obligations is more settled. As stated above in the "General Comments," the United States therefore considers it premature to take positions on the enforcement and implementation of the Code until the substance of the obligations of the draft Code is complete.

In light of the preliminary nature of the draft Code, at this stage the United States offers a few general observations that may be useful to bear in mind when the discussion of enforcement and implementation is ripe:

Enforcement:

- *Need to clarify different primary mechanisms of enforcement within the Code:* Some articles, such as those addressing independence and impartiality and multiple roles, will be the subject of disqualification proceedings and should improve the process for removing adjudicators when they are unable to meet these standards. Whether disqualification is appropriate should be determined through a reasonable application of the Code and should depend on such factors as the seriousness of the improper activity, the intent of the adjudicator, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the ISDS mechanism as a whole. Other articles, however, address primarily the administration of the proceedings themselves and are not typically suited to be used as standards for disqualification. In fact, in those cases, disqualification could potentially be more disruptive than the conduct at issue.

- *Publishing information about compliance with the Code:* In considering how to promote compliance with the Code, it could useful to find ways to publish and standardize information disclosed by adjudicators, such as the number of proceedings in which adjudicators are sitting or the timelines for issuing awards for panels on which they sit. In any publication of information about adjudicators, however, it will be important to ensure due process regarding any substantive comments on adjudicator performance. For example, the United States observes that paragraphs 93-94 of the Commentary discuss a possible "name and shame" approach with respect to potential reputational sanctions in enforcement

of the Code. The United States believes that due process for adjudicators should be considered when examining possible reputational sanctions.

Implementation:

- *Promoting flexibility in application:* As with arbitration rules themselves, it is likely that a Code of Conduct will be subject to updates and revision based on experience that develops as it is used. In considering any possible implementation mechanism, it will be important to find ways to allow the Code to be updated that minimizes or avoids the need to amend any individual or multilateral treaty in which the Code might be incorporated.

Western Balkans (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia)

BACKGROUND INFORMATION

The countries of the Western Balkans have actively been participating in the ISDS reform process and engaging in international and regional exchange on the various reform options which have emerged. The modernization and enhancement of the ISDS capacities and structures is a matter of high priority for the region, due to their exposure to high-value investor claims. Given their common legal tradition and common EU accession aspirations, the countries of the Western Balkans region have the benefit of observing the ISDS reform process from the national and regional level. The regional exchange in this process has yielded fruitful discussions and helped crystalize some common priorities and positions of the countries of the region.

One common issue that the representatives of the Western Balkans countries have frequently raised is the lack or arbitrator accountability and transparency in the arbitrator appointment process. Therefore, the publication of the Draft Code of Conduct for Adjudicators in ISDS (the Draft Code of Conduct) developed jointly by the ICSID and UNCITRAL Secretariats was a welcome development which received considerable attention in the region.

The Open Regional Fund for SEE – Legal Reform, in the framework of the sub-project "Harmonization of the Legal Framework for Investment Protection", during the month of May-June 2020 conducted a survey with a specific focus on ISDS related matters. One of the topics was the Draft Code of Conduct and 93% of the surveyed institutions in the Western Balkans, agreed that a set of professional and ethical rules (such as the UNCITRAL/ICSID Draft Code of Conduct for ISDS Adjudicators) should be included in the ISDS clauses in the applicable BITs.

GENERAL COMMENTS

During a regional conference, organized on the 8th and 9th of July 2020 representatives from institutions in the region such as Ministries of Justice, Ministries of Economies and Finances, State Advocate Offices, Ministries of Trade and investment law experts from the academia

[12]discussed the content and implications of the Draft Code of Conduct. These discussions were continued through regional exchange of the stakeholders, and the following sections outline the main conclusions which were reached in this sense[13].[14]

The need for a universal set of rules for ISDS adjudicators

- Rules of ethics and professional standards for ISDS adjudicators already exist in certain institutional rules and IIAs applicable in the Western Balkans countries
- A universal set of ethical rules and standards for ISDS adjudicators is a welcome development and a positive step forward. However, the weakness of such universal code is that it could not articulate particular rules for different types of adjudicators. Besides the universal standard of independence and impartiality there are specific for arbitrators and which would differ from judges in a potential multilateral court.
- The Code of Conduct for Adjudicators represents a response to the need of the international arbitration community to standardize adjudicator's conduct at the multilateral level. That is one of the key objectives of the ISDS reform efforts within the UNCITRAL Working Group III. In addition, the standardization of the adjudicators' conduct through by means of a multilaterally applicable Code has been identified as particular interest of Western Balkan countries.

The potential forms of implementation of the Draft Code of Conduct

- So far, the conduct of arbitrators has been guided by soft law instruments, i.e. non-binding principles and rules of national and international origin. In that sense, the Draft Code of Conduct for Adjudicators will be the first comprehensive code of conduct that is applicable exclusively to ISDS disputes, which could be included into BITs as a binding set of rules.
- The Code of Conduct is thoroughly drafted and addresses the concerns of all the parties involved in ISDS, provides the necessary standards of independence and impartiality and thoroughly regulates the conflict of interest of ISDS.
- Considering that the ICSID or UNCITRAL arbitration rules are most frequently selected as the rules of procedure in BIT ISDS clauses, they can also imply the application of the Code of Conduct once adopted. If any third arbitration rules are specified in BIT than it would be desirable to include reference to the Code of Conduct as well.
- It is good that the Code would not apply to counsel, experts and other participants in the proceedings who would require different regulations due to their different roles in the proceedings. E.g. while the role of arbitrators or judges is to consider all relevant facts and evidence with due objectivity and impartiality, legal counsel's role is to best represent their clients and thus focus on the facts and evidence that support their case.

[12] The partners were representatives of the governments and academia from Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia.

[13]None of the statements in this text should be considered as binding positions of the Western Balkans governments, nor should they prejudice any different approach which may be taken by each respective government. This is in line with the approach of the UNCITRAL Working Group III in the discussions of various reform options, which represent „a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations' final position."

[14] Most statements are a synthesis of the common conclusions derived from group discussions, and suggestions coming from individual states are indicated as such in the text.

- The competent institutions in the countries of the region should determine the proper approach to the adoption of any potential rules for ISDS adjudicators, upon a closer analysis. Such rules can take the form of soft law, or they can be considered in the negotiations for the reform of existing IIAs or the conclusion of new IIAs.

Article 4 Independence and Impartiality
Will the broad scope of the general provisions on independence and impartiality provided in the Draft Code of Conduct suffice, or is there a need for more ISDS-specific provisions?

The duties and responsibilities are justifiably placed among the first articles of the Code, while independence and impartiality are emphasized as the leading operational principles of every real professional in this field, which is of particular importance for this type of proceeding.

Although these terms are quite similar, independence and impartiality are still different and they should be regulated separately, which is the case in the national legislature of Western Balkans countries. The obligation to disclose all the circumstances surrounding the potential adjudicators which could influence their independence (conflicts of interest) is a key consideration of the parties in the process of nominating and appointing such an "adjudicator".

One suggestion raised in this context was the addition of a model statement of acceptance, independence and impartiality, as provided in the rules of the major international arbitration institutions.

Article 5 Conflicts of Interest: Disclosure Obligations
What are the anticipated effects of the disclosure obligations provided in the Draft Code of Conduct? Is there a need for additional clarifications and qualifications of the scope of the disclosure provisions?

- Broad disclosure by the potential adjudicators is necessary to avoid conflict of interest. One of the primary characteristics that an adjudicator must possess is independence and impartiality, and they cannot be assessed without broad disclosure of any fact that might trigger conflict of interest.

- However, the proposed disclosure obligations are broad and may be difficult to enforce.

Disclosure of obligations requirements may indeed be very broad and thus difficult to enforce. It is, on the other hand, most probable that such broad scope of requirements stems from the prior experience of disputing parties in ISDS proceedings. Having this in mind, requirements under points a) to c) of paragraph 2 of Article 5 seem reasonable and should be kept. As for point d), it should be narrowed down to publications and public speeches that can be directly or indirectly related to specific ISDS cases in which the adjudicator is to be involved.

Balancing the availability and independence and impartiality of adjudicators in ISDS

- As the Western Balkans governments already had issues with repeat appointments of arbitrators, it is of the interest of the Western Balkan countries that the issue of repeat appointments is regulated in the Code of Conduct. Namely, a general rule regulating that it is not allowed for an individual arbitrator to participate in more arbitrations than it is possible to manage should be set. That number should be defined using different factors, based on average duration of the proceeding, average complexity of investment arbitration proceeding, etc. Also, some other factors should be used when assessing the availability of the arbitrators. In that sense, it should be examined whether a particular arbitrator has other professional commitments, like academic classes, other engagements as an expert witness etc.
- There is a limited pool of available professionals in smaller arbitration communities. Having in mind the difficulty of finding the appropriate arbitrator and managing conflicts of interest in that kind of environment, strict conflict rules are not recommendable. Thus, a flexible mechanism of disclosure, which takes into consideration the particularities of specific fields, i.e. custom and practice should be considered. For example, in certain industries, it is the custom for parties to frequently appoint the same arbitrator in different cases and no disclosure of this fact is required. For example, this is provided in Footnote no. 5 of the IBA Guidelines of Conflicts of Interest in International Arbitration. If the case sensitive approach is taken, then the support of the Code would be wider.

Disclosure of Third-Party Funding

- Some Western Balkans Countries are of the view that the proposed text of the Article 5, Paragraph 2 (a) (iv) – disclosing the existence of any third party with a direct or indirect financial interest in the outcome of the proceeding should be adopted as mandatory in the final version of the Draft Code of Conduct, since it is important to measure the potential conflict in relation to the external funders.

Concerns related to the use of Social Media

- The use of social media is giving a new perspective to the arbitrators' independence and impartiality. In that sense, numerous issues are relevant regarding the use of social media, including active social media accounts, social media connections, posts, comments and interactions on social media, etc. Although, the Draft Code of Conduct addresses disclosure obligations and conflicts of interest issues in its Article 5, the above-mentioned ethical dilemmas regarding the use of social media should be elaborated more in the Code. That could be done in the commentary part explaining the rationale behind relevant article.

Article 6 Limit on Multiple Roles
Experiences and concerns of the Western Balkan countries in relation to double hatting.

- Among the issues addressed by the Draft Code of Conduct, double-hatting is a matter of high- concern for the Western Balkans countries, and these provisions are highly welcomed.

- The Western Balkans governments also had issues with repeat appointments of arbitrators and the lack of information on new arbitrators.
- The potential prohibition of "double-hatting" is a very important provision for the region, as it would curtail the ability of adjudicators in ISDS proceedings to appear simultaneously in multiple cases, thus preventing any such disputes is the prohibition of "double-hatting", which can affect their impartiality in the decision-making process. This issue is commented extensively and clearly in the elaboration of the proposed solutions within the Draft Code of Conduct itself.

–There was a suggestion to provide a two-year transition period prior to the prohibition of "double hatting", due to the limited number of potential adjudicators.

Article 10 Pre-appointment Interviews

Other important provisions are related to the pre-appointment interviews with the „adjudicators", especially regarding the scope of the interview, as well as the prohibition of any discussions which could lead to the assessment of the merits of the case by the interviewed adjudicator. The regulation of such interviews should be balanced against the need of the appointing parties to assess the considered candidates. The interviews should not be prohibited if there is no alternative source of information on arbitrators, but there should be clear and strict limitations to their scope and content.

Article 12 Enforcement of the Code of Conduct

Finally, when it comes to the enforcement and application of the Draft Code of Conduct, all the Western Balkans countries have recognized this as a very important issue which requires a strict and concise provision. Currently, the enforcement of the Draft Code of Conduct as it stands is left to the adjudicators themselves.

Some Western Balkans countries have recognized the potential benefits of the establishment of a permanent body which would oversee its application and decide on the objections and challenges raised with respect to the work of ISDS adjudicators. The challenge and dismissal process are good mechanisms to motivate the adjudicators and their assistants to comply with all the principles of the code.

Another possible option which was discussed in the Western Balkans region is the delegation of the control and enforcement role to the arbitration institutions in order to achieve full consistency and uniformity of the enforcement of the Code.

PUBLIC STAKEHOLDERS – International Organizations

American Bar Association (ABA) International Law Section

* The views stated in this submission are presented on behalf of the International Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

On May 1, 2020, the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III released a draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (the "Draft Code of Conduct"). The stated goal of the Draft Code of Conduct is to provide a binding and comprehensive set of ethical rules governing international arbitrators (or other adjudicators) engaged in the determination of investment treaty claims[15].

The potential for ethical conflicts and bias has been a source of criticism of the investor-state dispute settlement ("ISDS") process. The Draft Code of Conduct attempts to address "the lack or apparent lack of independence and impartiality of ISDS tribunal members[16]."

UNCITRAL Working Group III (WG III) met virtually on October 5 – 9, 2020, in Vienna to address this issue. The UNCITRAL Secretariat along with the ICSID Secretariat have announced an extension for accepting public comments on the Draft Code of Conduct to November 30, 2020.

The American Bar Association has long supported independent and impartial dispute resolution for investment treaty disputes in multilateral agreements such as the North American Free Trade Agreement[17]. The American Bar Association strongly supports bilateral and multilateral dispute resolution mechanisms providing for transparent, impartial, and effective resolution of such disputes.

We appreciate the opportunity to submit these comments on a number of important issues dealt with in the Draft Code of Conduct. In the interest of furthering the rule of law and fostering the benefits that flow from international trade and investment, we urge ICSID and the UNCITRAL Secretariat to consider the following comments.

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[15] Draft Code WG III Report, A/cn.9/1004 at ¶ 52.

[16] United Nation General Assembly, "*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019)*", A/cn.9/1004, at ¶51. ("DRAFT Code WG III Report) https://undocs.org/en/A/CN.9/1004

[17] For example, the American Bar Association Board of Governors adopted a resolution in February 1992 recommending that in the context of NAFTA, the governments of the United States, Canada, and Mexico adopt adequate and sound dispute resolution procedures embodying certain shared legal values. See also ABA resolution on NAFTA (Trade Customs and Sanctions) adopted by the ABA House of Delegates in February 1993 and ABA resolution on the Multilateral Accord on Agreement (Policy on International Business Transactions – Investment and Private International Law) adopted by the ABA House of Delegates in August 1996.

A. Avoiding fragmentation of impartiality and independence standards

Article 4 of the Draft Code of Conduct addresses the fundamental duty of adjudicators to be independent and impartial. This is one of four core adjudicator obligations set out in Article 3 of the Draft Code of Conduct[18].

The "independence and impartiality" obligation addressed in Article 4 of the Draft Code is already widely applied in commercial and investor-state arbitrations. Independence and impartiality are the central commitment of, and requirement for, arbitrators in the most commonly applicable investment arbitration rules[19].

In addition, the UNCITRAL Model Law forms an essential basis for domestic arbitration enforcement law in more than 90 countries. Article 12(2) of UNCITRAL Model Law provides that an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence." This "independence and impartiality" test has been applied extensively by local courts when considering arbitrator conduct in set-aside and enforcement applications.

The Introduction to the Draft Code of Conduct states that the document "has been prepared based on a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of conduct of international courts[20]."

However, it is not evident that the drafters considered the many decisions of national courts under the UNCITRAL Model Law and domestic arbitration laws in setting-aside or enforcement proceedings under the UNCITRAL Arbitration Rules or under other applicable rules such as the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members[21], or rules promulgated by the ICC Court of Arbitration, the London Court of International Arbitration or other institutions that administer private commercial arbitrations.

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[18] Article 3 provides that adjudicators shall at all times: (i) be independent and impartial and avoid conflicts of interest, impropriety, bias and appearance of bias; (ii) display the highest standards of integrity, fairness, and competence; (iii) be available and act with diligence, civility and efficiency; and (iv) comply with any confidentiality and non-disclosure obligations.

[19] Article 11 of the UNCITRAL Arbitration Rules (2010) requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Articles 12 and 13 provide for challenge to and removal of an arbitrator if such circumstances exist. The ICSID Convention Article 14(1) (in combination with Article 57) requires arbitrators to 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.” The ICSID Arbitration Rules (2006) require arbitrators to disclose any circumstance that might cause his or her “independent judgment to be questioned by a party” (Rule 6(2)) and provide for disqualification of arbitrators who fail to meet the standards set out in the ICSID Convention (Rule 9). See also ICSID Arbitration (Additional Facility) Rules (2006) at Articles 8, 13 and 15.

[20] Draft Code WG III Report, A/cn.9/1004 at ¶ 7.

[21] The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009)

Besides, for more than 20 years, the interpretation and application of rules regarding arbitrator independence and impartiality by courts as well as by international arbitration panels and institutions have been heavily influenced by the *International Bar Association Guideline on Conflicts of Interest in International Arbitration* ("*IBA Guidelines*[22]"). These are the product of widespread consultations with arbitrators and the practicing bar. Initially issued in 2004, they were updated in 2014[23].

An essential principle in the *IBA Guidelines* is the independence and impartiality obligation:

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated[24].

Unlike most arbitration rules, the *IBA Guidelines* also set out an extensive discussion of this standard, related conflict of interest and disclosure standards, and potential specific circumstances that may give rise to concerns regarding an arbitrator's independence or impartiality, including so-called "Red,,"" "Orange" and "Green" Lists of waivable and non-waivable conflicts. Surprisingly, given their extensive use in resolving arbitrator ethical issues, the *IBA Guidelines* are not referenced in the Draft Code of Conduct.

Recent investment treaties, including the new USMCA (the revised NAFTA) and the Canada - EU Comprehensive Economic and Trade Agreement (CETA), have explicitly required compliance with these *IBA Guidelines* in dispute resolution proceedings[25].
Local courts in the United Kingdom and the Republic of Colombia have also applied the *IBA Guidelines* to interpret the independence and impartiality standards for arbitrators under their local arbitration laws[26].

While the Draft Code of Conduct does not refer to these *IBA Guidelines*, Article 4(2) of the Draft Code of Conduct sets out a list of particular conduct in which adjudicators shall not engage.

We believe it is important that the Draft Code of Conduct be interpreted as not adopting a

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[22] IBA Guidelines on Conflicts of Interest in International Arbitration. https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#collapseOne. See Margaret Moses, "The Role of the IBA Guidelines on Conflict of Interest in Arbitrator Challenges" Kluwer Arbitration Blog, November 23, 2017. http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/?doing_wp_cron=1595119256.1736390590667724609375

[23] The 2014 revision to the IBA Guidelines clarified that they apply to investment arbitration and to international commercial arbitration, as well as to legal and non-legal professionals serving as arbitrators. This confirmation put to rest any suggestion that different standards apply depending on the type of arbitration or the professional calling of the arbitrator.

[24] IBA Guidelines on Conflict of Interest in International Arbitration; Part I: General Standards Regarding Impartiality, Independence and Disclosure, 23 Oct 2014 at General Principle 1.

[25] See USMCA (United States -Mexico - Canada), Article 14.D.6.5(a); Comprehensive Economic Trade Agreement (Canada-EU CETA), Article 8.30.

[26] Margaret Moses, "The Role of the IBA Guidelines on Conflict of Interest in Arbitrator Challenges"

separate, free-standing standard of independence and impartiality that is not informed by the considerable international precedent established under the UNCITRAL Model Law and the IBA Guidelines. Fragmentation and conflicting lines of interpretation on this critical rule of law principle of the impartial and independence obligation should be avoided to protect due process and enhance legal predictability.

To reduce the risk of such adverse application of the Draft Code of Conduct, we recommend that it refer explicitly to established and respected sources of interpretation and application of the impartiality and independence test, including the *IBA Guidelines*.

B. Enhancing Diversity in International Dispute Adjudication

We are concerned that the Draft Code of Conduct would not enhance diversity and inclusion in the selection of arbitrators or other adjudicators and would instead reverse recent progress on this issue.

There are no provisions in the Draft Code of Conduct mandating any consideration of diversity in the composition of the tribunals, panels, committees, or other bodies vested with the responsibility to decide investment treaty disputes. Further, the provisions on "double-hatting" in Article 6, discussed below, are likely to slow or even prevent the improvement of the current lack of diversity and inclusion in such bodies.

In raising this issue, we recognize that diversity can take many forms. Gender diversity is certainly an objective that should be pursued by any modern adjudicative body. Other diversities worthy of consideration when constituting an adjudicative panel include racial, regional, and cultural diversity. One of the criticisms leveled against the current ISDS system has been the lack of diversity among arbitrators, who disproportionately consist of white males from Europe and North America[27]. The Draft Code of Conduct's failure to include provisions designed to encourage diversity is a missed opportunity to improve contemporary dispute settlement.

The Draft Code of Conduct would be greatly improved by specifying, at a minimum, that best efforts should be taken to achieve diversity in the composition of investment treaty arbitration tribunals, committees, and the like. This is an area where the UNCITRAL Working Group and ICSID should apply greater focus.

An example of a strong commitment to diversity in an international court can be seen from Article 36(8) of the Rome Statute, which created the International Criminal Court. This provides:

> 8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

[27] *See, e.g.,* Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015).

(i) The representation of the principal legal systems of the world.

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

While the Draft Code of Conduct is intended to regulate the conduct of adjudicators, not states, adjudicators are often involved in the selection of other adjudicators (for example, when co-arbitrators are tasked with selecting, or assisting in the selection of, a presiding arbitrator). In doing so, consideration should be given to the diversity of the panel members.

C. The need for more consideration of Double Hatting and Issue Conflicts

Double hatting refers to situations where arbitrators in one case function as experts or counsel in a similar role in other arbitration cases.

Article 5 of the Draft Code of Conduct provides, *among other things*, that adjudicators shall disclose all ISDS cases in which they are acting or have acted as counsel, arbitrator, annulment committee member or expert, and Article 6 provides that adjudicators shall "[refrain from acting]/[disclose that they act] as counsel, expert, witness, judge, agent or in any other relevant role at the same time as they are acting in matters that involve the same parties, [the same facts] [and/or] [the same treaty]," within a period that is not yet defined in the draft that was circulated for comment.

The commentary to the Draft Code of Conduct notes that there is no comprehensive definition of double-hatting. The commentary suggests that this term could also include overlaps between counsel work and serving as an expert or as a mediator and could either concern proceedings under the same treaty or concerning all ISDS proceedings. Reliance on a small coterie of repeatedly appointed arbitrators and practices such as "double- hatting" is often highlighted as a critique of ISDS. As one recent study noted:

> It has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness. Over the last few years, these multiple roles have become the subject of some debate. The discussion has focused on the fact that some arbitrators also act as counsel, which in some situations, can raise doubts about the arbitrator's independence and impartiality[28].

Arbitrator ethical issues that have been raised in disqualification cases include:

[28] Pia Eberhardt & Cecilia Olivet, Profiting from Injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom, "Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators." *Corporate Europe Observatory*. N.p., n.d. Web. 31 May 2016.

- Arbitrators acting as counsel in similar cases
- Arbitrators and their relations with law firms
- Issue conflict with respect to facts or legal interpretations
- Repeated appointments by the same party
- Arbitrators' public comments or publications
- Arbitrator and counsel relations

Issue conflicts may arise, for example, when an arbitrator has previously expressed an opinion on a legal issue that arose in the case of a separate and unrelated arbitration. Issue conflict in investor- state arbitration was the subject of a detailed 2016 joint ASIL - ICCA Task Force Report[29]. It was also explicitly addressed in the 2014 revision of the IBA Guidelines[30].

Regulations addressing double-hatting and issue conflict could minimize the problems arising from asymmetrical information between arbitrators and parties. This regulation could reduce the overall risk of investment arbitration bias. However, we believe that the issue deserves further careful consideration and should be addressed in a manner than does not result in unintended adverse consequences, particularly concerning diversity and inclusion. The Draft Code of Conduct proposes a variety of options, including potentially banning double- hatting. The commentary states that "*an outright ban*" on double-hatting would be easier to implement, but recognizes that this would create various challenges, including excluding more candidates than necessary and curtailing parties' freedom to choose their adjudicator.

Various arbitral organizations have cautioned that a ban on double-hatting could result in disproportionate and detrimental effects on gender, regional, and other diversity. Progress has been made in recent years in appointing arbitrators outside of the small, historic pool described above. Still, few such arbitrators have sufficient appointments to earn a living from serving as arbitrators. If forced to choose, they would likely have to decline appointments to continue serving as counsel, academics, or experts[31].

We agree that it is important to insist on and protect arbitrator independence and impartiality, but not at the cost of preventing new entrants into the pool of potential ISDS adjudicators. Diverse candidates must not be prevented from serving as adjudicators in ISDS proceedings by overly severe restrictions on double-hatting. To avoid this adverse impact, we advocate adopting extensive disclosure obligations in Article 5 of the Draft Code of Conduct combined with very limited per se restrictions on multiple roles in Article 6 of the Draft Code of Conduct.

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[29] ICCA and ASIL Taskforce on Investor State Conflict of Interest - https://www.arbitration-icca.org/media/6/81372711507986/asil-icca_report_final_5_april_final_for_ridderprint.pdf

[30] IBA Guidelines – Part II, ¶6 – Commentary on the Orange List.

[31] *See, e.g.,* Vanina Sucharitkul, Arbitral Women, Kluwer Arbitration Blog, June 20, 2020 "ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles could negatively impact Gender and Regional Diversity, as well as generational Renewal" http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/?doing_wp_cron=1595122367.9971520900726318359375

CONCLUSION

Ethical, independent, and impartial dispute resolution is a hallmark of due process and the rule of law. We commend UNCITRAL Working Group III and ICSID for your attention to these matters and for your efforts to date.

The comments provided in this letter address only a few specific issues in the Draft Code of Conduct. The provisions currently contained in this version of the Draft Code of Conduct are incomplete. They require more integration into consideration of existing norms under international treaties, international professional bodies, and local arbitration laws in conformity with the UNCITRAL Model Law. In further deliberations, we urge that the following basic principles be kept in mind:

- The Draft Code of Conduct for adjudicators should avoid fragmenting well-established principles and legal precedents regarding arbitrator independence and impartiality.

- The overarching principle of diversity in the appointment of ISDS adjudicators should be enshrined and strengthened.

- Care must be taken to ensure that obligations set out in the Code of Conduct do not reduce diversity in the composition of the bodies that decide investment treaty disputes.

Thank you once again for the opportunity to provide comments on this important document. If you have any questions after reviewing these comments, we would be happy to provide further input.

International Bar Association (IBA)

Comments of the International Bar Association's Arbitration Committee on the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement

This document is submitted on behalf of the Arbitration Committee of the International Bar Association (the IBA) in response to the request from the UNCITRAL Secretariat for comments on the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (the Draft Code). The IBA is privileged to participate in this process. It recognises and thanks the drafters of the Draft Code for their significant contribution to the ongoing reform discussions among members of UNCITRAL Working Group III.

General comment

Many of the issues the Draft Code seeks to regulate—particularly disclosure obligations—are presently addressed by the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Conflict Guidelines) and the IBA Rules of Ethics for International Arbitrators (the IBA Ethics Rules). The IBA Conflict Guidelines and Ethics Rules—which reflect many years of study, reflection, and experience, and have benefitted from continuous adjustment and improvement—apply to both commercial arbitration and investment treaty arbitration. When the IBA Arbitration Committee developed the IBA Conflict Guidelines and Ethics Rules, it sought studiously to (i) avoid wording that introduced subjectivity, imprecision, impracticability or inconsistency, and (ii) draw the language as tightly as possible to avoid unintended interpretations and outcomes. To the extent the Draft Code is intended to serve as an alternative to those IBA instruments, the IBA Arbitration Committee believes that the Draft Code would benefit considerably from a close review focused on avoiding the subjectivity, impracticability, imprecision and inconsistency of some of its current provisions, examples of which are provided below, under "specific comments".

Scope of application

The Draft Code is stated to apply to any "disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute". It is unclear from the commentary to the Draft Code why the duties of arbitrators necessarily vary depending solely on whether one of the parties is a State or State entity. If it is believed that the participation of a State (entity) requires such a variation, a clear statement of the principled basis for that proposition would seem welcome. In addition, should a principled basis be identified for varying the duties of arbitrators in the context of investment treaty arbitration, it should be critically examined whether that basis applies undiminished to purely contractual disputes and commercial arbitrations that happen to involve a State (entity) as one of the parties.

Specific comments

1. Subjectivity

The Draft Code appears to inject a considerable degree of subjectivity in the standards of conduct it proposes. By way of example only (emphasis added in each instance):

- Adjudicators "shall avoid … *appearance of* bias" (Article 3(a)).

- Adjudicators "shall not … take action *that creates the impression that* others are in a position to influence their conduct or judgement" (Article 4(2)(c)).

- Adjudicators "shall not … directly or indirectly, incur an obligation or accept a benefit that would
  … *appear to* interfere, with the performance of their duties" (Article 4(2)(d)).

The use of a subjective test is appropriate for determining an arbitrator's *disclosure* obligations, as broad disclosure is to be encouraged. However, whether an arbitrator has acted in a manner inconsistent with the imperatives of independence and impartiality should not be a matter of subjective impressions, which unavoidably infuse the standard with a degree of arbitrariness.

2. Impracticable provisions

The Draft Code contains rules that, in their current wording, may prove impracticable to apply and enforce in practice. By way of example only:

- The Draft Code provides that an arbitrator may not "allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement" (Article 4.2(b)). As drafted, this standard is unrealistic: any person's conduct or judgment is necessarily influenced by his or her past family or social relationships. To be meaningful, the language needs to be tightened.

- The five-year period for disclosure (Article 5(2)(a)) is too long given the breadth of the disclosure envisaged and the failing nature of human memory. Three years would be more appropriate.

- The obligation to disclose any relationships with "any subsidiaries, parent-companies or agencies related to the parties" (Article 5(2)(a)(i)) is unrealistic. Given the potentially complex nature of corporate structures, an arbitrator may simply not have the tools to identify all such relationships.

- The obligation to disclose all existing and past cases as counsel (Article 5.2(c) is unrealistic. Busy counsel do not necessarily keep track of each and every mandate in which they were involved over several decades).

- The obligation to disclose all publications (Article 5(2)(d)) is similarly unrealistic. Most person do not keep track of every single publication.

3. Inconsistent or imprecise provisions

There are various instances where the Draft Code is internally inconsistent or imprecise. By way of example only:

- The broad disclosure obligation in Article 5 is incompatible with the confidentiality obligation of Article 9.

- The phrase "indirect conflict of interest" in Article 5(1) is unclear and may generate considerable uncertainty.

- As drafted, the obligation for adjudicators to disclose "any direct or indirect financial interest in .. the proceeding" (Article 5.2(b)(i)) would require them to disclose that they

expect to be remunerated for their services.

* * *

Should this be helpful, the IBA Arbitration Committee will be pleased to provide further, and more comprehensive, comments on the next iteration of the Draft Code.

International Council for Commercial Arbitration (ICCA) ISDS Watch Group

The Watch Group on Investor-State Dispute Settlement ("ISDS Watch Group") of the International Council for Commercial Arbitration ("ICCA") is grateful for the opportunity to submit observations on the ICSID/UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, released in May 2020 (the "Draft Code"). We welcome this joint initiative and consider it an important step toward establishing consensus on the standards governing the conduct of neutral adjudicators.

The Watch Group offers these observations in the spirit of stimulating close scrutiny of the Draft Code as it nears completion. These observations have not been considered by the ICCA Governing Body or ICCA as a whole, and they do not necessarily represent the view of each member of the Watch Group.

Article 2—Application of the Code

There is some divergence between the standard set out in Article 2(1) ("Adjudicators shall take appropriate steps to ensure that their assistants are aware of, and comply with, the relevant provisions of this Code.") and its articulation in paragraph 23 of the commentary ("Paragraph (1) . . . requires adjudicators to ensure that their assistants are aware of and comply with the provisions of the code."). The Watch Group proposes that those texts be reconciled by use of the language "take all reasonable steps to ensure."

Paragraph 14 of the commentary states that the Code does not apply to institutional "secretariats that provide administrative and registrar functions and assist in the proceedings as part of their regular work for the institution." The Watch Group notes that where adjudicators work with established institutions in which secretariat personnel act as tribunal secretary or assistant, adjudicators should satisfy themselves that the relevant institution maintains sufficient safeguards.

Article 3—Duties and Responsibilities

The Watch Group proposes that the implied modifier "applicable" be expressly inserted in the phrase "any confidentiality and non-disclosure obligations" to make clear that any such obligations must have an identifiable source. The phrase would thus read "any applicable confidentiality and non- disclosure obligations."

Article 5—Conflicts of Interest: Disclosure Obligations

The Watch Group queries whether the relationship between Article 5(1), Article 5(2), and Article 5(4) could be made clearer.

As presently drafted, it is not entirely clear whether adjudicators would be required to disclose a professional relationship with a party (Article 5(2)(a)(i)) if that relationship was such that it could not "reasonably be considered to affect their independence or impartiality" (Article 5(1)). If disclosure required by Article 5(2) is intended to set a floor for disclosure required under Article 5(1), its introductory words could be amended to read, "At a minimum, disclosure pursuant to paragraph (1) shall include the following "

The Watch Group queries whether the carve-out in Article 5(4) for matters as to which the adjudicator's role would have only a "trivial" bearing would be more effectively addressed by the affirmative statement of the relevant obligation of disclosure.

The Watch Group proposes revising Article 5(2)(a)(i) to read: "The parties, including, in the case of a private party, those of its subsidiaries, affiliates, and parents and, in the case of a state party, those of its agencies and state-owned enterprises, that have been identified by the parties."

The Watch Group proposes revising Article 5(2)(a)(iv) to read: "Any third party with a direct and material financial interest in the outcome of the proceeding, including third-party funders, that has been identified by the parties."

The Watch Group proposes that Article 5(2)(c) be (1) subject to confidentiality obligations applicable to any case or role, (2) limited to ISDS cases, and (3) limited to service as counsel of record. A high percentage of candidates and adjudicators will be involved or will have been involved in cases that they are under an obligation not to disclose. In addition, it would be impracticable to expect adjudicators, including but not limited to those who are or have been members of law firms, to disclose all cases in which they may have consulted, however briefly or informally. Concerns about issue conflict—that is, competing obligations or incentives as to specific issues— should be addressed by Article 6.

The Watch Group questions the utility and practicability of Article 5(2)(d), but in any event proposes that it be limited to publications.

For more on issue conflicts, see the Report of the Joint ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration (17 March 2016).

Article 6—Limit on Multiple Roles

The Watch Group believes that, as the commentary reflects, the issue of multiple roles encompasses a range of interconnected and complex issues, and the range of views within the Watch Group matches that circumstance.

That said, the Watch Group proposes that the issues addressed by Article 6 be treated as a matter of disclosure, not bar, so that the standards and procedures set forth in specific dispute resolution

regimes may then come into play in considering whether the adjudicator possesses the requisite independence and impartiality.

Further, the Watch Group proposes that a time limit between three to five years apply to the alternative roles to be disclosed.

Finally, having in mind the objective of ensuring the impartiality and independence of adjudicators, the Watch Group proposes that the disclosure obligation extend to matters in which the adjudicator has participated as counsel, expert, or the like that involve the same or related parties or arise from substantially similar facts or events. The Watch Group notes that the reference to simply "the same treaty" would be both under- and over- inclusive, and especially given the impossibility of predicting the legal issues that will arise in any given proceeding, an attempt to capture substantially similar legal issues would be unworkable.

Again, the Watch Group refers to the Report of the Joint ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration for further consideration of these questions.

Article 7—Integrity, Fairness and Competence
The Working Group considers that Article 7 must take account of pre-appointment contacts to determine availability and potential conflicts, as well as pre-appointment interviews, which Article 10 contemplates. It should also take an express position on post-appointment, pre-constitution consultation between an arbitrator and the appointing party on the selection of the presiding arbitrator when that function is entrusted to the co-arbitrators, which many consider a constructive practice.

Article 8—Availability, Diligence, Civility and Efficiency
The Watch Group points out the difficulty of regulating availability in the manner Article 8(2) proposes. Even for adjudicators whose adjudication activity is their sole profession, a raw number will not take account of complexity, time demands, and stage of the proceedings of different cases. For those whose adjudication activity is not their sole profession, that number will provide an even less reliable indication of their availability. Finally, number of cases does not take account of an individual's capacity for and pace of work.

The Watch Group would propose simply that the Code provide that a party may request a reasonable report of an adjudicator's professional commitments and a general description of his or her adjudication caseload before the appointment may be confirmed. A calendar like the one used by the ICC International Court of Arbitration is one means by which availability might be assessed, although perhaps with more guidance that what is meant by "unavailable" is unable to conduct a hearing or devote substantial time to the matter.

Article 9—Confidentiality
The Watch Group proposes two refinements to Article 9.

First, Article 9 should have no impact on the discretion of a tribunal to render a draft or provisional award for comment by the parties when it considers that technique appropriate.

Second, Article 9 should not bar objective description of a decision, ruling, or award as a component of international investment law or investor-state dispute resolution (for example, in the context of a speech, presentation, or class) so long as the adjudicator reveals no confidential information about the case or the tribunal's work.

Article 10—Pre-appointment Interviews
The Watch Group questions whether the term "interview" connotes a fuller discussion than that contemplated by the first sentence of Article 10(1). If so, it would propose that the term "interview" be replaced by "contact," and the rest of the sentence be revised to "be limited to a description of the dispute and a discussion concerning availability and absence of conflict."

The Watch Group also questions whether, in light of the narrow scope of the contact permitted by Article 10(1), Article 10(2) serves a compelling purpose.

Article 11—Fees and Expenses
The Watch Group observes that when an institution will set or confirm fees, it should do so if possible before constitution.

Article 12—Enforcement of the Code of Conduct
The Watch Group observes at this point that with this Code—like any code of conduct governing adjudicators, counsel, or experts—the most difficult question is enforcement. The Watch Group believes that enforcement would be maximized if the Code is eventually incorporated into treaty, contract, and governing rules.

Inter-Pacific Bar Association (IPBA)

I. Introduction

1. On 1 May 2020, the Secretariats of the International Centre for Settlement of Investment Disputes ("**ICSID**") and the United Nations Commission on International Trade Law ("**UNCITRAL**") released the long-awaited Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("**ISDS**") (the "**Draft Code**").

2. The Draft Code is the joint work product of ICSID and the UNCITRAL Working Group III ("**WG III**") and has been prepared against the background of global initiatives for ISDS reform, including most notably the WG III's work on potential ISDS reform proposals and ICSID's ongoing amendment of its arbitration rules.

3. The Draft Code is, *inter alia*, based on a comparative review of the codes of conduct in international investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts and institutions. It addresses a series of ethical issues as well as

criticism towards ISDS for "*the lack or apparent lack of independence and impartiality of ISDS tribunal members*."[32]

4. This paper sets out the comments on the Draft Code by the Investment Arbitration Sub-Committee of the Inter-Pacific Bar Association (IPBA).

II. Executive Summary

5. In short, the authors endorse the objectives and intentions of the Draft Code and wish to see it become a part of the ISDS landscape. However, the authors have various concerns and suggestions.

6. The provision that strikes us as most controversial is Article 6. An outright restriction on "double-hatting" seems to be a disproportionate measure to deal with the limited risk posed by the potential mischief of individuals performing multiple roles in different ISDS cases. This limited risk must be seen in the context of other inconsistencies and potential conflicts inherent in the ISDS system such as the existence of arbitrators who are only ever appointed by States or investors, or arbitrators who accept multiple appointments by the same party. More properly construed, the mischief that the proposed ban on double- hatting is intended to prevent relates to the desire to avoid conflicts of interest, and could perhaps be more specifically worded to address this underlying concern. Additionally, in the authors' view, enhanced disclosure and ethical requirements provided for in other Articles of the Draft Code sufficiently cover the risks of potential conflicts arising out of individuals acting as counsel and adjudicator in different cases.

7. Crucially, the effect of a ban on "double hatting" seems to create more problems than it solves. In particular, the authors are concerned that the practical effect would be to counter efforts to improve diversity within the ISDS community. In other words, if lawyers acting as counsel in cases are locked out of taking adjudicator appointments, this will naturally limit the pool of available arbitrators to a more senior, probably white, probably male, probably common law, demographic. Not only does this prejudice potential parties, who deserve a wide range of choice, it also confirms negative stereotypes of ISDS that have contributed to a crisis of confidence in the system, for example, in Europe.

8. The authors also note the unsettled question of the status of the Draft Code and, in particular, in what form it will eventually take shape. This has made it difficult at times to comment on certain provisions, particularly those relating to applicability and enforcement. For this reason, we have tended to proceed on the assumption that the Draft Code will take the form of a hard law instrument such as an international convention. However, we have also included suggestions for consideration should that not be the case, or to deal with potential applicability at a 'soft law' level in respect of cases involving States that do not

[32] United Nation General Assembly, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019), A/cn.9/1004, para 51. Accessed in Sep. 2020 at: https://undocs.org/en/A/CN.9/1004.

sign up to the convention, or to allow for *ad hoc* applicability by parties who wish to apply some or all of the Draft Code's provisions to particular disputes or disputes provided for under particular investment treaties.

9. Our comments are given on an article-by-article basis and a short summary of our views is set out below:

Article 1: Definitions
We endorse the existing draft text but suggest wording to broaden applicability to cover Adjudicators in evolving forms of ISDS *fora*.

We also suggest the definition of Assistants be clarified in relation to its application to Tribunal-appointed experts and/or other actors working alongside Tribunals, with influence on the decision- making process

Article 2: Application of the Code
Application will depend on the ultimate format of the Draft Code. To the extent the Draft Code is intended to apply beyond its initial boundaries and have any role as a soft law instrument, the authors encourage engagement with other relevant entities, particularly arbitral institutions.

Article 3: Duties and Responsibilities
We endorse the existing draft text, particularly the inclusion of availability as a duty.

Article 4: Independence and Impartiality
We endorse the existing draft text.

Article 5: Conflict of Interest – Disclosure Obligations
We generally endorse the existing draft text, particularly the inclusion of third party funding-related interests, but raise concerns regarding:
(1) potential ambiguity and overreach concerning the difference between "direct" and "indirect" conflicts of interest;
(2) the importance of ensuring a level playing field (so that incomplete or narrow disclosure is not 'rewarded' and extensive disclosure is not 'punished');
(3) the temporal limit for disclosure of relationships;
(4) the breadth of the contemplated requirement to disclose public speeches. The authors suggest this is limited to public speeches for which there is a record of the content of the speech and limited by time.

Article 6: Limit on Multiple Roles
The authors consider an outright ban to be disproportionate and likely to have a negative impact on efforts to increase the diversity of the pool of available ISDS Adjudicators. The identified risks are limited and those risks are, in the authors' view, sufficiently mitigated through other provisions (e.g. duties and disclosure). Therefore, the authors strongly advocate limiting this Article to the alternative of disclosure or, in the alternative of a ban, more precisely defining the situations in which a true conflict of interest is likely to exist.

Article 7: Integrity, Fairness and Competence
We endorse the existing draft text.

Article 8: Availability, Diligence, Civility and Efficiency
We endorse the existing draft text but question the limit on the number of appointments contemplated by draft Article 8(2) on the basis that it could be an arbitrary number and not truly reflective of availability (which is in any event addressed through other articles).

Article 9: Confidentiality
We endorse the existing draft text.

Article 10: Pre-appointment interviews
We endorse the existing draft text and suggest that the Article also require Candidates to maintain a contemporaneous written record of pre-appointment interviews (to ensure a level playing field and remove the issue of deficient or selective note-taking by counsel).

Article 11: Fees and Expenses
No comments on the existing draft text.

Article 12: Enforcement of the Code of Conduct
The authors agree with the principle of binding and enforceable obligations but note that the question of how the Draft Code is given "teeth" necessarily depends upon its format. We support the principle of voluntary compliance and also suggest additional wording for consideration be included at Article 12 that requires adjudicators to confirm compliance with the Draft Code in any Final Award.
We are also concerned that the possibility of sanctions on Adjudicators may be misused or deter suitably qualified Adjudicators from accepting appointments.

III. Comments to the Draft Code

Article 1: Definitions
Comments on definition of 'Adjudicators'

10. Some comments note that this provision "*purposefully encompasses a broad category of existing and possible future participants in ISDS adjudicatory processes*"[33] and "*can easily be applied regardless of the type of reform that might be adopted*"[34], in anticipation of likely systematic reforms in ISDS in the near future. The authors agree with this assessment and note that this reflects evolving treaty practice. For example, the European Union is in the process of replacing traditional ISDS as we know it with an Investment Court System by establishing various investment courts in its recent investment protection agreements, and various treaties include provision for adjunct interpretative committees that perform

[33] See http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/.
[34] Ibid.

decision-making functions affecting the parties in tandem with an arbitral tribunal[35]. This signals something of an evolution in ISDS practice which in many ways departs from the investor-state arbitration ISDS model.

11. However, we query whether the definition as drafted is broad enough to cover all evolving forms of ISDS adjudicators. While the words "*judges on a permanent mechanism for the settlement of investor-State disputes*" would arguably apply to a permanent investment court, it seems ISDS provisions in treaties such as CETA allow for the possibility of quasi-permanent courts, or bespoke tribunals with a limited life expectancy, to be instituted. It would therefore be advisable to have some broader wording to avoid technical disputes about the status of the relevant adjudicators. We propose the following additional wording:

> *Adjudicators' means arbitrators, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes* ***or such other adjudicators appointed for the purposes of making final determinations in investor-State disputes***.

Comments on definition of 'Assistants'

12. The definition includes tribunal secretaries and is in general a welcome development given the criticism concerning the role of tribunal secretaries in ISDS (such as in the *Yukos* annulment saga). In this regard it is also positive that Article 2(1) imposes on the "*Adjudicators*" an obligation to "*ensure*" that their "*Assistants*" are aware of and comply with the Draft Code.

13. There are, however, potential issues that the Draft Code does not address:
    - Whether the Assistant's participation and role(s) in ISDS is a matter of agreement (which would be subject to the particular International Investment Agreements ("**IIAs**") or parties to an investment dispute) or a matter that should conform to certain universal rules.
    - How the Draft Code will sanction or otherwise be enforced against Assistants.
    - Applicability to experts: it seems clear that the Draft Code does not apply to party-appointed experts who, other than their duty to assist the Tribunal generally, are not usually embedded in any tribunal-controlled decision-making process and are subject to separate rules and regimes governing their conduct. However, as to tribunal-appointed experts, or experts set up to determine collateral issues such as the admissibility of allegedly secret or privileged evidence, such experts may arguably fall within the definition of "*Assistants*" and should, as a matter of principle, equally be subject to the code.

14. To address the above, we suggest that further thought is given to whether "*Assistant*" should be subject to specific sanctions/disclosure requirements. We also suggest that the definition

[35] See, for example, Article 51.12(20) of the recently added investment chapter of the Japan-ASEAN EPA.

expressly apply to tribunal-appointed experts or other decision-makers instituted under the auspices of the Adjudicators.

Definition of 'Candidates'

15. We have no comments on the definition of 'Candidates' *per se* but refer to our comments in relation to Article 10 (*Pre-Appointment Interviews*) below.

Definition of 'Investor-State dispute settlement'

16. We have no comments on the definition of ISDS.

Article 2: Application of the Code

17. Article 2(1) suggests that the Draft Code is intended to apply to "all" persons serving and adjudicating in ISDS proceedings. The authors of this paper endorse that aspiration but consider that it may be impractical, not least because of the potential conflict issue with other applicable treaties and institutional rules.

18. In short, the authors consider that if the Code is to be included in an international convention then considerable amounts of time, cost and negotiating effort are required. On the other hand, if the draft Code is to exist as a set of guidelines or "soft law", it will presumably be incorporated by reference, either in IIAs or ad hoc in the procedural orders of specific cases.

Article 3: Duties and Responsibilities

19. The authors endorse the duties and responsibilities outlined in Article 3. Naturally it will be for case law and those charged with ensuring compliance with the code in the context of particular cases that will define the details of the principles articulated. However, the existing wording appears to be a good distillation of current international principles and appropriately ambitious objectives. In particular, the authors commend the inclusion of availability as part of the listed responsibilities and refer to their comments below in relation to Article 6 (noting that such provision appears to be counter-productive in relation to the intentions reflected in Article 3).

Article 4: Independence and Impartiality

20. The authors endorse the requirements outlined in Article 4.

Article 5: Conflict of Interest – Disclosure Obligations

21. ISDS adjudicators have always been under a general obligation to avoid conflicts of interest and to disclose any information that could give rise to doubts as to their impartiality and independence (the disclosure requirement under the ICSID Rules require adjudicators to make statements of impartiality and independence; similar requirements exist under all major institutional arbitration rules).

22. However, Article 5 of the Draft Code aims to take further steps and provides that adjudicators must be pro-active and undertake reasonable efforts not only to avoid, but also to become aware of interests, relationships or matters that can create a conflict or that could be perceived as affecting their independence and impartiality.

23. In this regard, the current Article 5 seems to reflect the concern and desire expressed by some states that more extensive disclosure, if not full disclosure, should be the norm in ISDS to improve the public's perception of this type of dispute resolution. As one (academic) comment remarks, Article 5 requires "*extensive adjudicator disclosure as a key policy tool to ensure the avoidance of conflicts of interest and ensure that parties know as much as possible prior to an adjudicator's appointment*[36]." A full disclosure would "*allow a full assessment of any possible conflict of interest of any adjudicator by the parties so that they can be fully satisfied with their choice, or, alternatively, raise their concerns and decide to challenge the adjudicator*." This would "*give direction and important guidance to adjudicators on what should be disclosed*[37]." The same author's position is that "[i]*deally, clear and mandatory provisions that require full disclosure and that qualify and limit the pervasiveness of double hatting will be adopted*[38]."

24. Theoretically, more disclosure enables better transparency and less chance of actual or apparent conflicts of interest. Practically, however, a balanced approach is required to avoid, for example, unequal application of standards between cases or attempts by counsel to apply the requirements in an overly technical manner for strategic purposes (i.e. later on in proceedings where it appears the case is not going their client's way on the merits).

25. With this in mind, we make the following specific comments in relation to Article 5: Article 5(1) (general obligation):

- The proposition that adjudicators and candidates should disclose all and any interest, relationship, or matter that could "*reasonably*" be considered to affect their independence or impartiality appears to be an objective standard based on the perspective of a reasonable third person, presumably the organization/institution overseeing the implementation of the Draft Code. This standard is different from the current ICSID Rules and the IBA Guidelines on Conflict of Interest in International Arbitration ("**IBA Guidelines**"), which impose an arguably subjective test and require the disclosure of circumstances that might cause the parties to question the arbitrator's independence and impartiality[39].

- It remains unclear how this different standard would be evaluated in practice. While an adjudicator's independence may be objectively verifiable by a reasonable person, objective impartiality can be very difficult to assess as it may pertain to an adjudicator's subconscious views and approaches and a certain predisposition in respect of the relevant facts or legal issues. One comment

[36] See http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/.
[37] Ibid.
[38] https://www.ejiltalk.org/the-draft-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement-an-important-step-forward-in-the-reform-process/.
[39] Panel discussion at the Young ISDS Club, recorded at https://efilablog.org/2020/07/27/young-isds-club-icsid-and-uncitral-draft-code-of-conduct-for-adjudicators-in-isds-disputes/.

suggests that, instead of "*direct or indirect interest*", the Draft Code should use "*significant interest*" defined as "*interest resulting in doubts about independence, sense of fairness and impartiality of the adjudicators*[40]." We do not necessarily support requiring disclosure only of "*significant*" conflicts of interest, but would here rather propose specifying the meaning of "*indirect interest*". Alternatively, the wording could refer instead simply to "*conflict of interest*" and dispense with "*direct or indirect*" (noting that the second sentence of the existing article covers all types of interest that "*could reasonably be considered*" to be a conflict – whether direct or indirect).

- It is equally nebulous what efforts will be necessary to satisfy the requirement to "*make all reasonable efforts to become aware*" of potential conflicts as this standard is dependent upon the circumstances of each case, including the resources available to the candidates and the complexity of the relationships involved.

Article 5(2) (disclosure requirements):

- **General**: One comment questions whether a "*formalistic approach to disclosure*" might lead to more arbitrator challenges overall resulting in higher cost and delay and eliminating honest candidates[41]. We echo this concern but note that this relates to the detail of what is required rather than the general (and accepted) requirement for disclosure. In this regard, we refer specifically to our comments on individual limbs of Article 5(2) below. Further, we note that it is important to ensure a level playing field so that those who make more fuller disclosures do not end up facing more challenges as result while those who make narrower (and potentially incomplete) disclosures are given an easier treatment.

- **Article 5(2)(a)**: We note the contemplated relevant disclosure period for relationships or facts subject to this Article is five years but this is in square brackets for now. The authors suggest a longer time period may be more appropriate given the depth of relationships that can occur and the comparatively long durations of ISDS cases (during which such relationships are formed[42]). As to the potential inclusion at Article 5(2)(a)(iv) that covers relationships with other third parties with financial interests, the authors agree that these relationships should be covered given the widespread and growing use of third-party funders (and taking into account the increasing recruitment of ISDS practitioners by third party funders or other financially interested parties e.g. insurers). With this in mind, the authors note that problems arise when the

[40] Comments on the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Maharashtra National Law University Mumbai, accessed at: http://mnlumumbai.edu.in/pdf/Comments%20on%20Draft%20Code%20of%20Conduct%20(CAR%20Ed.).pdf.
[41] Panel discussion at the Young ISDS Club, recorded at https://efilablog.org/2020/07/27/young-isds-club-icsid-and-uncitral-draft-code-of-conduct-for-adjudicators-in-isds-disputes/.
[42] One comment also suggests a longer timeline *Ibid.*

applicable rules do not require disclosure of the identity of the third-party funder, but this is outside the scope of the Draft Code[43]. **Article 5(2)(c)**: The requirement for disclosure of involvement in any capacity, and without indicating any time limit, is meant to allow the parties to assess "*the relationship between adjudicators and each actor involved in the proceedings*". This is helpful in seeking to address the side effects of repeated appointments, namely a lack of diversity and barriers to entry for new adjudicators. It also allows the parties to be better equipped to assess experience and availability levels. In this regard, it seems best to include the areas currently in square brackets[44].

- **Article 5(2)(d)**: The requirement for disclosure of "*all publications*" and "*relevant public speeches*" without any time limits may expedite the due diligence conducted by counsel. However, some comments query the value of such disclosure, "*as challenges based on issue conflicts rarely prevail in practice*[45]" as well as its "*necessity and practicability*"[46]. This is reflective of the debate about the compatibility of personal legal opinions with requirements to be impartial, and also of the reality that a person's views can change and evolve over time, particularly where careers may extend over several decades, for example. On balance, it is most desirable that parties are fully informed about the substance of an Adjudicator's published views so they can make their own decisions about whether the strength of such views out-balances the value of their knowledge, experience or reported ability to make independent and objective determinations notwithstanding previously held or personal opinions on particular issues.

- However, in relation to the contemplated requirement relating to "*relevant public speeches*" there are real concerns as to the potentially burdensome nature of this requirement and potential for inadvertent (and immaterial) non-disclosure. Retroactive application of the Draft Code to speaking engagements on dates prior to the emergence of the code may cause difficulty for some practitioners. If practitioners are aware of the Draft Code, it would not be so burdensome for

[43] If the involvement of a funder is not disclosed, in that case, how could an adjudicator know whether there is a relationship with a third-party funder involved in the arbitration? This issue may be addressed through other instruments, case law and institutional rules. Similar concerns arise with respect to the disclosure requirements extended to include relationships with subsidiaries, parent companies and agencies related to the parties. It appears to us entirely plausible that the adjudicators in question may not know, or may not know the extent of such relationships. It seems unreasonably burdensome that adjudicators in each matter should actively undertake efforts to find out whether these remote relationships, which may arise after the conclusion of a matter due to divestitures and acquisitions, may affect his/her objective impartiality.

[44] Notwithstanding this, the authors note that repeat appointments in and of themselves do not necessarily suggest dependence or affinity with the nominating party, or bias in its favor. Admittedly, bias may be unconscious; the concern is thus difficult to address. Even if an adjudicator has sided with the same side repeatedly (certain arbitrators have pro-investor or pro-state reputations), it does not automatically prove bias. This may simply be the adjudicator's assessment based on his/her legal opinion.

[45] *Ibid*.

[46] *Ibid*.

them to keep a list of their public speaking engagements but there would inevitably be disputes about what is public and what is relevant. Different practitioners may take different views and a different approach to record keeping. Therefore, to ensure a level playing field, it may be better to specify public speeches of which there is a record as to the content of the speech, or to dispense with this requirement.

Article 6: Limit on Multiple Roles

26. While there has been some criticism of "double hatting", the mischief which the double-hatting provision is intended to prevent is not clearly articulated. Specifically, while the UNCITRAL Working Group III (A/CN.9/1004*) paper (at paras 58, 58 and 69) reflects that the issue of double hatting has been raised there is no explanation as to why there is a problem or potential problem with individuals acting as, for example, counsel and adjudicator at the same time in entirely separate proceedings. The authors infer that the perceived mischief centres around whether adjudicators who also take on roles as counsel may come into conflict by being fearful of making determinations which may cause them difficulty in circumstances where, acting as counsel, they may be required to argue against the substance or rationale of such determinations. Such a concern might equally apply where adjudicators have in the past testified as experts on matters relevant to the case they are being asked to adjudicate. While this issue is understood, given conflicts of interest, integrity, fairness, competence, availability, diligence, civility and efficiency are covered by other articles and professional standards, the authors do not consider that an outright restriction on double hatting is useful, proportionate or appropriate.

27. In particular, the authors suggest the deletion of an outright ban on double hatting for the following reasons:
    a) There is little commentary in favor of an outright ban on double hatting, while its introduction could affect party autonomy and restrict access of new entrants to the realms of adjudicators who bring gender and regional diversity. Instead, disclosure is generally preferred over strict recusal.
    b) The problem of lack of diversity is more harmful systemically to the ISDS system than the limited potential conflict scenario arising out of double hatting. As noted in an article on "Arbitral Women", a prohibition on double hatting would "*reduce the overall pool of potential arbitrators, notably women, and deprive the parties of the ability to select the arbitrator of their choice"* and would *"have the unwelcome effect of reinforcing the existing dominance of a relative handful of male arbitrators mostly from Western Europe and North America in the field of ISDS*." Instead, "[a] *time-phased or number-of-total cases approach might provide more flexibility*[47]."
    c) Linked to the issue of diversity is that of arbitrator availability. Arbitrators taking on too many appointments and not devoting appropriate time to the cases they take on is also a major problem experienced by parties (as recognized by Article 8 of

[47] https://www.arbitralwomen.org/icsid-and-uncitral-draft-code-of-conducts-potential-ban-on-multiple-roles-could-have-a-severe-impact-on-gender-diversity/.

the Draft Code). Consequently, a restriction on double hatting, which would have the effect of limiting the ability of candidates to accept appointments and thereby reducing the overall size of the pool of potential arbitrators, would have more of a harmful effect than the eradication of potential conflicts of interest.

d) The potential conflict of interest identified as the mischief which may justify the restriction is limited in nature and can be addressed through disclosure requirements, professional standards and other Articles requiring impartiality, integrity and ethical behavior from both adjudicators and counsel. Further, an outright ban may practically be difficult to be complied with. This is highlighted by the placeholders in Article 6 for the number of years that the authors of the Draft Code have left for the time between acting as counsel and adjudicator. Modern legal careers are subject to differing and unpredictable career structures and cases can technically go on for decades. It therefore seems unrealistic, and potentially harmful, to police the ability of counsel to move into the role of adjudicators and vice versa by reference to fixed and arbitrary time limits.

e) From a practitioner's perspective, the temporal limit is also problematic given its potential constraint on party autonomy and the general availability of professionals. As a reference, under the IBA Guidelines, serving as an arbitrator concurrently with representing or advising one of the parties in another case is considered a red list item, i.e. is seen as a conflict, while past service as counsel for one of the parties within the last three years is considered an orange list item, i.e. one that requires disclosure but does not necessarily raise justifiable doubts as to the arbitrator's impartiality and independence. Such situations would be adequately addressed through the proposed disclosure requirements of the Draft Code.

28. In making the above comments the authors emphasise that, as far as qualified ISDS professionals are concerned, only a minority exclusively work in one role. Further, the issue of double hatting from a professional ethics viewpoint usually arises when adjudicators serve concurrently as counsel in cases involving the same or similar facts. In such cases, the adjudicators could choose to either withdraw as counsel or recuse themselves as adjudicator. There is usually no issue with past service, including legal representation that just terminated, because a strict conflict of interest would no longer exist upon the termination of the professional relationship.

29. In the authors view, a greater risk to integrity – and to confidence in the ISDS system more generally – arises from arbitrators who accept multiple appointments by the same entity or who are only ever appointed by States or investors (indicating a clear and obvious belief that the relevant arbitrator is, to some extent, biased in favour of the appointing party). In these cases, the risk that such arbitrators try to please prospective future appointees as source of future work may be higher than if an arbitrator candidate also has a flourishing practice as counsel or expert. Considering that the draft Code is quite granular in addressing conflicts of interest, we suggest that the drafters give additional thought to how to address this issue in the Draft Code – particularly as "[r]*epeat appointment has been identified as*

a concern by many observers of ISDS" and "*was also considered by UNCITRAL Working Group III during its deliberations*[48]".

30. In this context, the risk of double-hatting from the perspective of substantive issues is more nuanced. As drafted, Article 6 foresees disclosure or recusal when the adjudicator participated in a prior proceeding involving (i) the same parties, (ii) the same facts, or (iii) the same treaty. This is regarded as particularly relevant in ISDS proceedings which usually involve the interpretation and application of similarly-worded legal instruments. The broadest proposed language would potentially prohibit a candidate from serving as an adjudicator when he/she has previously acted as counsel, expert, witness, agent, or in another relevant role, in a matter involving the same treaty. This could be disproportionally restrictive due to the nature of ISDS proceedings. The concern is long- present in ISDS and similar concerns arise to those discussed above for issue conflicts. For instance, the challenge of Prof. Kaj Hober in *KS Invest v. Spain*, based on the circumstance that he was concurrently serving as adjudicator and counsel in different ECT arbitrations involving similar legal issues, was not upheld.

31. Having said this, we notice that a more restrictive approach seems to have gained popularity in the most recently concluded IIAs. The EU has adopted broad provisions with regard to multiple roles: concurrent service is prohibited under "*any international agreement*" and after acting as arbitrator, the concerned person may not, *inter alia*, act for one of the parties in arbitrations under the same treaty[49]. The 2019 Dutch Model BIT prohibits concurrent counsel and adjudicator work, as well as counsel work in the five preceding years in any ISDS disputes. The US-Mexico-Canada Agreement ("**USMCA**"), to a lesser degree, prohibits concurrent counsel and adjudicator work in cases under the USMCA. While appreciating the policy consideration behind these provisions, we are also concerned if and to what extent such restrictions may interfere with party autonomy in the choice of adjudicators.

32. If a ban of some sort remains desirable, it may be useful to enumerate precise circumstances such as, for example, a person acting as both arbitrator and counsel (at different points in time) for the same party, in which the person concerned would be banned from acting. Although such enumeration doubtlessly requires more work, it would likely result in a less arbitrary approach to the issue of double-hatting.

33. In sum, the key to drafting Article 6 is to find "*the right balance between ethical priorities, concerns over unconscious bias and appearance of bias, interest in enhancing diversity, and freedom of the parties to select an adjudicator*"[50], adopting the approach that disclosure

[48] Commentary on the Draft Code of Conduct, para. 52, accessed at: https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

[49] These provisions are found in the EU's recently concluded multilateral investment instructions, such as the EU-Canada Comprehensive Economic and Trade Agreement, the EU-Singapore Free Trade Agreement and Investment Protection Agreement, and the EU-Vietnam Free Trade Agreement.

[50] See http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/.

should be favored over prohibition, and that the imposed limitations should be within reason to allow an increased level of diversity, while preserving a party's freedom to choose their adjudicator.

34. One possible solution in response to the growing public criticism of the ISDS system could be to facilitate, via the Draft Code, new entrants to the overall pool of potential adjudicators and allow more regional and gender diversity in the process. The rules should not be designed to further narrow the existing range of choices for the parties and, as such, the authors do not see an outright ban on double hatting as compatible with this objective.

35. The Draft Code also provides that adjudicators should not act as "*agent*" and "*any other relevant role"* at the same time but only questions in the accompanying explanatory text if the concern around "double hatting" applies equally to adjudicators acting in the capacity of mediators and states it is unclear when agents should be banned from acting as adjudicators. In the absence of a clear articulation of the mischief which the inclusion of these roles is intended to prevent, the inclusion of such roles in the Draft Code appears to be overly restrictive.

Article 7: Integrity, Fairness and Competence

36. The authors endorse the requirements outlined in Article 7 and have no further comment.

Article 8: Availability, Diligence, Civility and Efficiency

37. The authors endorse the requirements outlined in Article 8. Further, we note that some experienced and reputable ISDS adjudicators may be in very high demand by parties and tend to be on a large number of ISDS matters at the same time. The unavoidable consequence is a lack of availability and decreased efficiency (and often, unfortunately, potential lapses in quality). This can lead to issues including unnecessary delay in the proceedings (due to unavailability to attend to important procedural steps in due course), inappropriate use of assistants, and lack of diligence and care in the conduct of the proceedings or in rendering decisions.

38. A declaration pursuant to Rule 6.2 of the 2006 ICSID Arbitration Rules does not require an arbitrator to make any commitment as to his/her availability throughout the proceedings. In contrast, a declaration pursuant to the Draft Arbitration Rule 19(3)(b) of the ICSID Working Paper IV requires an arbitrator to commit time and availability to the effective and efficient performance of an adjudicator's duties.

39. Article 8 in this regard is a welcome addition, although with reference to Article 8(2), if specific limits are to be imposed on adjudicators, an appropriate objective base, if at all, should be set out with more clarity. ISDS matters differ in their nature and complexity and may require different commitments of time and energy. Article 8(2) currently only concerns a person's engagement as adjudicators; a more comprehensive approach would also take into consideration his/her other professional engagements, whether or not ISDS- related (with reference to but not limited to Article 6).

40. As to the draft text at Article 8(2) which considers imposing a limit on the number of cases an adjudicator takes on, this reflects an oft-voiced concern that some adjudicators take on too many cases to perform their role effectively. However, given the varying size in caseloads and other workloads there is a risk that a strict limit becomes arbitrary. Rather, it would be more useful to require potential adjudicators to list the number of major commitments they have on and/or commit to making the time available. In addition, or alternatively, the adjudicator could be obliged to notify parties of any particular periods of unavailability contemplated as at the time requested to take on the relevant appointment. The authors note that similar "availability" declarations already required of adjudicators occasionally stand in contrast to their actual availability to devote attention to a case, so more onerous availability disclosure might be of limited utility in practice, but still better than an arbitrary limit on the number of cases.

Article 9: Confidentiality

41. The authors endorse the requirements outlined in Article 9 and have no further comment.

Article 10: Pre-appointment interviews

42. Some recently concluded IIAs already contain codes of conduct for "*candidates*", such as under NAFTA, EU-Canada CETA and Annex 14-B of the EU-Singapore Trade and Investment Protection Agreement. Article 10 of the Draft Code, which concerns pre-appointment interviews, particularly prohibits candidates from discussing substantive matters with counsel at such pre-appointment stage and proposes requiring that all interview records be disclosed to parties upon appointment.

43. The authors agree with the intentions of this provision but suggest that, for better effectiveness, Article 10 should also mandate the keeping of records of such pre-appointment interviews. This aims to ensure a level playing field and to discourage parties/counsel from adopting a 'safe practice' approach of intentionally not creating contemporaneous notes of such conversations. This suggestion is premised on the agreed principle that nothing discussed between an independent adjudicator candidate and counsel during a pre-appointment conversation concerning the relevant dispute ought to be controversial or merit protection from production to the other side (while advice from counsel to client following such conversations, by contrast, would usually, and legitimately, be protected by privilege).

Article 11: Fees and Expenses

44. The authors endorse the requirements outlined in Article 11 and simply note the need to achieve harmony between this provision and the rules of entities administering the proceedings.

Article 12: Enforcement of the Code of Conduct

45. The actual effects and impact of the Draft Code will ultimately depend on how it is to be implemented and enforced. It is unknown if the Draft Code will be incorporated into the amended ICSID rules, as an annex to existing IIAs, as part of a new multilateral treaty such as the Mauritius Transparency Convention or if the Draft Code will simply exist in the form

of soft law guidelines that may be applied and incorporated by parties to international agreements of proceedings as they wish.

46. The ultimate form and status of the Draft Code is substantively connected to discussions on whether the Draft Code should primarily function as guidelines or have "teeth". In the context of ISDS proceedings, soft law instruments such as the IBA Guidelines are regularly applied without a designated enforcement mechanism. The WG III reports a general preference that the Draft Code should be binding and contain specific rules rather than guidelines[51]. Several states also propose sanctions in case of violation[52].

47. Article 12(1) imposes an "*obligation*" on adjudicators and candidates to "*comply*" with the Draft Code, without specifying an implementation or supervising mechanism. We agree that, in light of the objectives of the Draft Code, it should be binding on adjudicators covered by its scope. However, we make the following comments and suggestions:

- **Institutionalised Enforcement:** Article 12 of the Draft Code suggests the importance of voluntary compliance and currently proposes no specific mechanism to oversee such compliance. To the extent the code of conduct is applied by parties in the context of proceedings governed by an arbitral institution, it may be desirable for those institutions to require that all adjudicators on the panel of such institutions have agreed to be bound by the code and may risk removal from the panel if they are found not to have abided by the code. It would then be a matter for those institutions to assess the practicality and viability of monitoring compliance and take appropriate actions. One practical step institutions could take is to add a confirmation that an adjudicator has read and will comply with the Draft Code as an additional item listed on applicable disclosure/availability forms.

- **Sanctions:** It is questionable whether monetary (linked with a remuneration scheme), disciplinary (disqualification or removal of adjudicators), or reputational sanctions (such as through the creation of a public list containing the names of arbitrators who are found to have violated the provisions of the code of conduct, which has been suggested) are appropriate to be included in the code of conduct. Sanctions may deter qualified prospective candidates from accepting appointments for fear of risking sanction for inadvertent or marginal non-compliance. There is also a risk that sanctions may be misused as threats by a party trying to challenge an adjudicator or candidate. New entrants to the field of ISDS adjudicators (and quite possibly the younger candidates who would bring more gender and regional diversity to the pool of choices), who are otherwise already well-achieved as counsel or academics, could potentially be more susceptible to such negative consequences. As an alternative, to capture the

[51] Id., paras. 52, 68.
[52] Id., paras. 59, 62-64, 77.

essence that the code of conduct is a binding document and consistent with the principle of voluntary compliance, the Draft Code may usefully include, as a further sub-provision of Article 12, the following:

> ***Unless otherwise agreed by the parties, every Adjudicator will confirm, in the final award issued in relation to the relevant proceedings, that they have complied with the Code of Conduct during the course of the proceedings.***

This would serve as a reminder to adjudicators and may provide some re-assurance to parties or potential parties that the code of conduct will be followed. While there is some minor risk that a disgruntled party may seek to challenge a final award on the basis that an adjudicator did not include the relevant wording, or did not in fact comply with the code of conduct, this wording would not create any additional risk of parties successfully making such arguments without basis. There is only a risk if the party can convince an *ad hoc* Committee or competent court that the code of conduct was indeed breached – and even then it would only be relevant to the extent such breach was also a breach of relevant treaty articles or national laws governing grounds for annulment, set aside and so forth. In any event, we have qualified this provision by making it expressly subject to override by agreement of the parties, to promote consideration of whether the parties wish to accept this provision or opt out from it, for example, by adding appropriate wording in an agreed procedural order.

- **Disqualification:** Article 12(2) of the Draft Code states that disqualification and removal procedures in the applicable rules shall continue to apply. The implications of this Article are not clear as it appears to place violations of the Draft Code alongside established procedures for disqualifying/removing an adjudicator in ISDS proceedings. If the Draft Code is violated and a party complains about it (to whom?), the question then arises as to whether such a complaint could amount to, or be equated with, a challenge of the adjudicator/candidate. If enforcement of the Draft Code is envisaged through challenges procedures pursuant to existing sets of arbitration rules, which differ from one another, this mechanism would very likely further complicate the procedure to challenge an arbitrator/candidate in ISDS proceedings. Constructively, as noted above, it may be clearer and more effective to request arbitral institutions or other administrative bodies to include reference to the code of conduct in their rules on disqualification or removal of arbitrators (and take into account breaches of the code within their challenge/disqualification frameworks).

IV. Conclusion

48. The prominent criticism of investment tribunals' independence, impartiality, ethics and integrity is an obstacle to the renaissance of ISDS. Against this background, a code of

conduct that would bind ISDS adjudicators could be a meaningful tool in the ISDS reform and the authors are supportive of the intentions and objectives of the Draft Code.

49. The suggestions in this paper are intended to be constructive and we are grateful for the opportunity granted to us to put forward our comments.

50. As reflected in our comments, we are generally very supportive of the existing draft text and the comments and suggestions made are primarily concerned with practicalities and clarifications. The one exception is Article 6. In this regard, we strongly recommend deletion of the outright ban on 'double hatting' currently contained in Article 6. In essence, this is because we do not consider it a proportionate measure in relation to the narrow potential risk of adjudicators performing different roles. Further, Article 6, if implemented, will have the adverse effect of reducing the size of the pool of potential adjudicators, negatively impact gender and regional diversity, and pose significant barriers to entry for the new generation of potential adjudicators. All these undesirable effects should be avoided while any relevant risk can be and is adequately addressed through the disclosure, duty and impartiality requirements contained in this and other articles. If a ban is desired, it should be limited to specific situations based on actual conflicts of interest.

51. For similar reasons we are skeptical about the prospect of sanctions for non-compliance with the code while at the same time recognizing the importance to establish mechanisms to ensure that the Code has "teeth". We suggest this is best done in conjunction with arbitral institutions and existing frameworks for challenges/disqualification.

PUBLIC STAKEHOLDERS – Individuals (Alphabetically by last name)

Fach Gómez, Katia

"Drafting a Twenty-First Century Code of Conduct for International Investment Adjudicators", in Chaisse, Julien, Choukroune, Leïla, Jusoh, Sufian (eds.) Handbook of International Investment Law and Policy, Springer 2020, in press.

Hanotiau, Bernard

There has been in these recent years a trend which I would not hesitate to characterize as being the expression of a totally unjustified distrust of the arbitration process and international arbitrators. It is principally driven by people who either know little about the process, either by scholars who have very little practical view of international arbitration or by lawyers who are frustrated not to be appointed as arbitrators.

Beyond very good points, I am afraid that the proposed code of conduct seems to be inspired by this same spirit. In my opinion, it is not acceptable in a number of provisions. If it were adopted as it is, I could not adhere to it.

To me, the draft seems excessive in several respects, some provisions could even be considered illegal. I am sure that, if it was approved in its present form, it would generate a huge number of challenges, disputes, actions to set aside, etc., on any frivolous ground. This would have very significant negative effects on the ISDS disputes resolution mechanism, making it even more costly, lengthier, even more adversarial than it is (as it would disincentivize the sense of cooperation between the parties and the tribunal). At the end, the whole system risks becoming completely unworkable. Because of the intended restrictions, the code could also drive out of business fulltime arbitrators.

In the first place, Articles 5 and 6 raise significant problems.

Article 5 is so broadly drafted that it will be a delight for lawyers who try to find any ground to challenge an arbitrator or want to set aside an award. Its wording is not only too broad but it is also imprecise when it refers to "any professional, business or other significant relationship" (without any additional clarification) within the past five years with, for example, the parties' counsel. If I had to apply this provision strictly, I confess that I would be unable to do so.

I also find unreasonable and terribly excessive to ask for a list of all publications of the adjudicator or candidate and their relevant public speeches. No institution anywhere in the world has ever required that. This is one good example of the negative spirit in which the document seems to have been drafted. Is it the intention that leading arbitration specialists should avoid expressing their personal independent opinions on any issues pertaining to ISDS? I would also like to point out that in the IBA Guidelines on Conflicts, the expression of general opinions on legal issues is included in the Green List, rightly so. I am aware that there has been one case where a well-known lawyer has publicly expressed an opinion on a dispute in which he was involved as arbitrator. This is not acceptable but it is not a reason to give the impression to the world that checking all the publications of an arbitrator is very important to make sure that he/she is conflict-free.

Article 6 is unworkable. I am personally against double-hatting and I think that prohibiting it is a very good policy. Our firm has decided several years ago not to act anymore as counsel in ISDS arbitration but it remains that the provision, as drafted, raises problems. First, the issue of confidentiality is not addressed. Second, as written, the provision means that an arbitrator should refrain from acting or disclose that he/she acts as arbitrator in cases involving the same facts or the same treaty. Again, as phrased, it will definitely be a source of disputes. When are you able to realize that the facts are similar? When the parties have finalized their submissions? What does it mean the same facts? A priori, the facts are never the same.

Article 8.2 is not acceptable, beyond the fact that it is probably illegal. The justification for the provision is allegedly the concern that an adjudicator may not be able to dedicate the necessary time when working on many cases. But as the comment below the provision rightly points out,

the number of cases an arbitrator can diligently manage depends on an number of factors, including the complexity of the case, the capacity of the individual, and the role played by the adjudicator (presiding or not); further, cases may settle or become dormant, allowing the adjudicator to manage other cases.

There is an increasing number of fulltime arbitrators. This is a profession and it should be recognized as such, in the same way as for fulltime judges. These arbitrators contribute a lot to the development of international arbitration because precisely they are fulltime, they invest a lot in that area in terms of teaching, publications, conferences, seminars and generally speaking by their contribution to the development of international arbitration. Limiting them to a few ISDS cases is not only unfair; it is irrational. All lawyers do not work at the same pace, their work depends upon their role in the arbitral tribunal, on the complexity of the case, or, for example, if in their career, they are only acting as arbitrator, and not as counsel. I know a lawyer who has presently 18 active cases as lead counsel and two as arbitrator. Do you think that he is going to deliver his awards faster than an arbitrator who is handling ten arbitration cases which, by definition, also extend over several years?

The code of conduct already asks to disclose the number of active cases that you have current. I think that this should be enough. The parties have the right to appoint the arbitrator that they find the most competent for the case. By definition, the most competent arbitrators are also generally the busiest ones. Duly informed, the parties have the right to appoint them if they want. This is one of the most fundamental pillars of international arbitration.

I will add that when I receive the CV of all the arbitrators with whom I work in ICC arbitration, I note that many of them are handling twenty cases or more. This is communicated to the parties and I am not aware of any case where the parties have withdrawn their nomination on this basis. Nor has the institution. In other words, Article 8.2 is not a solution for its published purpose. It is excessive, prejudicial to the harmonious development of ISDS and consequently unacceptable. It should be deleted.

One should also realize that if arbitrators have to spend so much time to draft an award, it is because the parties cannot limit themselves to the essential and file submissions which are too long and include too many unnecessary developments. Is it really necessary for example to write 250 pages on the meaning of fair and equitable treatment? Every international lawyer knows what it means but from the moment the tribunal has received these 250 pages, it has to answer all the developments that they contain.

One final note. I think that the provision between brackets at Article 9.2 should be maintained. It is totally unethical for a lawyer to publish an opinion on any decision, ruling or award, in which he/she has participated. And it happens much too often.

I sincerely hope that the draft will be amended to make it more balanced, more respectful of the work of international arbitrators. This is not only in their interest but also in the interest of a good, harmonious functioning of the ISDS dispute resolution mechanism.

Jaime, Margie-Lys

1) **Article 1. Definitions**

For the purpose of this Code:

1. "Adjudicators" means arbitrators, members of international ad hoc tribunals, members of annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;

Commentary:

- For greater clarity, it is recommended to add the term "tribunals" after "ad hoc".

2) **Article 5. Conflicts of Interest: Disclosure Obligations**

…

2. Disclosures made pursuant to paragraph (1) shall include the following:

(a) Any professional, business, close family, and other significant relationships, within the past [five] years with:

(i) The parties [and or any person having a controlling influence in one of the parties, or affiliates, subsidiaries, parent-companies or agencies related to the parties];
(ii) The parties' counsel;
(iii) Any present or past adjudicators or experts in the proceeding;
(iv) [Any third-party funder or person with a direct or indirect financial interest in the outcome of the proceeding];

…

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and or mediator]; and

(d) A list of all relevant publications by the adjudicator or candidate [and their relevant public speeches] within the past [fifteen] years.

Commentary:

- The five years threshold, as required by the arbitrator declaration in the ICSID Rules Amendments seems reasonable. A relationship that existed before such threshold but could reasonably affect the adjudicators' independence or impartiality would still be subject to a duty of disclosure in accordance with paragraph (1).
- A "close family" relationship should be considered, as it is contemplated in the IBA Guidelines on Conflict of Interest (¶2.2).
- The disclosure should also include "any person having a controlling influence in one of the parties", as well as affiliates of one of the parties, as considered by IBA Guidelines on Conflict of Interest (¶2.3).

- It would be positive to expressly include the disclosure regarding third-party funder.
- The inclusion of international arbitrations appointments is welcomed as it would allow a greater assessment of any possible conflict of an adjudicator. Domestic arbitration, however, is presumed not to create a conflict in ISDS cases.
- Disclosures regarding relevant publications and public speeches address the concern of issue conflict. Although this will enhance the opportunities of parties to learn more about the prospective adjudicator, the duty of disclosure should be limited in time. The draft proposes that adjudicators and candidates be required to disclose any relevant publication and relevant public speech within the previous fifteen years. Expanding the duty to disclose to any kind of publications and/or speeches over time could create a significant burden for prospective adjudicators. Furthermore, it is possible that adjudicator's opinion regarding a particular issue have changed or evolved over time; thus, the appointment of an adjudicator should not be affected by an opinion too remote to create a real issue conflict.

3) Article 6. Limit on Multiple Roles

Adjudicators shall [~~refrain from acting~~]/[disclose that they act] ~~as~~ counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within ~~X~~ five years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

Commentary:
- The problem of *double-hatting* raises questions as to whether, or under what circumstances, an individual can serve as counsel and at the same time serve as arbitrator in other cases. This practice might cause actual conflict of interests which could have a negative impact on the perception of legitimacy of the ISDS system. Therefore, regulating the double hatting could be useful. However, as pointed out by the Draft Code of Conduct for Adjudicators in ISDS, an outright ban may exclude a greater number of persons than necessary to avoid conflicts of interest (¶68). Therefore, a full disclosure within the past five years, should be sufficient for proving the parties with the necessary information to decide whether to challenge a particular adjudicator.
- This article may need to be considered further regarding its application in the context of a standing body such an appellate body in light of UNCITRAL Working Group III discussions.

4) Article 7. Integrity, Fairness and Competence

…

2. An adjudicator shall not engage in *ex parte* contacts or communications concerning the proceeding.

…

4. Adjudicators shall not delegate their decision-making function to assistants or any other person.

Commentary:

- For greater clarity, it is recommended to add the term "communications" in addition to "contacts".
- "Assistants" should be expressly included.

5) **Article 8. Availability, Diligence, Civility and Efficiency**

…

2. ~~[~~Adjudicators shall refrain from serving in a significant number of ~~in more than [X]~~ pending ISDS proceedings and other arbitration cases at the same time so as to issue timely decisions.~~]~~ Parties shall be informed about the number of proceedings in which the adjudicators are currently serving.

…

Commentary:

- To fix a limited number of pending cases might be difficult as availability, diligence and efficiency could depend on different factors. Other national and international arbitration cases shall be considered. Parties should have the right to be informed about the number of proceedings in which the adjudicators are currently serving.

6) **Article 9. Confidentiality**

…

2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose or comment on any decision, ruling or award in which they have participated until it is in the public domain ~~[and they shall not comment on any decision, ruling or award in which they participated]~~.

…

Commentary:

- The last phrase could be simplified to encompass comments of decisions, rulings o awards in which the adjudicators have participated.

7) **Article 10. Pre-appointment Interviews**

…

2. ~~[~~If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.~~]~~

Commentary:

- The disclosure of pre-appointment interviews is welcomed.

8) **Article 11. Fees and Expenses**

1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, where applicable ~~when possible~~, shall be communicated to the parties through the entity administering the proceeding.

2. Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistants, if any.

Commentary:

- "Where applicable" seems more appropriate than "when possible".
- The defined term is "assistants" in plural. But, does this means that there would always be persons assisting adjudicators in a case?

9) **Article 12. Enforcement [and implementation] of the Code of Conduct**

[2.] If an adjudicator has not performed his or her functions with due diligence or has breached his or her obligations or duties under this code, then the entity administering the proceeding, after hearing the parties and the adjudicator concerned, may adopt any of the following measures:

(a) Caution the adjudicator verbally or in writing;

(b) Reduce the fees payable to an adjudicator;

(c) Notify the matter to any professional associations with which the adjudicator concerned is registered, for the determination of the ethical responsibilities; and

(d) Adopt any other measure to preserve the integrity of the proceedings and the enforcement of the award.

[3.] The disqualification and removal procedures in the applicable rules shall continue to apply.

[4.] [Other options based on means of implementation of the code]

Commentary:

- The code of conduct shall be binding and enforceable. Sanctions linked with remuneration scheme, disciplinary measures, reputational sanctions and notifications to professional associations, should be considered, as discussed at the thirty-eighth session of UNCITRAL Working Group III.
- Regarding the implementation of the Code, the ideal scenario would include the implementation of the code as part of a multilateral instrument on ISDS reform. In parallel, a multiplicity of options could be implemented simultaneously:
    - To incorporate the code into investment treaties and other instruments of consent;
    - To have disputing parties agree to its application at the inception of each case; or
    - To incorporate the code into applicable procedural rules.

A broader application of the code will help to make ethical obligations predictable and uniform.

Kairouani, Ali [FRANÇAIS]

I- Observations formelles :

La codification des règles de conduite des arbitres et leur normalisation seraient un facteur supplémentaire dans l'amélioration du rendement du mécanisme de règlement des différends entre investisseurs et Etats. Avec une définition plus claire du rôle de l'arbitre entre interprétation et régulation de l'équilibre entre l'Etat et l'investisseur étranger. Actuellement, ce système continue à subir de nombreuses critiques de la part de ses détracteurs particulièrement au niveau de son application (V. Projet de réforme de la RDIE CNUDCI). La codification conduira probablement à un ajustement de cet équilibre tant recherché. Néanmoins, la multitude des sources et leurs proliférations continues peuvent s'avérer difficile à contourner. La stabilité des relations économiques internationales et la prospérité de la société internationale dépendent essentiellement de l'efficacité et de l'efficience du système de règlement des différends relatifs aux investissements internationaux. De ce fait on constate que la justice arbitrale internationale est d'une nature réparatrice qui vise à rétablir une certaine équité, qui a été rompue par un acte injuste[53]. Dès lors, l'encadrement par le droit international de la conduite des arbitres devient la priorité pour mettre à niveau le système de règlement des différends. Actuellement, les arbitres ne sont soumis à aucun contrôle hormis celui du Conseil d'administration du CIRDI et du secrétariat de la CNUDCI ou bien le secrétariat de la Cour permanente d'arbitrage concernant les listes d'arbitres inscrits auprès de la CPA. Ainsi qu'elle est la finalité d'une telle codification ? Uniquement d'encadrer l'action des arbitres ou plus à travers l'établissement d'un équilibre procédural nouveau dans le cadre du règlement des différends relatifs aux investissements. Pour consolider la confiance des Etats et des investisseurs dans le système de règlement des différends, la transparence, l'uniformisation et l'équilibre de l'arbitrage transnational restent les principaux ingrédients de la réalisation d'un tel code.

II- Observation substantielles :

Il me semble que dans les articles 4, 5 et 5(2) la divulgation et non-divulgation sèment le trouble dans l'esprit du lecteur et renvoie ainsi au principe de transparence qui figure notamment au sein du règlement d'arbitrage de la CNUDCI relatif à la transparence de 2014(V. article 1,2 et 3 du règlement). Je suggère dès lors, d'intégrer le principe de transparence dans les articles 5 afin d'y inclure les arbitres et leurs conduites et de dissocier la divulgation de l'obligation de transparence et distinguer de facto la non-divulgation de l'obligation de transparence des arbitres et de la transparence de la procédure arbitrale. D'ailleurs, nous ne pouvons dissocier la transparence lors de la procédure arbitrale de l'exigence de transparence des arbitres qui sont les principaux acteurs aux côtés des parties au différend de ce mécanisme de règlement des différends. L'articulation de ces deux obligations reste le point focal sur lequel la réforme devrait se concentrer afin de ne pas créer une distorsion normative. Cette distinction permet de dissocier la transparence formelle relative à la désignation des arbitres dans les articles 7, 8, 9 et 10 de la transparence substantielle dans les articles 3, 4, 5 et 5(2).

Par ailleurs, s'agissant de l'article 7 relatif à l'intégrité, l'équité et la compétence et c'est surtout le second point qui m'interpelle à savoir l'équité. Il s'agit d'un traitement partiel de l'équité au premier sens du droit du contentieux international comme le principe d'égalité des parties à

[53] Aristote, *Ethique à Nicomaque* Sur la justice, Editions Flammarion, Paris 2008, p 19.

l'arbitrage transnational. La notion d'équité figurant dans l'article 38 du statut de la Cour internationale de justice qui dispose expressis verbis « […] si les parties sont d'accord de statuer ex aequo et bono » renvoie à une équité qui laissera le soin à l'arbitre de statuer ex aequo et bono lorsque l'application des règles va conduire à une conséquence déraisonnable et inégalité entre l'Etat et l'investisseur. Si la clause compromissoire reflète l'acceptation par les parties du recours à l'arbitrage, celle-ci n'équivaut pas à leur acceptation d'une décision arbitrale en équité. De ce fait, se pose la question de la pratique des tribunaux arbitraux CIRDI ou CNUDCI de l'équité. Dans ce sens quels sont ses éléments constitutifs sachant que l'équité peut s'inscrire dans la recherche d'un équilibre entre les intérêts divergents entre l'Etat et l'investisseur. L'accent devrait être mis également sur la neutralité économique de l'arbitre dans les articles 7 et 8 qui lui confère plus de légitimité ainsi qu'un apport considérable en matière de confiance auprès des parties au différend. L'arbitrage transnational ou mixte pose à l'heure actuelle un problème de déséquilibre procédural mais également d'inconstance jurisprudentielle ce qui a été évoqué dans les multiples notes de la CNDUCI et des projets d'amendements du CIRDI. Autrement dit, mettre en avant la neutralité de l'arbitre et la nécessité d'une interprétation équilibrée de ce donnera plus de crédibilité à ce projet. N'oublions pas que l'Etat reste un sujet de droit international et l'investisseur est un acteur et c'est à cet effet qu'il dispose de ce droit de recourir unilatéralement à l'arbitrage transnational. Cela continue à susciter plusieurs critiques en Afrique, en Amérique du Sud ce qui justifie ce mettre en avant la fonction du juge d'équilibre qui incombe à l'arbitre CIRDI ou CNUDCI.

Kantor, Mark

Thank you for all the hard work in preparing the Draft Code. I limit myself below only to criticisms. If I were to include all my compliments, this document would be book-length.

Art. 1 – Definitions

Art. 1.1 defines "adjudicators" to include "judges on a permanent mechanism for the settlement of investor-State disputes." Art. 1.4 defines "Investor-State dispute settlement" to include a mechanism to resolve disputes involving a foreign investor and a State or REIO … "arising under … domestic law…."

As drafted, that language has the potential to be interpreted to cover sitting judges in national courts (because the reference to a mechanism does not limit itself to mechanisms that are exclusive to the settlement of investor-State disputes). The Code of Conduct should not purport to extend to national court justices. The Code of Conduct should be clarified to assure that result does not arise.

As drafted, that language has the potential to be interpreted to cover claims settlement commissions as the type established arising out of WW1, WW2 and national expropriation disputes such as the Cold War disputes and the Iran-US Claims Tribunal. Those commissions are commonly established by unilateral national legislation or by specific post-conduct international agreements (e.g., the Algiers Accord). The Code of Conduct should be clarified to assure that it

does not purport to cover such specialized tribunals unless the instrument(s) establishing that tribunal so elect.

Art. 3 – Duties and Responsibilities

Art. 3(a) states that the adjudicator shall be "independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias." Comment 27 states these duties are elaborated in Arts. 4 and 5 below. However, Arts. 4 and 5 do not explain how the terms "impartiality" and "independence" are different (if at all) from "impropriety", "bias" or "appearance of bias", except that comment 35 appears to equate "partiality" with the "absence of bias or predisposition".

Comment 28 states that impropriety, bias and the appearance of bias are "further addressed in article 6." Article 6 deals only with forms of dual-hatting. However, the terms impropriety, bias

and the appearance of bias are far broader concepts, not limited solely to dual-hatting situations. Unless these terms are given substantive content in the Code of Conduct, their presence is an invitation to aggressive allegations and motion practice. I recognize these terms are found in recent EU instruments addressing ethics of members of investment courts, but strongly recommend they either defined to show how (if at all) they differ from independence or impartiality or be deleted.

Neither Art. 3 nor the comments make any effort to give content to the obligation to "avoid any direct or indirect conflicts of interest." The reference to "indirect" conflicts of interest in particular has the potential to be extraordinarily broad. If the intention is to link those concepts to the disclosure obligations in Art.5, then Art. 3 should so state. If the intention is broader then, unless these terms are given substantive content in the Code of Conduct, their presence is an invitation to aggressive allegations and motion practice. I recognize these terms are found in recent EU instruments addressing ethics of members of investment courts, but strongly recommend they either defined to show how (if at all) they differ from specified disclosure duties or be deleted.

Art. 4 - Independence and Impartiality

Art. 4.2(a) states that adjudicators shall not be influenced by "self-interest." Art. 4.2(d) states that adjudicators shall not use their position to advance any personal or private interests. Adjudicators often publicize their appointments to various international tribunals to develop their reputation in the field (whether as professionals or as scholars). Similarly, the organizations to which they belong do the same (for example, an academic institution or a law firm will include in its promotional materials the professional qualifications of its members to represent to prospective users the positive qualities of the associated individuals. The language in Arts. 4.2(a) and (d) can be interpreted to preclude such "marketing" efforts. Preventing adjudicators or their organizations from announcing the adjudicator's achievements to advance their own professional or organizational interests is surely not an objective of the Code of Conduct, but the

chosen language is open to that result. The Code of Conduct should be clarified to assure that such an interpretation is not appropriate.

Comment 35 states that "partiality means the absence of bias or predisposition of the adjudicator towards a party." Thus, the comment implies that impartiality and the absence of bias/predisposition are essentially the same concept. That comments illustrates the difficulty noted above for understanding the differences (if any) between the terms "impartiality," "independence", "impropriety", "bias" and "appearance of bias". The Code of Conduct needs to make clear (1) whether impartiality and bias are synonyms or, if not, the differences, (2) how the "appearance of bias" differs from "bias," impartiality" or "independence" (if at all) and (3) what is covered by "impropriety" – illegality, professional misconduct under applicable professional codes of conduct (noting that those codes differ substantially among jurisdictions and between professions) or something else such as an ill-defined "smell test" applied by the enforcing authority.

Art. 5 – Conflicts of Interest; Disclosure Obligations.

Art. 5.1 states that "Candidates and adjudicators shall avoid any direct or indirect conflict of interest." That, along with the identical statement in Art. 3(a) creates a standalone duty. Neither Art. 3(a) nor this article make any effort, however, to define conflicts of interest or explain the difference between "direct" and "indirect" conflicts. Moreover, neither Art. 3 nor Art. 5 make clear whether those duties are limited to an adjudicator's disclosure obligations or extend beyond the items identified for disclosure. As stated above, if the intention is broader then, unless these terms are given substantive content in the Code of Conduct, their presence is an invitation to aggressive allegations and motion practice. I recognize these terms are found in recent EU instruments addressing ethics of members of investment courts, but strongly recommend they either defined to show how (if at all) they differ from specified disclosure duties or be deleted.

Art. 5.2(a)(iv) in brackets would require an adjudicator to disclose "(iv)[Any third party with a direct or indirect financial interest in the outcome of the proceeding];". The chosen language is painfully open-ended and vague. It does not define "direct" vs. "indirect". It does not limit itself to material financial interests – Art. 5.4 excludes only those whose bearing on their role in the proceeding is "trivial". Thus, shareholders and employees in companies and taxpayers in States all surely have a financial interest in the outcome of investor-State proceedings. Creditors of investors (or their direct or indirect shareholders) and creditors of States or their instrumentalities all have a financial interest in the proceedings. Partners, associates and other employees in law firms representing a disputing party all surely have a financial interest in the outcome of the proceedings. How do we measure whether those interests are "trivial" or more than trivial? Must the adjudicator identify the third party and require that third party to demonstrate triviality? Art. 5.1 and Comment 44 state that the provision adopts a "reasonableness" standard. However, Art. 5.4 specifically adopts a "triviality" standard, which is by no means the same a "reasonableness". Moreover, for even a properly limited obligation to be enforceable, there needs to be a mechanism for the parties and counsel to make the requisite disclosure of persons or entities with the covered financial interest in the outcome of the proceeding. The Code does

not contain any such provisions. The adjudicator has no reasonable means of independently investigating the persons or entities outside his or her jurisdictional reach.

Art. 5.2(b) requires the adjudicator to disclose any "indirect" financial interest in the proceeding itself or another proceeding "that involves questions that may be decided in the ISDS proceeding." The term "indirect" is again unclear and needs to be clarified. Moreover, the reference to other proceedings involving questions that may be decided in the ISDS proceeding is too broad. It covers, for example, means of treaty interpretation, means of contract interpretation, means of mandatory information exchange and means of admitting or giving weight to documentary or witness evidence. It is unlikely the provision was intended to cover more that questions of substantive rights and obligations under international investment law. However, the chosen language reaches far beyond those substantive rights and obligations. Indeed, as to substantive rights and obligations, did the authors of this provision intend for it to reach other proceedings in which an international or domestic law obligation of good faith, reasonableness, fairness, equity, non-discrimination or similar broad concepts is at issue? If so, then the disclosure duties under this provision are extremely broad.

Art. 5.2(c) in brackets would require the adjudicator to disclose "[… other [international]arbitration] cases in which the candidate or adjudicator has been or is currently

involved …." Many arbitration disputes are subject to confidentiality. Indeed, applicable arbitrator ethics codes such as the 2004 AAA/ABA Revised Code of Ethics for Arbitrators impose a duty of confidentiality on arbitrators regardless of whether the disputing parties themselves are bound by confidentiality. The proposal that the disclosure duty cover all arbitration cases, or even all international arbitration cases, would require arbitrators to breach ethical duties they owe to others. Moreover, if the matter does not implicate the relevant ISDS proceeding, then the requirement is unnecessary and burdensome.

Art. 5.2(d) requires adjudicators to disclose a list of all publications and, in brackets, their relevant public speeches. Using myself as an example (and believing that many others are similarly situated), I cannot comply with these requirements. I have been publishing for at least 42 years. I have not maintained a comprehensive list of publications for that period. Many of those publications have little to do with international investment law, investments, or indeed even law – it is hard to see how that is relevant to an assessment of my possible conflicts. Moreover, I have made many posts over the decades on listservs, social networks or similar platforms – are those publications? I do not keep a record of those posts either. As for "public speeches," I again have been giving presentations for decades. I do not keep a comprehensive record – indeed, I normally speak from handwritten notes that I discard promptly after the event. Further, what is covered – is my participation on a panel of discussants at a conference covered? As a moderator of such a panel? As a "speaker" at a program sponsored by a student group?

Comment 47 states that Art. 5.2 covers" significant relationships." However, Art. 5.2 does not use the term "significant" and Art. 5.4 excludes only "trivial" disclosures. That confusion of languages needs to be resolved.

Comments 51-58 address repeat appointment concerns. However, the relevant disclosure provisions of Art. 5 extend well beyond engagements in which a repeat player situation may arise. They cover all such cases even when no individual or entity from the relevant ISDS proceeding is involved. The disclosure duty therefore would obligate the adjudicator to disclose irrelevant material in all cases.

Comments 51, 59-61 address issue conflicts. However, as discussed above, compliance with the relevant provisions of Art. 5 is extraordinarily difficult, especially for someone with years of professional experience. Moreover, the disclosure duties are not linked in any way to matters relevant to the ISDS proceeding. The disclosure duty therefore would obligate the adjudicator to disclose irrelevant material in all cases.

Comment 64 describes the exclusion of trivial information from disclosure duties. As noted above, that is different from a reasonableness standard. Moreover, Comment 64 itself states that Art. 5.4 "follows the practice of ISDS tribunals, which have held that certain information need not be disclosed and that the duty to disclose only includes relationships and circumstances that an adjudicator reasonably believes would cause their reliability for independent judgment to be questioned by a reasonable third party.' That "reasonable adjudicator belief," "reliability for independent judgment," "reasonable third party" standard is quite different from a "triviality" standard.

Art. 6 – Limit on Multiple Roles

What does the phrase "any other relevant role" mean? Comments 66-72 correctly describe many of the problems, but the draft Code provides no answers. An open-ended scope of cover is an invitation to mischief.

Art. 7 – Integrity, Fairness and Competence

Art. 7.4 states that "Adjudicators shall not delegate their decision-making function to any other person." The definitions in Art. 1 are broad enough to cover disputes under, for example, the WTO TRIMS Agreement. The WTO Secretariat, and indeed the secretariats of many international administrative bodies, play a large role in drafting determinations. The Code of Conduct should clarify that it does not intend to address those situations.

Art. 8 – Availability, etc.

Art. 8.2 in brackets would limit the number of concurrent ISDS appointments. First, the number depends on the complexity of the matter – absolute numbers are a poor proxy. Second, other professional obligations (including arbitrations and court proceedings) as well as personal commitments arguably play a larger role in availability and diligence than the number of concurrent ISDS proceedings. While the intention behind this provision is laudable, the chosen approach is ineffective.

Art. 9 – Confidentiality

Art. 9.2 prohibits an adjudicator from "disclos[ing] any decision, ruling or award to the parties prior to delivering it to them." As drafted, this provision arguably prohibits an adjudicator from sharing a draft decision with the parties i to solicit comments before finalization. It is unlikely the authors intended to prohibit that practice, but the chosen language is capable of being so interpreted.

Art. 10 – pre-Appointment Interviews.

Art. 10.1 limits the scope of pre-appointment interviews to availability and conflicts. Existing arbitrator codes of ethics, such as the IBA and ABA/AAA Codes, permit discussion of characteristics of a chair both pre- and post-appointment. Since other provisions of the Code prohibit ex parte communications, does this Code intend to prohibit that practice? If so, the Code should make that prohibition explicit.

Rubino-Sammartano, Mauro

Art. 5.2(a) does not include an express reference to possible conflicts of interest concerning also partners, associates and any other close contact of the candidate or adjudicator.

It has been said that it would be already included in art. 5.2(a), but it seems to me that it would be preferable to clearly deal with it, possibly stating also – what is less easy – how far and deep searches as to possible conflicts concerning partners, associates and any other close contact should go.

I enclose for your convenience the Code of Ethics of our institution.

Steingruber, Andrea Marco

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: Comments on some Aspects related to the Nationality (Nationalities) of Adjudicators

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("Draft Code") jointly prepared by the Secretariats of ICSID and UNCITRAL is to be welcomed.

The Secretariats of ICSID and UNCITRAL have also to be commended for the diligent and thoughtful way in which they have presented the Draft Code to the public and engaged in dialogue with stakeholders about the Draft Code.

Having had the opportunity to participate in that public dialogue, I also wished to provide the Secretariats of ICSID and UNCITRAL with certain comments and suggestions concerning the Draft Code.

My observations will be limited to a minor aspect: "nationality". It is striking that the Draft Code does not once mention the concept of "nationality". This despite the fact that several legal instruments relevant for investor-State dispute settlement ("ISDS") – the ICSID Convention, free trade agreements ("FTAs"), and arbitration rules – mention "nationality" in relation to the adjudicators' requirements. Moreover, the concept of "nationality" is also relevant in relation to the disputing parties, because in international ISDS they need to be nationals of different countries[54].

Hereinafter I will briefly mention some examples of legal instruments – the ICSID Convention, FTAs and different arbitration rules – which address "nationality" in relation to the adjudicators' requirements and then make some suggestions of minor amendments of the Draft Code in order to take into account the concept of "nationality".

1. SOME EXAMPLES OF LEGAL INSTRUMENTS MENTIONING "NATIONALITY"

The legal instruments mentioning the concept of "nationality" are of different types. They can be international treaties, but also arbitration rules. With regard to international treaties it is noteworthy to observe that beside the ICSID Convention increasingly also free trade agreements of the new generation address "nationality" of arbitrators[55]. Hereinafter some relevant examples will be provided.

1.1. The ICSID Convention and the ICSID Arbitration Rules

Article 39 of the ICSID Convention under the heading "Constitution of the Tribunal" states that:

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Rule 1(3) of the ICSID Arbitration Rules under the heading "General Obligations" states that:

The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

[54] See e.g. Article 25(1)-(2) of the ICSID Convention.
[55] Particularly FTAs concluded by the European Union.

Rule 3(1) of the ICSID Arbitration Rules under the heading "Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)" states that:

1. If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:
   (a) either party shall in a communication to the other party:
      (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
      (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;
   (b) promptly upon receipt of this communication the other party shall, in its reply:
      (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
      (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;
   (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

1.2. The PCA Arbitration Rules (2012)

Article 6 of the PCA Arbitration Rules (2012) under the heading "Appointing authority" states that:

1. The Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority.
2. In exercising its functions under these Rules, the appointing authority may require from any party and the arbitrators the information it deems necessary and it shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner it considers appropriate.
3. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

1.3. The UNCITRAL Arbitration Rules (2010)

Article 6(7) of the UNCITRAL Arbitration Rules (2010) under the heading "Designating and appointing authorities" states that:

> 7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

1.4. The ICC Arbitration Rules (2017)

Article 13 of the ICC Arbitration Rules (2017) under the heading "Appointment and Confirmation of the Arbitrators" states that:

1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

2. The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or in- dependence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

3. Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, re- quest a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

4. The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:
   (a) one or more of the parties is a state or may be considered to be a state entity;
   (b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
   (c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

5. The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

1.5. The LCIA Arbitration Rules (2020)

Article 6 of the LCIA Arbitration Rules (2020) under the heading "Nationality of Arbitrators and Parties" states that:

6.1 Upon request of the Registrar, the parties shall each inform the Registrar and all other parties of their nationality. Where the parties are of different nationalities, a sole arbitrator

or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitrator candidate all agree in writing otherwise.

6.2 For the purposes of Article 6.1, in the case of a natural person, nationality shall mean citizenship, whether acquired by birth or naturalisation or other requirements of the nation concerned. In the case of a legal person, nationality shall mean the jurisdiction in which it is incorporated and has its seat of effective management. A legal person that is incorporated in one jurisdiction but has its seat of effective management in another shall be treated as a national of both jurisdictions. The nationality of a party that is a legal person shall be treated as including the nationalities of its controlling shareholders or interests.

6.3 A person who is a citizen of two or more States shall be treated as a national of each State; citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality; a citizen of a State's overseas territory shall be treated as a national of that territory and not of that State; and a legal person incorporated in a State's overseas territory shall be treated as such and not (by such fact alone) as a national of or a legal person incorporated in that State.

1.6. The SCC Arbitration Rules (2017)

Article 17 of the SCC Arbitration Rules (2017) under the heading "Appointment of arbitrators" in the relevant paragraphs states that:

6. If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or the Board otherwise deems it appropriate.
7. When appointing arbitrators, the Board shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.

1.7. The Comprehensive Economic and Trade Agreement ("CETA")

Article 8.27 of the CETA under the heading "Constitution of the Tribunal" states that:

.....

2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada[56] and five shall be nationals of third countries.

…..

6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a

[56] Footnote 11 to Article 8.27(2) of the CETA states that: "Either Party may instead propose to appoint up to five Members of the Tribunal of any nationality. In this case, such Members of the Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article".

national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.

…..

8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and shall be appointed for a two-year term and shall be drawn by lot from among the Members of the Tribunal who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the CETA Joint Committee. The Vice-President shall re- place the President when the President is unavailable.

9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a re- quest shall be made before the constitution of the division of the Tribunal.

1.8. The EU-Singapore FTA

Article 3.9 of the EU-Singapore FTA under the heading “Tribunal of First Instance” states that:

1. A Tribunal of First Instance ("Tribunal") is hereby established to hear claims submitted pursuant to Article 3.6 (Submission of Claim to Tribunal).
2. The Committee shall, upon the entry into force of this Agreement, appoint six Members to the Tribunal. For the purposes of this appointment:
   (a) The EU Party shall nominate two Members;
   (b) Singapore shall nominate two Members; and
   (c) The EU Party and Singapore shall jointly nominate two Members, who shall not be nationals of any Member State of the Union or of Singapore.

Article 3.10 of the EU-Singapore FTA under the heading “Appeal Tribunal” states that:

1. A permanent Appeal Tribunal is hereby established to hear appeals from provisional awards issued by the Tribunal.
2. The Committee shall, upon the entry into force of this Agreement, appoint six Members to the Appeal Tribunal. For the purposes of this appointment:
   (a) The EU Party shall nominate two Members;
   (b) Singapore shall nominate two Members; and
   (c) The EU Party and Singapore shall jointly nominate two Members, who shall not be nationals of any Member State of the Union or of Singapore.

2. SUGGESTIONS OF AMENDMENTS OF THE "DRAFT CODE" IN RELATION TO "NA- TIONALITY"

"Nationality" ("nationalities") may influence the conduct or judgement of adjudicators. It is therefore relevant for the independence and impartiality of adjudicators. Moreover, the disclosure of the "nationality" ("nationalities") should be self-evident for adjudicators. In order to take into account the concept of "nationality" it is herewith suggested to slightly amend Articles 4 and 5 of the Draft Code (suggestions of amendments in red).

2.1. The relevant provisions with the suggested amendments

Article 4 Independence and Impartiality

1. Adjudicators shall at all times be independent and impartial.

2. In particular, adjudicators shall not:

   (a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism;
   (b) Allow any past or ongoing financial, business, professional, family or social relationships, nationality (nationalities) to influence their conduct or judgement;
   (c) Take action that creates the impression that others are in a position to influence their con- duct or judgement;
   (d) Use their position to advance any personal or private interests; or
   (e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or ap- pear to interfere, with the performance of their duties.

3. The Tribunal as a whole shall be neutral and conduct in a neutral way.

Article 5
Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.
2. Disclosures made pursuant to paragraph (1) shall include the following:
   (a) Any professional, business and other significant relationships, within the past [five] years with:
      (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];
      (ii) The parties' counsel;
      (iii) Any present or past adjudicators or experts in the proceeding;
      (iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];
   (b) Any direct or indirect financial interest in:

(i) The proceeding or in its outcome; and
(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

(e) The nationality (nationalities) of the candidates and adjudicators.

3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.

4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.

2.2. Reasons for the suggested amendments

2.2.1. General

The "nationality" ("nationalities") of adjudicators may influence their conduct or judgement. This may be relevant in relation to the independency and/or impartiality of adjudicators. In this regard it can also be spoken of the neutrality of adjudicators and/or of the tribunal.

Candidates and adjudicators should therefore at least be reminded that they shall conduct in an independent and impartial way regardless of their "nationality" ("nationalities") and in a way that permits a complete ascertainment of their "nationality" ("nationalities"), i.e. that they shall fully disclose their "nationality" ("nationalities"). In the process of disclosure particularly tricky are situations where candidates and adjudicators hold more than one "nationality".

With regard to the language used in Article 4 of the Draft Code the Commentary to the Draft Code underlines that it is similar to existing codes, as for example Articles 11-15 of the CETA, Code of Conduct[57]. Still, one needs to bear in mind that the CETA, Code of Conduct, is drafted for a standing tribunal. For standing bodies or mechanisms "nationality" has possibly a different significance, because "nationality" plays already a role in the screening and nomination process of adjudicators.

However, the Draft Code is also drafted for adjudicators forming part of *ad hoc* international tribunals. This type of tribunals will continue to exist also in the future. In the nomination and appointment process of adjudicators of *ad hoc* international tribunals "nationality" arguably still remains an important issue.

[57] See Commentary to the Draft Code, page 10, footnote 11

2.2.2. "Nationality" of adjudicators of standing bodies or mechanisms

a. General

According to Article 1(1) of the Draft Code the term "adjudicators" also encompasses "judges on a permanent mechanism for the settlement of investor-State disputes".

In the case of standing bodies or mechanisms "nationality" will already be important in the screening and nomination process, which can take various forms as discussed in the resumed thirty-eighth session of Working Group III (see documents A/CN.9/WG.III/WP.169, paras. 43-60 and A/CN.9/1004/Add.1, paras. 114-130). However, the Draft Code is not meant to address the screening and nomination process for a standing body or mechanism[58].

Once the candidates have been selected to be part of the standing body or mechanism, there would then be a specific selection and appointment process to hear a particular case, as well as specific requirements. The obligations in the Draft Code apply to this last phase, when adjudicators are selected to hear a specific case[59].

In the case of standing bodies or mechanisms, at least for the President (Chair) of a tribunal with an uneven number of members or a sole arbitrator "nationality" plays indeed an important role also for the specific selection and appointment process to hear a particular case. In such cases even the place of residence of adjudicators may arguably be of importance.

b. The risk of ambivalence of the Draft Code with regard to "nationality" in the case of standing bodies or mechanisms

In the case of standing bodies or mechanisms with regard to "nationality" the Draft Code risks to be ambivalent under another viewpoint.

Article 4(2)(a) of the Draft Code speaks that adjudicators shall not be influenced by "political considerations" or "loyalty to a party to the proceedings". It is however fairly difficult to conceive how in the case of standing bodies or mechanisms tribunals' members who are nationals of the disputing parties should not be influenced by "political considerations" or "loyalty to a party to the proceedings", particularly in the case of members who have the same "nationality" of the disputing State party. It seems indeed to be hard, after a screening and nomination process which is arguably also political, not to be influenced by "political considerations" or "loyalty to a party to the proceedings".

In the case of tribunals of standing bodies or mechanisms the risk is that Article 4 of the Draft Code becomes the "fig leave" for inherently political tribunals, i.e. tribunals whose majority of members may have the "nationality" of the disputing parties. It seems therefore to be important to stress that a specific tribunal as a whole should be neutral and conduct in a neutral way, even

[58] See Commentary to the Draft Code, page 5, footnote 5.
[59] Ibid.

though this aspect would perhaps be better dealt with in the international (investment) treaties and/or arbitration rules which are relevant for a specific tribunal.

2.2.3. "Nationality" of adjudicators of *ad hoc* international tribunals

Another reason for addressing "nationality" in the Draft Code is the fact that adjudicators can also be members of *ad hoc* international tribunals. In such situations "nationality" can be dealt with in the framework relevant for the proceeding: the ICSID Convention and the ICSID Arbitration Rules, the PCA Arbitration Rules, the UNCITRAL Arbitration Rules, or other institutional arbitration rules (ICC, LCIA, SCC, etc.), the municipal law of the seat of arbitration.

Still, the Draft Code could have the function of bringing a certain harmonization between tribunals of standing bodies or mechanisms and *ad hoc* tribunals, and in the case of *ad hoc* tribunals among proceedings of different types, i.e. proceedings conducted under different procedural frameworks.

2.2.4. "Nationality" of adjudicators in presence of disputing parties of a supranational union or a political association of member States

"Nationality" of adjudicators may also play a role when the respondent is a supranational union, such as the European Union. The European Union can be party to investment arbitration proceedings. A recent example is *Nord Stream 2 AG v. European Union* (PCA Case No. 2020-07), conducted under the UNCITRAL Arbitration Rules (1976).

A question which seems to be legitimate is whether in such a case the citizenship of the European Union should play a role or not, when appointing adjudicators? It is not here the place to enter into a discussion on the difference between the concepts of "nationality" and "citizenship". It is however observed that Article 6.3 of the LCIA Arbitration Rules (2020) for example address- es the treatment of citizens of the European Union. More generally, it is suggested that at least the disclosure of the "nationality" ("nationalities") of candidates is important in such situations.

Further issues may arise with States forming part of a political association of member States such as the Commonwealth of Nations. An example could be disputes arising under the CETA, where one of the disputing parties is either a Canadian investor or Canada as the host State; an- other example in the future could be disputes between a UK investor and the EU, or *vice versa* between an EU investor and the UK. What should in such disputes the role of nationals of member States of the Commonwealth of Nations be? Can they for example be the Chair of a tribunal composed of three members[60], or a sole adjudicator[61]? The nationality of "a national of a third country" / "nationals of third countries[62]" may therefore sometimes possibly also become an issue.

[60] See e.g. in the case of CETA, Article 8.27(6), for the divisions of the Tribunal.
[61] See e.g. in the case of CETA, Article 8.27(9).
[62] See e.g. the terminology used in Article 8.27 of the CETA.

3. CONCLUSION

In conclusion it can be said that it seems to be important to explicitly address the “nationality” of adjudicators also in the Draft Code, even though Paragraph 2 of Article 4 of the Draft Code (“In particular, adjudicators shall not …”) and Paragraph 2 of Article 5 of the Draft Code (“Disclosures made pursuant to paragraph (1) shall include the following …”) are both drafted as non-exhaustive lists of examples.

Another question is whether beside “nationality” also other aspects should play a role, such as for example the place of residence of adjudicators. Article 13(1) of the ICC Arbitration Rules (2017) for example speaks that the Court shall also "consider the prospective arbitrator's t...] residence and other relationships with the countries of which the parties or the other arbitrators are nationals". In other words, beside "nationality" also territorial relationships or other types of relationships with countries may be of relevance. The place of residence of adjudicators can indeed for example be an important indicator for financial relationships of adjudicators.

I hope that these comments and suggestions will be of interest and some help to you.

Stern, Brigitte

I am writing to comment on the project of the Code of conduct for ISDS adjudicators prepared by ICSID and UNCITRAL, and I am sorry to say that I am quite disappointed.

If you allow me a touch of humor, it looks like a set of police regulations whose purpose is to fight a mafia of arbitrators, who are considered as dishonest, unreliable and biased.

To be more serious, what is lacking in my view is a proper perspective on the role of a Code of conduct: to foster additional trust among the parties as well as among outside observers, without undermining other elements of trustworthiness that already exist, such as the involvement of the parties in the constitution of tribunals, which is – I believe – a cornerstone of current arbitration. The Code should be simple, unambiguous, proportionate, nondiscriminatory, and should help arbitrators to fulfill their mission, which is to solve disputes in a binding manner, on the basis of the rule of law.

Once adopted, the Code should protect all stakeholders: parties, counsels but **also arbitrators**. It should not open up, by piling up far-reaching requirements of disclosure over long periods of time and concerning extensive fields (like public speeches), wide doors for improper challenges, often based on frivolous bases, and sometimes albeit rarely simply insulting.

Also, the community of arbitrators is quite diverse, both in their background and in their practice and the Code should not impose a too extensive burden to some of us. As it is, it seems to be tailor made for “amateur” arbitrators devoting most of their time to other activities, and to be **discriminatory** against full time arbitrators, who can barely follow all proposed regulations.

These general comments having been made, I will enter into more details on some of the Draft Articles.

I have no major problems with the standards of behavior, as set out in Draft Articles 2, 3 and 4. Just some interrogations.

Draft Article 2 applies to candidates: does this mean that a candidate has to fulfill all the overly broad disclosures of Draft Articles 5 and 6? I think the answer should be negative and this should certainly be clarified.

Draft Article 3 refers to « appearance of bias ». This is highly **ambiguous** and needs to be clarified, so as to avoid that a party invokes the mere appearance of bias as it sees it, as a means to eliminate an arbitrator nominated by the other party, who does not match with its personal likes and tastes.

In Draft Article 4, I am not sure I see what (c) « Take action that creates the impression that others are in a position to influence their conduct or judgement » refers to.

There are to the contrary, in my view, serious problems with Draft Articles 5 and 6.

> Draft Article 5:
> 2. Disclosures made pursuant to paragraph (1) shall include the following:
> (a)Any professional, business and other significant relationships, within the past [five] years with:
> (i)The parties [and any subsidiaries, parent-companies or agencies related to the parties];
> (ii)The parties' counsel;
> (iii)Any present or past adjudicators or experts in the proceeding;
> (iv)[Any third party with a direct or indirect financial interest in the outcome of the proceeding];
> (b)Any direct or indirect financial interests in:
> (i)The proceeding or in its outcome; and
> (ii)An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;
> (c)All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and
> (d)A list of all publications by the adjudicator or candidate [and their relevant public speeches].

As a first remark, I find the wording quite **ambiguous**, especially the part related to « professional relationships ». This should be defined and/or clearly limited to active professional relationships. Should an arbitrator mention the multiple times he or she did sits in an arbitration hearing expert K. on valuation, an expert that he or she has not chosen and that receives no instruction and no

fees from him or her? I can tell that – at least for full time arbitrators – the rule is unworkable due to its too extensive character: at least, experts that have simply appeared in front of an arbitrator (as opposed to experts that this arbitrator has appointed in a different capacity) should be discarded, the same way witnesses are.

Moreover, why should the rule also cover the past arbitrators and experts in the proceeding, as suggested in Draft Article 5(a)(iii). If a case is followed by an annulment, should an arbitrator indicate any « professional » relationship with the members of the first tribunal and of the *ad hoc* committee and the experts appearing in these earlier phases of the proceedings? This really loses any sense of **proportionality**, without any gain, and a serious risk that, if an arbitrator forgets something in this burdensome exercise, there will be an opening for a challenge.

My second remark: **5 years** is quite an extensive period of time, and in my view, too extensive. I would advocate 3 years. Five could be acceptable as a clear-cut time limit that would protect arbitrators from further fishing expeditions but it is totally blurred by the commentary:

> 48. … Further, a relationship that existed before the five-year threshold but could reasonably affect the adjudicators' independence or impartiality would still be subject to a duty of disclosure in accordance with paragraph 1.

This commentary is **ambiguous** and leads to highly subjective interpretations. I apologize here to provide a case study as an example, but this is the best way to test the proposed rules.

Assume an arbitrator has been appointed by the same counsel in various cases over a period of more than 15 years, say in 2004, in 2011, in 2013, in 2016, in 2017, and receives a further appointment from this counsel in 2020. Assume further that the cases brought in 2004 and 2011 are closed with an award rendered as well as the case brought in 2013, this one quickly discontinued without an award. Now with the 5 years rule, the arbitrator could simply mention 2016 and 2017, and forget the rest. Any experienced arbitrator however will agree that this way of forgetting what is not in the 5 year period would, with high likelihood, induce an accusation of hiding appointments, if the other party seeks a challenge. Thus, the Code is currently drafted in such a way that it does not even protect an arbitrator who strictly adheres to the stated rules. In other words, I think that the Code should state **expressly** that an arbitrator has no obligation to mention her or his appointments beyond the three or five years. This is in fact linked also with the next remark.

Third remark: to ask an arbitrator to mention **all ISDS arbitration cases** in which she/he has ever been involved, even 20 or more years ago, is really farcical. This is even more so, as there is a proposal to apply this requirement to **all other arbitrations** (sport arbitrations, arbitrations between States, arbitrations between international organisations, commercial arbitrations, arbitrations in the domain name, etc …). This is totally **disproportionate** and moreover **contradictory** with the 5 years limitation, as far as nominations by a party are concerned.

Fourth remark: the following commentary concerning repeat appointments appears **discriminatory**.

> 53. …The primary concern is that a person who has been appointed repeatedly by the same counsel, client or party may develop an affinity with that party and thus decide in their favour.

It seems to target full-time arbitrators by ignoring size effects: I think it is not the same if an arbitrator has been nominated let us say 5 times by the same party or counsel on a case load of 150 or 200 cases or has been nominated 5 times by the same party or counsel on a case load of 5 cases.

My fifth remark is on the **ambiguity** of the wording « **a direct financial interest in the proceeding** ». Of course, any arbitrator is remunerated for her/his work in a case and this is a direct financial interest. This again opens a wide door to unacceptable inquiries: some experienced arbitrators have been faced, once or twice in their career, with very intrusive questions, e.g. related to the break-up of their total annual income, this information deemed essential to understand the overall financial benefits he or she receives.

Does this make sense? I consider that arbitrators are paid by the institution, to accomplish a mission, and have no financial link with the party that nominates her or him.It seems important to me, that this aspect is clarified.

Sixth remark: in the commentary to the Draft of the Code of conduct, the following is stated:

> 53. The general concern raised by repeat appointment in ISDS is the existence of possible bias in favor of the nominating party. The primary concern is that a person who has been appointed repeatedly by the same counsel, client or party may develop an affinity with that party and thus decide in their favor.
> …
> Concern over repeat appointment also exists when an arbitrator is appointed numerous times by the same 'side' (either Claimant or Respondent).
> …
> 56. The practice of repeat appointment has been criticized for causing a lack of diversity and creating a barrier to entering the field for new adjudicators. This is also an important policy-related concern and is largely in the hands of those who are nominating adjudicators and choosing candidates.

I think item 56 is totally alien to the object of the Code of conduct which is of a deontological character and its disclosure requirements, which relate to the impartiality of an arbitrator towards the parties. I take advantage of this reference to indicate that, while I highly favor diversity, this is a political aim that should be achieved by other means.

Moreover, as a seventh remark of utmost importance, I do not see either the relevance of the concern mentioned in the commentary raised by **repeat appointments by States or investors**, as a generic categories. In other words, I do not see the relevance of a general mention of « States », since investment arbitration has precisely been proposed as a way to put States and investors on an equal footing. Furthermore, each State has specific characteristic and thus there is no such global entity. What is common between Zimbabwe, Laos, Canada, Romania, Venezuela, etc? The same holds true for investors. What is common between Chevron and an individual having constructed a small hotel on a lake?

Eighth remark: to ask an arbitrator to mention all publications and possibly relevant public speeches is also going beyond limits and is **discriminatory and disproportionate**. It would unduly target an arbitrator who had for example a 45 years career as an academic. His/her list might be huge. And the same holds true for public speeches, although they would be limited to the ones that are relevant. This opens again an uncertainty of what is "relevant". Moreover, besides of being burdensome, I think that this has undesirable side effects, as arbitrators or candidates might refrain from expressing their opinion, in favor of lukewarm and stereotyped considerations.

Ninth remark: more importantly, the commentary to the Draft explains the following relating to what is called **issue conflict**:

> 59. Subparagraph (d) addresses issue conflict. The existence of conflict of interest due to a possible issue conflict has been widely debated. Issue conflict may exist when an adjudicator has taken a position on a legal matter relevant to the case or has prior factual knowledge relevant to the dispute at hand. Adjudicators usually have expertise in a subject, and many author academic writings, make presentations or otherwise participate in events that show such expertise. Such academic writings or other public statements as well as past decisions may show a certain bias or prejudgment of certain issues. The concern is that an adjudicator might not address issues at stake in the proceedings with an open mind, as they may have prejudged such issues. Issue conflict may indicate that an arbitrator lacks the necessary impartiality to judge a specific dispute.

I have a **fundamental philosophical disagreement** with such an approach, besides the fact that it infringes academic freedom. I believe the question of issue conflict is a false question and is entirely mischaracterized. It actually shows a deep misunderstanding of the specificities of investment arbitration, as compared to commercial arbitration. An investment arbitrator is faced with a limited number of concepts. She or he applies the law, using – hopefully – a sound method of reasoning, which should be used in all cases. Thus, preventing an arbitrator to sit in a case presumably involving concepts which have already been dealt with in another tribunal of which this arbitrator was a member just does not make sense.

The result would be, for example, that, once an arbitrator has participated in a decision adopting a definition of what constitutes expropriation, this arbitrator would be prevented to sit in any other investment case, as expropriation is systematically raised in the immense majority of investment arbitration cases. This is what I meant when I described the Code as tailor made for "amateur' arbitrators.

To give a further example. I think that the fact for an arbitrator to decide in a case that the principle of non-retroactivity has to be applied when interpreting a treaty, does not mean that she or he is biased if that arbitrator applies the same correct legal reasoning in a subsequent case. What I would call a bias, would be to apply or not the principle of non-retroactivity depending on any business or other link with a party.

Moreover, I think that the approach suggested in the Draft also seems to overlook the fact that in the immense majority of cases, an arbitrator is not alone, and if he or she has an analysis on the interpretation of a given legal rule, his or her co-arbitrator might have another analysis and from this dialectical confrontation, the more robust solution should emerge.

Concerning Draft Article 6, I am indeed opposed to the same person using multiple hats. I have already given my view on this subject in 2010 in an interview by GAR, in which I stated the following:

> I am definitely of the view that the same person shouldn't act as counsel or arbitrator at the same point in their career. The soccer World Cup is coming soon. Would it be acceptable that the player is also the referee? In fact – probably because of this analogy – the Court of Arbitration for Sport adopted a rule not long ago, prohibiting a person who is appearing as counsel before the court from also acting as an arbitrator in CAS cases. Even the ICJ has some rules to avoid the same person acting as counsel and ad hoc judge in certain time frames. I think that's a good rule which should be extended.

As far as Draft Article 8. 2 is concerned, I think the proposed solution of fixing a number of cases which can be handled by an arbitrator at the same time seems completely out of the context of real arbitration life. Does it make sense to allow the same number of cases for someone who is president and someone who sits as wing? Does it make sense to allow the same number of cases for someone who is full time arbitrator and someone who is also an active counsel (or an active professor or painter)? Does it make sense to allow the same number of cases, if some cases are suspended for years (which happens), or delayed because the chair is overbooked or resigns or unfortunately passes away? Also, this mathematical approach is targeted, in a **discriminatory** way, against full time arbitrators, and forgets entirely the obvious fact, which is that the more cases an arbitrator has heard, the more knowledgeable that arbitrator becomes and therefore the quicker she or he works.

I hope all these remarks will help enhancing the Code of conduct, so that it becomes a useful and balanced tool to monitor international arbitrations.