

# **Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two – April 19, 2021**

**Comments by State/Commenter  
as of September 3, 2021**

**CODE OF CONDUCT FOR ADJUDICATORS IN  
INTERNATIONAL INVESTMENT DISPUTES  
VERSION 2 DRAFT**

**COMMENTS BY STATE/COMMENTER**

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## STATES (Alphabetically)

### Argentina

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General comment:

The development of a Code of Conduct for Adjudicators in International Investment Disputes is supported, but it is necessary to establish clear and concrete guidelines both in relation to the drafting of the articles and the consequences of non-compliance with the provisions of the Code of Conduct.

Below are some suggestions for drafting changes and additional wording in some of the articles, as well as explanatory comments. These suggestions and additions are not exhaustive and further suggestions and comments may be made at a later date.

#### Proposed edits to Article 1 - Definitions

3. “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, ~~as agreed with the parties~~;
- ...
5. “International Investment Dispute” (IID) means a dispute arising pursuant to [the investment promotion and protection provisions in an international treaty];

#### *Comment:*

The above modification in Article 1.3 is suggested, to make it clear that the case-specific tasks to be performed by Assistants should be agreed by the disputing parties.

As for Article 1.5, “International Investment Dispute (IID)” is defined as a dispute arising pursuant to the investment promotion and protection provisions in an international treaty. However, the application of the Code of Conduct should be extended to all disputes governed by ICSID rules and to those investment disputes governed by UNCITRAL arbitration rules, regardless of the source of the disputes (investment promotion and protection provisions in an international treaty, investment contracts or foreign investment law).

#### Proposed edits to Article 2 - Application of the Code

5. ~~[This Code shall not apply if~~ If the treaty upon which consent to adjudicate is based contains a Code of Conduct for proceedings initiated pursuant to that treaty, the provision of the Code provided for herein shall only apply to the extent that they are compatible with the Code of Conduct in the treaty upon which consent to adjudicate is based.]

#### *Comment:*

Article 2.5 addresses the interaction of this Code with specific Codes of Conduct incorporated in treaties and provides that the latter would be applicable in preference to this Code. Although

Codes of Conduct incorporated in treaties should prevail, this Code should remain applicable in a supplementary manner to the extent that its provisions are compatible with the former.

### **Proposed edits to Article 3 - Independence and Impartiality**

1. Adjudicators shall be independent and impartial, and shall ~~take reasonable steps to~~ avoid ~~bias, any direct or indirect~~ conflicts of interest, impropriety, ~~bias and~~ ~~appearance~~ apprehension of bias;
2. ~~In particular~~ For instance, Adjudicators shall not:  
...
  - (e) use their position to advance any personal or private interest; ~~or~~
  - (f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties; . or
  - (g) accept their appointment as Adjudicators if they have acted within the past five years as counsel or expert in another IID case involving the same factual background, or at least one of the same parties or their subsidiary, affiliate or parent entity as are involved in the IID proceeding.

#### ***Comment:***

In Article 3.1, the reference to “direct or indirect” conflicts of interest, as it appeared in the previous version of the Code, should be reinserted. In the same article, the reference to “reasonable steps”, which did not appear in the previous version of the Code, should be eliminated. In addition, the word “apprehension” should be “appearance”, as in the previous version of the Code.

Regarding Article 3.2, although the commentary clarifies that it is not an exhaustive list, the current wording may lead to confusion, so it would be preferable to replace “In particular” with “For example” or another similar expression.

The inclusion of a new literal (g) is suggested in Article 3.2, to exclude the possibility of Adjudicators accepting a designation in a case if they have acted within the past five years as counsel or expert in another IID case involving the same factual background, or at least one of the same parties or their subsidiary, affiliate or parent entity.

### **Proposed edits to Article 4 - Limit on Multiple Roles**

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case ~~[involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity]~~.

#### ***Comment:***

The proposed wording in brackets should be eliminated, and the prohibition of double-hatting should not be qualified. Even if the possibility of qualifying the prohibition of double-hatting were to be entertained, the language suggested between brackets would not adequately serve that purpose, because it uses the connector “and” instead of “or” (thereby making the conditions cumulative rather than alternative) and, for example, it does not include any reference to cases involving similar legal issues, where double-hatting is clearly to be prohibited.

**Comment:**

It is not clear what the meaning of “competing obligations” in Article 5.1 is. It should be clarified either in the text of the article or in the commentary.

**Proposed edits to Article 7 - Communications with a Party**

1. ~~No~~Any pre-appointment communications shall take place between a disputing party and a Candidate, except between a disputing party and with a Candidate considered as a potential party-appointed Arbitrator by that disputing party, and concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.
2. ~~Upon appointment, the Candidate designated as party-appointed Arbitrator shall inform whether any pre-appointment communications with a disputing party existed, the manner in which such communications took place and the issues addressed in such communications. The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate.]~~

**Comment:**

Pre-appointment communications should be limited to those between a disputing party and a Candidate considered as a potential party-appointed Arbitrator. There should not be pre-appointment communications between a disputing party and other types of Candidates (for example, a person considered for appointment as a presiding Arbitrator). Upon appointment, the Candidate designated as party-appointed Arbitrator should inform whether any pre-appointment communications with a disputing party existed, the manner in which such communications took place and the issues addressed in such communications.

**Proposed edits to Article 10 - Disclosure Obligations**

1. Adjudicators shall disclose any past or present interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make all reasonable efforts to become aware of such interest, relationship, or matter.

- ...
2. ...
- (a) Any financial, business, professional, or personal relationship within [the past five years] with:
- (i) the parties, ~~and~~ any subsidiary, affiliate or parent entity identified by the parties, and those of which the Adjudicator has knowledge or becomes aware after conducting a reasonable investigation;
- (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;
- ...
- (iv) any third-party ~~funder~~ with a direct or indirect financial interest in the outcome of the proceeding ~~and~~ identified by a party, and that of which the Adjudicator has knowledge or becomes aware after conducting a reasonable investigation;
- (b) Any ~~financial or personal~~ interest in:
- ...
- (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background ~~or~~ involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and
- (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [~~5~~/10] years or is currently involved in as counsel, expert witness, or Adjudicator.
- (d) A list of all publications by the Adjudicator or Candidate and their relevant public speeches.
3. Adjudicators shall make any disclosures in the form of Annex 1 both prior to ~~and~~ upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.
- ...
4. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not prejudge the existence or not of situations that may give rise to a lack of independence or impartiality, bias or conflicts of interest ~~establish a breach of this Code~~.

**Comment:**

In relation with the text of Article 10.1, the expression “past or present” should be included with reference to “interest”. Moreover, the term “all” should be reinserted before “reasonable efforts”, as it appeared in the previous version of the Code of Conduct.

The five-year term in Article 10.2(a) is appropriate and, therefore, the brackets should be eliminated.

The expression “identified by the parties” in items (i) and (iv) of Article 10.2(a), should be amended to also include the cases of which the Adjudicator has knowledge or becomes aware after conducting a reasonable investigation, in line with the obligation under Article 10.1 to make all reasonable efforts to become aware of potentially conflicting situations.

In the same item (iv), third parties should not be limited to third-party funders, but should include all third parties with a financial interest in the outcome of the proceeding, as it was provided for in the previous version of the Code of Conduct. Moreover, the reference to “direct and indirect” in relation to a financial interest should be reinserted in Article 10.2(a)(iv), as it appeared in the previous version of the Code of Conduct.

Non-IID proceedings should be included both in Article 10.2(a)(ii) and in Article 10.2(c).

Therefore, the brackets should be eliminated. Furthermore, a ten-year term for Article 10.2(c) seems appropriate.

In relation to Article 10.2(b), the reference to “financial or personal” should be eliminated, so as not to exclude other relevant interests that would need to be disclosed, such as fiduciary duties. Moreover, the situations contemplated in Article 10.2(b)(ii) should not be cumulative but alternative. Therefore, the connector “and” should be replaced by “or”.

The duty to disclose a list of all publications by the Adjudicator or Candidate and their relevant public speeches, as provided for in the previous version of the Code of Conduct, should be reinserted as literal (d) of Article 10.2.

As regards Article 10.3, the duty to make disclosures should be fulfilled both prior to and upon accepting an appointment, since disclosures are necessary for the disputing parties to assess the potential existence of conflicts of interest or bias of Candidates.

Adjudicators have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information, as provided for in Article 10.4 and spelled out in item 3 of Annex I. The proposed Annex I includes in item 5.b the possibility to state that there is “no additional disclosure or information to be provided”. It should be clarified in item 5.b of Annex I that such is the situation at the time the declaration is made, which may subsequently change, to reflect the continuing nature of the duty to make disclosures.

Finally, the last sentence of Article 10.5 should be redrafted to make it clearer and avoid confusion, by explaining that the fact of disclosure by an Adjudicator does not prejudice the existence or not of situations that may give rise to a lack of independence or impartiality, bias or conflicts of interest.

### **Proposed edits to Article 11 - Enforcement of the Code of Conduct**

1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code as fundamental rules of procedure.
2. Breaches of the Code shall be assessed in ~~T~~the disqualification and removal procedures in the applicable rules to the extent relevant to such procedures ~~shall apply to breaches of Articles~~



~~3-8 the Code, without prejudice to specific sanctions provided for herein.~~

**Comment:**

Reference to the fact that the provisions of the Code are considered fundamental rules of procedure should be included in Article 11.1.

Breaches of the Code in general should be assessed in disqualification and removal procedures to the extent relevant to such procedures, which should not be limited to considering breaches of Articles 3-8 of the Code, since breaches of other articles of the Code may be relevant to assess a specific challenge.

In addition, specific sanctions should be included in the Code. For example, reduction of fees and publicity of breaches could be considered as potential sanctions, and other alternatives should be explored.

**Proposed edits to Annex 1**

1. I acknowledge having received a copy of the Code of Conduct (attached) for this proceeding. I have read and understood this Code of Conduct and undertake to abide by it.

...

5. ...

b. [STATE NO ADDITIONAL DISCLOSURE OR INFORMATION NEEDS TO BE PROVIDED TO DATE]

## Armenia

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### Substantive Comments

1. On Article 2(2) and paragraph 16, the term ‘reasonable’ in place of ‘appropriate’ is an improvement because it suggests an objective assessment of any alleged breach of this duty by the enforcement body of the Code. The Commentary should make this explicit: it should not be a subjective assessment by the Adjudicator (‘honest belief’) but rather a ‘due diligence’ standard of conduct. Though the last sentence of paragraph 16 seems to be correct insofar as the usual reaction of parties might be concerned, it would depend on whether they were even aware of a problem concerning assistants and the gravity of the alleged misconduct. The Commentary should thus make clear that the Adjudicator might face investigation in case of alleged failure to exercise reasonable control over their Assistants.
2. Article 2(5) appears to be correct and should be retained. It is difficult to conceive of this general code of conduct displacing a code specifically adopted in a bilateral investment treaty. However, the scope of this provision should be expanded to include contracts and domestic legislation upon which the arbitration is based; it is conceivable that codes of conduct might become adopted in such instruments in future. A question that should be addresses is whether parties to an arbitration might modify this Code for the purpose of that

arbitration, as opposed to a code of conduct that had been legislated beforehand. In the interest of consistency in investor-state dispute settlement, we suggest that the answer to this question should be negative, though we remain open to a different policy.

3. Article 3 and paragraph 25 could be improved by providing factual examples of conflicts of interest. These examples also link to Article 10 on disclosure obligations. Though we understand that the drafters have decided not to follow the ‘traffic light system’ of the IBA Guidelines on Conflicts of Interest, it would nonetheless be helpful to buttress the commentaries with examples of relationships that do not give rise to a disclosure obligation (e.g. – scholarly activities), relationships that give rise to a disclosure obligation but may not be a conflict of interest (e.g. – a close personal friendship between an adjudicator and counsel for one of the parties) and relationships that give rise to a disclosure obligation and may be a conflict of interest (e.g. – a significant financial interest in one of the parties or in the outcome of the case). As a great deal depends on the facts, illustrative examples are useful to guide practice and to provide predictability on the application of the Code.
4. On Article 4, though we prefer there to be a complete ban on double-hatting, we accept the current formulation of general prohibition with the exception of informed consent by both parties. We support the removal of the bracketed text and agree with those comments urging a full prohibition, as stated in paragraph 30; the bracketed text is likely to add complexity and to perpetuate the problems arising from double-hatting in investor-state arbitration today. We agree with the reasoning in paragraph 28 and so suggest that this provision be confined to arbitrators, for judges of international courts and tribunals are universally prohibited from acting as counsel during their terms of office. To facilitate informed consent, this provision should be linked to disclosure obligations under Article 10 whereby arbitrators should be required to promptly disclose their concurrent appointment as counsel or expert witness as early as possible in the appointment process. This would enable parties to avoid wasted costs in including such individuals in an appointment process when one party is not prepared to consent to the double-hatting.
5. On Article 5, a practical consideration is the availability of a prospective arbitrator to enable the arbitration to proceed expeditiously. The Commentary could cross-refer to Article 10(2)(c) by referring to the need to comprehensively disclose to parties current appointments as arbitrators and counsel as part of the appointment process so that they might evaluate whether to appoint another nominee in the interest of expedition. In other words, disclosure of this information concerns not only potential conflicts of interest but also availability. This information would also facilitate ‘new entrants’ as arbitrators, as the established figures are much in demand. Whilst in principle this should not be a factor for judges due to being full-time civil servants, the recent resolution of the International Court of Justice to ban external appointments in investor-state arbitration shows that a prospective investment court should ensure that external activity for judges be prohibited.

6. In Article 7(1), the clause ‘that they reasonably can anticipate will arise in the proceeding’ should be redacted. It is difficult to envisage why *any* ‘jurisdictional, procedural, or substantive’ matter need be discussed as part of the appointment process; this is consistent with the first sentence limiting discussion to ‘the expertise, experience and availability of the Candidate’. We support the retention of Article 7(2) for the reason set out in the last sentence of paragraph 37: there are various secure platforms available free-of-charge that enable conversations to be recorded for subsequent communication to the other side. Secrecy would facilitate breaches of the Code by enabling parties to illicitly discuss substantive issues with prospective arbitrators, thus compromising their independence in Article 3. Paragraphs 2 and 3 of Article 7 should be reversed in sequence in order to make clearer that the scope of paragraph 2 applies not only to pre-appointment interviews (paragraph 1) but also to any *ex parte* contacts on selection of presiding Arbitrators (paragraph 3).
7. We are content with Article 8. The reference to ‘a relevant Bar or professional association’ in paragraph 44 pertains to Article 11 on enforcement of the Code and so should be addressed there. On the substance of that sentence, it is arguable that the enforcing bodies (i.e. – the Secretariats or an investment court in plenary) for the Code would have jurisdiction to investigate an alleged breach of the continuing duty of confidentiality. Sanctions might include, for example, claiming back the arbitrator’s fee or a published admonishment.
8. We are content with Article 9 and paragraphs 45-46.
9. As aforementioned on Article 3, the Commentary to Article 10 could usefully include detail on factual situations distinguishing between relationships requiring disclosure and relationships giving rise to conflicts of interest. Whilst we would prefer waiver not to play a role in ‘curing’ conflicts of interest, the question whether parties might jointly waive conflicts should be addressed. The utility of prescribing on these questions is to potentially reduce the scope for challenges by clarifying the situation in advance; also, to save parties investing energy into researching potential relationships by clarifying those relationships that need not be disclosed at all. We support the retention of the five-year period in the bracketed text in Articles 10.
10. We suggest that Article 11 is the most important provision of the Code and should be strengthened to ensure that the Code be implemented in practice. We consider paragraphs 1 and 2 to be insufficient to achieve this aim; there is a real reputational risk to investor-state arbitration or a prospective investment court to have adopted a code of conduct that is seen to be toothless in reality. We therefore propose the inclusion of additional means of enforcement, as bracketed in paragraph 3 and stated in paragraph 58.

11. Concerning the last sentence of paragraph 58, experience shows it to be extremely rare for parties to file complaints to professional accreditation bodies, such as bar associations;<sup>1</sup> one example was a successful complaint made to a South African bar association for a case of bribery in ICSID Case No. ARB9AF/07/01 *Foresti v. South Africa*. A crucial reason why it is so rare is that extremely few bar associations have made plain whether their ethical rules apply to investor-state arbitration and, if so, whether they assert enforcement jurisdiction over the conduct of their members in arbitration. Practitioners have reported in surveys and other empirical studies that they generally have no idea whether their domestic rules or bar associations apply to their arbitral practice.<sup>2</sup> Consequently, it is unrealistic to expect bar associations alone to enforce this Code of Conduct when they do not have jurisdiction over the Code (they would apply their own rules instead, which differ widely on the substance) and have been given no mandate to do so. We suggest that the ICSID Secretariat should be vested with enforcement powers for ICSID arbitrations and the PCA Secretariat for UNCITRAL/PCA arbitrations; a prospective investment court could enforce the Code by the judges in plenary by majority vote.

#### Drafting Suggestions

12. In Article 1(1), replace ‘and’ with ‘or’.

13. In Article 1(3), delete ‘and control’ because ‘direction’ should be sufficient. Is an Assistant intended to include persons who are not remunerated? This seems to be the logic of the provision but it is worthwhile clarifying this, as family members and interns have been known to work gratis.

14. In Article 1(4), does the phrase ‘who is under consideration for selection as a Judge’ include persons who have yet to be contacted about appointment?

15. In Article 1(6), replace ‘a judge’ with ‘a person’ for consistency.

16. For elegance, we suggest that the title of Article 6 be ‘Integrity and Competence’ instead of ‘Other Duties’. The reference to ‘availability’ in Article 6 appears to overlap with the ‘necessary time and effort to the proceeding’ in Article 5. The point about adjudicators dedicating sufficient time and effort is best addressed in Article 5.

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<sup>1</sup> See, generally – Sarvarian, *Professional Ethics at the International Bar* (2013).

<sup>2</sup> Ibid. See also the commentaries to the International Bar Association Guidelines on Party Representation in International Arbitration 2013.

## Australia

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Australia wishes to express its ongoing appreciation to the ICSID Secretariat and the UNCITRAL Secretariat for their comprehensive work on the development of the second draft Code of Conduct published on 19 April 2021. Australia is grateful for the time and expertise dedicated by both secretariats to incorporating earlier comments and facilitating discussions among members of UNCITRAL Working Group III to progress this important investor-state dispute settlement (ISDS) reform option. We look forward to continuing to work constructively with the other members of UNCITRAL Working Group III as we progress towards finalising the draft Code of Conduct ahead of the 55<sup>th</sup> session of the Commission in 2022.

Australia offers the following further preliminary comments on the second draft without prejudice to its final position<sup>3</sup>.

### Definitions (Articles 1)

- Australia welcomes the fact that through the definition of ‘International Investment Dispute’ (IID) in this revised draft article the Code is focused on treaty based ISDS cases.

### Application of the Code (Articles 2)

- Australia considers this revised draft article provides more clarity on the scope of application than in the previous draft.
- Noting that adjudicators must take reasonable steps to ensure that assistants are aware of and comply with the Code, Australia continues to consider 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)).
- Australia considers it would be useful, as suggested at paragraph 9 of the Explanation of Changes, to clarify if the term ‘Assistants’ is intended to apply to other roles, such as tribunal-appointed experts, tribunal secretaries, and registries.
  - 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)), if they are not captured by the definition of ‘Assistant’.
- Australia would welcome discussion on the rationale for extending the duty in Article 7(3) on *ex parte* contacts after the conclusion of the IID proceeding.
- Australia is supportive of including a provision addressing the interaction between this Code and treaty-specific code of conducts. However, regarding paragraph (5), we query whether this Code should apply in preference to whatever the code of conduct is which is contained in the treaty, with the objective of promoting harmonization in the ethical standards applying to adjudicators in IIDs.

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<sup>3</sup> See also our comments on the initial draft Code: Australia’s Preliminary Comments on the Draft code of Conduct for Adjudicators in Investor-State dispute Settlement dated 30 November 2020.

- Australia queries whether this revised draft article also needs to expressly deal with the temporal application of the Code.

#### **Limit on multiple roles (Article 4)**

- The revised draft article goes a long way towards balancing different views on a complex issue which is important to maintaining the legitimacy of ISDS.
- Australia queries whether concerns about conflicts, impartiality, and independence could arise in other forms of double hatting that are not presently covered in the draft. For example, whether acting as expert witness or counsel in domestic court proceedings that are related to the ISDS proceeding could lead to a risk of conflict.
  - If so, perhaps consideration could be given to expanding the prohibition on double hatting to non-IID proceedings in which the interpretation and application of investment treaties are at issue.
- Australia has doubts about the desirability of including the square bracketed text in this draft article as it would appear to undermine the policy rationale for the prohibition on double hatting.
- Australia would welcome a discussion as to whether, one potential unintended consequence of the revised draft article, is the risk that arbitrators resign mid-arbitration to undertake lucrative counsel work that unexpectedly arises. It may be helpful to consider possible ways to mitigate this risk.
- Australia suggests that, since draft Article 4 is the only instance of the term ‘disputing parties’ being used in the Code, this term be replaced with simply ‘parties’ so that it reads: ‘Unless the parties agree otherwise ...’.

#### **Other Duties (Article 6)**

- Australia suggests that the word ‘shall’ might be better than ‘should’ in paragraph (2) so that it reads: ‘Candidates shall decline an appointment if they believe they do not have the necessary competence ...’.

#### **Communications with a Party (Article 7)**

- Australia notes that the revised draft article prohibits types of pre-appointment or *ex parte* communication between a Candidate/Adjudicator and a party.
  - Query whether it may be useful to expressly specify that this also applies to pre-appointment or *ex parte* communications as between a Candidate/Adjudicator and agents of a party, as well as with any third-party funders.
  - Another formulation could be as in the CPTPP Code of Conduct, paragraph 5(h), which provides that ‘an arbitrator shall not engage in any *ex parte* contact concerning the tribunal proceeding’, without specifying who the communication involves.

- Australia remains to be convinced about the necessity of including the square bracketed text that comprises paragraph (2) of the draft article.

### **Confidentiality (Article 8)**

- Australia suggests adding the textual qualifier ‘or the parties otherwise agree’ to revised draft Article 8(2)(b) so that it would read as follows: ‘... unless the applicable rules or treaty so permits, or the parties otherwise agree.’ This would give the parties the flexibility to disclose any decision, ruling or award where they agree and is in line with the reference to ‘party consent’ in paragraph 42 of the Explanation of Changes.

### **Fees and expenses (Article 9)**

- In Australia’s view, the practicalities of this draft article require further consideration. It seems that there may be instances where fees cannot be agreed prior to the constitution of the tribunal.
  - For example, if there is no administering institution and discussions on fees are to be communicated through the presiding Arbitrator, who by definition is not appointed until the tribunal is constituted.
- Australia would also welcome a discussion on the interaction of draft Article 9 and draft Article 7, dealing with pre-appointment or *ex parte* communication between a Candidate/Adjudicator and a party, noting that the latter article makes no reference to communication regarding fees.
- In relation to paragraph (3) Australia suggested replacing ‘procedure’ with ‘proceeding’ and replacing ‘assistant’ with ‘Assistant’, so that it reads: ‘Adjudicators remunerated on a non-salaried basis shall keep an accurate and documented record of their time devoted to the proceeding and of their expenses, as well as the time and expenses of any Assistant.’

### **Disclosure (Article 10)**

- In Australia’s view, it would not be unreasonable to require a period for disclosure of the past 10 years in relation to:
  - all cases, in revised draft Article 10(2)(c); and
  - any financial, business, professional, or personal relationship that may give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias, in revised draft Article 10(2)(a).
- Australia is supportive of including the square bracketed phrase ‘non-IID proceedings’ in revised draft Articles 10(2)(a)(ii) & 10(2)(c).
  - As indicated in our comments in relation to Article 4, we query whether concerns about conflicts could arise from double hatting in non-IID cases, for example, acting as an expert witness or counsel in domestic court proceedings that are related to an IID case, and we therefore consider such scenarios should be disclosed.

- Australia suggests that the word ‘shall’ might be better than ‘should’ in paragraph (5) so that it reads: ‘Adjudicators shall err in favour of disclosure if they have any doubt as to whether a disclosure should be made.’

### **Enforcement of the Code of conduct (Article 11)**

- Australia queries whether the disclosure obligations in Article 10 should be subject to the disqualification and removal procedures in Article 11(2) in order to encourage compliance with those obligations.
- As previously indicated, in the interests of having a proportionate range of sanctions, Australia considers that enforcement of the Code should, if possible, include options other than disqualification, such as, reducing arbitrators’ fees.
  - It could even be worth exploring whether it may be possible for appointing authorities to adopt a practice of not appointing arbitrators found to have breached the Code within a specified period of time.

### **Implementation**

- Australia welcomes consideration of the Code being implemented through a multilateral instrument, as set out in the Secretariat’s Draft Note on Implementation and Enforcement dated 7 May 2021.
- We consider that implementation of the Code through a mechanism adopted at a multilateral level could efficiently achieve harmonization, especially in relation to arbitrations under states’ networks of existing international investment agreements.
- 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.
- In Australia’s view implementation of the Code through a multilateral instrument would not preclude other methods of implementation in parallel, such as, incorporation on a treaty-by-treaty basis or through agreement of disputing parties.

### **Commentary on the Code**

- Australia notes that the draft Code envisages the preparation of a Commentary on the Code to provide further guidance and clarification on each provision of the Code. It will be important to ensure that states are given adequate time to review draft versions of this Commentary before the draft Code is finalised.

## **Bahrain**

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Bahrain relies on foreign investment and is generally satisfied with the international framework created by existing treaties and institutions, in particular ICSID and the PCA. Bahrain has 16 existing BITs, and in the few instances when it has not been able to resolve disputes with investors



on an amicable basis has been content with the available mechanisms for resolution.

Still, Bahrain has the clear sense that with respect to legitimacy and accountability the present environment of self-regulation by the principal categories of actors professionally involved in individual disputes is unsustainable. Whatever may be the undeniable qualities of the texts developed by the International Bar Association, it remains the work of those whose conduct is to be judged and this creates (at least) the perception of a credibility deficit which needs to be addressed.

The need for a Code of Conduct reflecting the views and concerns of the broad international community is urgent and should not be delayed pending the evolution of controversial debates with respect to the wisdom of creating new, untested international institutions which might end up in undesirable competition with existing structures such as precisely the PCA and ICSID, in which Bahrain is a Member State, reposes great trust, and does not wish to harm.

Moreover, Bahrain expects ready agreement to the Code of Conduct, and would regret it being delayed or even abandoned because it is linked to far more ambitious and problematic “structural reforms” whose difficulties of implementation have so far not even been discussed.

Such a Code of Conduct would be a significant and salutary achievement of the Working Group and would validate its considerable efforts. It would be a pity to delay it, and there is no necessity at all for linkage and delay.

## Canada

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Canada is grateful to the UNCITRAL and ICSID Secretariat for having produced an excellent second draft of the code of conduct taking into account the excellent comments made by delegations and observers in written comments and in previous sessions.

In Canada’s view, the changes to the overall format and structure of the code are an improvement on the previous draft and clarify the relationship between the obligations of adjudicators and the disclosure obligations.

Canada also welcomes the proposal of an accompanying commentary to provide examples, clarify the content of each provision and discuss practical implications.

Overall, we believe that this new draft provides a good basis for consideration by the working group. Canada wishes to raise a few remaining points that merit further consideration.

With respect to differentiating between obligations that are applicable respectively to arbitrators, judges and candidates, as noted in previous comments, Canada suggests that further consideration be given to addressing in a separate code the obligations applicable to members of a permanent tribunal. In the case of members of a permanent tribunal, obligations must take into account the specific context of their employment and appointment which may already include restrictions that limit the risk of conflicts. While some of the necessary adjustments have already been noted in the draft code, there should be further adjustments to some of the provisions as noted by the delegation of the European Union. Given the number of adjustments that are required, it may be preferable and clearer to set out the applicable obligations in a separate code. Canada looks forward to reviewing the next draft of the code to provide further comments in this respect.

#### **General comments on Articles 1 and 2:**

In terms of the application of the code beyond candidates, arbitrators and adjudicators, Canada notes that while ethical obligations may also be desirable for other participants in investment disputes, like counsel, witnesses and experts, they raise different considerations and implementation issues. The code of conduct should also not automatically extend to mediators as their duties are different and may require ex-parte communications and certain adjustment to confidentiality obligations. As a result, although it could be considered at a later stage, it would not be advisable at this point to broaden the scope of application of the code to other individuals beyond candidates, arbitrators and adjudicators, except potentially to provide the application to assistants to tribunals. With respect to assistants to tribunals, article 2(2) could be modified to make the code directly applicable to tribunal assistants. In order to avoid conflicts of interests, and ensure the independence and impartiality of the tribunal, assistants to the tribunal should also be subject to the obligations set out in Articles 3, 4, 7, 8 and article 10.

The additional clarifications regarding the term ‘adjudicator’ in Article 1, combined with other changes with respect to the scope and application of the obligations in the code in Article 2, are helpful.

#### **Article 1, Paragraph 4:**

With respect to the definition of candidate in Article 1(4) we would suggest clarifying that it refers to a person contacted about an appointment as arbitrator *in a particular case*. Alternatively, this could be addressed in the commentary.

#### **Article 1, Paragraph 5:**

In keeping with the objective of having the code apply to treaty based investment disputes whether state to state and investor state dispute settlement, we suggest adjusting the proposed definition of “International Investment Dispute” to make it more precise. Instead of “a dispute arising pursuant to the investment promotion and protection provisions in an international treaty”

we would suggest: “an investment dispute under the state-to-state or investor-state dispute settlement provisions of a treaty”.

In terms of non-treaty based investment disputes, the code should not automatically extend to those disputes. A party could however choose to make the code of conduct applicable with respect to disputes under domestic foreign investment law or under their contracts with investors if they so wish. The Commentary should clarify that nothing should prevent disputing parties to agree to apply the Code in a contract-based investment dispute or foreign investment law cases.

**Article 2:**

Article 2 paragraph 3: for efficiency reasons, article 10 should be applicable to candidates so that the disclosures are made prior to appointment.

Article 2, paragraph 4: Obligations that continue to apply after the end of the proceedings should be limited to confidentiality obligations in Article 8. While ex parte communications would not be prohibited after the end of the proceedings, arbitrators would be limited by confidentiality obligations and could not discuss the content of deliberations.

**Article 2, paragraph 5:**

We are supportive of the suggestion in Article 2(5) to include a provision addressing the interplay between this Code and any treaty-specific Code of Conduct. While this issue is linked to the discussion on implementation of the code, and will require further discussion depending on the outcome, we offer some preliminary observations. There are relatively few treaties that contain code of conducts for investor-state dispute settlement. More recent treaties to which Canada is a party such as CETA, CPTPP and CUSMA contain such codes. Given that these treaties were recently negotiated and contain detailed provisions addressing many of the same issues being contemplated in the code, we believe it is appropriate to provide that the code would not apply to IID under those treaties – especially given that certain obligations/prohibitions may go further in those treaties. As a general rule, while it is desirable to have harmonized ethical obligations for arbitrators, parties should also be allowed to provide additional specific limitations or obligations. To the extent, parties to an existing treaty which contains a code of conduct nevertheless want the code to apply, they could explicitly agree to make it applicable (for example through a diplomatic note). This could be accommodated by including language at the end of Article 2(5) that provides “unless parties agree otherwise”. We also suggest a drafting change for greater precision as follows: “This Code shall not apply if the treaty upon which consent to adjudicate is based contains a code of conduct for international investment disputes initiated pursuant to that treaty”. We note that some earlier FTAs also contain codes of conduct for state-to-state dispute settlement that are not necessarily adapted to the concerns related to investor-state dispute settlement. The current drafting of Article 2(5) would not provide for application of the code of conduct to investment disputes under those treaties. Parties would therefore need to specify the application of the code to these treaties.

### **Article 3-9 (adjudicator obligations) General comments:**

In general, the reorganization and streamlining of the adjudicators' obligations is greatly improved as compared to the first draft and makes the code of conduct more readable.

#### **Article 3:**

The key obligation of independence and impartiality is well set out in Article 3. However, the code contains no guidance on what could constitute conflict of interest, impropriety and the appearance of bias. Canada remains of the view that it is important to provide practical guidance on recurring issues in investment arbitration, for example issue conflict and repeat/previous appointments, previous work by a partner in same law firm for one of the parties, etc. While we understand that it would be beyond the purpose of the code of conduct to address the issues comprehensively, these issues merit consideration and discussion otherwise parties are left to rely on IBA guidelines which in their current form are not necessarily adapted to ISDS. As suggested in paragraph 54 of the paper, we support the idea of providing guidelines in the commentary. For example, while Canada does not support a prohibition on repeat appointments, some indication in the commentary would be useful as to when repeat appointments by a party could raise concerns related to lack of independence and impartiality. In this regard the commentary could provide that there would be a presumption of lack of impartiality if an adjudicator is appointed by the same party or legal representative more than 3 times in 5 years.

#### **Article 4:**

The scope of the revised Article 4 on limits to multiple roles is narrower than what Canada included in some of its recent treaties but represents a reasonable compromise position in that it addresses the scenario where the most glaring conflict of interests can arise i.e. when an individual is “concurrently” acting as party appointed expert or counsel and as arbitrator. As noted in earlier comments, Canada would not include the bracketed text which would narrow the restriction even further and not address the situation where as an arbitrator the individual can influence the law on an issue relevant to their client in their role as counsel. We would also not include further narrowing of the restrictions (e.g. limiting the restrictions to the same treaty).

With respect to paragraph 27 of the paper, we note that the commentary should make clear that other provisions, in particular Articles 3 and 6 may also limit whether an individual can act in different roles beyond what is provided in Article 4.

#### **Article 5:**

We have the following drafting suggestion for the first sentence of Article 5: “Adjudicators shall perform their duties diligently and efficiently throughout the proceedings to provide a fair resolution of the dispute and shall refuse competing obligations”. The commentary could clarify that competing obligations include taking on new cases or responsibilities that prevent or unduly delay the adjudicator's ability to fulfil its duties with respect to existing proceedings. The

commentary could also address the implications of the duty of diligence in terms of potential limits to resignations of arbitrators from existing cases. For example, resignations should be in good faith, justifiable and prior to resigning the arbitrator should consider the effect of the resignation on the proceedings. This would parallel and complement Article 6(2) that provides that candidates should not accept appointments if they believe they do not have the availability to fulfil their duties.

The commentary to article 5(2) could describe the tasks that could be delegated to assistants (e.g. research tasks, drafting of procedural summaries, etc.) and those that cannot (e.g. decision making). This would complement the recommendation to discuss the role of the assistant with the parties (as per article 1 paragraph 10 of the paper).

#### **Article 7:**

As noted in Canada's previous comments, we do not believe Article 7(2), is necessary. In our view, the communication of pre-appointment discussions between a party and a candidate would not necessarily promote transparency or equality of the parties. As noted above, Article 7(3) should be limited to the duration of the proceedings. Generally, Article 7 should not be limited to communications with a party and their counsel, but also apply to communications with a third party funder with respect to a proceeding. Unless this issue is addressed in a more general way, Article 7 may need to be adjusted.

Paragraph 39 of the paper raises the possibility of communication with a party appointed arbitrator for the purpose of selecting a presiding arbitrator. While we are not opposed to this possibility we have two comments: (1) discussion with the party appointed arbitrator should be limited but could extend to issues that could impact on the functioning of the tribunal (2) communication, if allowed, should extend not only to the situation where the president is appointed by the co-arbitrators but also to the scenario where the president is appointed by the parties.

#### **Article 10 (disclosure obligations) and Annex I simplified disclosure form:**

Canada supports the new approach to disclosure obligations and the fact that a failure to disclose is relevant to assessing conflict of interests but by itself it cannot give rise to challenges. The attached simplified disclosure form is also a useful addition.

Paragraph 1 refers to various different standards (doubts as to independence and impartiality, bias or appearance of bias, or conflict of interest). We understand that this was drafted broadly to capture different standards in applicable arbitral rules. This would mean that the standard for disclosure would be broader than what could potentially give rise to disqualification under the applicable arbitral rules. We wonder if this issue has been fully considered. We also suggest adding "justifiable" before doubts as the arbitrator could not otherwise assess what could give rise to doubts for a party as a purely subjective matter.

The relationship between paragraph 1 and paragraph 2 should be discussed in the commentary. We understand that paragraph 1 sets the standard and paragraph 2 provides an illustrative list. As a result, situations that are not covered by paragraph 2 but fall within paragraph 1 would still need to be disclosed. Conversely, trivial relationships that could be captured by paragraph 2 would not need to be disclosed if they could not give rise to doubts as to independence and impartiality. This would avoid the situation where the disclosure obligation is so onerous as to make it impractical for individuals in the legal or business community to serve as arbitrators, thereby depriving the disputing parties of the services of those who might be best qualified to serve as arbitrators.

In paragraph 2, the five-year time period appears to be a reasonable period of time. Subparagraph 2(a)(ii) should be limited to any IID and related non-IID proceedings. This would include non-IID proceedings involving the same or related parties and the same facts or measures. The same would go for subparagraph 2(c).

As mentioned in earlier comments, beyond requiring disclosure in Article 10, the commentary should provide guidance on the issue of repeat appointments.

On the scope of disclosure, and mindful of confidentiality limitations that may apply to non-ISDS cases as well as the more limited risk of conflict that could arise from an arbitrator's involvement in a non-ISDS case, we believe disclosure of non IID cases should not be required as a matter of course (e.g. as per paragraph 10(2)(c)). Involvement in, or appointment by, any of the disputing parties in other non-ISDS international arbitrations, mediations or conciliations should be disclosed in cases where as set out in paragraph 1 it could give rise to justifiable doubts as to independence and impartiality, for example where the non IID dispute involves the same facts or measures or where frequent appointments were made by the same party or law firm. In those cases, the disclosure should contain sufficient information to allow the parties to assess the risk to independence and impartiality.

As set out in Paragraph 5, failure to disclose should not necessarily lead to disqualification. While it is not determinative to ascertaining lack of independence and impartiality, it could be a factually relevant element depending on the circumstances. The commentary could further elaborate on this point while making clear that the requirement to disclose consistently with Article 10 is a binding obligation.

#### **Article 11 Enforcement of the Code:**

With respect to paragraph 2, more general language regarding the relationship between the obligations and the code and the disqualification provisions may be a better approach. While the obligations in articles 3-8 of the Code of Conduct are indeed the main ones that could lead to disqualification, as discussed above failure to comply with article 10 may be a relevant element.

Paragraph 57 of the paper raises a question as to whether the duties set out under article 6 could give rise to a challenge and disqualification. While challenges on this basis should necessarily be limited in light of the general, high-level nature of the duty, and arbitrators should be given a margin of manoeuvre, in principle, article 6 should not be excluded as failure to fulfill this duty could affect the integrity of the proceedings.

### **Comments on the Secretariat Paper on Enforcement:**

Canada views the means of implementation of the code of conduct as mutually reinforcing, not mutually exclusive. While a multilateral convention may lead to more harmonization, the effectiveness of soft law instruments on issues related to conflicts should not be underestimated. In reflecting on the means implementation, consideration should be given to the importance of retaining flexibility to adapt/adjust the obligations and how it can best be achieved.

## Chile

This document includes the comments of the Republic of Chile to the second draft Code of Conduct submitted for comments by the ICSID and UNCITRAL Secretariats on April 19, 2021. 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 second draft code.

### **Article 1 Definitions**

- We support referring generically to “Adjudicator” as encompassing both “Arbitrator” and “Judge,” and supports the proposed broad definition of “Arbitrator” and “Judge”.
- Note that Art. 1(2) and Art. 1 (6), respectively, refer to an Arbitrator and a Judge who is “appointed”, without specifying who made the appointment (if an an institution, party, or other). We understand this to be in line with our comment on Version 1 of the Draft CoC, that the term “Adjudicator” should include individuals “howsoever appointed.”
- In Art. 1(4), for a consistent use of the language, it may be worth to replace “not yet been confirmed in such role” for “not yet been *appointed* in such role.”
- We suggest revising the definition of “International Investment Dispute” (IID) included in Art. 1(5) to encompass disputes arising out of contracts or domestic law. In Version 1 of the Draft CoC those disputes were included. Excluding those disputes may lead to having disputes decided by adjudicators subject to a different and perhaps lesser standard of conduct.

## **SUGGESTED LINE-EDITS**

4. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for selection as a Judge, but who has not yet been ~~appointed confirmed~~ in such role;
5. “International Investment Dispute” (IID) means a dispute arising pursuant to ~~an the investment promotion and protection provisions in an~~ international investment treaty, a national legislation or a contract relating to the governance of international investments.;

## Article 2 Application of the Code

- Regarding Art. 2(2), we refer to our comments on Version 1 of the Draft CoC in the sense that Assistants should also be subject to the CoC. We propose that when the parties receive a request to approve the appointment of an Assistant, that the Assistant be required to sign a declaration confirming that s/he will comply with the CoC.
  - We would be open to consider modifications to Art. 2(2) in the sense of limiting the obligations of the Assistants to specific provisions listed in the rule.
  - Finally, regarding the sanctions to the assistants - a topic discussed during the informal consultations- we consider that this could be included in the declaration to be signed by the Assistant, in the sense that s/he would need to resign immediately. Additional monetary sanctions (i.e. no-payment of pending fees could be considered).
- We suggest amending Art. 2(5), as shown in the left-hand column, in the sense that the provisions of this code shall not apply, only to the extent that there is a contradiction between this code and a treaty-based code. In that case, the treaty-based code shall prevail.

## SUGGESTED LINE-EDITS

2. ~~Adjudicators shall take reasonable steps to ensure that their~~ Assistants shall also be aware of, and comply with, the provisions of this Code, to the extent relevant.

...

5. [Should there be an incompatibility between the provisions of tThis Code, and a code of conduct that is part of~~shall not apply if~~ the treaty upon which consent to adjudicate is based for the initiation of ~~contains a Code of Conduct for~~ proceedings, the provisions of the treaty-based code shall prevail~~initiated pursuant to that treaty.~~]

## Article 3 Independence and Impartiality

- We consider that it would be better to separate the obligation to be independent and impartial and move the concepts of “avoid[ing] bias, conflict of interest, impropriety, or appearance of bias” to the second paragraph, considering that “bias, conflict of interest, impropriety” are grounds to determine whether there is a lack of independence and impartiality.
- We support the idea of including in the Commentary a list of examples of conduct falling within Art. 3(1), but suggest that the list also include situations that may be less obvious, so that the exercise can prove more useful.



- Regarding Art. 3(2)(d), and with reference to our comment on Art. 4(2) of Version 1 of the Draft CoC, we suggest broadening the scope of influence by also including forward-looking situations. We suggest saying: “allow any past, existing or *prospective* financial, business, professional or personal relationship to influence their conduct or judgment.”
  - With this addition, we seek to prevent resignation of arbitrators during the course of the proceeding due to a conflict of interest created by a superseding circumstance that was avoidable.

#### SUGGESTED LINE-EDITS

1. Adjudicators shall be independent and impartial., ~~and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias~~

2. In particular, Adjudicators ~~shall take reasonable steps to avoid bias, conflict of interest, impropriety, or appearance of bias and~~ shall not:

...

(d) allow any past, ~~or~~ existing ~~or~~ *prospective* financial, business, professional or personal relationship to influence their conduct or judgement;

#### Article 4 Limit on Multiple Roles

- In line with our comments on Version 1 of the Draft CoC, we support a prohibition on multiple roles while a case in which the adjudicators is acting, is pending. We therefore support the adoption of Art. 4 without the bracketed text.
- We further support limiting the bar on double hatting to counsel or expert witness eliminating the other categories that were mentioned in version 1 of the Draft Code.
- Regarding experts, we agree that this should apply to both party-appointed and tribunal appointed experts.
- While we can support the rule as drafted - subject to the elimination of the bracketed text- we would welcome the possibility of deleting the reference to “*unless the disputing parties agree otherwise*”, to incorporate a clearer and easier to apply rule. We consider that it may be difficult for parties to agree on this issue prior to making their appointments.

#### SUGGESTED LINE-EDITS

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case ~~[involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].~~

#### Article 5 Duty of Diligence

- In line with our comment on Art. 8(1) of Version 1 of the Draft CoC regarding the duty of diligence, and in order to address concerns voiced by States during the WG III discussions, we propose to incorporate in Art. 5(1) examples of the types of duties that Adjudicators are expected to perform diligently.
- We also propose to address in a separate paragraph (Art. 5(2)) the duties related to the availability required for Adjudicators to perform their duties in a timely manner (duty to refuse competing obligations, maintain reasonable availability, and dedicate time and effort to the proceeding).
- We suggest reincorporating in Art. 5(3), the obligation to act in a punctual and expeditious manner throughout the proceeding (previously included under Art. 8(3), which is both more precise and has a broader scope than current Art. 5(2)).
- In line with our comment on Art. 8(2) of Version 1 of the Draft CoC, we agree with the removal of the specific limitations on the number of cases that Adjudicators could concurrently handle.
- As a formal comment, a “to” seems to be missing in Art. 5(1): “...shall dedicate the necessary time and effort **to** the proceeding...”

#### **SUGGESTED LINE-EDITS**

1. Adjudicators shall perform their duties diligently throughout the proceeding including by conducting a thorough review of the record and constructive participation in hearings and deliberations.

2. Adjudicators ~~and~~ shall refuse competing obligations, ~~and~~ they shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort to the proceeding, and shall render all decisions in a timely manner.

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

4. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.

#### **Article 6 Other Duties**

- In line with our comment on Art. 7(3), second sentence, of Version 1 of the Draft CoC, we propose that Art. 6(2) states that Candidates **“shall”** decline, instead of “should” decline.
- We agree with the proposal to include in Art. 5, as part of the “Duty of diligence” the

Adjudicators' duty not to delegate decision-making functions (formerly addressed in Art. 7(4) of Version 1 of the Draft CoC).

#### SUGGESTED LINE-EDITS

2. Candidates ~~shall~~ ~~should~~ decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfill their duties

#### Article 7 Communications with a Party

- Regarding Art. 7(1), we suggest including a reference to the “case”, as suggested by some delegations during the informal session.
- In line with our comment on Art. 10(2) of Version 1 of the Draft CoC, we propose removing Art. 7(2). Since Art. 7(1) limits what may and may not be discussed at the pre-appointment interview, it may not be necessary to burden the parties and the Adjudicator with the disclosure of the content of pre-appointment interview.
- Alternatively, and, as a compromise, we propose that Art. 7(2) be amended to include the obligation to disclose the existence of the pre-appointment interview but eliminating the reference to the “content” of the communication and omitting the word “fully”. Our concern is that a process (i.e. the interview) that to date has not generated much debate, could end up enlarging the list of procedural battles in ISDS cases.
- Regarding Art. 7(3), if this provision is maintained, we propose that it be expanded to cover also third-party funders and be specified that the communication between the adjudicator and the party is allowed for constitution of the Tribunal and not leave it open for interpretation.

#### SUGGESTED LINE-EDITS

1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to the case, including jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.

2. [The ~~existence~~~~contents~~ of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be ~~fully~~-disclosed to all parties upon appointment of the Candidate.]

3. An Adjudicator shall not have any *ex parte* contacts with a party or a third-party funder concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties in connection with the constitution of the Tribunal.

## Article 8 Confidentiality

- We consider that the current language of draft Art. 8(2)(c) would not necessarily be interpreted as prohibiting verbal or written comments regarding decisions, rulings and awards in which the Adjudicator has participated. For this reason, we propose reincorporating the last sentence of former Art. 9 (2), pursuant to which Adjudicators shall not “comment on any decision, ruling or award in which they participated, unless and until the decision, ruling or award becomes public”, as a new Art. 8.2(d).

## SUGGESTED LINE-EDITS

(d) comment on any decision, ruling or award in which they participated, unless and until the decision, ruling or award becomes public.

## Article 9 Fees and Expenses

No comments.

## Article 10 Disclosure Obligations

- There seem to be three different standards of disclosure in Art. 10(1) (doubts as to independence and impartiality; demonstration of bias; and demonstration of appearance of bias). Having three different standards of disclosure may create confusion and lead to an unharmonized application of the provision and defeat the purpose of this exercise.
- We agree with the 5-year period for the disclosure of information proposed in Art. 10(2)(a).
- We agree with the generic reference to “any subsidiary, affiliate or parent entity” in Art. 10(2)(a)(i), as “any” encompasses direct and indirect entities. We also agree with the replacement of “agency” for “affiliate”.
- With regard to Art. 10.2(a)(ii), we support including non-IID matters, and trust that we can find mechanisms for such disclosures to take place, without breaching confidentiality obligations, as it is done, for example, in proposals by law firms and others.
- We request removing the brackets in Art. 10(2)(c), in order to include disclosure of non-IID proceedings.
- We agree with the 5-year limit proposed in Art. 10(2)(c) but are flexible on this question and could agree to a bigger number should this be presented as a proposed option.
- We agree with the continuing duty of disclosure encompassed in Art. 10(4) and the duty to disclose newly discovered information “as soon as they become aware of such information.”
- We support the inclusion of Art. 10(5), last sentence, that the disclosure by an adjudicator

does not establish a breach of the CoC.

- We note that the duty to disclose a list of publications proposed in Art. 5(2)(d) of Version 1 of the Draft CoC has been removed. We welcome the removal from the list of mandatory disclosures. Nevertheless, in our past comments, we had suggested to make this a recommended disclosure in lieu of eliminating the obligation all together. Since it would be useful to have access to this information, and it could have some impacts on issue-conflict, we respectfully resubmit our proposal and request that a new article (text below) be added listing the elements that the code recommends being disclosed:

*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.*

#### **SUGGESTED LINE-EDITS**

2. (...)

(a. (...)

(ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID {and non-IID} proceedings;

...

(c) All IID {and non IID} proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator. (...).

#### **Article 11 Enforcement of the Code of Conduct**

- We do not agree with the idea of omitting the disclosure requirements in Art. 10 from the disqualification and removal proceedings upfront. While they may not necessarily give rise to a challenge there may be cases in which the lack of disclosure could be sufficient to justify a challenge. The current drafting of Art. 11(2) would not permit this.
- In addition, different rules, with different enforcement mechanisms may apply to a dispute in which the Adjudicators are subject to the CoC, for example, under some rules failure to act expeditiously may lead to a reduction of the fees payable to the tribunal. For these reasons we suggest broadening the scope of Art. 11(2) and refer to disqualification and other sanctioning procedures, as suggested in our line-edits to Art. 11.

We further refer to our comments on Art. 12 of Version 1 of the Draft CoC reproduced herein for ease of reference:

As to the enforcement of the code:

- 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.

#### **SUGGESTED LINE-EDITS**

2. The disqualification, ~~and~~ removal procedures and other sanctioning procedures in the applicable rules shall apply to ~~breaches of this Articles 3-8~~ the Code.

## European Union and its Member States

### **General comments**

The European Union and its Member States express their gratitude to the Secretariats of ICSID and UNCITRAL for their work on version two of the draft Code of Conduct and for taking into

account in this revision a number of comments that had been raised by the European Union and its Member States.

The European Union and its Member States would like to take this opportunity to make some comments and text proposals on remaining aspects that should be dealt with.

## Article 1

1. Paragraph 1 and 5: The Commentary on the Code should clarify that treaty parties and disputing parties may agree to apply the Code *mutatis mutandis* to mediators, conciliators, etc.
2. Paragraph 3: The European Union and its Member States agree that the Commentary on the Code should note that “Assistant” does not include the staff of arbitral institutions or of standing mechanisms as these persons are employed by the institution/court seized of the dispute. Additionally, in order to address concerns related to the drafting of awards or decisions, the definition of “Assistant” could clarify that any drafting provided by assistants can only be “preliminary” drafting and not comprise the drafting of awards and decisions of tribunals.
3. Paragraph 5: The Commentary on the Code should clarify that nothing should prevent disputing parties to agree to apply the Code *mutatis mutandis* in a contract-based investment dispute or foreign investment law cases.
4. Paragraph 6: The definition of “Judge” should refer to a “member of a standing mechanism for IID settlement”. It remains to be seen what is ultimately the best term to use. The Commentary on the Code may clarify this definition further.

## Article 2

5. Paragraph 1: Since not all Articles referred to in paragraph 1 are equally relevant for and applicable to Arbitrators and Judges, the European Union and its Member States would suggest the following changes (in light also of the comments made below on those provisions):

“1. Articles ~~3 to 5~~, 5(3), 6(1), 7(3) ~~and~~, 8, 9, 10(1), (4) and (5), ~~and~~ 11 of this Code apply to Adjudicators in IID proceedings. Articles 4(1), 5(1), 10(2) and (3) of this Code apply only to Arbitrators in IID proceedings. Articles 4(2), 5(2) of this Code apply only to Judges in IID proceedings.”

6. Paragraph 2: The European Union and its Member States suggest to review the code of conduct at the end of the discussions to assess if all provisions or only certain provisions of the Code should apply to assistants.
7. Paragraph 3: The European Union and its Member States consider that:
  - i. also Articles 3(1) and 10(1) should apply to candidates, and

- ii. since not all Articles referred to in paragraph 3 are relevant for and applicable to Candidates who are under consideration for selection as a Judge, suggest the following changes in red (see also comments below):
    - “3. Articles 3(1), 6(2), 7(1), 7(2), 8(1), ~~and~~ 8(3) and 10(1) of this Code apply to Candidates from the date they are first contacted concerning a possible appointment. Articles 6(2), 7(1), 7(2) and 8(1) of this Code apply only to Candidates who have been contacted regarding potential appointment as Arbitrators.”
8. Paragraph 4: the European Union and its Member States suggest adding two new rules on former adjudicators and former judges (see new paragraphs 3(3) and 4(3) as suggested in the comments below) and, as a result, suggest adding a reference to those new paragraphs in Article 2(4):
- “4. Articles 3(3), 4(3), 7(3) and 8 of this Code continue to apply to Adjudicators after the conclusion of the IID proceeding.”
9. Paragraph 5: The European Union and its Member States consider that the new paragraph 5 can be acceptable with the addition of the text in red below, which would allow for flexibility to cover situations of total or partial prevalence of one code over the other:
- “5. This Code shall not apply if the treaty upon which consent to adjudicate is based contains a Code of Conduct for proceedings initiated pursuant to that treaty, **unless and to the extent that the Parties to that treaty have agreed otherwise.**”

### Article 3

10. Paragraph 1: the general obligation of independence and impartiality:
- i. should apply also to candidates;
  - ii. should cover also the *appearance* of independence and impartiality, in line with the EU’s treaty practice and arbitral practice on the matter:
- “1. **Candidates and** Adjudicators shall be, **and shall appear to be**, independent and impartial, and shall ~~take reasonable steps to~~ avoid bias, conflict of interest, impropriety, or ~~apprehension of bias an appearance thereof.~~”
11. The Commentary on the Code could clarify that Article 3.2(b) does not preclude the appointment of an arbitrator with the same nationality of one of the disputing parties.
12. The European Union and its Member States suggest to add a new paragraph 3 on obligations on former adjudicators, in line with the EU’s treaty practice:
- “3. **Former Adjudicators shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from any decision, ruling or award**”



in which they participated.”

#### Article 4

13. Article 4 is only relevant to Arbitrators. For this reason, the European Union and its Member States would suggest the following changes drawing from rules on ethics of existing international courts (in particular the International Court of Justice, the International Criminal Court and the European Court of Human Rights):

“1. Unless the disputing parties agree otherwise, an ~~Adjudicator~~ **Arbitrator** in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].

2. Judges shall not act as counsel or expert witness in another IID case or exercise any political or administrative function. Judges shall not engage in any other occupation of a professional nature which is incompatible with their independence, impartiality or with the demands of a full-time office. Judges shall declare any other occupation of a provisional nature to the [President] of the standing mechanism and any question on the application of this paragraph shall be settled by the decision of the standing mechanism.

3. Former Judges shall not become involved in any manner whatsoever in proceedings before the standing mechanism relating to an IID which was pending, or which they have dealt with, before the end of their term of office. As regards IID initiated subsequently, former judges shall not represent a party or third party in any capacity in proceedings before the standing mechanism until a period of [three] years after the end of their term of office.”

#### Article 5

14. Paragraph 1: This paragraph is not suitable in its entirety for Judges. Therefore, the European Union and its Member States would suggest the following changes drawing from rules on ethics of existing international courts:

“1. ~~Adjudicators~~ **Arbitrators** shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort to the proceeding, and shall render all decisions in a timely manner.

2. Judges shall be bound to hold themselves permanently at the disposal of the standing mechanism, unless exception is granted by the [President of the standing mechanism].

3. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.”

## Article 6

15. Paragraph 2: This paragraph is only relevant for Candidate Arbitrators. The rules of a standing mechanism would lay out the requirements on competence, skills or availability for permanent adjudicators. Suggested changes:

“Candidates **who have been contacted regarding potential appointment as Arbitrators** should decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfil their duties.”

## Article 7

16. Paragraphs 1-2: These paragraphs are only relevant for Candidate Arbitrators since they refer to pre-appointment communications with the disputing parties, while, in the view of the European Union and its Member States, a standing mechanism should not provide for the party-appointment of permanent adjudicators and would have its own rules on the appointment of a permanent adjudicator to a specific case. Suggested changes:

1. Any pre-appointment communication with a Candidate concerning a potential appointment **as Arbitrator** shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates **who have been contacted regarding potential appointment as Arbitrators** shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.

2. [The contents of any pre-appointment communication concerning the proceeding between the Candidate **who has been contacted regarding potential appointment as Arbitrator** and a party shall be fully disclosed to all parties upon appointment of the Candidate.]

17. Paragraph 3: The text (or the Commentary on the Code) should clarify that the rule on Judges should be more prescriptive:

3. **A Judge shall not have any *ex parte* contacts with a party concerning the proceeding.** An ~~Adjudicator~~ **Arbitrator** shall not have any *ex parte* contacts with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

## Article 8

18. Paragraph 1: This paragraph is relevant to Candidate Arbitrators because it refers to case-specific information, while a candidate for the post of permanent adjudicator would not know, while she or he is a candidate, what cases she or he will hear during her or his term of office. Suggested changes:

“1. Candidates **who have been contacted regarding potential appointment as Arbitrators**

and Adjudicators shall not: [...]”

### Article 9

19. A new paragraph 1 should be added to provide for the different rules on remuneration for permanent full-time Judges with fixed salaries:

“1. Unless otherwise regulated by the applicable rules, treaties or statutes, the fees and expenses of Adjudicators shall be regulated by this Article.”

### Article 10

20. Paragraph 1:

- i. the general disclosure obligation in paragraph 1 should apply also to candidates; and
- ii. the standard to be applied for disclosure should be an objective standard, rather than an “in the eyes of the parties” standard. As confirmed by arbitral case-law, an appearance of bias should be evaluated from the perspective of an objective and informed third party:

“1. Candidates and Adjudicators shall disclose any interest, relationship or matter that ~~may, in the eyes of the parties~~ from the perspective of an objective and informed third party, could be reasonably seen as giving rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety, or an appearance ~~of bias thereof~~.  
□...□”

21. Paragraph 2 and 3 should only refer to Arbitrators: In line with the comment made on the first version of the draft Code, the European Union and its Member States consider that the disclosure obligations included in paragraphs 1, 4 and 5 are sufficient in the context of a permanent mechanism and, therefore, paragraph 2 and 3 should apply only to Arbitrators. In case of full-time adjudicators with no other professional activities, case-related conflicts of interest will be less frequent. Hence, extensive disclosure obligations for every single case may not be necessary and are not usual in the practice of permanent mechanism. In this scenario, case-related conflicts of interests would be covered through the general obligations of draft paragraphs 1, 4 and 5, which would warrant disclosure and potential recusals:

“2. ~~Adjudicators~~ Arbitrators shall make disclosures in accordance with paragraph (1) and shall include the following information: [...]”

3. ~~Adjudicators~~ Arbitrators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.”

### Article 11

22. Paragraph 2: The European Union and its Member States consider that:

- i. it should not be possible for disputing parties to challenge a Judge for alleged lack of competence and, therefore, we suggest that this is reflected in a future version of the text;
- ii. at least the most serious or repeated violations of the disclosure obligations under Article 10 should be subject to the sanctions under Article 11;
- iii. it should not be excluded that the statute of a future Court could provide for other types of sanctions (e.g. sanctions on former adjudicators); and for these reasons make the following text suggestions in red:

“2. The disqualification and removal procedures **or any other sanction provided for** in the applicable rules, **treaties or statutes** shall apply to breaches of Articles 3-8 [*Comment: not to breaches of Article 6 with respect to Judges*] and to serious or repeated breaches of Article 10 of the Code.”

23. Finally, the European Union and its Member States would like to underline that decisions on disqualification or removal should be taken by a body whose independence and impartiality are ensured, and which should provide the sanctioned adjudicator with the possibility to be heard prior to the issuance of any decision. In the context of 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).

## India

1. The Indian Model BIT 2015 also provides a guidance on some of the aspects that have been covered in the Draft code of conduct under Article 19. The same is being provided in the Annex for the benefit of the discussions of UNCITRAL Working Group III reforms.
2. The following specific comments are provided on the Articles and explanations provided in the Draft Code -

### **Article 1 – Definitions –**

The term “adjudicators” has been proposed to cover a wider category of persons, whether they maybe arbitrators or judges in permanent bodies or members in an Investment Court. There is also a separate definition for arbitrators and Judges. Furthermore, in the Explanation it is being discussed whether other type of adjudicators are also to be included.

It is proposed that other types of adjudicators (those who exercise the functions of adjudicating ISDS cases) may also be included.

#### **Article 2(5) –**

In the alternate, the applicability of the Draft Code for concluded treaties and new treaties may also follow the manner in which the UNCITRAL Transparency rules were made applicable in which the parties have the choice to opt-in for concluded treaties and a choice to opt-out for future treaties.

#### **Article 3 – Independence and Impartiality**

It is important to ascertain how this provision will be applied in practice, keeping in mind the existing rules on independence and impartiality and the timelines provided therein. For instance, under ICSID there is a 21 day time-period to challenge an arbitrator whereas under UNCITRAL there is a 15 day time period. The Draft Code currently does not stipulate any time period.

It is also important to note the difference in the standards used to test independence and impartiality under different rules. Under ICSID, there is use of the term “manifest lack of impartiality” whereas under UNCITRAL the term used is “justifiable doubt”. Thus, it appears that ICSID applies a higher threshold to determine independence and impartiality.

A similar threshold to determine such standards may be incorporated in the Draft Code. Given the importance of investment disputes and its linkage with public policy, and given that the Working Group during its deliberations of identifying issues (i.e. phase I of the reform process in WG-III) had given importance to perception issues including legitimacy. In this regard, the term “justifiable doubt” is preferred.

Working Group also needs to deliberate on how these rules would actually play out during implementation stage.

The Draft Code proposes certain subjective criteria, such as adjudicators shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism. It needs to be deliberated further as to how “self-interest” or “fear of criticism” can be identified and if not, the need for such criteria maybe revisited. Further, while listing the entities from which Arbitrator should not get influenced, this should also include “Third Party Funder” or such entities.

#### **Article 7- Communication with the Party**

This should also include the communications with Third Party Funders who fund the dispute.

#### **Article 9 – Fees and expenses**

Normally, where the administering institution does not specify a fixed fee scale, the fees are determined during the terms of appointment/constitution of the Tribunal by the Parties.

Therefore, the need for Article 9(2) may be revisited.

### **Article 10 - Disclosure Obligations – Conflict of Interest**

While the duty to disclose rests with the adjudicators, once such disclosure is provided, the burden shifts on the counsels and Parties on whether to use such disclosure to challenge the arbitrators. There is normally a very short window for raising such challenges and not raising it within that time frame is considered as waiver of such right to challenge. Therefore, with more elaborate duties to disclose, it would be necessary to revisit the time frames.

However, at the same time, it should be kept in mind that, Parties and counsels must not use challenges as dilatory tactics to delay the arbitration process. The Draft code should not lead to increase in unnecessary challenges to the arbitrators.

### **Article 11 – Enforcement of the Code –**

The most fundamental provision in the Draft Code is enforcement of the Code.

Article 11 has been kept open ended to further suggestions. A separate document on Means of implementation of the Draft Code of conduct and enforcement has been circulated by UNCITRAL which broadly provides for option to implement the Code such as in the form of a multilateral instrument or in treaty by treaty, or by Agreement of the Disputing Parties or amendments to the existing UNCITRAL rules and ICSID rules.

The mode of enforcement needs deliberation

### **Annex**

#### **Indian Model BIT Article 19**

<b>Article 19</b>	
<b>Prevention of Conflict of Interest of Arbitrators and Challenges</b>	
19.1	Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.
19.2	Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the disputing parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 19.10 and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the

parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favour of such disclosure.

- 19.3 A disputing party may challenge an arbitrator appointed under this Treaty:
- (a) if facts or circumstances exist that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or
  - (b) in the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of the arbitrator performing his or her functions,

Provided that no such challenge may be initiated after fifteen days of that party: (i) learning of the relevant facts or circumstances through a disclosure made under Article 19.2 by the arbitrator, or (iii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under Article 19.3, whichever is later.

- 19.4 The notice of challenge shall be communicated to the disputing party, to the arbitrator who is challenged, to the other arbitrators and to the appointing authority under Article 18.3. The notice of challenge shall state the reasons for the challenge.

- 19.5 When an arbitrator has been challenged by a disputing party, all disputing parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

- 19.6 If, within 15 days from the date of the notice of challenge, the disputing parties do not agree to the challenge or the challenged arbitrator does not withdraw, the disputing party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority as specified under Article 18.3.

- 19.7 The appointing authority as specified under Article 18.3 shall accept the challenge made under Article 19.3 if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.

- 19.8 In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in the Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a disputing party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.

- 19.9 If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the disputing parties.
- 19.10 A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest shall be deemed to exist on account of the following factors, including if:
- a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
  - b. The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (3) years prior to the commencement of arbitration;
  - c. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;
  - d. The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;
  - e. The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives financial interest;
  - f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;
  - g. The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;
  - h. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.
- 19.11 The Parties shall by mutual agreement and after completion of their respective procedures adopt a separate code of conduct for arbitrators to be applied in disputes arising out of this Treaty, which may replace or supplement the existing rules in application. Such a code and may address topics such as disclosure obligations, the independence and impartiality of arbitrators and confidentiality.

## Israel

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Israel wishes to express its sincere gratitude to the ICSID Secretariat and the UNCITRAL Secretariat for the careful consideration of the comments provided regarding the previous draft



and the development of the second draft Code of Conduct (Version 2). Our view is that this comprehensive work facilitates the progress/ on going discussions among member states of Working Group III towards investor-state dispute settlement (ISDS) reform according to its mandate.

On this backdrop, Israel would like to offer the following further comments on the second draft (V2) without prejudice to its final position.

### **Definitions (Articles 1)**

- Israel has doubts on whether it would be preferable for the code to apply to both State-State and Investor-State disputes arising from international investment treaties. Israel considers ISDS disputes as a mechanism with special nature in international law, in comparison to disputes between member states under international treaties. We would therefore propose that the Code would be focused on treaty based ISDS cases.
- Israel supports making a clarification in the commentary that the term ‘Assistants’ does not include the staff of arbitral institutions or of standing mechanisms.

### **Application of the Code (Articles 2)**

- For the purpose of clarity and legal certainty, Israel considers that it would be useful to specify which provisions assistants must comply with.

Israel supports the regulation of the interplay between this Code and treaty-specific codes of conduct. However, our view is that this issue should be addressed based on the broader discussion of the modalities of adoption of reform options taking place in Working Group III. To that end, we consider that a note should be taken by UNCITRAL Secretariat to address this issue at the appropriate time.

- Without prejudice to our view in the above paragraph, for the sake of maintaining flexibility within the interplay between this Code and treaty-specific codes of conduct, we suggest adding at the end of paragraph 2(5) the wording "unless otherwise agreed by the disputing parties".

### **Limit on multiple roles (Article 4)**

- Israel's preference is for disclosure obligations on arbitrators over the limitation of flexibility of the parties for selection of candidates. On the basis of this approach we supported the previous version of article 6 of the draft (version one), which stated that (emphasis added): "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, [the same facts] [and/ or] [the same treaty]."

We therefore would like to see a proposal for a text that will not create an ex-ante limit on acting on concurrent cases but an article that will create a disclosure obligation.

- Israel considers that a disclosure obligation may minimise the risk of potential unintended consequences of the revised draft article 4, in which arbitrators might resign mid- arbitration in order to undertake lucrative counsel work that unexpectedly arises. Israel welcomes discussion on this issue in the framework of the Working Group.
- In case that the article will be adopted with the current proposed limitation, Israel considers that the bracketed text is preferable in order to limit the limitation's scope.

### **Communications with a Party (Article 7)**

- Israel considers that further discussion is necessary regarding the shared information from the pre-appointment interviews. Specifically, Israel considers that Article 7 should include specific language for the exception from disclosure obligations and limitations to ensure that only non-privileged information from such an interview (when designated by the candidate as privileged) would be shared from such an interview with the parties.

### **Confidentiality (Article 8)**

- Israel is of the view that information designated by either of the parties as confidential should be also added to the categories of information prohibited for disclosure without parties' consent .
- Israel welcomes a discussion on the issue of the definition of the term "non-public information" in order to fully understand its scope.

### **Disclosure (Article 10)**

- In Israel's view, it would be undesirable to limit the disclosure obligation in Article 10(2) to a period of 5 years since certain relationships might be also of importance for disclosure for the parties even if they took place before the 5 year period. Israel considers that the criteria for disclosure should therefore rely on the substantive character of the relationship and not on its temporal scope.
- Israel supports the application of article 10(2)(a)(ii) and 10(2)(c) to all proceedings, including ISDS and non-ISDS (see our comments regarding the term IID in the above comment on article 1 of Version 2). Israel welcomes discussion on whether there is a need to define in a commentary the scope of non-ISDS proceedings - so as to clarify that it refers to non-investment related proceedings.
- Israel finds that the reference in Article 10(2)(a)(ii) to a "**legal** representative" may prove to be too narrow and suggests referring to a "representative".

- Israel further considers that relationships with the parties' representative and their firms (e.g. law firms) should be disclosed. Therefore, Israel suggests adding the words "and their firms, where applicable" after the word "counsel" in sub-paragraph 10(2)(a)(ii), draft v.2.
- Israel supports the use of the word "shall" instead of the word "should" in article 10(5).

## Korea

The Republic of Korea (“Korea”) sincerely appreciates the United Nations Commission on International Law (UNCITRAL) Secretariat and the International Centre for Settlement of Investment Disputes (ICSID) Secretariat for their recent joint work and preparation of Version Two of the draft Code of Conduct (“the Code”).<sup>4</sup> Korea, in line with many delegations, finds that the amended Code shows a significant improvement, adequately reflecting many of the comments submitted. The recent ICSID-UNCITRAL joint consultation indeed was helpful. As for the items on the amended Code that were not specifically addressed during the consultation or those worth an emphasis, Korea would like to provide its comments and observations as follows.

### 1. Article 2 (Application of the Code)

Korea welcomes the idea of having Article 2 as it shows in a simplified form how the obligations under the Code apply and to whom. In the meantime, as already pointed out by some delegations, it would be helpful to revisit this Article at a later stage of the discussions once all the ideas have been crystallized and the provisions are fixed so that this article clearly stipulates the application of the final version of the Code.

Article 2(3) stipulates specific articles in the Code that apply to Candidates from the date they are first contacted concerning a possible appointment. As Article 11(1) expressly obliges every Candidate as well as Adjudicator to comply with the applicable provisions of this Code, Korea finds that Article 11 should be included in the list of articles that apply to Candidates just like it does for Adjudicator in Article 2(1).

Article 2(4) designates Articles 7(3) and 8 to apply to Adjudicators after the conclusion of an International Investment Dispute (“IID”) proceeding. This is reiterated in paragraph 15 of the explanation. Article 8, which provides detailed sets of confidentiality obligations of Adjudicators, contains an express provision in paragraph 3 that “The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.” Article 7, which

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<sup>4</sup> Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two, 19 April 2021

regulates communications with a Party, however, has no such express survival statement. As such, it may be helpful to add a similar language in Article 7(3) for clarity, or to delete paragraph 3 of Article 8 to avoid redundancy. Nevertheless, maintaining paragraph 4 of Article 2 as it is may have an effect of reiterating that the obligations in the referenced articles survive until after the conclusion of an IID proceeding. Korea remains flexible and brings this to the Working Group's attention for further consideration.

Furthermore, paragraph 16 in the explanation states that an Adjudicator can theoretically be challenged for failure to take reasonable steps to ensure an Assistant's compliance with the Code. On the other hand, the explanation further notes that in practical terms, the disputing parties would likely ask for a removal of an Assistant of concern. To this respect, a clarification would be helpful as to what circumstances can rise to the level for an Adjudicator to be challenged for an Assistant's action in violation of the Code.

## 2. Article 4 (Limit on Multiple Roles)

Article 4 leaves room for a potential double-hatting by the phrase "unless the disputing parties agree otherwise". Korea understands the rationale behind requiring the parties' consent. At the same time, Korea is of the view that requiring such a consent may not necessarily help effectively limit multiple roles. In practice, it may be difficult for the disputing parties under some circumstances to object to an Adjudicator playing multiple roles. Moreover, paragraph 26 in the explanation provides that Article 4 reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties based on disclosure pursuant to Article 10. To provide more succinctness on this provision, Korea suggests including in Article 4 that the disputing parties' agreement to allow double-hatting shall be given on an informed basis in accordance with disclosure requirements set forth in Article 10.

Furthermore, Korea is concerned that limiting an Adjudicator's multiple roles only to the "same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity" in an exclusive list may not fully address the concerns identified by the Working Group nor achieve the objective of limiting multiple roles.

## 3. Article 7 (Communications with a Party)

As stated in paragraph 37 in the explanation, Korea can see that it can be onerous to fully disclose all the contents of any pre-appointment communication concerning the proceeding between a Candidate and a party, especially if there were multiple contacts. Therefore, Korea can be flexible with deleting Article 7(2) in square brackets as many delegations have requested. At the same time, Korea understands that Article 7(2) has a monitoring function aimed at ensuring that any pre-appointment communication is, in practice, in full compliance with Article 7(1). As such, Korea suggests that the Working Group discuss whether this monitoring function would be

necessary considering the object and purpose of the Code. If determined necessary, the Working Group may further consider elaborating or substituting the existing text of Article 7(2) with a language that requires candidates to disclose (i) any pre-appointment communication concerning the proceeding with a party that fall outside the scope of communication permitted under Article 7(1), or (ii) information otherwise in violation of the Code.

#### 4. Article 9 (Fees and Expenses)

Paragraph 1 requires that any discussion concerning fees to be concluded “before” constitution of the adjudicatory body, whereas paragraph 2 provides that if there is no administering institution the presiding Arbitrator shall communicate to the parties any discussion concerning fees. These two paragraphs contradict each other and Korea suggests replacing “before” in paragraph 1 with “immediately upon”, a term used in the previous version.

#### 5. Article 10 (Disclosure Obligations)

Korea notes that Articles 10(2)(a)(ii) and 10(2)(c) have been amended to include “any IID [and non-IID] proceedings”. The previous version read “All ISDS [and other [international] arbitration] cases” focusing generally on international arbitration. Comparing these two versions, the scope of the amended version can be interpreted to be a lot wider than that of the previous version as “any IID and non-IID proceedings” can mean any kind of proceedings, whether international or domestic, or arbitration or non-arbitration, unless otherwise expressly clarified in the Code or its commentary. Therefore, it would be necessary to narrow down the scope, and a clarification to this extent would be helpful.

Another point for attention is that Article 10(2)(a)(i) states “the parties, and any subsidiary, affiliate or parent entity identified by the parties”, whereas paragraph Article 10(2)(b) states “at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding”. These two paragraphs appear to identically refer to the parties, subsidiary, affiliate, or parent entity involved in the IID proceeding, but actors “identified by the parties” and actors “as involved in the IID proceeding” are not entirely the same. As such, Korea recommends clarification to this regard and suggests a consistent use of language.

#### 6. Article 11 (Enforcement of the Code of Conduct)

In Article 11(2), Korea considers that some disclosure obligations in Article 10 should also be subject to enforcement and sanctions in Article 11(2) as such obligations comprise an important part of the Code. In terms of the enforcement mechanism, Korea anticipates that the Code will be part of the multilateral instrument, which will include all other reform options adopted in the final stage of the ISDS reform project. Korea can be flexible and agree with having the Code

readily available as a soft law or other forms once finalized for its universal application and maximization of its effects.

## Morocco [FRE]

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### **INTRODUCTION :**

La délégation marocaine tient à remercier les Secrétariats du CIRDI et de la CNUDCI pour leurs efforts en vue d'élaborer un projet de Code de conduite pour les personnes appelées à trancher des différends en matière d'investissements internationaux.

La délégation marocaine tient également à saluer la disponibilité des Secrétariats du CIRDI et de la CNUDCI à examiner les commentaires à soulever par les Etats concernant ce projet de code de conduite afin d'améliorer son contenu dans la perspective de mettre en place un code de conduite moderne établissant des règles d'éthiques transparentes et contraignantes qui sont de nature à garantir des procès équitables et justes en matière de règlement des différends entre investisseurs et Etats.

Etant donné l'importance du projet de code de conduite dans la réforme globale du régime de RDIE, l'approche marocaine pour l'élaboration de ce projet de code vise à concevoir une réforme globale et non partielle en matière d'éthique et de conduite et ce, à travers la mise en place d'un texte unique et uniforme qui devrait s'appliquer à tous les intervenants dans les différends portant sur l'investissement international et couvrir tous les types de litiges que ce soit les litiges qui sont fondés sur les traités d'investissement ou ceux qui sont basés sur une clause compromissoire dans les contrats d'investissement.

A cet effet, la délégation marocaine souhaite, à travers ses propositions formulées dans le cadre de ses commentaires ci-dessous, contribuer à la conception d'un texte juridique novateur et ambitieux en matière d'éthique et de conduite qui énonce dans des termes très précis et sans ambiguïtés, les règles de comportement auxquelles sont censés se soumettre toutes parties prenantes impliquées dans le processus de règlement des différends en matière d'investissement internationaux.

Dans ce cadre et après examen de la 2<sup>ème</sup> version du projet de Code de conduite pour les personnes appelées à trancher des différends en matière d'investissements internationaux, la délégation marocaine a soulevé un certain nombre d'observations concernant cette 2<sup>ème</sup> version du projet de code qu'elle souhaite partager avec les Secrétariats du CIRDI et de la CNUDCI et les délégations participantes dans les travaux du Groupe de travail III de la CNUDCI sur la réforme du RDIE.

Les observations de la délégation marocaine sont réparties en (I) observations d'ordre général portant sur le projet de code de conduite dans sa globalité et (II) observations concernant les dispositions de projet de code.

## **I/OBSERVATIONS D'ORDRE GENERAL :**

1. La délégation marocaine propose de mettre en place un code de conduite « **universel** » qui codifie en un seul texte toutes les règles régissant la conduite dans le cadre des procédures relatives au règlement des différends en matière d'investissement internationaux (DII) et qui peut remplacer tous les codes existants actuellement et ce, afin de répondre aux objectifs de la réforme du régime de RDIE à savoir : assurer la cohérence et l'uniformité des règles applicables.

2. Contrairement à ce que prévoit le projet de code qui édicte des règles dédiées uniquement aux juges et aux arbitres, **la délégation marocaine suggère que le code de conduite englobe des règles qui s'adressent à tous les acteurs participants dans le processus de règlement de DII** à savoir ; les juges, les arbitres, les médiateurs ou conciliateurs, les avocats, les experts et les témoins.

Le code peut également prescrire des disciplines pour les parties au différend (Etat défendeur et investisseur), les parties non parties au différend, les financeurs et les membres du Centre consultatif de RDIE.

Tous les acteurs participants dans le processus de règlement de DII ont une part de responsabilité dans la bonne conduite de la procédure d'arbitrage et de ce fait, ils ne doivent pas avoir un conflit d'intérêt avant et pendant les procédures et doivent déclarer tout conflit d'intérêt potentiel avant leur nomination.

Ainsi, la délégation marocaine estime que tous les participants à une procédure de règlement de DII doivent observer des standards internationaux en matière d'indépendance, d'impartialité, d'intégrité, d'efficacité et de transparence afin d'asseoir la confiance de tout le monde dans la légitimité de l'arbitrage en tant que système de justice crédible et fiable et non controversé.

3. Le Code de conduite peut comporter **un chapitre général** dans lequel seront codifiés toutes règles déontologiques communes applicables à tous les acteurs participants à une procédure de règlement de DII et **des chapitres dédiés à chacun de ces acteurs** qui contiennent séparément des règles spécifiques les concernant établies en fonction de la nature de leur activité et/ ou la nature de leur intervention ( Chapitre pour les arbitres, chapitre pour les médiateurs, chapitres pour les avocats, chapitre pour les experts, chapitre pour les témoins etc...).En outre, des déclarations modèles d'acceptation du contenu devraient être prévues en annexe du Code pour chacun de ces acteurs.

4. Les règles du code de conduite devront être établies en se basant sur les bonnes pratiques, les principes et directives internationaux en matière d'éthique et de conduite déontologique dans chacun des domaines couverts par le code **tout en privilégiant les règles qui visent à relever encore plus les standards de comportement.**

5. Pour garantir le respect des règles du code par tous les acteurs participants dans le règlement DII, la délégation marocaine estime qu'il est opportun de mettre en place un **organe régulateur** qui supervise le code et veille au respect de ses règles avec la possibilité d'imposer des sanctions, en cas d'infraction de ses dispositions, qui devraient être conformes aux normes internationales. Pour les besoins de transparence, les infractions devraient être clairement et précisément définies dans le code de conduite.

6. Afin d'assurer la mise en application correcte de ses règles, la délégation marocaine propose d'établir en annexe du code, **un guide** dans lequel seront fournis pour chacune des normes du code des exemples de bonnes et mauvaises pratiques et des exemples de comportement approprié ou inapproprié. De ce fait ce guide permettra aux acteurs participants au règlement du DII d'avoir une meilleure compréhension des normes du code de conduite et de leurs droits et leurs obligations dans le cadre de ce code.

7. En se basant sur ses commentaires ci-dessus, la délégation marocaine propose que le code porte l'appellation suivante « **Code d'éthique et de conduite pour les participants dans les procédures de règlement des différends en matière d'investissement internationaux.** »

8. Pour renforcer le caractère exigeant des règles du code, il y a lieu de concevoir de nouvelles sanctions plus contraignantes dans le projet de code en cas de non-respect de ses obligations, autre que celles qui sont déjà prévues dans les règles de procédures applicables.

9. Etant donné son importance en tant qu'instrument juridique d'interprétation et de compréhension des objectifs du code, la délégation marocaine propose d'inclure un **préambule** au niveau du projet de code qui prévoit, entre autre, les considérants suivants :

- Affirmant que les différends en matière d'investissement internationaux doivent, comme les autres différends internationaux, être réglés par des moyens pacifiques et conformément aux principes de la justice et du droit international,
- Affirmant les principes fondamentaux des Nations -Unies relatifs à l'indépendance de la magistrature (1985) ;
- Rappelant les Principes de Bangalore sur la déontologie judiciaire et les commentaires y afférents ;



- Reconnaissant l'importance de développer un code de conduite conforme aux standards internationaux qui consacrent les principes d'indépendance, d'impartialité, et d'intégrité, dans les procédures judiciaires et arbitrales ;

- Reconnaissant l'importance de codifier dans un seul texte des normes de conduite claires, transparentes et détaillées à l'égard des participants aux procédures de règlement des différends en matière d'investissement internationaux (DII) à même de les guider pour résoudre les questions d'éthique dans le cadre de ces procédures.

10. Afin de bien cerner le périmètre du projet de code, la délégation marocaine propose de prévoir une clause portant sur **la portée du code et son objectif**.

A cet effet, et en vue d'éviter la fragmentation des règles applicables en matière de conduite, il est suggéré que le code s'applique aussi bien aux différends découlant des traités d'investissement qu'aux différends fondés sur les contrats d'investissement.

De même, la clause portée désignera tous les acteurs qui seront soumis aux dispositions du projet de code comme proposé au paragraphe 2 du présent document.

Pour ce qui est de l'objectif du « code d'éthique et de conduite », il vise à décrire en termes claires et précis, les règles de conduite minimales auxquelles tous les participants dans les procédures de règlement des différends en matière d'investissement internationaux sont censés obéir.

## **II/ OBSERVATIONS AU SUJET DES DISPOSITIONS DU PROJET DE CODE :**

### **Article 1 : Définitions :**

11. En tenant compte de nos observations formulées au niveau du paragraphe 2 du présent document, il y a lieu de prévoir une définition pour chaque acteur participant dans les procédures de règlement DII ;

12. il y a lieu de définir également un certain de termes qui sont utilisés par le projet de code, tels que le terme « conflit d'intérêt », le terme « intégrité », le terme « honoraires », le terme « frais », le terme « tierce partie », l'expression « informations non publiques » ou l'expression « contacts *ex parte* », l'expression « partialité apparente » etc... ;

13. inclure également dans la portée de la définition du terme « différend en matière d'investissements internationaux », les différends découlant d'un contrat d'investissement (paragraphe 5) tout en prévoyant une définition afférente audit contrat d'investissement.

## **Article 2 : application du code :**

14. Afin d'éviter le chevauchement entre l'article 2 et l'article 11 du projet du code qui porte le même intitulé « Application du code de conduite », il est proposé de renommer l'article 2 comme suit : « Portée du code » et ce, tout en tenant compte nos observations formulées au niveau du paragraphe 10 au sujet de la portée du code.

## **Article 3 : indépendance et impartialité :**

15. En tenant compte de nos observations formulées au niveau des paragraphes 2 et 3 du présent document, les dispositions de cet article devraient être reformulées afin que les obligations d'indépendance et d'impartialité s'appliquent à toute partie prenante qui est appelée à intervenir dans le processus de règlement du DII.

## **Obligations en matière de compétence et de qualité :**

16. Compte tenu que les différends soumis à l'arbitrage affichent une complexité juridique, technique et financière croissante, il est proposé de prévoir des obligations, pour chacun des acteurs participant à la procédure de règlement de DII, **en matière de compétence et de qualité** notamment pour ce qui est des juges, des arbitres et leur assistants, des experts, des conseillers etc... et ce, afin de renforcer l'objectivité et l'indépendance des sentences ou des jugements rendus par les tribunaux et de contribuer à une plus grande efficacité du processus de règlement de DII.

## **Article 4 : Limitation des rôles multiples :**

17. Il est proposé de supprimer le passage suivant « A moins que les parties au différend n'en conviennent autrement », étant donné qu'il est de nature à atténuer le caractère contraignant de cet article et il risque de conduire à un possible conflit d'intérêt.

## **Article 5 : Devoir de diligence :**

18. Pour assurer l'efficacité dans les procédures de règlement de DII notamment en matière de durée, il serait approprié de prévoir un délai maximum pour la résolution des litiges qui peut être prorogé sur demande justifiée par le tribunal et ce, pour s'assurer que la procédure de règlement de DII se déroule de manière efficace en évitant que les parties au différend supportent des frais excessifs ou inutiles . A cet effet, il est proposé de reformuler l'intitulé de l'article 5 comme suit : Devoir de diligence et d'efficacité.

## **Article 6 : Autres obligations :**

19. Il est proposé de mentionner au niveau de cet article, les voies pour assurer les obligations prévues au niveau du (b), telles que les formations continues sanctionnées par des diplômes, la participation aux forums ou congrès internationaux portant sur les questions en relation avec leurs attributions etc...

#### **Article 10 : Obligations d'information :**

20. Il est proposé que les obligations d'informations couvrent une période plus longue allant jusqu'à 10 ans au lieu de 5 ans.

**NB :** La délégation marocaine peut soulever d'autres commentaires sur le projet de code de conduite lors de sa discussion par le Groupe de travail III de la CNUDCI durant ses prochaines sessions.

#### Morocco [ENG] (Non-official translation)

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##### **INTRODUCTION :**

The Moroccan delegation wishes to thank the Secretariats of ICSID and UNCITRAL for their efforts to develop a draft Code of Conduct for Adjudicators in International Investment Disputes.

The Moroccan delegation also wishes to welcome the availability of the Secretariats of ICSID and UNCITRAL to examine the comments to be raised by States concerning this draft code of conduct in order to improve its content with a view to establishing a modern code of conduct, with of transparent and binding rules of ethics which are likely to guarantee fair trials in matters of dispute settlement between investors and States.

Given the importance of the draft code of conduct in the overall reform of the ISDS regime, the Moroccan approach for the development of this draft code aims to design a comprehensive and not partial reform in matters of ethics and conduct, and this, through the establishment of a single and uniform text which should apply to all parties involved in disputes relating to international investment and cover all types of disputes, whether disputes based on investment treaties or those based on an arbitration clause in investment contracts.

To this end, the Moroccan delegation wishes, through its proposals formulated below, to contribute to the design of an innovative and ambitious legal text in matters of ethics and conduct which sets out, in very precise and unambiguous terms, the rules of behavior to which all stakeholders involved in the settlement of international investment disputes are supposed to abide.

In this context and after examining the 2nd version of the draft Code of Conduct for adjudicators in international investment disputes, the Moroccan delegation raised a number of observations concerning this 2nd version of the draft code, which it wishes to share with the ICSID and UNCITRAL Secretariats and delegations participating in the work of UNCITRAL Working Group III on ISDS reform.

The observations of the Moroccan delegation are divided into (I) general observations relating to the draft code of conduct as a whole and (II) observations relating to the provisions of the draft code.

## **I/ General observations relating to the draft code of conduct**

1. The Moroccan delegation proposes to set up a **“universal”** code of conduct which codifies in a single text all the rules governing conduct in the framework of procedures relating to the settlement of international investment disputes (IID) and which can replace all currently existing codes in order to meet the objectives of the reform of the ISDS regime, namely: to ensure the coherence and uniformity of the applicable rules.

2. Contrary to what is provided for in the draft code which lays down rules dedicated only to judges and arbitrators, **the Moroccan delegation suggests that the code of conduct includes rules which are addressed to all the actors participating in the settlement of IID** namely: judges, arbitrators, mediators or conciliators, lawyers, experts and witnesses.

The code may also prescribe rules for parties to the dispute (respondent and investor State), parties not parties to the dispute, funders and members of the ISDS Advisory Center.

All actors participating in the settlement process of IID are responsible for the proper conduct of the arbitration procedure and therefore they must not have a conflict of interest before and during the procedures and must declare all potential conflict of interest prior to their appointment.

Thus, the Moroccan delegation considers that all participants in a settlement procedure of IID must observe international standards regarding independence, impartiality, integrity, efficiency and transparency in order to establish the confidence in the legitimacy of arbitration as a credible, reliable and uncontroversial system of justice.

3. The Code of Conduct may include a **general chapter** in which all common ethical rules applicable to all actors participating in a settlement procedure of IID will be codified and **chapters dedicated to each of these actors** which separately contain specific rules based on the nature of their activity and / or the nature of their intervention (chapter for arbitrators, chapter for mediators, chapters for lawyers, chapter for experts, chapter for witnesses, etc.). Models of declaration of

acceptance of the content of the Code should be provided in an appendix to the Code for each of these actors.

4. The rules of the code of conduct must be established on the basis of good practices, international principles and guidelines in matters of ethics and professional conduct in each of the areas covered by the code **while giving priority to the rules which focus on the standards of behavior.**

5. To guarantee the respect of the rules of the code by all the actors participating in the settlement of IID, the Moroccan delegation considers that it is appropriate to set up a **regulatory body** which supervises the code and ensures compliance with its rules, including the possibility to impose sanctions in the event of violation of its provisions, which should comply with international standards. For the sake of transparency, breaches should be clearly and precisely defined in the code of conduct.

6. In order to ensure the correct application of the code, the Moroccan delegation proposes to establish in the annex to the code, **a guide** in which examples of good and bad practices and examples of appropriate or inappropriate behavior will be provided for each of the standards of the code. As a result, this guide will allow actors participating in the settlement of IID to have a better understanding of the standards of the code of conduct and of their rights and obligations under this code.

7. Based on its comments above, the Moroccan delegation proposes that the code be called: "**Code of ethics and conduct for participants in international investment dispute settlement.**"

8. To strengthen the binding nature of the code's rules, new, more restrictive sanctions should be devised in the draft code in the event of non-compliance with its obligations, other than those already provided for in the applicable procedural rules.

9. Given its importance as a legal instrument for interpreting and understanding the objectives of the code, the Moroccan delegation suggests including **a preamble** to the draft code which provides, among other things, for the following recitals:

- Affirming that international investment disputes, like other international disputes, must be settled by peaceful means and in accordance with the principles of justice and international law;
- Affirming the United Nations Fundamental Principles of the Independence of the Judiciary (1985);
- Recalling the Bangalore Principles of Judicial Deontology and the commentaries thereto;

- Recognizing the importance of developing a code of conduct in accordance with international standards which enshrine the principles of independence, impartiality, and integrity, in judicial and arbitration proceedings;
- Recognizing the importance of codifying, in a single text, clear, transparent and detailed standards of conduct for participants in the settlement of international investment dispute (IID) proceedings which can guide them in resolving issues regarding ethics in the context of these procedures.

10. In order to clearly define the perimeter of the draft code, the Moroccan delegation proposes to include a clause relating **to the scope of the code and its objective**.

To this end, and in order to avoid fragmentation of the applicable rules of conduct, it is suggested that the code apply both to disputes arising from investment treaties and to disputes based on investment contracts. .

Likewise, the scope clause will designate all the actors who will be subject to the provisions of the draft code as proposed in paragraph 2 of this document.

Regarding the objective of the "code of ethics and conduct", it aims to describe in clear and precise terms the minimum rules of conduct to which all participants in the procedures for settling IID should comply with.

## **II/ Observations relating to the provisions of the draft code**

### **Article 1: Definitions:**

11. Taking into account our observations made in paragraph 2 of this document, a definition should be provided for each actor participating in the settlement procedures of IID;

12. It is also necessary to define some of the terms which are used in the draft code, such as the term "conflict of interest", the term "integrity", the term "fees", the term "costs" , the term "third party", the expression "non-public information" or the expression "ex parte contacts", the expression "apparent bias" etc...;

13. Also it should be included in the scope of the definition of the term "international investment dispute", disputes arising from an investment contract (paragraph 5) while providing a definition relating to such investment contract.

### **Article 2: application of the code:**

14. In order to avoid the overlap between article 2 and article 11 of the draft code which bears the same title “Application of the code of conduct”, it is proposed to rename article 2 as follows: “Scope of code”, while taking into account our observations made in paragraph 10 regarding the scope of the code.

### **Article 3: independence and impartiality:**

15. Taking into account our observations made in paragraphs 2 and 3 of this document, the provisions of this article should be reformulated so that the obligations of independence and impartiality apply to any stakeholder who is called upon to intervene in the settlement process of IID

### **Competence and quality obligations:**

16. Given that the disputes submitted to arbitration involves complex legal, technical and financial issues, it is proposed to provide for obligations, for each of the actors participating in the settlement procedure of IID, **regarding competence and quality**, in particular as regards judges, arbitrators and their assistants, experts, advisers etc ... and this, in order to reinforce the objectivity and the independence of the awards or judgments rendered by the tribunals and courts and to contribute to a greater effectiveness of the settlement process of IID.

### **Article 4: Limitation of multiple roles:**

17. It is proposed to delete the following phrase: “Unless the disputing parties agree otherwise”, since it might lessen the binding character of this article and could leading to a possible conflict of interest.

### **Article 5: Duty of care:**

18. To ensure efficiency in the settlement procedure of IID, particularly regarding duration, it would be appropriate to provide for a maximum period for the resolution of disputes which can be extended upon justified request by the court, in order to ensure that the settlement process is carried out efficiently and that the parties to the dispute do not incur excessive or unnecessary costs. To this end, it is proposed to reformulate the title of Article 5 as follows: “Duty of diligence and efficiency”.

### **Article 6: Other obligations:**

19. It is proposed to mention in this article the means to ensure the obligations provided for in (b), such as continuing education leading to diplomas, participation in international forums or congresses dealing with related issues, with their functions etc ...

## **Article 10: Obligations of information:**

20. It is proposed that the information obligations cover a longer period of up to 10 years instead of 5 years.

**NB:** The Moroccan delegation may raise other comments on the draft code of conduct during its discussion by UNCITRAL Working Group III during its next sessions.

## **Panama**

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The Republic of Panama (“**Panama**”) expresses its gratitude to the Secretariats of ICSID and UNCITRAL for their efforts in spearheading the Draft Code of Conduct for Adjudicators in International Investment Disputes. The Code is a welcome initiative, and the first two drafts reflect immense work and care.

### **I. General Comments**

Before turning to the articles that comprise the Draft Code, Panama wishes to make three general comments.

*First*, as other commentators have observed<sup>5</sup>, parts of the Draft Code appear to have beendriven by comments from persons who seem to distrust international arbitrators. However, Panama does not see any basis for a presumption of distrust. In Panama’s experience, international arbitrators take their role seriously, and approach the proceedings with professionalism and integrity.

*Second*, and especially in light of the foregoing, it is important not to lose sight of the factthat the Draft Code is part of a broader reform effort — and that the concerns that motivated this particular exercise are not the only ones that have been aired. Thus, in addition to complaints about repeat appointments, double-hatting, and issue conflicts, there have also been calls for increased efficiency, for predictability and consistent decisions, and for the reduction of expensesand fees. Panama raises this point because the “solution” to one problem could serve to exacerbate others<sup>6</sup>, and it seems imperative to begin addressing priorities.

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<sup>5</sup> See, e.g., Draft Code of Conduct: Comments by Article & Topic as of 14 January 2021, p. 128 (comments of B. Hanotiau).

<sup>6</sup> For example, a ban on double-hatting could limit the pool of available candidates, especially considering the profile suggested in WGIII (see First Draft Code, ¶ 77). That, in turn, could lead to repeat appointments (which, in turn, would increase the potential for issue conflicts).



*Third*, it is equally imperative to consider the practicality of each rule. For instance, although it makes sense in principle to require candidates and adjudicators to disclose various types of events and relationships, it is not clear how an adjudicator would track every type of direct or remote “financial interest” that she might have in every “administrative, domestic court[,] or other international proceeding involving substantially the same factual background . . . [as] in the IID proceeding[.]”<sup>7</sup> Further, requiring an adjudicator to assess whether a separate “administrative, domestic court,” or international proceeding “involv[es] substantially the same factual background” as the IID at hand seems likely to prompt challenges on the basis that the arbitrator has prejudged the facts.

## **I. Comments on Specific Draft Articles**

### **A. Draft Article 1**

The definition of “assistant” appears to establish a presumption that a person other than an adjudicator is permitted to engage in the drafting. In Panama’s view, the presumption should be that an assistant is *not* permitted to conduct any drafting unless the parties otherwise agree.

### **B. Draft Article 4**

Panama agrees with the commentators who have stated that “Article 4 should be tailored to those situations most likely to cause conflict, given the adverse impact of a full prohibition on new entrants in the field and on party freedom of appointment.”<sup>8</sup> However, Panama also believes that this tailoring exercise could be difficult, as the question of whether a conflict exists will often come down to a review of the facts in their context. Accordingly, so as not to articulate a rule that is too strict or too liberal, Panama would propose revising Article 4 to state: “When considering appointments, the disputing parties and Candidates shall consider those situations that are likely to cause conflict, including an Adjudicator’s concurrent service as counsel or expert witness in another IID case involving the same international treaty, the same factual background, and/or at least one of the same parties or their subsidiary, affiliate, or parent entity.”

### **C. Draft Article 7(2)**

The commentary to Draft Article 7 explains that “[Draft] Article 7(2) is bracketed, reflecting different views in comments received. Some suggested that Article 7(2) was unnecessary

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<sup>7</sup> Second Draft Code, Art. 10(b)(ii). Panama notes, however, that the text of this provision is ambiguous, and could have been intended only to require disclosure of “[a]ny financial or personal interest in: . . . any administrative, domestic court[,] or other international proceeding involving **[both (a)]** substantially the same factual background **[as in the IID proceeding;]** and **[(b)]** involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding”

<sup>8</sup> Second Draft Code, ¶ 31.

and could be onerous if there were multiple contacts. Others suggested that a provision such as Article 7(2) could easily be complied with by a recording or transcript and was a useful guarantee of compliance with Article 7(1).”<sup>9</sup>

For its part, Panama agrees with the first camp. Although Panama would not be opposed to including a checkbox on the disclosure form that inquires whether or not the adjudicator had been interviewed, Article 7(2) seems unnecessary and onerous. Panama also notes that commissioning a transcript of an interview would be burdensome and expensive (and that a recording of the conversation might not be permitted in all jurisdictions).

#### **D. Draft Article 10(2)**

With respect to Article 10(2)(a), in Panama’s view, the five-year period seems adequate.

Regarding Article 10(2)(a)(i), Panama agrees with the observation that the ICSID Secretariat had made during the recent webinar: in practice, it may be difficult for adjudicators to identify all of the relevant subsidiaries and affiliates themselves. To enable adjudicators to conduct appropriate searches for conflicts, Panama would suggest that the common practice explained at the webinar (namely, the claimant investor’s inclusion of a corporate structure chart as part of its request for arbitration) be memorialized in a formal rule.

As for Article 10(2)(a)(ii), Panama believes that the disclosure obligation should be limited to ISDS matters (IID and investment arbitration based on contracts or legislation), and should not include international or domestic commercial arbitrations.

Finally, with respect to Article 10(2)(c), Panama’s view is that the disclosure obligation should be limited to IID proceedings. Including non IID proceedings could create an undue burden on adjudicators.

#### **E. Draft Article 11**

Panama is concerned that the text of what is now Draft Article 11(2) will cause an uptick in adjudicator challenges, and lead to increased expenses for the parties. It therefore proposes that the drafters revert to the text that had appeared in the previous version (*viz.*, “The disqualification and removal procedures in the applicable rules shall continue to apply”).<sup>10</sup>

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<sup>9</sup> Second Draft Code, ¶ 37.

<sup>10</sup> First Draft Code, Article 12(2).

## Singapore

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As a general editorial comment, we have replaced “part(y)(ies)” with “disputing part(y)(ies)” for clarity.

### **Proposed edits to Article 1 - Definitions**

Art 1(1): “Adjudicator” means Arbitrator ~~and or~~ Judge;

Art 1(3): “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, as agreed with the disputing parties;

Art 1(4): “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, [or who is under consideration for selection as a Judge on an *ad hoc* basis .] but who has not yet been confirmed in such role;

Art 1(6): “Judge” means a judge appointed to a standing mechanism for IID settlement, including a judge appointed on an *ad hoc* basis; and

Art 1(7): “Treaty Party” means a Party to the applicable treaty.

To respond to Article 1(4), we note that Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates. A “Candidate” currently includes a potential Judge. We would like to seek clarification if the intent is for these articles to apply to the selection of ad hoc Judges, similar to the ad hoc judges of the International Court of Justice, rather than permanent Judges of any investment court. If so, we suggest inserting the words “ad hoc” in the definition of a Candidate.

In our view, Articles 6(2), 7(1) and 7(2) are not applicable to permanent Judges of an investment court (including a person proposed but not yet confirmed as a Judge of a standing mechanism). For Article 6(2), the rules for a standing mechanism would lay out the requirements on competence, skills or availability of the permanent Judges. Articles 7(1) and 7(2) are not applicable to potential permanent Judges who may be assigned to a specific case, as a standing mechanism would likely not provide for the party-appointment of permanent Judges, and have its own rules on the selection of permanent Judges for a particular proceeding.

### **Proposed edits to Article 2 - Application of the Code**

Art 2(4): ~~Articles 7(3) and~~ 8 of this Code continues to apply to Adjudicators after the conclusion of the IID proceeding.

On our suggested edits to Article 2(4), please see our comments on Article 7(3). We are supportive of the suggestion in Article 2(5) to include a provision addressing the interplay between this Code and any treaty-specific Code of Conduct.

### **Proposed edits to Article 3 - Independence and Impartiality**

Art 3(2)(b): be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding;

#### **Proposed edits to Article 4 - Limit on Multiple Roles**

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or party-appointed expert or witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].

Singapore welcomes the insertion of the word “concurrently”. As set out in our written comments on version 1 of the draft COC, an outright prohibition against double hatting should be limited to: (i) cases where the adjudicators play different inconsistent 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. On (ii), we propose to replace “expert witness” with “party-appointed expert or witness”. The mere fact that an adjudicator acts as an expert or witness in another IID case is not sufficient to give rise to an apparent conflict of interest. For instance, the adjudicator may be appointed by another IID Tribunal as a neutral third party to provide expert evidence on a discrete point of law.

#### **Proposed edits to Article 5 - Duty of Diligence**

Art 5(1): Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the disputing parties and the administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner.

In relation to Article 6(1)(c), it is unclear who the “participants in the proceeding” are. Article 8(4) of version 1 of the COC (on which this paragraph is based), stated that “Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties”. We seek clarification on whether “participants in the proceeding” is intended to replace “the parties and one another”, or whether it is intended to refer to a broader category of persons in the proceedings, such as witnesses and experts.

#### **Proposed edits to Article 7 - Communications with a Party**

Article heading: **Communications with a Disputing Party**

Art 7(2): [The contents of any pre-appointment communication concerning the proceeding between the Candidate and a disputing party shall be fully disclosed to all disputing parties upon appointment of the Candidate.]

Art 7(3): During the proceeding, aAn Adjudicator shall not have any *ex parte* contacts with a disputing party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the disputing parties.

For the reasons set out in our comments on Article 1(4), Article 7(1) and (2) should not apply to potential permanent judges.

On Article 7(2), Singapore reiterates our comments in version 1 of the COC that the contents of pre-appointment communications should be disclosed.

On Article 7(3), Singapore supports Switzerland's proposal to insert "during the proceeding" to make clear that this obligation only applies when the proceeding is ongoing. In our view, it is too restrictive to include a prohibition against an adjudicator making ex parte communications with a disputing party after the conclusion of the proceedings, as interests of impartiality and transparency no longer apply. We have therefore proposed to delete this paragraph from the surviving obligations in Article 2(4).

#### **Proposed edits to Article 8 - Confidentiality**

Art 8(1): Candidates, ~~and~~ Adjudicators, former Candidates and former Adjudicators shall not:

Art 8(2): Adjudicators and former Adjudicators shall not:

Art 8(2)(b): disclose any decision, ruling or award to the disputing parties prior to delivering it to them, unless the applicable rules or treaty so permits;

Art 8(3): ~~The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.~~

We note the intent of Article 8(3) and thank the Secretariat for ensuring that the obligations in Article 8 are surviving obligations. Based on the SSDS COC in the CPTPP, surviving obligations are indicated in the relevant paragraph itself by explicitly referring to former panellists (see paragraphs 2, 3(b), 7 and 8(a)-(c)). In our view, this approach is optically clearer and avoids having to make cross-references. We propose to adopt a similar approach here. For this reason, we suggest deleting paragraph 3.

#### **Proposed edits to Article 9 - Fees and Expenses**

Art 9(2): Any discussion concerning fees shall be communicated to the disputing parties through the entity administering the proceeding, or by the presiding Arbitrator if there is no administering institution.

Art 9(3): Adjudicators ~~remunerated on a non-salaried basis~~ shall keep an accurate and documented record of their time devoted to the procedure and of their expenses, as well as the time and expenses of any assistant.

In relation to Article 9(3), the obligation to keep an accurate and documented record of time and expenses should apply to all adjudicators, rather than those remunerated on a non-salaried basis. Even if an adjudicator's fees are fixed, we think that it is important to keep such records for the purposes of transparency and accountability to the disputing parties.

### **Proposed edits to Article 10 - Disclosure Obligations**

Art 10(1): Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

Art 10(2)(a)(i): the disputing parties, and any subsidiary, affiliate or parent entity identified by the disputing parties;

Art 10(2)(a)(ii): the disputing parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the disputing parties' legal representative in any IID [and non-IID] proceedings;

Art 10(2)(a)(iv): any third-party funder with a financial interest in the outcome of the proceeding and identified by a disputing party;

Art 10(2)(b)(ii): any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same disputing parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and

Art 10(3): Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the disputing parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.

Art 10(5): Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. ~~The fact of disclosure by an Adjudicator does not establish a breach of this Code.~~ Disclosure of an interest, relationship or matter is without prejudice as to whether that interest, relationship or matter is indeed covered by this Article, or whether it warrants recusal, disqualification, removal or replacement in accordance with the applicable rules.

In relation to the inclusion of the square bracketed phrase “non-IID proceedings” in Article 10(2)(a)(ii) and 10(2)(c) for disclosure, we are supportive. We think involvement in or appointment by any of the disputing parties in other non-ISDS international arbitrations, mediations or conciliations are also relevant and should be disclosed.

In relation to Article 10(5), we have suggested drafting changes to take into account the suggestion that this Article should not be subject to the enforcement procedures in Article 11 (see explanatory paragraph 56). We understand and support this intent, which is to limit frivolous challenges to adjudicators, especially where the failure to disclose is in good faith or unintentional. However, the obligation of disclosure is a key obligation that provides legitimacy to the system of IIAs. We are concerned that Article 10 might be viewed as a “second tier” obligation if we were to expressly provide that it is not subject to enforcement procedures. To bridge both sets of concerns, we have suggested language that explicitly provides that disclosure of an interest is without prejudice to whether the interest falls under this Article, or whether it warrants disqualification.

## **Proposed edits to Article 11 - Enforcement of the Code of Conduct**

Art 11(2): If a disputing party considers that an Adjudicator has violated a provision in this Code of Conduct, tThe disqualification, and removal and replacement procedures in the applicable rules shall apply to breaches of Articles 3-8 the Code.

In some cases, the disputing parties might not agree on whether there is a violation of the Code in the first place, and the applicable rules may set out the applicable procedures if there is a dispute. We have therefore suggested edits to take this into account. That said, we have no objections to maintaining the current text. We would also prefer not to exclude certain articles from enforcement, as elaborated in our comments on Article 10(5).

## Switzerland

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### **I. GENERAL COMMENTS**

Switzerland would like to thank the ICSID Secretariat and the UNCITRAL Secretariat for their joint work on the revised version of the Draft Code of Conduct. The re-ordering of the provisions provides for more clarity and great efforts have been made to take into account the comments which were previously made.

Furthermore we think that it would be very helpful to prepare a Commentary on the Code to cover specific questions.

### **II.COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT TEXT**

#### *Article 1 – Definitions*

Paragraph 3 and note 9: It would indeed assist greater clarity to specify in the commentary that the term “Assistant” does not include persons employed by the institution/court seized of the dispute acting in such capacity.

Paragraph 3 and note 10: If the commentary so notes, it should also mention “deliberation attendance”.

Paragraph 5 and note 13: We would like to remind that “*it was agreed that the Working Group would focus on treaty-based ISDS and would later consider the possibility of extending the results of its work to contract and investment law based ISDS*” (A/CN.9/930/Rev.1, para. 30). Hence in Switzerland’s view, it is appropriate to cover only treaty-based disputes for the time being.

## ***Article 2 – Application of the Code***

Paragraph 5: The conflict rule contained in Art. 2(5) could be slightly rephrased as follows: “This Code shall apply only insofar as its provisions are compatible with those of a Code of Conduct contained in the applicable investment treaty”. As currently formulated, the rule calls for an automatic exclusion of the UNCITRAL-ICSID Code as soon as an IIA contains a different code. However, there may be instances where the IIA-specific code only has basic provisions which may be complemented/supplemented by the UNCITRAL-ICSID Code (to the extent that the latter is not in conflict with the former).

Further regarding para. 5, the need for a conflict rule for treaties containing a code of conduct will depend on the modalities for the implementation of the Code.

The Code should ideally be made applicable to existing treaties through a multilateral convention, similar to what has been achieved with the Mauritius Convention for transparency in ISDS proceedings.

## ***Article 3 – Independence and Impartiality***

Paragraph 1: The term “apprehension” of bias is not a common term in international dispute settlement. The most commonly used term is “appearance of bias” and we would thus suggest adopting the latter. Indeed, the term “appearance of bias” is found in the explanatory note 22 to this paragraph and in other provisions of the Code (see Article 10, paragraph 1).

Paragraph 2, *chapeau*: Not all the examples would necessarily result in a lack of impartiality and independence (e.g. an Adjudicator who is influenced by fear of criticism may pay particular attention to his or her duties and avoid any impropriety). Therefore, it would be preferable to introduce the list of examples by stating: “Lack of independence and impartiality can in particular result from the fact that an Adjudicator:”, after which the start of each subparagraph must be adjusted (i.e. to “is influenced”, “takes”, “allows”, “uses”, “assumes”).

Paragraph 2(b): We would suggest adding “counsel to a disputing or non-disputing party”. It is important that an Adjudicator not be influenced by a feeling of loyalty to counsel to the parties (in addition to the other actors already mentioned in paragraph 2(b)). Indeed, a risk of “loyalty” may arise in case of so-called repeat appointments by the same counsel (regardless of the party which the counsel represents), a concern which appears to be addressed in a different provision of the Code.

Article 3, note 24: The suggestion of a commentary giving “examples of conduct falling within Article 3(1)” other than the situations listed in Article 3(2) which is precisely said to “expand on



Article 3(1) by giving examples” (see note 23) is somewhat misleading. It could give the impression that Article 3(1) and Article 3(2) provide for other types of obligations when they actually both deal with independence and impartiality. While the examples in note 24 refer to situations that resemble more a lack of independence and the examples in Article 3(2) cover both independence and impartiality, both sets of examples seek to illustrate instances of breach of the obligation of independence and impartiality which is the topic of this article. Moreover, there are partial overlaps between the examples enumerated in Article 3(2) and those listed in note 24 (note 24(iii) overlaps with Article 3(2)(c); note 24(ii) overlaps with Article 3(2)(d); and note 24(i) overlaps with Article 3(2)(b)). Therefore, it may be preferable to abandon the suggestion of a commentary along the lines of note 24 and, if deemed necessary, expand some of the examples in Article 3(2).

#### ***Article 4 – Limit on Multiple Roles***

In the context of ad hoc ISDS arbitration, Switzerland is of the view that, instead of a ban on double-hatting, the code should contain an obligation to disclose the overlapping roles with a possibility for the parties to challenge the Adjudicator.

Should the current draft provision be retained, it has to be limited to those situations most likely to cause conflict. The lack of diversity is 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. Considering that a full-fledged proceedings generally lasts several years, it is unrealistic to think that an arbitrator appointed in a single proceedings can afford not to work on any other case, be it as counsel or in another capacity, for the whole duration of the proceedings. Accordingly, the prohibition to act concurrently as counsel or expert witness should be tailored as proposed in the bracketed text to cases (i) involving either the same or related parties and (ii) resulting from essentially similar facts or measures.

#### ***Article 7 – Communications with a Party***

Note 39 correctly states that “Arbitrators ... may communicate *ex parte* with the party that appointed them for the sole purpose of selection of a presiding Arbitrator by the co-Arbitrators, if such a selection method is offered by the relevant rules or treaty or where the parties consent to such a method”. This appears like an important issue that should be included in the text of Article 7 (as third sentence in paragraph 1 or preferably as a new paragraph 2), rather than left for the Commentary.

#### ***Article 8 – Confidentiality***

Paragraph 1(a): There may be situations in which the Adjudicator may be required by a court order to disclose information; or the Adjudicator may be sued by a party and therefore need to

disclose certain information to protect his/her rights. In this respect we suggest to add such an exception.

Paragraph 2(b): We would suggest to add "... unless the applicable rules or treaty so permits or the disputing parties otherwise agree" (which seems indeed the understanding under note 42 ("or with party consent"))).

Paragraph 2(c): Note 43 specifies that this prohibition only applies to decisions, rulings or awards not in the public domain. While this may be implied in the use of the verb "disclose", for greater clarity, it may be advisable to add the reference to public domain in Article 8(2)(c) itself.

### ***Article 9 – Fees and expenses***

Paragraph 1: In an *ad hoc* arbitration (i.e., an arbitration not administered by an institution) the fees are normally discussed and agreed with the full tribunal once constituted. The rule as it now stands would prompt each candidate to make his/her own arrangement when being approached to act as arbitrator. Such a course would lack transparency and result in unequal fees among arbitrators. We thus would suggest deleting this paragraph, which does not appear very important in any event.

Paragraph 3: "and documented" should be deleted as it is duplicative of the term "record". Hence, "accurate record" should be sufficient.

### ***Article 10 – Disclosure Obligations***

Paragraph 1: We suggest adding "justifiable" before "doubts". The standard of "justifiable doubts" is the prevailing one in this setting. See, e.g. UNCITRAL Arbitration Rules (2010): "*When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.*" It seems to us that it would be inappropriate for the Code to suggest a different standard.

Furthermore, the formulation "*or demonstrate bias, conflict of interest, impropriety or an appearance of bias*" does not seem correct. A circumstance that "*demonstrates bias, conflict of interest, impropriety*" etc. is necessarily included within those raising justifiable doubts about independence and impartiality, and the "appearance of bias" is already covered by the reference to the "eyes of the parties". We would thus suggest to delete this part. The first part of the sentence is sufficient to set out the scope of the disclosure obligations.

Paragraph 2, *chapeau*: The drafting of the sentence could be improved as follows: "Disclosures made in accordance with paragraph (1) shall, in particular, include the following information".

Paragraph 2(a)(i): The rule only addresses affiliates from the perspective of private parties but appears to leave out similar relationships with State parties. A proposal for a new formulation is included below at the end of the next paragraph.

Paragraph 2(a) (i) and (ii): We understand the specification included in sub-paragraph (ii) (“including all appointments”) to address repeat appointments. We note that the same specification is not included in paragraph 2(a)(i) which covers relationships with the parties in general terms. However, repeat appointments should be disclosed also in respect of the same party (regardless of counsel). Indeed, a party may be represented by different counsel in different investor-State proceedings or not be represented by outside counsel. In those circumstances, repeat appointments by the same party raise similar concerns as those that seem to underlie the rule in sub-paragraph (ii). Hence, we would suggest to unify the language in the two sub-paragraphs.

Therefore, taking into account the last two comments, paragraph 2(a)(i) could be reformulated as follows:

“the parties, including, in the case of a private party, its subsidiaries, affiliates, and parents identified by the parties, and, in the case of a state party, its agencies and state-owned enterprises, identified by the parties, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties (or any of the afore-mentioned entities) in any IID [and non-IID] proceedings”.

With regard to the bracketed text in sub-paragraph (ii) (and in sub-paragraph (i) in our proposal), we are in favor of extending the disclosure also to non-IID proceedings, as what matters here is the number of appointments and not the subject-matter of the proceeding (the situation is thus different from letter (c), which is addressed below).

Paragraph 2(c): We are of the view that the disclosure should cover IID cases only because these are the cases that matter in respect of possible issue conflicts. Furthermore a potential adjudicator who was for example counsel in a commercial case may be bound by a confidentiality obligation preventing him or her from making a disclosure. Moreover, relationships with parties, counsel, Adjudicators and experts linked to commercial arbitrations will in any event be disclosed under paragraph 2(a). Finally, a limit of 5 years seems appropriate.

Paragraph 5, second sentence: It goes without saying that “[t]he fact of disclosure by an Adjudicator does not establish a breach of this Code”. If the Code *obliges* the Adjudicator to make disclosures, we do not see how he/she could be in breach for having complied with the Code. We would suggest to reformulate the rule as follows: “the fact of disclosure does not establish in itself a lack of independence or impartiality”. This is linked to the fact that the

circumstances falling within the scope of the disclosure are broader than those that justify a disqualification for reasons of lack of independence and impartiality.

Finally the requirement to disclose publications has been rightly removed. Switzerland is of the opinion that the disclosure of a publications list does not appear useful first because these lists are readily available from different sources and second because scholarly writings are as a rule not considered affecting an adjudicator's impartiality and independence.

### ***Article 11 – Enforcement of the Code of Conduct***

Switzerland considers that Article 11 merits further discussion and clarifications as it raises a number of important issues, as one can also appreciate from the “Draft note: Means of implementation of the Code of conduct for adjudicators in international investment disputes (IID) and enforcement of the obligations contained therein”.

We would in particular welcome clarifications on Article 11(2), which provides that “[t]he disqualification and removal procedures in the applicable rules shall apply to breaches of Articles 3-8 the Code”. In our view, assuming the Code is applicable to a given proceeding, it is not clear whether Article 3 to 8 of the Code

- (i) Introduce additional grounds for disqualification or removal under the applicable rules, separate from lack of independence and impartiality;
- (ii) Simply elucidate the circumstances that may give rise to justifiable doubts on impartiality and independence under the applicable rules; or
- (iii) Prevail over or modify any existing grounds under the applicable rules, to the extent they are not compatible.

For instance, under Article 57, first sentence, of the ICSID Convention “[a] party may propose to a [...] Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”. Article 14(1) of the ICSID Convention, in turn, provides that “[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”. We have noted the explanation in the draft note that “disqualification procedures are governed by Articles 14, and 56 through 58 of the ICSID Convention and that arbitrators (and conciliators) cannot be disqualified for other reasons” (Draft note, p. 2, emphasis added).

However, Article 6(1)(b) and (c) of the Code for example provide that an Adjudicator shall “make best efforts to *maintain and enhance* the knowledge, skills, and qualities necessary to

fulfil their duties” and “treat all participants in the proceeding with *civility*”. These obligations do not appear to have any obvious counterpart in Article 14 of the ICSID Convention. If an ICSID arbitrator fails to maintain and enhance his/her knowledge or does not treat a participant with civility, can he/she be disqualified under Article 57? Will a lack of civility be deemed a factor indicating that the arbitrator cannot “be relied upon to exercise independent judgment” or is it a new and separate ground for disqualification separate from those enumerated in the Convention (which the draft note appears to exclude)?

Similarly, in *ad hoc* arbitrations governed by national law the question may arise as to whether all of the grounds provided under Articles 3 to 8 of the Code would be compatible with grounds for disqualification under national law.

In sum, Switzerland considers that Article 11 raises important issues that require further clarification and discussion.

Finally, regarding the proposed text of the “Declaration, Disclosures and Background Information” which is annexed to the Code, we observe that the afore-mentioned note states that “[i]ncorporating the Code in the arbitrators’ declaration would mean that arbitrators would undertake to be bound by the Code”. However, the text of the proposed declaration is not sufficiently clear in this respect. We would suggest to modify paragraph 1 of the declaration as follows:

“I acknowledge having received a copy of the Code of Conduct (attached) for this proceeding. I have read and understood this Code of Conduct and undertake to comply with it.”

## Turkey

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Turkey respectfully submits its comments on the second version of the Draft Code of Conduct.

### Article 3 / Independence and Impartiality

According to the Article 3/1, adjudicators shall be independent and impartial, and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias. One of the examples within the scope of Article 3/1 is “the adjudicator or a member of their family is employed by or has equity in a juridical entity that is a party to the proceeding”. Turkey suggests that if “a member of their family” is to be included as a commentary within in the scope of Article 3, the degree of relationship should be clarified.

Additionally, in order to explain the expressions of “public clamor” and “fear of criticism” in 3/2-a, examples should be given in the comments.

## Article 10 / Disclosure Obligations

According to the Article 10, adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. In the second paragraph of Article the 10, the issues that adjudicators should explain are regulated.

Turkey suggests that to facilitate the application and understanding of the code, the clarifications regarding the first paragraph of the Article 10 can be included in the comments.

Turkey would like to again underline that the terms “parties” should be interpreted to include “controlling shareholders” of the parties. As we mentioned in our submission dated 30 July 2020, the ones who direct the company identify the strategy for the company and further choose the arbitrator are controlling shareholders. This issue may lead to a conflict of interest. In order to avoid any problem that may impair the impartiality and independence of the arbitrators, the term “parties” should be interpreted to include the expression “controlling shareholders”. Hence, Turkey again emphasizes on including the commentary that adjudicator should disclose any interest, relationship or matter also with controlling shareholders.

## United Kingdom

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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 the development of the Code 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 some of the policy and drafting choices raised within the commentary on the code of conduct.
4. The UK would like to stress the importance of clear and concise drafting to ensure consistent interpretation of the Code. We also consider that we should not rely on the commentary to provide clarity when this could be easily achieved in the main body of the code. We see that the purpose of the commentary is to provide interpretational guidance and it should not be used to define or describe key concepts.
5. The UK feels confident that the Working Group will be able to agree a final Code of Conduct from this draft. We believe that agreement on the code could demonstrate an early success and the viability of our ISDS reform negotiations.

## **Article 1 – Definitions**

6. The UK notes that in the current system of ISDS arbitration, “Judges” do not exist. We understand the inclusion of the definition of “Judge” is to account for a future potential standing mechanism for ISDS, however we do not feel it is appropriate to include a definition of Judge or prejudice how the Code could or should apply to them while negotiations are ongoing. In agreeing this in the Code at this stage we risk precluding the negotiated outcome around a potential standing mechanism.
7. Further, should the Working Group wait until negotiations around a standing mechanism have concluded in order to assess how this ought to interact with the Code on matters such as its application to Judges, this will have implications for when the Code of Conduct itself can be implemented.
8. However, we are confident a solution can be found that allows for early implementation of the code. The UK suggests that the Working Group should seek to agree the Code as it applies to arbitrators in the current system and, reconsider its application to a standing mechanism and its Judges once negotiations on this issue have progressed.
9. Notwithstanding our above comments, the UK suggests the word “and” in paragraph 1 is replaced with “or”.
10. The UK has concerns with applying the code to non-ISDS disputes, including State-to-State and contract-based arbitration. We believe that this would fall outside of the mandate of the Working Group and therefore is beyond the scope of what we have been asked to and been able to properly consider.
11. The UK thinks the Code ought to be clearer in how it defines Assistant, as suggested within the explanation of changes. We think it would be useful include the list of what an Assistant does not include within the definition itself, rather than in the Commentary.

### **Article 2 – Application of the Code**

12. The UK questions whether Article 2, paragraphs 1, 3 and 4 are necessary. It is clear throughout the Code which provisions apply to Adjudicators, Judges and Candidates and summarising as such in Article 2 is repetitive.
13. The UK believes that Assistants should themselves be responsible for ensuring that they are aware of and comply with the code. We note paragraph 16 in the paper provided by the Secretariats which states that in practical terms parties would likely ask for Assistants to be removed directly, rather than the burden of non-compliance fall on the adjudicator should a breach be found. We believe the drafting should reflect these practicalities.

### **Article 3 – Independence and Impartiality**

14. The UK supports high standards of independence and impartiality in the Code of Conduct and is broadly supportive of Article 3 as it stands. However, we do think that the drafting of this Article could be improved by breaking up paragraph 1, removing the words “and shall take reasonable steps... bias” and importing them into paragraph 2, so it reads as follows:

“2. Adjudicators shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias. In particular, they shall not:

a....”.

15. The UK considers that the suggestion at paragraph 25 in the commentary, should be included within the Code as an additional Paragraph 3.3. This is on the basis that this represents a crucial caveat which forms a principle of the Code, so should be included within the main body rather than in explanatory commentary.

#### **Article 4 – Limit on Multiple Roles**

16. As per our previous submission on the Code of Conduct, 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.
17. The UK considers that overly strict double hatting rules would create additional unintended impacts, such as affecting 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. The UK considers that strengthening the independence and impartiality requirements within the Code of Conduct is a more effective approach to dealing with this issue.
18. The UK supports a clause, such as the one in the square brackets, which limits the roles an Adjudicator can take on while not outright banning double-hatting. However, the UK does not support the text in the square brackets as it currently stands.
19. The UK would welcome further clarity about the scope of “same factual background”, in particular what the Working Group considers that this would reasonably cover and to what extent. As is, we think that this drafting choice may lend itself to a broad interpretation of the scope of the phrase “same factual background”, which could lead to inconsistencies in interpretation and application. Tighter drafting would further avoid the question of who will be judging whether the factual background is the same, and any dispute in that regard. We should provide greater clarity within the Code itself, however we must first establish amongst the Working Group the scope.
20. The UK wonders whether an appropriate alternative would be to limit this to the same measure or series of measures, in addition to the requirement for at least one of the same parties, or their subsidiary, parent or affiliate entity.

#### **Article 5 – Duty of Diligence**

21. The UK welcomes the commitments made in Article 5 concerning the availability and diligence of arbitrators and the removal of limitations of the number of cases an adjudicator can handle. However, the UK believes that the use of the phrase “and shall refuse competing obligations” in paragraph 1 is unclear and unnecessarily broad. For example, it is unclear whether this is intended to relate to personal obligations, legal



obligations, or simply workload. The UK considers that requiring an Adjudicator to refuse obligations beyond their workload would be too onerous.

22. This phrase, if deleted, could be replaced with clearer drafting which seeks to achieve what we believe is the same aim; to prioritise the given dispute in their workload. The UK would however be grateful for clarity from the Working Group as to the scope of the “obligations” we would be expecting them to refuse before we can properly consider alternative drafting.

#### **Article 6 – Other Duties**

23. The UK supports the intention of Article 6 and looks forward to discussions on how to tighten the drafting of this article in the Working Group.

#### **Article 7 – Communications with a Party**

24. The UK suggests that replacing “reasonably can anticipate” with “reasonably anticipate” in paragraph 1 of Article 7 would improve the drafting.
25. The UK considers that the obligation in Article 7, paragraph 2 would be too onerous if there were multiple contacts between the Candidate and a party and do not support its inclusion in its current form. We suggest this obligation should only go as far as requiring obligation for pre-appointment communication between the Candidate and a party to be disclosed only where the communication is directly relevant to the potential appointment.

#### **Article 8 – Confidentiality**

26. The UK supports the current drafting of Article 8 and looks forward to further discussion of these articles in Working Group III.

#### **Article 9 – Fees and Expenses**

27. The UK believes that there is a potential drafting inconsistency between paragraphs 1 and 2 of Article 9. Requiring discussions of fees to be communicated to the presiding Arbitrator is inconsistent with the requirement that discussion concerning fees shall be concluded before constitution of the adjudicatory body.
28. The UK continues to support transparency around discussions of fees and would welcome the Secretariats revisiting this point and suggesting another form of drafting that may be better suited.

#### **Article 10 – Disclosure Obligations**

29. The UK considers that applying the disclosure obligations in 2(ai) and 2(c) to any non-IID proceedings would potentially be overly burdensome for Adjudicators and therefore does not support application of these obligations to non-IID proceedings in this way if such proceedings are to be considered to fall within the scope of our mandate and covered by the Code.

30. The UK also notes that requiring disclosure related to non-IID cases could conflict with confidentiality arrangements related to those cases. Requiring disclosure of information relating to non-IID cases could potentially prevent or disincentivise arbitrators from taking on commercial and/or IID cases, which would not be a desirable outcome.
31. However, the UK considers there may be information relating to non-IID proceedings that could be relevant in determining the independence and impartiality of an Adjudicator. We would support disclosure of such information concerning non-IID cases when the information is directly relevant to the IID case in question. We suggest that this would cover cases featuring at least one of the parties, their subsidiaries, parent entities or affiliates but the UK is open to further discussions on this point in the Working Group, to identify if there are other considerations here.

### **Article 11 – Enforcement of the Code of Conduct**

32. 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. The UK supports not applying Article 11 to Article 10 and agrees that a failure to disclose could be factually relevant to establishing a breach of Articles 3 to 8, but it is not in and of itself a ground for disqualification.
33. In line with our comments on Article 2 of the Code, the questions whether Article 11, paragraph 1 is necessary. It is clear throughout the Code that Adjudicators and Candidates must comply with the applicable provisions. It is also inherent that in adoption of the Code that Adjudicators and Candidates should apply with its obligations. Should we wish to streamline the Code further, the UK suggests this could be removed.

### **Implementation of the code**

34. The UK supports broad implementation of the Code as this will ensure that its impact is maximised. The UK thinks it is important, however that this group considers how we can minimise the risk that broad implementation may lead to fragmentation resulting in multiple codes of conduct in use. Consistency is important in order to maximise the Code's credibility and to create consistency of standards used in IID disputes.
35. In this regard, discussion around implementation should also consider how we ensure consistency is maintained once implementation has taken effect. It will be important to ensure that, if the Code is agreed and implemented through multiple channels, updates made to the Code can be reflected consistently across the various means of implementation.
36. In this sense, it will be particularly important to consider how the Code relates to a future potential standing mechanism. The UK is of the view that it is preferable to incorporate the Code of Conduct into the rules and regulations of any standing mechanism, rather than within its establishing principles. In the latter scenario, the UK expects it would be much more difficult to make amendments to the code if needs be.

37. The above is without prejudice to the UK's view, given in our comments on Article 1, that the Working Group should seek to develop the Code as it applies to the existing system of ISDS arbitration and reconsider its application to a standing mechanism once negotiations on this issue have progressed. We believe that agreement on the code could demonstrate an early success and the viability of our ISDS reform negotiations.

## United States

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General: The United States thanks the Secretariats of ICSID and UNCITRAL for their work on the revised version of the draft Code of Conduct for Adjudicators in International Investment Disputes. The revised draft makes progress toward establishing a set of default principles to ensure the impartiality and independence of adjudicators in international investment disputes (IID). The United States appreciates the incorporation of comments that we made on the initial draft, as well as the general efforts to streamline the code and clarify the ethical obligations and related duties of adjudicators.

The United States nonetheless has additional comments to submit on this draft, as well as some additional concerns about several provisions, for consideration of the preparation of a third version of the draft Code.

We also look forward to the opportunity to review and discuss the draft commentary that will accompany the code provisions, as that component of the draft Code will be important for the Code's ultimate application and interpretation. The United States welcomes the intended efforts by the Secretariats to draw on existing ethical guidelines for adjudicators, such as the IBA Guidelines, so as to incorporate existing best practices in this area.

Finally, the United States supports the efforts to establish a single code that would apply to all adjudicators of IID to the greatest extent possible. Suggestions that certain duties are inappropriate for any adjudicators who might be appointed to a future permanent or standing body are premature and prejudice the process by which such adjudicators will be selected.

Moreover, it may be beneficial to be overinclusive as to coverage and note that a duty may not apply in a particular instance or will be modified by subsequent rules rather than attempt to carve out certain duties on the assumption that adjudicators to a permanent body may not face potential conflicts that are similar to those faced by adjudicators in traditional investor-State dispute settlement proceedings.

Article by Article:

### ***Article 1 – Definitions:***

Paragraph 2: It is unclear whether the use of the term “ad hoc” correctly captures the contrast with a judge appointed to a standing mechanism. It may be useful to replace it with “arbitral” or another term that will also clearly capture arbitrations that are administered by arbitration institutions or delete the term altogether. Suggested language:

“Arbitrator” means a member of an *ad hoc* arbitral tribunal or administered arbitration panel, or a member of an ICSID *ad hoc* Committee who is appointed to resolve an “International Investment Dispute” (IID).

Paragraph 5: It would be preferable to provide a choice to include IID cases that arise under investment contracts or foreign investment law, so that States may opt to apply the Code to all kinds of disputes that are comparable to IIDs under their international investment agreements (IIAs). At least to the extent that such bases for a dispute are included in an IIA, the rationale for excluding these types of disputes is unclear.

### ***Article 2 – Application of the Code:***

Paragraph 4: Regarding the reference to the duty in Article 7(3), see the specific comments on that Article below.

Paragraph 5: The United States welcomes the inclusion of a provision to address the relationship between the Code itself and any other code of conduct or ethical obligations that are included in an existing IIA. We believe, however, that the current rule may be overly broad and inflexible. As noted in the U.S. comments on the first draft, the Code itself should apply unless there is an inconsistency between a provision of the IIA, *i.e.*, the governing document, and a provision of the Code, in which case 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. Suggested language:

This Code shall apply unless otherwise modified by provisions in a Code of Conduct or other ethical obligations for Adjudicators included in the treaty upon which consent to adjudicate is based.

It may also be useful to include a provision that, if the Code has not been incorporated into an IIA, it will apply in its entirety when the parties to the dispute expressly agree to its application in a particular dispute, such as when they adopt arbitration rules that may include the Code. Finally, it may be preferable to allow States to indicate whether they want the new Code to replace or supplement an existing Code or other ethical provisions included in their international investment agreements or other legal bases for investment disputes through the mechanism of a multilateral instrument, once concluded.

### ***Article 3 – Independence and Impartiality:***

Paragraph 1: Consistent with the U.S. comments on the first version of the draft Code, this provision should include the duty to avoid direct and indirect relationships that give rise to conflicts of interest and reasonable steps to avoid not only the appearance of bias, but also avoid the appearance of impropriety or a lack of independence or impartiality. The United States agrees that it would be useful to include illustrative examples in the commentary of what type of conduct falls within the scope of this provision, as well as emphasizing the fact-specific nature of any inquiry into a breach of independence and impartiality. We note that IBA Guidelines acknowledge that conflicts of interest can arise from either direct or indirect relationships, whereas the WTO Rules of Conduct and numerous codes of conduct agreed to by States in connection with investment chapters of free trade agreements require that covered persons shall avoid both “direct and indirect” conflicts of interest. Drawing on the IBA Guidelines, it may be useful to define a **direct conflict of interest** as equivalent to a conflict arising from a direct relationship, such as an identity between a party and an adjudicator and define an **indirect conflict of interest** as equivalent to a conflict arising from an indirect relationship, such as an adjudicator who indirectly holds shares in one of the parties to a dispute, or one whose close family member has a significant financial or personal interest in an affiliate of one of the parties.

In its description of the behaviors that an adjudicator shall take reasonable steps to avoid, the commentary to this provision should explain the relationship between independence and impartiality on the one hand, and bias and impropriety on the other hand. Similarly, it would be useful to include in the text the appearance of bias, impropriety, or a lack of independence or impartiality, given the prevalence of these terms in codes of conduct in existing treaties.

Paragraph 2(b): While the United States agrees that Adjudicators should not be influenced by loyalty to a Treaty Party, a non-disputing Treaty Party, a disputing party or non-disputing party, the commentary to this paragraph should clarify that (i) certain existing or prior relationships between an Adjudicator and non-parties (non-disputing parties and non-disputing Treaty Parties) do not imply or result in a violation of this duty, and (ii) any conflicts that may arise as a result of certain existing or prior relationships between an Adjudicator these entities are waivable.

Paragraph 2(d): The use of the term “personal relationship” may be overly broad. The United States recommends reverting to the original language of “family or social” because it is more commonly used and understood.

The United States repeats its recommendation from its comments on the initial draft that it may be useful to include an obligation under this article requiring Adjudicators to decline an appointment when they have misgivings about their ability to be independent or impartial, as is the case with the IBA Guidelines. Such a duty reinforces the importance of Adjudicators being proactive when their independence and impartiality either cannot be guaranteed or would clearly be questioned.

#### ***Article 4 – Limits on Multiple Roles:***

The United States welcomes the simplification of this provision and the attempt to identify the appropriate default rule and many of our comments on the initial draft Code apply to the revised provision as well. As noted in our initial comments, however, finding consensus in a multilateral setting on the appropriate default rule beyond a general rule of disclosure may prove difficult.

The two options presented in the current version of the Code capture the differing views expressed to date on the scope of a limitation on multiple roles – a broad prohibition on serving concurrently as an arbitrator and counsel or expert witness and a tailored prohibition focused on those cases most likely to pose a conflict. Both options should be preserved in the next version to facilitate a full policy discussion at the Working Group’s next session.

With respect to the bracketed text addressing instances in which the same factual background and at least one of the same parties is involved, we recommend changing the “and” to “or.” For example, serving concurrently as a counsel or an expert to one of the parties or their subsidiaries, affiliate or parent entity in an IID case would raise serious questions as to the impartiality or independence of that Adjudicator, regardless of whether the factual background of the case was the same. In addition, the language “factual background” is ambiguous and further explanation would help further the policy debate at the Working Group. Finally, as suggested in the initial U.S. comments, a reference to the same treaty should also be included as a third alternative scenario raising questions about the impartiality or independence of an adjudicator because it could indicate that the adjudicator has a predisposed view as to similar legal questions or the interpretation of the same provisions.

#### ***Article 5 – Duty of Diligence:***

Paragraph 1: The United States welcomes the revision of this provision. We question, however, whether the term “competing obligations” is clear enough and recommend that it be replaced with the following suggested text: “concurrent obligations that may preclude or interfere with their devoting necessary time to adjudicating the IID.”

#### ***Article 6 – Other Duties:***

Paragraph 1(b): The United States welcomes the revision of this provision; however, we question whether it should serve as a basis for challenge and, as written, may invite litigation over what constitutes an adjudicator’s best efforts. Instead, it may be useful to include this language in the commentary to explain the term “competence,” as displaying “high standards” of competence would imply taking steps to maintain and enhance that competence.

Paragraph 2: This obligation should be mandatory and use the term “shall” rather than “should” to define the duty. Additionally, this provision addresses more directly the concern expressed in paragraph 1(b) about maintaining competence, making paragraph 1(b) unnecessary.

***Article 7 – Communication with a Party:***

Paragraph 1: The United States welcomes the revisions made to this Article to refine its scope but recommends that the language be further clarified to prohibit only the discussion of jurisdictional, procedural or substantive matters specific to the particular case. As written, the paragraph may inadvertently preclude discussion of issues that would be relevant to assess a candidate’s experience.

Paragraph 2: As noted in our comments on the initial version, the United States supports requiring the disclosure of the fact of a pre-appointment interview upon the appointment of a Adjudicator, but does not support the disclosure of its contents. Further disclosure of the contents, however, should be permitted if there are grounds for seeking more information. The commentary that accompanies this paragraph should make clear that the duty lies with the Adjudicator, rather than one of the parties to the dispute.

Paragraph 3: The United States welcomes the clarifications to the scope of *ex parte* communications during a proceeding that are permitted under applicable rules or the treaty itself. It may be useful, however, to limit its survival past the proceeding to any subsequent post-award review, *e.g.*, annulment or set-aside. There may be discussions about the conduct of the hearing, such as the performance of witnesses or presentation of an argument, that might benefit parties in future cases, and that would not be problematic after the conclusion of any post-award proceedings. Given that Article 8(2) precludes the disclosure of any deliberations, even after the proceedings conclude, an indefinite prohibition on *exp parte* communications with former parties may be unnecessary.

***Article 8 – Confidentiality:***

The United States welcomes the revisions to this article but recommends that, in addition to the disclosures prohibited in paragraph 2, that an additional obligation be added prohibiting adjudicators from commenting on the merits of any pending proceeding. Examples of such a prohibition can be found in in codes of conduct associated with recent model agreements and treaties. One example is USMCA Code Art. 8.6 for State-State dispute settlement, which states that “[a] member shall not make a public statement regarding the merits of a pending proceeding.”

***Article 9 – Fees and Expenses:***

Paragraph 3: It may be useful to extend this obligation to salaried Adjudicators as well to ensure transparency about the time devoted to a case by any type of Adjudicator.

***Article 10 – Disclosure Obligations:***

Overall: The United States welcomes the revisions to the disclosure obligation, both in terms of streamlining and clarifying the obligations and illustrative disclosures, as well as its placement

after the obligations that are subject to disqualification. That said, we have a number of comments to the revised Article, set out below.

Paragraph 1: The United States welcomes the use of the subjective standard “in the eyes of the parties,” consistent with the IBA Guidelines, as a way to encourage the broadest possible disclosure of potential conflicts that might be relevant to the dispute. With the deletion of the limitation of not requiring disclosures that are “trivial,” however, some additional guidance should be provided to clarify an outer limit to what must be disclosed. One possibility would be to follow the approach taken in the IBA Guidelines and provide in the commentary examples of the types of relationships or conduct that clearly do not give rise to a conflict, such as common professional associations or serving on the same faculty, absent any closer professional or social relationship.

We also recommend revising the first sentence by deleting the word “demonstrate,” which may be hard to assess, and replacing it with “lack of.” Suggested revised language:

Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or ~~demonstrate~~ lack of bias, conflict of interest, impropriety or an appearance of bias.

Paragraph 2: The United States welcomes overall the revisions to this paragraph, although we recommend that the language make clear that the information listed for disclosure in the subsequent paragraphs is not exhaustive, either in the provision itself or the commentary. Suggested revised language:

Adjudicators shall make disclosures in accordance with paragraph (1), and ~~shall include~~ including the following information:

Below are additional comments on individual subparagraphs:

- 2(a): The United States supports the five-year time frame, so long as it is accompanied by commentary that explains that there may be financial, business, professional, or personal relationships that predate the time frame that should nonetheless be disclosed if they would satisfy the standard in paragraph 1.
- 2(a)(i): The language should be supplemented to require due diligence on the Adjudicator’s part if there are other subsidiaries, affiliates or parent entities about which the arbitrator knows or should reasonably know, but are not identified by the parties. This supplemental language could be in the provision itself or in the commentary.
- 2(a)(ii): The United States supports including disclosure of non-IID proceedings where the Adjudicator was appointed by one or more of the parties’ legal representatives, with some flexibility in the nature of the disclosure to accommodate potential confidentiality requirements. For example, it might be sufficient to note the number of non-IID cases in



which the adjudicator has been appointed by the parties' legal representatives, if the details of the cases and the parties are confidential.

- 2(a)(iv): The language should be supplemented to require due diligence on the arbitrator's part if the arbitrator knows or should reasonably know about a third-party funder with a financial interest in the outcome of the proceeding, but such funder is not identified by the parties. This supplemental language could be in the provision itself or in the commentary.
- 2(b)(iii): The United States recommends that "and" between background and involving be replaced with "or" because either scenario would give rise to doubts about impartiality and independence.
- 2(c): The United States supports the disclosure of all IID cases in which the Adjudicator has been involved or is currently in as counsel, expert witness or Adjudicator without a time limitation. The United States also supports disclosure of the same information for non-IID cases for the past five years. In either case, any confidentiality obligations regarding the cases should be accommodated. As noted in our initial comments, in the unusual case in which even the existence of a previous appointment in one of these situations cannot be disclosed, language should be considered that would require an Adjudicator to decline the appointment.

The United States notes that the requirement to disclose relevant publications and speeches has been deleted from this version. In the U.S. comments to the initial version of the draft Code, we supported its inclusion because such information can provide an important opportunity for parties to learn about an Adjudicator's expertise and qualifications and any predispositions that may call into question the Adjudicator's impartiality or independence. At a minimum, guidance to accompany the Adjudicator Declaration at Annex I should note the importance of including relevant publications and speeches on an Adjudicator's CV.

***Article 11 – Enforcement of the Code of Conduct:***

Paragraph 2: The United States agrees that the obligation to disclose set out in Article 10 should not generally be subject to disqualification and removal provisions. We note, however, that it will be important to add language clarifying that a willful disregard of the disclosure obligations, through either repeated or serious omissions, could give rise to doubts about an Adjudicator's duties under Article 3 (independence and impartiality), Article 5 (duty of diligence) or Article 6 (high standards of integrity). The United States also recommends that a failure to comply with Article 6(1)(b) should not cause an Adjudicator to be subject to disqualification and removal.

## Viet Nam

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Based on (A) the Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two; (B) the Draft Note on the Implementation and Enforcement of the Code of

Conduct and (C) the Initial draft on the regulation of third-party funding published by the Secretariat, Viet Nam would like to provide comments on the options set out in such current drafts. Any views and suggestions presented herewith are preliminary in nature and are without prejudice to Viet Nam's future position on these topics. Viet Nam reserves the right to submit additional comments on the above-mentioned issues.

Viet Nam also takes this opportunity to express its continued support of the ongoing ISDS reform process at Working Group III and thank the Secretariat for their tremendous work.

## **A. Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two**

1. Article 2(4) of the Draft Code regulated the obligations of former Adjudicators. However, such obligations are limited to ex-parte contacts and disclosure requirements. An additional obligation on former Adjudicators similar to provision 15 of Annex 8 EVIPA (*All former arbitrators shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or rulings of the arbitration panel*) should be considered.

2. Article 2(5) of this Draft Code is extremely necessary to addresses the interplay of this Code with any treaty-specific Code of Conduct, especially CPTPP and EVIPA.

3. With the aim to improve transparency, Article 7(2) of the Draft Code is necessary.

4. Article 10(1) of the Draft Code requires disclosure of matters that may give rise to doubts “in the eyes of the parties”. However, “in the eyes of the parties” may not be an appropriate criterion due to its subjective nature. Such criterion can be abused by disputing parties to reject the appointment of Adjudicators to delay the proceeding. The Secretariat and the Working Group may consider the Provision 3(c) of the Code of Conduct of CPTPP in which the appearance of impropriety or an apprehension of bias is based on a judgment of “**a reasonable person**”:

*“Each candidate or arbitrator shall disclose the existence of any interest, relationship or matter that is likely to affect the candidate’s or arbitrator’s independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created when a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate’s or arbitrator’s ability to carry out the duties with integrity, impartiality and competence is impaired”.*

## **B. Draft Note on the Implementation and Enforcement of the Code of Conduct**

5. Viet Nam supports the following means of implementation of the Code of Conduct (the reasons are stated respectively):

(i) Incorporation through a multilateral instrument to guarantee the legal bases and to achieve harmonized application.

(ii) Incorporation in the applicable procedural rules (ICSID and UNCITRAL) to utilize the available sanctions provisions of such rules and ensure the immediate application of the Code of Conduct.

(iii) Incorporation in the arbitrators' declaration, as an annex to the declaration to simplify the legal procedure and improve the use of the Code of Conduct.

### **C. Initial draft on the regulation of third-party funding**

#### **C.1. Definition**

6. In general, Viet Nam, is of the view that the regulation of third-party funding is an extremely important reform. Viet Nam strongly supports methods of administering and restricting third-party funding.

7. Regarding Paragraph 5 of the Working Paper, the current definition given by the Secretariat is adequate and covers all possible cases. Such general definition without specifying the type of proceedings and the legal basis of the investment disputes will ensure the cover of all related cases. Similarly, in regard to Paragraph 7 of the Working Paper, "funded party" should not be limited to claimant investors.

8. Concerning Paragraph 9 of the Working Paper, funding by legal counsel or parties' representatives should not be excluded from the definition. In contrast, funding by legal counsel or parties' representatives besides equity financing, and instances where the third-party funder owns or invests in a law firm representing a disputing party should be expressly covered by the definition.

9. Regarding Draft Provision 1(4), more clarification is needed in the term "equivalent support" to avoid confusion. For example, whether the participation of civil society organizations or environmental protection organizations in the form of amicus curiae to protect public interest in an investment dispute is considered "equivalent support" to the States, and therefore is prohibited or restricted by this regulation.

#### **C.2. Models**

10. In reality, claimant investors usually do not disclose third-party funding and the burden of proof rests on the States. Therefore, in regard to the four options of Prohibition models, further research is needed to find out methods allowing the States to detect investors receive third-party funding.

11. Concerning Restriction models, Viet Nam share the following comments:

(i) Viet Nam strongly opposes the restricted list model at Paragraph 26 of the Working Paper. Because the restricted list model could potentially omit a lot of methods of third-party funding and is based on the general principle of allowing third-party funding. Moreover, the information provided by the investors may be inaccurate or fraudulent, leading to a false assessment of the tribunal as to whether the funding is subject to the restricted list or not.

(ii) Limited access to justice is a major concern of the States opposing the ban on third-party funding. Therefore, this model with the improvement in the criteria and procedures for receiving third-party funding may be a good compromise. In particular, Viet Nam believes it is necessary to clarify the concept of “pursuing the claim in good faith”, such as adding criterion for determining or illustrating by examples. Besides, Viet Nam concerns about the criterion “prospects of success”. The addition of such criterion relating to the merit of the case is likely to complicate the arbitral proceedings, making it difficult for both the investor (in receiving funding) and the State (in opposing third-party funding). In short, regarding the Restriction models, the criteria for receiving third-party funding should be clearly determined and can be examined at the early stages of the proceedings to save time and costs for the parties and not to complicate the matters.

12. Viet Nam supports the Draft provision 6 of the Initial draft. Moreover, Viet Nam suggested that the sanctions can be determined or added based on the seriousness of the violation, especially further sanctions for acts of circumventing regulations (abusing funding agreements, lending forms, etc.). In fact, there were cases only after the issuance of the award (the arbitration panel was also dissolved), did the State has information about the investor's third-party funding. Therefore, the violation of the disclose of third-party funding should not be considered a minor breach. Instead, such violation should be considered a material breach affecting the legality of the award, and as a result, the States can apply for setting aside or annulling the award.

### **C.3. Disclosure**

13. Regarding Paragraph 38 of the Working Paper, the respondent States should not be subject to the same requirement of disclosure as claimant investors, as respondent States are subject to disclosure requirements under domestic laws.

14. Concerning Paragraph 39 of the Working Paper, the rules need to be prepared for disclosing the information *prior to* the constitution of the tribunal and any of the information disclosed in accordance with draft provision 7 should also be made available to the public similar to the procedural information under the Transparency Rules.

15. The Draft Provision 7(1)(c) should be amended as follow: “the funding agreement **and** the terms thereof” to ensure the full disclosure of the funding’s provision.

16. Concerning Draft Provision 7(2), an additional disclosure requirement about the financial status of the funded party and its ability to exercise award in the event that the party is required to indemnify should be considered.

### **C.3. Other provisions**

17. The clarification at Draft Provision 8 is necessary to preclude third-party funders from raising claims against a State on the basis of any loss or damage suffered by funding another claimant.

18. Regarding Draft Provision 9, in case the Prohibition models are not selected, Option A would be a good compromise with the following suggestion:

(i) Removing “or” at the end of section b), keeping only the “and”<sup>11</sup> to improve the rigour when the parties receive funding. This is a core issue to protect the interests of the respondent state, when in fact the investors often fail to fulfill their financial obligations after losing the dispute

(ii) Adjusting the text of section c) in the following direction: “The third-party funder **reach an agreement with the Respondent** that they would cover any adverse costs decision against the funded part” to ensure the implementation of the funder.

19. Regarding Draft Provision 10, Option B together with the deletion of “*unless determined otherwise by the tribunal*” would ensure the funded party bears full responsibility for the costs of third-party funding. Finally, Viet Nam supports the drafting of an additional provision allowing the tribunal to allocate the costs of the proceedings to a third-party funder (in case the funded party fails to fulfill its financial obligations – very common in practice) referred to in Paragraph 59 of the Working Paper.

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<sup>11</sup> “b) it is not able to pursue its claim without the third-party funding; **and**”

## PUBLIC STAKEHOLDERS – International Organizations

### Corporate Counsel International Arbitration Group (CCIAG) & United States Council for International Business (USCIB)

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The Corporate Counsel International Arbitration Group (CCIAG<sup>12</sup>) and the United States Council for International Business (USCIB<sup>13</sup>) are grateful for the opportunity to comment, as observers in UNCITRAL Working Group III, on Version Two of the *Draft Code of Conduct for Adjudicators in International Investment Disputes*, circulated on April 19, 2021. We reiterate our strong support for the project of developing a code of conduct that ensures that arbitrators in investment disputes act, and are seen to act, in accordance with the highest professional standards. We commend the UNCITRAL and ICSID Secretariats for their exhaustive efforts, in challenging pandemic conditions, to move this project forward.

We are pleased that this version of the draft Code does just that. It effectively incorporates extensive written comments from states and observers as well as oral comments that were conveyed at informal meetings on March 3-4, 2021. In so doing, it substantially improves the structure, scope, precision, and practicality of the rules in the draft Code.

Looking forward to the next version of the draft Code, three suggestions are of the highest priority.

First, the next version should accept the bracketed language in Article 4 and ban double-hatting only in circumstances where experience demonstrates a likelihood of a conflict of interest: cases involving the same factual background and at least one of the same parties or its subsidiary, affiliate, or parent entity. This compromise approach would solve a discrete problem without creating untold risks, including risks of depleting the pool of qualified arbitrators and creating barriers to new entrants to the pool (including diverse arbitrators).

Second, the next version should further refine the disclosure obligations in Article 10 with a view to setting clearer expectations for parties, arbitrators, and counsel, and avoiding creating new fodder for meritless challenges. For example, drafters should consider assembling an illustrative “green list” of scenarios that generally will not give rise to disclosure obligations.

Third, the next version should be implemented in a manner that ensures maximum

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<sup>12</sup> The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution.

<sup>13</sup> USCIB is an association of international companies, law firms, and business associations from every sector of the economy, dedicated to promoting international trade and investment. As sole U.S. affiliate of the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and Business at OECD, USCIB presents informed business views and solutions to government leaders and policy makers worldwide.

flexibility. This will increase the prospects of achieving wide acceptance expeditiously and decrease the risk of unintended consequences from new and untested rules.

We would welcome the opportunity to discuss our detailed comments below with interested delegations, whether formally or informally.

## **Article 2 (Application of the Code)**

### Paragraph 4

- We strongly support the general ban in Article 7(3) on ex parte communications between an arbitrator and a disputing party concerning the proceedings. Such a ban helps ensure that the disputing parties are accorded due process and equal opportunities to present arguments.
- However, we do not understand the justification for applying this ban after the conclusion of the proceedings, as set out in this paragraph, since there is no risk of prejudice once the matter is concluded. Arbitrators may need to exercise special care not to breach Article 8 in such discussions (e.g., not to disclose the contents of deliberations or any view expressed by an arbitrator during deliberations), which could be highlighted in the commentary. But a ban appears unnecessary and undesirable.

### Bracketed text in paragraph 5

- The relationship between the Code and treaty-based codes of conduct hinges on the working group's decision as to how to implement the Code. As discussed below, we recommend an approach to implementation that accords maximum flexibility to states and disputing parties: the Code should be made available for states to incorporate it in their individual treaty practice and for disputing parties to adopt it on an ad hoc basis.
- If the working group adopts this approach, it would be useful to include a provision in the Code addressing the scenario in which an individual treaty already includes ethics rules, and the disputing parties want to utilize the Code in some manner.
- Disputing parties will not be able to deviate from treaty requirements. However, disputing parties should not be precluded from applying the Code or portions of the Code that address subject matter not included in the treaty, or that can otherwise be applied in a manner that is not inconsistent with the treaty. Party autonomy should prevail to the maximum extent possible, given its well-established importance to both states and investors in the resolution of international investment disputes.

## **Article 3 (Independence and Impartiality)**

### Paragraph 1

- The added value of the second clause – “and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or appearance of bias” – is unclear, given the overriding obligation of independence and impartiality. It appears sufficient to require the result without requiring reasonable steps to achieve the result.

- If the working group decides to maintain the second clause in the next version of the Code, we offer three drafting suggestions.
  - o First: Make it a separate numbered paragraph under Article 3 and revise Article 11(2) to exclude it from the scope of applicable disqualification and removal procedures. We question the logic of disqualifying an arbitrator for “failing to take reasonable steps” whilst the arbitrator remains independent and impartial in fact.
  - o Second: Omit “impropriety,” a broad term that is difficult to define. Some definitions – e.g., “behavior that is dishonest, socially unacceptable, or unsuitable for a particular situation” (the Cambridge English Dictionary) – likely exceed the scope of a rule focused on independence and impartiality.
  - o Third: Omit “appearance of bias.” This term introduces a subjective inquiry that is inconsistent with the objective approach in the remainder of the article.
- We endorse the suggestion in paragraph 24 of the commentary to provide examples of conduct that, depending on the facts, may violate paragraph 1. Examples would facilitate the consistent and predictable application of the Code by arbitrators and disputing parties. They would also mitigate the risk that the Code will lead to a flood of challenges on questionable grounds that will needlessly increase the cost and duration of disputes. To create a list of examples, the working group should consider each of the scenarios in the waivable and nonwaivable red lists in the IBA Guidelines on Conflict of Interest, which have proven their value in practice in many investor-state dispute settlement cases.

#### **Article 4 (Limit on Multiple Roles)**

- This article presents a stark choice: without the bracketed text, it would ban essentially all double-hatting, and with the bracketed text, it would ban double-hatting only where the two cases involve the same factual background and at least one of the same parties or their subsidiary, affiliate, or parent entity.
- In our view, any double-hatting ban is unnecessary. Under Article 10 of the Code, arbitrators will be required to disclose whether they are double-hatting. If a disputing party believes there is a conflict of interest that violates Article 3, it can challenge the arbitrator on that basis. The challenge can be assessed based on the specific facts and circumstances of that case. The alternative – a ban – will neglect the nuances of individual cases. Good arbitrators acting ethically will be disqualified.
- If the working group believes that a ban is nonetheless necessary, we could support Article 4 with the bracketed text. A double-hatting ban in cases involving the same facts and parties targets conduct that, not always, but often, could create a conflict of interest or the appearance thereof. A targeted double-hatting ban coupled with significant new disclosure obligations in Article 10 appears to be a reasonable compromise.



- We strongly oppose dropping the bracketed text, however. We have previously set out our concerns about a broad double-hatting ban<sup>14</sup>. In short, it would undermine party autonomy in the selection of arbitrators, which is the cornerstone of the current system for the resolution of international investment disputes; eliminate many good arbitrators from the arbitral pool; frustrate efforts to achieve a more diverse arbitrator pool; and increase the prevalence of repeat appointments of the same arbitrators by the same counsel or parties, which arguably presents greater ethical concerns than double-hatting. We believe that investor-state dispute settlement with a broad double-hatting ban will be less attractive and functional for both states and investors.
- Also, there appears to be no evidence to justify a broad double-hatting ban. Disputing parties – both states and investors – appoint double-hatters regularly. These arbitrators are rarely challenged on that basis. Further, we have seen no evidence of systemic bias or bias in individual cases resulting from double-hatting.
- To be clear, we fully respect that some states favor a broad double-hatting ban, which is present in some recent investment treaties. Some states undoubtedly disagree with the assertions above regarding the likely negative impacts of a broad ban. Others may share our concerns but view a broad ban as nonetheless necessary to address the perception in some quarters that double-hatting is illegitimate. To states that are entertaining a broad ban, we offer two additional points.
  - First: A targeted ban is a middle ground approach that appears to be capable of achieving consensus support in the working group. A broad ban seems unlikely to achieve such support, as numerous states have raised serious objections to such an approach.
  - Second: Even if one supports a broad ban, there is reason to question whether this is the appropriate venue to pursue it. The working group is striving to create a universal template of core ethical standards for investment treaty practice, but not a single investor- state dispute settlement case has been litigated under an investment treaty with a broad double-hatting ban. There is significant risk in implementing a broad ban across many treaties in the absence of any experience to help evaluate the pros and cons in practice.

### **Article 5 (Duty of Diligence)**

#### Paragraph 1

- The obligation to “refuse competing obligations” is unclear and appears unnecessary in light of the arbitrator’s obligation in the following sentence to be “reasonably available to the parties” and able to “dedicate the necessary time and effort to the proceeding.”

### **Article 6 (Other Duties)**

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<sup>14</sup> The CCIAG previously provided written comments on Version One of the Code. See [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code\\_of\\_conduct\\_-\\_comments\\_by\\_state-commenter\\_-\\_updated\\_01.14.21.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_-_comments_by_state-commenter_-_updated_01.14.21.pdf) (pp. 90-106). Please find the discussion of double-hatting at pages 97-100.

#### Paragraph 1(b)

- We support in principle requiring arbitrators to maintain and enhance their knowledge and skills, but we question the need for this rule given the preceding rule requiring arbitrators to display high standards of competence.
- If the working group decides to maintain this rule in the next version of the Code, we recommend revising Article 11(2) to exclude it from the scope of applicable disqualification and removal procedures. Otherwise, it may invite challenges on frivolous grounds (e.g., an arbitrator should be disqualified because of a failure to take professional development courses, subscribe to a particular journal, or meet other subjective metrics).

#### **Article 7 (Communication with a Party)**

##### Bracketed text in paragraph 2

- After further consideration based on comments voiced at the informal March 3-4 meetings on the Code, we worry that a rule requiring the disclosure of the contents of pre-appointment communications may produce greater costs – including increased challenges based on frivolous grounds – than benefits, given that these types of communications have not given rise to significant concerns in practice.
- Also, the rule seems internally flawed. The premise of the rule appears to be that we should not trust that arbitrators and parties will mind the restrictions in paragraph 1 regarding the permissible scope of pre-appointment communications. But if that is the case, it seems inconsistent to trust that they will accurately record their communications, particularly if the discussions stray into subject matter that may be in tension with the rule. Article 7 hinges on trust that arbitrators and parties will conduct themselves with integrity, whether or not the article includes the bracketed text in paragraph 2. The article is similar in that respect to the core obligations in Article 3(1), which rely primarily on trust.

#### Paragraph 3

- We strongly support the suggestion in paragraph 39 of the commentary that arbitrators should be permitted to communicate ex parte with the party that appointed them for the sole purpose of selecting the presiding arbitrator, if that selection method is offered by the relevant rules or treaty or where the parties consent to such a method. This well-recognized practice helps ensure that parties have maximum input in the selection of the tribunal, which builds confidence in the tribunal, the arbitral process, and the arbitral decisions.
- Given the importance of these types of communications to both states and investors – and the potential tension with the text of paragraph 3 – we recommend including text in the Code itself (not the commentary) expressly allowing these communications where this selection method is available.

#### **Article 8 (Confidentiality)**

##### Paragraph 2

- We welcome the clarification that arbitrators can disclose a draft decision, ruling, or award to the disputing parties prior to delivering it to them, if permitted by the applicable rules or treaty. In the next version of the Code, we recommend adding that the draft instrument may also be disclosed to the non-disputing treaty parties (if permitted by the applicable rules or treaty).
- Several investment treaties (e.g., the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and the United States-Peru Trade Promotion Agreement) permit non-disputing parties to review and comment on draft decisions or awards in certain circumstances. This valuable procedural tool should not be precluded by the code of conduct – in fact, it merits consideration in the working group’s discussion of procedural reforms. It can improve the correctness and consistency of arbitral awards without materially affecting the duration or costs of the proceedings.

### **Article 10 (Disclosure Obligations)**

#### Paragraph 1

- We welcome the core standard for disclosure: if the interest, relationship, or matter “may in the eyes of the parties, give rise to doubts as to [the arbitrator’s] independence or impartiality.” This standard uses clear language, promotes broad disclosure, and helpfully tracks the IBA Guidelines on Conflict of Interest.
- However, the current text strays from the IBA Guidelines in also requiring disclosure of matters that “demonstrate conflict of interest, impropriety, or an appearance of bias.” This language appears redundant because bias and conflict of interest are examples of a lack of independence and impartiality. This redundancy could create interpretive issues in practice. Separately, “appearance of bias” is unnecessary and confusing. If, “in the eyes of the parties,” an interest, matter, or relationship could demonstrate only the “appearance of bias” – and could not possibly demonstrate actual bias – that matter should not need to be disclosed under paragraph 1.
- We thus suggest the following alternative drafting for the first sentence of paragraph 1: “Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, such as by demonstrating bias or conflict of interest.”

#### Paragraph 2

- We welcome omission of the requirement to disclose past speeches and writings, which would have inevitably led to more disqualifications and compelled resignations based on past statements that do not indicate a lack of independence or impartiality (even with the new clarification that the fact of disclosure does not establish breach). That would have been a terrible outcome, compromising party autonomy and chilling academic discourse. Importantly, paragraph 1 still applies. So, for example, if an arbitrator writes an article commenting on the specific case or facts in a manner that could give rise to doubts regarding the arbitrator’s independence or impartiality, the arbitrator will be obligated to disclose that article.
- In the next version of the Code, a few further changes should be considered.

- First: Some obligations in paragraph 2 appear needlessly broad, making it difficult for arbitrators to determine what to disclose and creating grounds for spurious challenges. An example is the obligation in paragraph 2(a) to report “any” “professional” or “personal” relationships in with four categories of persons. Without further guidance, this language could require arbitrators to catalog and disclose, for example, all contacts at professional associations, social and charitable organizations, and conferences, which seems ill-advised. There should be a safe harbor. This could take the form of a “green list” of examples of types of relationships that need generally need not be disclosed, to parallel the list of examples of prohibited conduct envisioned in paragraph 24 of the commentary.
- Second: Disclosures should be limited to relationships and matters in the last three years, consistent with the IBA Guidelines. Outside of that period, relationships and arbitrations are likely stale and immaterial, and any benefits of a disclosure requirement would be outweighed by the costs.
- Third: The obligation in paragraph 2(c) to report past cases merits an exception where an arbitrator is prevented from making disclosures by virtue of confidentiality commitments. A substantial percentage of arbitrators could not comply with this obligation as written and would be required to decline an appointment or resign, even if no possible conflict of interest could arise from the confidential case or cases. The exception could make clear than an arbitrator need not provide information that is subject to a confidentiality agreement. The commentary could add that, in such circumstances, the arbitrator should report basic information not protected by confidentiality, such as the claimant’s industry or sector, the respondent’s region, and the applicable arbitral rules.
  - o Notably, a confidentiality exception would not shield an arbitrator from reporting details of a case that could create a conflict of interest in the eyes of the parties, since paragraph 1 still applies. In such a case, the arbitrator would have no choice but to decline an appointment or resign, which is consistent with the approach in the IBA Guidelines.
- Fourth: The bracketed text requiring the disclosure of information regarding commercial arbitration cases should be deleted, since such disclosures are unlikely to be probative. However, there should be an exception to report appointments by the same party or same counsel in commercial cases, given the possibility that repeat appointments could give rise to conflicts of interest in individual cases. This could be achieved by retaining the bracketed text in paragraph 2(a)(ii) (“non-IID proceedings”) and adding parallel phrasing in paragraph 2(a)(i) (i.e., “the parties, and any subsidiary, affiliate or parent entity identified by the parties, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by such individuals or entities in any IID and non-IID proceedings”). These additions would obviate any need to require arbitrators, pursuant to paragraph 2(c), to disclose all the commercial cases in which they have been involved during a certain term of years.

## **Article 11 (Enforcement of the Code of Conduct)**

### Paragraph 2

- We concur with the approach reflected in the provision that the mere failure to disclose should not be grounds for disqualification under applicable rules.
- There is no basis in international practice for disqualifying arbitrators for the mere failure to disclose. Further, imposing such a requirement would promote strategic challenges that bog down the arbitral process.
- Importantly, arbitrators will have strong incentives to fully comply with Article 10. A failure to disclose could result in disqualification and removal by establishing a breach of another article, such as the duty in Article 6 to “display high standards of integrity,” particularly if the failure to disclose is in bad faith, egregious, or repeated. It could also contribute to a finding of lack of independence and impartiality under Article 3. The commentary could provide as such.
- Further, beyond the individual case, being caught failing to disclose would be embarrassing and could have significant reputational consequences.

### **Means of Implementation**

- The choice of means of implementation of the Code is a critical issue that will determine – potentially more than any other decision taken by the working group – whether the Code is viewed as a success or a missed opportunity.
- In our view, the next version of the Code should provide for an implementation method that ensures maximum flexibility for states and disputing parties: the ICSID and UNCITRAL Secretariats should endorse the Code for adoption by states in their treaty practice and by disputing parties in individual disputes. In the case of UNCITRAL, for example, the Secretariat could issue a recommendation similar in nature to its recommendations regarding the interpretation and application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>15</sup>.
- This approach is preferable to the much-discussed option of incorporating the code in a multilateral treaty, for four reasons.
- First: good governance. The Code will likely introduce some significant changes in the rules governing the resolution of investment disputes; some may work well, some less so. It would behoove states to observe the use of the Code in practice, in collaboration with stakeholders, before making it a permanent fixture in the rules for the resolution of investment disputes.
- Second: prospects for wide acceptance. If the Code works well, disputing parties and states can be expected to use it widely. That was the experience of the IBA Guidelines on Conflict of Interest. By contrast, a multilateral treaty – which is understood as a prerequisite to applying the code en masse to existing investment treaties – is a difficult and uncertain proposition.
- Third: avoiding fragmentation. A multilateral treaty that is meant to create a universal approach to ethics rules in investment disputes is more likely to splinter state practice between those that ratify and those that do not.

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<sup>15</sup> See [https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards).

- Fourth: ease of updating. Ethics rules should be iterative – they should be regularly revisited and refined as assumptions and values change with experience. It will be much harder to do so if the rules are inserted in a treaty. By contrast, the IBA Guidelines (as well as the IBA Rules on the Taking of Evidence in Arbitration) were both significantly revised after 10 years of use. This is a good model for the implementation of the Code.

## Inter-American Bar Association (IABA)

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### **Article 1**

Numeral 2. Related to the definition of “Arbitrator.” We should consider the possibility of other appellate body or bodies, whether permanent or ad-hoc. Perhaps, the language of numeral (2) should include other institutional review or appellate body.

Numeral 3. All the information referred in commentary 10 should not be required for adjudicators personal assistants. We would suggest that this should only be required in cases where they are serving as secretary of the arbitral panel.

Numeral 5. This Code of Conduct should not be applicable only to treaty-based investment disputes. It should include state-state and investor state investment disputes whether they arise from a treaty or whether they arise from a non-treaty investment that includes an international arbitration clause. All those cases should be under the code.

If that is not the majority decision in the Working Group, the other option would be to add a commentary making it clear that it could apply to non-treaty-based investment disputes if the agreement incorporates it.

### **Article 2**

Numeral 5. Addresses the interplay of this Code with any treaty-specific Code of Conduct. We would suggest that this Code of Conduct be applicable only if there is not another Code of Conduct provided by in the treaty, the particular investment agreement, or chosen by the parties during the arbitration proceedings. In that case, the language should indicate that “This code will apply unless another code of conduct is provided for in a treaty, investment agreement, or chosen by the parties during the arbitration proceeding.”

Additionally, we would suggest a commentary making it clear that if the treaty, the agreement, or the parties wish to do so during the proceedings, they could choose this Code to supplement the code of conduct they incorporated.

### **Article 3**

Numeral 1. Establishes that “Adjudicators shall be independent and impartial, and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias. “

We would recommend the use of the term “appearance” instead of “apprehension” because it reflects better the intended effect and is best aligned with the Spanish and French versions.

Numeral 2. We suggest language that makes it noticeably clear that those are only examples by either adding some language at the beginning or by adding a line at the end, as suggested below.

At the beginning of the numeral: “2. In particular, Adjudicators shall not, among other things, ...  
“or “2. In particular, Adjudicators shall not, without limitation, ...”

At the end of the numeral: “2. In particular, ... (g) Avoid any situation that would affect or appear to affect its independence and impartiality”.

### **Article 4**

1. The language in brackets should be part of the norm.

2. Proper disclosure should be expressly required in this article to ensure “informed consent.”

3. The parties should be able to agree otherwise.

4. In term of technique, we also suggest stating first the general rule and referring then to the exception. An alternative suggested text for Article 4 follows:

*“Article 4: Limit on Multiple Roles*

*An Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case involving the same factual background and at least one of the same parties or their subsidiary, affiliate, or parent entity, unless the disputing parties agree otherwise based on the adjudicator’s full disclosure.”*

### **Article 5**

Numeral 1. The text in bold has a minor omission, it seems that is missing a word after “effort”, which could be “to” or “during.”

Numeral 2. In terms of technique, we suggest stating the main rule in positive, and reinforcing then the idea of no delegation. Additionally, we suggest indicating that it can’t not be delegated, period, without more elaboration. Although we are trying to eliminate all possibility to delegate by referring to “... an Assistance or to any other person” we might be in fact leaving the door open to AI or other virtual means. An alternative suggested text for Article 5, numeral 2, follows:  
*“2. The decision-making function is exclusive responsibility of the Adjudicator and shall not be delegated.*

### **Article 6**

The IABA shares the reservations expressed by the distinguished delegate of the US regarding the language of competence included in Article 6. We also agree with the distinguished delegate

of the EU regarding the recommendation that the Code should specify that parties should not be able to bring challenges based on Article 6(2).

### **Article 7**

Numeral 3. The intent of the rule is to prohibit ex parte communications concerning the proceeding, other than the ones contemplated by the applicable rules or treaty, or consented to by the parties, during or after the proceeding. However, the text of Article 7(3) does not clearly state that, so we would suggest that the text expressly indicates it applies even after the proceeding has ended by inserting “at any point in time” in the text or by adding “This rule applies after the proceeding has concluded” at the end of the paragraph.

### **Article 8**

Numeral 2.b., as suggested, should specifically note in a Commentary that it would allow Adjudicators to circulate a draft ruling for comment to the parties if permitted by the relevant rules or treaty, or with party consent.

Numeral 3. It should not be so definitive and should include the duty of confidentiality as a general norm and indicate the exception(s) in an equivalent way as done in numeral 2.b. of this Article related to the fact that the obligations in Article 8 shall continue to apply after the proceedings have ended, save the information related to an award which is in the public domain in accordance with the relevant rules on publication of such materials.

### **Article 9**

[No comments]

### **Article 10**

The IABA supports the suggestion that the Commentary include a note, for avoidance of doubt, that the Adjudicator’s remuneration for work performed and reimbursement of expenses incurred in connection with the IID proceeding is not considered a financial interest for the purposes of Article 10.

We agree with the idea that Annex 1 should be used as a reference for disclosure. However, the type of form used should not be an issue as long as the relevant information is disclosed.

The Commentary says that repeated appointment would remain permissible unless it rises to the level of a lack of independence or impartiality under Article 3 of the Code. The IABA agrees with allowing repeated appointment of Adjudicators. The issue here is how to determine if or when it rises to that level of lack of independence or impartiality. Clearly, the criteria of certain number of cases and certain number of years could be arbitrary, but as any quantitative criteria it is easier to identify. This will be a prima facie safe harbor with a reasonable number of cases on a given timeframe. The question is whether we should consider qualitative criteria, since there



could be other evidence of to close a relationship that could indicate lack of independence or impartiality, and that should also be taken into consideration.

### **Article 11**

The Commentary posed the question of whether the obligations in Articles 6, 9 and 10 should be subject to challenge and removal provisions under Article 11(2). According to the current drafting it only applies from 3-8. In principle, we agree that it should apply to those provisions only. We understand that the provision as drafted is trying to avoid numerous or strategic challenges based on requirements that are not strictly related to ethics. However, there is a question about Article 9(3), which is being considered just an administrative requirement. In principle, it could be just an administrative requirement, but it might also reflect on the ethics of the arbitrator.

## [International Bar Association \(IBA\)](#)

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The Arbitration Committee of the International Bar Association (the **IBA**) is grateful for the opportunity to respond to the request from the UNCITRAL Secretariat for comments on Version 2 of the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (the **Draft Code 2, or the Code 2**).

### **General comment**

As previously indicated, many of the issues the Draft Code 2 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**). Nevertheless, the IBA Arbitration Committee notes that the Draft Code 2 represents a considerable improvement as compared to the initial Draft Code.

Based on its experience derived from the IBA Conflict Guidelines and Ethic Rules, the IBA Arbitration Committee is convinced that the acceptability of these kinds of rules depends directly on their practicability. In order to gain a large acceptance (and therefore fulfil their role) such rules should be balanced, realistic, and workable in practice. Enacting rules that denote an essentially theoretical approach will not result in Draft Code 2 gaining the necessary traction for widespread acceptance.

With this in mind, the IBA respectfully submits the following comments for the consideration of the drafters.

## **Articles 1 and 2 – Definitions, Application**

- Limitation to international investment disputes (IID) is necessary. Commercial arbitration is a distinct process and many of the provisions are not applicable or fit for purpose.

## **Article 3 - Independence and Impartiality**

- Consider deleting “apprehension of bias” at subparagraph 1. This language introduces an element of subjectivity that may prove difficult to implement in practice.
- Consider adding “when deciding a case” at the end of subparagraph 2. (d). Otherwise the statement is of general application.

## **Article 4 - Limit on Multiple Roles**

- It is necessary to maintain the text between brackets: “involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity.”
- A general ban on issue conflicts will create an entry barrier that will consolidate the position of established arbitrators to the detriment of diversity and younger arbitrators (for a lucid discussion on this issue, see L. Ahtouk-Spivak, Ethical considerations in international arbitration: Is it time for a uniform code of conduct for arbitrators, in 40 under 40 International Arbitration, Carlos Gonzales- Bueno (ed.), 2021, pp. 49 to 69, spec. at p. 63).

## **Article 7 - Communications with a Party**

Consider deleting the current subparagraph 2 (“The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate”) and replacing it by “ To the extent that the content of any pre- appointment communication between the Candidate and a party deviate from the requirements of subparagraph 1, such content shall be fully disclosed to all parties upon appointment of the Candidate.”

Systematic disclosure would not be required if the interview is conducted in accordance with the requirements of subparagraph 1, thereby promoting access to more diverse arbitrators. Systematic disclosure may lead the appointing party to seek a more established arbitrator without any need for additional disclosures.

## Article 8 - Confidentiality

- Confidentiality is an essential obligation for adjudicators. As drafted however, this essential obligation may clash with the extensive disclosure obligations. One possible solution is to limit disclosure to non-confidential information.

## Article 10 - Disclosure Obligations

We respectfully offer some additional comments that we hope will help with some of the various practicalities of implementing the Code 2 in practice. A less ambitious rule that is workable and leads to a high degree of adherence is often preferable to a stricter requirement for which compliance is difficult.

- Five years is a realistic overall limit at subparagraph 2. (a). A longer period may lead to incomplete and inaccurate disclosures, especially if lawyers have changed institutional affiliations.
- Consider replacing “affiliates” by “affiliates identified by the parties” at subparagraph 2. (a). (i). Some companies have thousands of affiliates and it is often an impossibility for potential arbitrators to be aware of their existence. Leaving “affiliates” will lead to incomplete disclosures.
- Subparagraph 2. (a). (ii): “the parties’ legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties’ legal representative in any IID proceedings;” may be clarified. The term “counsel” seems to be duplicative with “legal representative.” If something else is meant by these terms perhaps it would benefit from an explanation in the text.
- Subparagraph 2. (c). as drafted is unworkable in practice. “All IID proceedings [or non-IID proceedings] in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.” Many people do not keep track of their activities as counsel, especially in large firms. Disclosures will inevitably be incomplete and result in challenges. Consider limiting disclosures to five years for IID cases only, and removing the obligation to disclose cases as counsel.
- Consider adding a subparagraph 6: “compliance with the above obligations is subject to mandatory ethical obligations as may be applicable to the Adjudicator.” Many arbitrators are also subject to professional confidentiality by virtue of their bar affiliation, which in some circumstances cannot be overridden. The breach of an obligation may result in professional sanction, civil liability, or even criminal

punishment. Consider also making a carve-out for confidentiality obligations in general.

## International Council for Commercial Arbitration (ICCA) ISDS Watch Group

The Watch Group on Investor-State Dispute Settlement (“Watch Group”) of the International Council for Commercial Arbitration (“ICCA”) is grateful for the opportunity to submit observations on Version 2 of the ICSID/UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes, released in April 2021 (“Version 2”). We welcome this joint initiative and consider it an important step toward establishing consensus on the standards governing the conduct of neutral adjudicators.

As a general matter, the Watch Group considers that it would be helpful for ICSID and UNCITRAL to convene a separate session to discuss the Commentary to the Code of Conduct, given its importance in interpreting the final document.

The Watch Group confines its observations to Version 2 as it would apply in arbitration, and does not address its application to judges in a permanent mechanism.

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 Board or ICCA as a whole, and they do not necessarily represent the view of each member of the Watch Group.

### **Comments:**

**Article 1(3):** The Watch Group notes that the current definition of Assistant in Article 1(3) of Version 2 (“‘Assistant’ means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, including research, review of pleadings and evidence, case logistics and similar assignments, as agreed with the parties;”) may be ambiguous, as it is not clear whether the agreement of the parties is required in order that an Assistant be used at all, or only as to the scope of that person’s activities.

**Article 1(5):** The Watch Group notes that the revised scope of disputes covered by the draft Code of Conduct by reason of the substitution of “IID” for “ISDS” means that contractual and foreign investment law cases are not included and that the Commentary notes that this change “avoids the need to address sub-national entities”. The Watch Group nonetheless considers that it may make sense to include references to sub-national entities in Article 4 (Limit on Multiple

Roles) and Article 10 (Disclosure Obligations) in order to facilitate the identification of possible conflicts. Please see comments on Articles 4 and 10, below.

**Article 2(2):** As presently drafted, Version 2 does not apply to Assistants directly: obligations regarding the conduct of Assistants are imposed only on the Adjudicators with whom they work. In those circumstances, the importance of Adjudicators’ supervising the conduct of their Assistants could be reinforced by using the language “take all reasonable steps” rather than “take reasonable steps” per the current draft.

The Watch Group takes the view that making the conduct of Assistants the responsibility of the Adjudicators whom they assist is the appropriate form of regulation, in light of the fact that Adjudicators have a decision-making function and Assistants do not.

Noting proposals made by some participants in the Working Sessions of 7 and 10 June 2021 that obligations should be imposed on Assistants directly by the Code, the Watch Group follows with interest the development of such proposals.

Consistent with its comment on Version 1 of the Draft Code, 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 2(5):** The Watch Group considers that the application of the Code to a treaty that already contains a code of conduct, or to any other instrument (such as a contract, or a set of arbitration rules) should rather be regulated by that instrument, and not by this Code, in order to avoid potential incompatibility.

Article 2(5) could then potentially be reworded as follows: “If the treaty, contract, or other instrument implementing the Code of Conduct already contains a code of conduct, the Code of Conduct will not apply except to the extent that the treaty, contract or other instrument otherwise provides.”

See also comments on Article 11 (Enforcement of the Code of Conduct), below.

**Article 3:** The Watch Group proposes adding “at all times” following “Adjudicators shall” in paragraph 1.

The Watch Group further proposes that paragraph 1 end at “independent and impartial,” given that this is already an established standard that encompasses the obligation to avoid bias, appearance of bias, conflict of interest, and impropriety. The references to bias, appearance of bias, conflict of interest and impropriety might be more usefully included in the Commentary to Article 3 in the context of examples.

The Watch Group proposes that “In particular, Adjudicators shall not” in Article 3(2) be amended to read “The duty to be independent and impartial encompasses an obligation not to,” to avoid a suggestion that the conduct proscribed by Article 3(2)(a)–(f) is necessarily more harmful than other conduct that would nonetheless breach Article 3(1).

**Article 4:** As noted in its comments on Version 1 of the Code, the Watch Group considers that 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 4 of Version 2 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.

If Article 4 of Version 2 were to be recast as a disclosure obligation, not a ban, the Watch Group would propose that a time limit of between three to five years should apply to the alternative roles to be disclosed.

Regarding the bracketed text, the Watch Group proposes to include the text within the brackets, amended as follows: “involving the same or substantially similar factual background and at least one of the same parties or their subsidiary, affiliate, parent entity, State agency or State-owned enterprise.”

The Watch Group considers that the language describing related entities should be broadened to include language covering entities and persons related to State parties, notwithstanding that the revised scope of disputes covered by the draft Code of Conduct no longer includes contractual and foreign investment law cases.

As presently drafted in Version 2, acting concurrently as counsel in a contractual case arising out of a dispute between a private party and a State-owned entity would not prevent a person acting as arbitrator in a treaty-based arbitration between the State and a private party that was not an affiliate of the private party in the contract dispute, even if both disputes arose from exactly the same factual background (for example, a government measure affecting a joint operating agreement to which both private parties were signatories).

If Article 4 of Version 2 were to be recast as a disclosure obligation, as suggested by the Watch Group, failure to include a reference to State agencies and State-owned enterprises would mean that concurrent service as counsel in the contractual dispute described in the preceding paragraph would not have to be disclosed in the treaty-based arbitration.

Finally, having in mind the objective of ensuring the impartiality and independence of adjudicators, the Watch Group agrees with the revisions to the Article to include 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.

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 5:** The Watch Group welcomes the removal of Article 8(2) of Version 1 regarding a limit on the number of cases on which they may serve at any one time.

The Watch Group considers that it could be desirable to include language in the Code or Commentary acknowledging that it is appropriate for a party to 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 6:** The Watch Group considers that the words “make best efforts to” in Article 6(1)(b) could be removed. It is more appropriate to construct the obligation as one of result rather than one of “best efforts.”

The Working Group refers to the [Guidelines on Standards of Practice in International Arbitration](#), prepared by the ICCA Task Force on Standards of Practice in International Arbitration and published in June 2021.

**Article 6(2):** The Watch Group prefers the construction used in Article 7(3) of Version 1: “Candidates should only accept appointments for which they are competent.” The Watch Group considers that the key question is the Candidate’s competence, rather than their honestly held belief regarding their competence.

**Article 7(1):** The Watch Group recalls its comments on Article 10(1) of Version 1, and proposes that the limits on pre-appointment communication be extended to include “a description of the dispute”. Article 7(1) would then limit pre-appointment communication to “a description of the dispute and a discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest.”

The Watch Group notes the concern expressed by some participants during the Working Session that including the topics of “expertise [and] experience” would be undesirable as it would risk opening up topics that could become relevant in the proceedings. This is a valid concern, but the Watch Group considers that the risk is balanced by the second part of Article 7(1) and its prohibition of the discussion of “any issues pertaining to jurisdictional, procedural, or substantive matters that they can reasonably anticipate will arise in the proceeding.” The risk could also be addressed by way of examples in the Commentary.

**Article 7(2):** As noted in its comments on Article 10(2) of Version 1, the Watch Group questions whether, in light of the narrow scope of the contact permitted by Article 7(1) of Version 2, Article 7(2) of Version 2 serves a compelling purpose.

Clarification that the restriction on pre-appointment contact applies to counsel and third-party funders could usefully be addressed in the Commentary.

**Article 8(1)(b):** The Watch Group notes the change in the drafting from Article 9(1)(b) of Version 1 to the equivalent provision Article 8(1)(b) in Version 2.

While Article 9(1)(b) of Version 1 referred to the disclosure or use of “any such information” (that is, “any non-public information concerning, or acquired from, a proceeding” as referred to in Article 9(1)(a)), Article 8(1)(b) of Version 2 refers to “any information concerning, or acquired in connection with, a proceeding”.

The result of the change seems to be that Article 8(1)(b) of Version 2 potentially covers public information, where Article 9(1)(b) of Version 1 only covered non- public information.

The Watch Group queries the intention behind this drafting change.

**Article 8(2)(b):** The Watch Group welcomes the amendment to what was Article 9(2) of Version 1, such that an Adjudicator could—pursuant to Article 8(2)(b) of Version 2—disclose a draft decision, ruling or award to the parties if permitted by the applicable rules or treaty.

**Article 8(2):** The Watch Group concurs with the removal of the bracketed language of Article 9(2) of Version 1 imposing an obligation not to comment on any decision, ruling or award in which an Adjudicator has participated.

**Article 9:** In its comments on Version 1 of the draft Code, the Watch Group observed that when it is an institution that sets or confirms fees, it should do so if possible before the constitution of the tribunal.

The Watch Group proposes that revised Article 9(1) be amended to read: “Any discussion concerning fees shall be concluded before constitution of the adjudicatory body where possible, and otherwise immediately upon constitution of the adjudicatory body.”

A note could be added in the Commentary to clarify that when it is an institution that sets or confirms fees, it should do so if possible before the constitution of the tribunal.

**Article 9(3):** The Watch Group considers that all Arbitrators should keep an accurate record of their time and expenses, as well as the time and expenses of any Assistant. The words “and documented” seem to the Watch Group to be redundant.

**Article 10:** The Watch Group welcomes the repositioning of the disclosure obligations within Version 2 of the draft Code. This provides a helpful visual cue that the scope of matters that must be disclosed is not necessarily co-terminus with the scope of matters giving rise to a conflict of interest that would breach Article 3 of Version 2.

The Watch Group proposes that the obligations contained in Article 10 be made subject to confidentiality obligations applicable to any case or role. A large number of candidates and adjudicators will be involved or will have been involved in cases that they are under an obligation not to disclose.



The Watch Group queries whether it would be worth noting in the Code or the Commentary the standard practice that arbitrator candidates decline appointments when confidentiality obligations bar them from disclosing a conflict.

**Article 10(1):** The Watch Group is concerned that the qualifier “in the eyes of the parties” may complicate the provision unhelpfully by introducing an element of subjectivity to the test in Article 10(1). The Watch Group notes that the general standard for assessing bias is from the perspective of an objective and reasonable third-party observer. The Watch Group further proposes adding the word “justifiable” before “doubts.” The use of the expression “justifiable doubts as to their independence or impartiality” would echo the disclosure standard in Article 11 of the UNCITRAL Arbitration Rules (2010).

For the reasons expressed in relation to Article 3, the Watch Group cautions against adding qualifiers after the established standard of “independence or impartiality” and proposes ending the sentence after those two words. The references to bias, appearance of bias, conflict of interest and impropriety might be more usefully included in the Commentary to Article 10 in the context of examples.

The Watch Group thus proposes reworking Article 10(1) to read: “Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of an objective third-party observer, give rise to justifiable doubts as to their independence or impartiality.”

**Article 10(1) and 10(2):** The Working Group welcomes that Version 2 has clarified the relationship between these two paragraphs. It notes that the ICSID Secretary General emphasised during the Working Sessions the intention that a matter must be disclosed if it falls within the terms of either or both of Article 10(1) and (2); the Working Group proposes that this point be made in the forthcoming Commentary.

**Article 10(2)(a)(i):** As noted in comments on Article 5(2)(a)(i) of Version 1 of the Code, the Watch Group proposes that the subparagraph be amended 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 present drafting of Article 10(2)(a)(i) of Version 2 covers entities related to private parties, but the language used does not cover entities related to States.

It having been clarified that the obligations in Article 10(2) and Article 10(1) are cumulative, the Watch Group considers that it would promote the effectiveness of the disclosure regime to place an onus on parties to identify related entities (“that have been identified by the parties”) in order to facilitate the Adjudicator’s conflict checking.

By referring expressly to entities “that have been identified by the parties,” Article 10(2)(a)(i) could signal to parties that they should provide the Adjudicator with a list of all other entities and persons to which they are relevantly related.

This approach, which is already commonly employed in practice, would ensure that the Adjudicator’s attention would be drawn to those entities and persons that are not obviously related to the parties.

**Article 10(2)(a)(iv):** Similarly to the comment made on Article 5(2)(a)(iv) of Version 1, the Watch Group proposes revising Article 10(2)(a)(iv) of Version 2 to read: “Any third party with a direct and material financial interest in the outcome of the proceeding, including any third-party funder, that has been identified by the parties.”

The Watch Group considers that it is particularly important to include “identified by the parties” in Article 10(2)(a)(iv), as there is no basis on which an Adjudicator can identify all entities that have a financial interest in the outcome of the proceeding unless such entities are identified by the parties.

The Watch Group considers that the Code of Conduct should clarify that “any third-party funder” refers to a subset of all third parties “with a direct and material financial interest in the outcome of the proceeding.” If instead “third-party funder” is used as a category in itself, there is a risk of disagreements about whether an entity is a third-party funder by definition.

**Article 10(2)(b)(ii):** As noted above in relation to Article 10(2)(a)(i), the Watch Group proposes that the subparagraph be amended to refer to: “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 present drafting of Article 10(2)(b)(ii) covers entities related to private parties, but the language used does not cover entities related to States.

**Article 10(2)(c):** The Watch Group queries the utility of Article 10(2)(c) insofar as it is directed at the disclosure of roles that are not disclosable under either Article 10(2)(a) or Article 10(2)(b). If Article 10(2)(c) is directed at the identification of possible issue conflicts, this provision might perhaps better form part of Article 4 (Limit on Multiple Roles).

In any event, if the obligation presently included in Article 10(2)(c) of Version 2 is to remain in the Code (whether as part of Article 4 or otherwise), the Watch Group proposes that it be (1) made subject to confidentiality obligations applicable to any case or role, (2) limited to IID cases, and (3) limited to service as counsel of record. As noted above, a large number 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.

If the obligation presently included in Article 10(2)(c) is to remain in the Code, the Watch Group proposes that the obligation to disclose IID cases in which the Candidate or Adjudicator acted as counsel of record apply to the Candidate’s or Adjudicator’s activities over the five years leading up to the disclosure.

The Watch Group welcomes the removal of the proposed carve-out for trivial matters (Article 5(4) of Version 1) and the obligation to disclose a list of all publications (Article 5(2)(d) of Version 1).

**Article 11:** The Watch Group considers that the wording of Article 12(2) of Version 1 was preferable to the wording of Article 11(2) of Version 2.

The Watch Group considers that the most efficient and effective method to bring the Code of Conduct into effect would be for parties to incorporate it by reference in a treaty, contract, or other instrument providing consent to international dispute resolution. The disqualification rules applicable to that instrument would then apply to violations of the Code of Conduct.

Given the variety of ways that the Code may be made applicable to a proceeding, whether through incorporation into a treaty, contract, or set of rules, it may lead to confusion or ambiguity for the Code itself to attempt to prescribe which breaches would constitute grounds for disqualification and removal under the applicable rules.

For example, assume that the applicable rules provide that an arbitrator may be removed only if there are justifiable doubts as to their impartiality and independence, such as under Article 12(1) of the UNCITRAL Arbitration Rules (2010).

As presently drafted, the Watch Group queries whether the effect of Article 11(2) of the draft Code would be that any breach of the duties in Articles 3 – 8 would become a ground for challenge and potential removal in an UNCITRAL arbitration to which the Code applied, even if the relevant duty was one that was not related to impartiality or independence.

The text as drafted suggests that this would be the effect of Article 11(2) of the draft Code. If this is the intent, the Watch Group queries the possible implication of Article 11(2) on the duration of proceedings in which arbitrators could be subject to multiple challenges.

If this is not the intent, the Watch Group refers to its comments above about the risk of confusion. There is less opportunity for inconsistency and incompatibility if the instrument that makes the Code applicable also sets the terms on which the Code interacts with pre-existing mechanisms for disqualification and removal, and indeed any other sanctions, in the applicable rules, treaty, or contract.

## PUBLIC STAKEHOLDERS – Individuals (Alphabetically by last name)

### AFFAKI, Georges

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#### 1. Background

- 1.1. On 19 April 2021, ICSID and UNCITRAL have released Version Two of the Draft Code of Conduct for Adjudicators in International Investment Disputes, taking into account the comments and discussions submitted by stakeholders on Version One published on 1 May 2020. Version Two includes a commentary (the **Commentary**) of each article addressing the changes made to Version One.
- 1.2. Bearing in mind recent developments in the field of investment arbitration, the likely transposition by tribunals and parties of all or some of the provisions of the Code of Conduct into other dispute resolution mechanisms, including international commercial arbitration, and the needs of parties, arbitrators, and counsels, I suggest below changes reflecting the Code of Conduct’s perspectives: to wit, to promote additional trust and cooperation among the parties and tribunals. In that sense, the Code of Conduct should set realistic standards, and strive towards simplicity and clarity, in order to assist arbitrators in the fulfilment of their mission in rendering enforceable awards on the basis of the rule of law.
- 1.3. The final version of the Code of Conduct should be tailored-made for a diverse community of arbitrators, both in their background and in their practice, without imposing an unrealistic, burdensome disclosure standard. Specifically, the Code should not create far-reaching disclosure requirements for arbitrators, which could trigger disputes and challenges on frivolous grounds. On the contrary, it should be an instrument to protect the legitimate expectations of all actors in the arbitration proceedings, including counsel and arbitrators.

#### 2. Article 3 – Independence and Impartiality

- 2.1. Article 3 of the Code of Conduct states that:  
(...)
- 2.2. In their comments on Version One, stakeholders have expressed concerns about the extensive list of general “*Duties and Responsibilities*” applicable to adjudicators “*at all times*.” (Article 3, Version One). As explained in the Commentary on Version Two (at ¶ 21), the former version of Article 3 caused confusion and was therefore deleted. In

Version Two, revised Article 3 only provides for the adjudicators' obligation to "*be independent and impartial*" and to "*take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias.*" I welcome the change made.

- 2.3. As revised, those two sets of duties seem reasonable as they foster trust in the arbitral process and effectiveness of the resulting award. The lack of independence and impartiality of the arbitrator is a common ground to annul an award. The addition of the word "*reasonable*" in Article 3.1 is also welcome in order to enhance a sense of proportionality in the arbitrators' disclosure duties and to protect them against an excessive opening for challenges.
- 2.4. Version Two also substituted the terms "*appearance of bias*" used in Version One by "*apprehension of bias*". The former had been pointed out by commentators as being potentially too subjective, therefore prompting possible abusive challenges. I recommend that the term "*apprehension of bias*" be defined in the Code of Conduct to avoid the same risks.
- 2.5. I note that the Commentary under Article 3 (¶ 22) maintains the use of the term "*appearance of bias.*" If the choice in Version Two of the term "*apprehension*" is confirmed, the Commentary should be revised in that sense.
- 2.6. Imprecision remains in the differences and distinctions between the terms used, including, in particular, between "*impartiality*" and "*bias*", on the one hand, and "*apprehension of bias*" and "*bias*", on the other hand. I also note that "*impropriety*" in Article 3.1 is undefined. I recommend that the Code of Conduct specifies precisely the concepts it covers and how the new terms differ from the other terms used in Article 3.1.
- 2.7. In light of the above, by imposing broad and imprecise duties on adjudicators, the Code of Conduct generates disproportionate obligations at the expense of the arbitrators, but also at the expense of the parties and counsel, as the resulting process makes the dispute resolution mechanism excessively long and costly, due to the likelihood of the multiplication of challenges, without any assured gain for the parties to the proceedings.

### **3. Article 4 – Limit on Multiple Roles**

- 3.1. Article 4 of the Code of Conduct provides that:  
(...)
- 3.2. As stated in the Commentary (¶ 26), Article 4 "*reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties.*" It also states that the language currently in brackets proposes a "*tailored provision that would prohibit*

*concurrently acting as counsel/expert witness and adjudicator where the cases involve the same factual background.” (¶¶ 30-31)*

- 3.3. In my view, prohibiting double-hatting in absolute terms, as currently proposed in Article 4 would be impractical and may exclude a significant number of adjudicators with potential dire consequences that outweigh what is necessary to limit conflicts of interest. Additionally, as phrased, Article 4 could create legal uncertainty as to the degree of similarity in the factual background of IID proceedings. The wording “*same factual background*” is too generic and could be a source of disputes.
- 3.4. As currently drafted, Article 4 is also too broad for another reason relating to the prohibition to act as an expert and an adjudicator in different IID proceedings. An expert report can address specific points of law that are not influenced by the factual background of the specific case. It should not be objectionable to act as an independent expert and an adjudicator in separate IID proceedings that raise similar legal issues.
- 3.5. In sum, I recommend limiting the prohibition of “*double-hatting*” to counsel and adjudicators in cases involving the same parties or their affiliates, but not to transpose it to experts.

#### **4. Article 7 – Communications with a Party**

- 4.1. Article 7 of the Code of Conduct states that:  
(...)
- 4.2. Regarding Article 7.2 in brackets, I consider that the language is unnecessary. Article 7.1 already limits the possibility of discussion between a party and an adjudicator, and I approve that. Requiring, in addition, the disclosure of every communication is too onerous and burdensome for the adjudicator. Additionally, it might be impractical to determine what constitutes a pre-appointment interview subject to disclosure, and whether it would extend, for instance, to a general discussion between a candidate and a party that would not be related to the particular proceeding. In that sense, the fact that a discussion outside the scope of pre-appointment communications would not be disclosed to all parties, whereas a pre-appointment communication would, could create uncertainty for the parties and the adjudicator and, as a result, generate unwelcome challenges.
- 4.3. Without limiting the above, I suggest that Article 7 mandate counsel to keep a record of any pre-appointment interview, in order to avoid any controversy about the content of the discussion between an independent adjudicator and a party’s counsel. This practice would avoid the risk of another party initiating a challenge on an abusive ground and, thus, may contribute to discouraging dilatory tactic.

## 5. Article 10 – Disclosure Obligations

- 5.1. Article 10 of the Code of Conduct states that:  
(...)
- 5.2. Regarding Article 10, I note that it is now a steady feature in international arbitration to follow the IBA Guidelines on Conflicts of Interest, which have become the unquestionable benchmark in the field of international arbitration in relation to the assessment of the existence of conflicts of interest likely to impede the proper conduct of the proceedings. In that regard, I suggest that the disclosure obligation be accompanied by an express provision allowing the parties to explicitly waive any conflicts, as provided in Article 4(c)(ii) of the IBA Guidelines on Conflicts of Interest.
- 5.3. Overall, I suggest keeping in mind a measure of proportionality between *necessary* disclosure which prevents conflicts of interest and *extensive* disclosure that could undermine the expeditiousness of the proceedings.
- 5.4. Additionally, I believe that the Code of Conduct should ensure that the burden of detailed disclosure does not outweigh its benefits. Extensive disclosure could be an unrealistic expectation for full-time academic arbitrators who cannot easily comply with the high standard of disclosure covering all the publications and lectures as opposed to arbitrators who can enlist the assistance of support staff in large firms. As a result, burdensome obligations could prevent the parties from choosing the best qualified professionals.
- 5.5. In that sense, notwithstanding the fact that disclosure fosters transparency and reduces the risk of actual or apparent conflicts of interest, the perspective of a balanced and reasonable approach to disclosure obligations should be pondered to prevent disproportionate disclosure.
- 5.6. With regard to the language adopted in Article 10, as explained above for Article 3, the references to “*impropriety*” and “*appearance of bias*” are ambiguous and should be clarified in order to avoid a party invoking the mere appearance of bias as a ground for challenge to eliminate an arbitrator nominated by the other party. As the wording “*apprehension of bias*” has been chosen in Article 3 over the wording “*appearance of bias*”, and as in Article 10 the wording “*appearance of bias*” is preferred, the difference between the two terms should be explained. In order to eliminate possible debates as to the meaning of the words, I recommend providing examples of improper conduct like it was done in Article 3.2. More generally, as a way of envisaging which situations would constitute “*impropriety*” or “*appearance of bias*”, the Commentary should include examples to illustrate the meaning of those terms in context in order to avoid unnecessary

challenge. That guidance could include examples and excerpts of successful, and unsuccessful decisions on challenge, whether rendered by courts or by other arbitral institutions.

- 5.7. Article 10.2(a) requires the adjudicator to disclose “*any professional relationship*” with the persons mentioned in Article 10.2(a)(i), 10.2(a)(ii), 10.2(a)(iii), and 10.2(a)(iv). I suggest that this obligation be limited to “*active*” professional relationships. In addition, I note that Article 10.2(a)(ii) does not specify whether relationships with the parties’ legal representatives should be extended to the partners, associates and other staff of the parties’ legal representatives, and to those potentially located in other countries but not working on the case.
- 5.8. Drawing inspiration from the IBA Guidelines on Conflicts of Interest, I propose to add the disclosure of a “*close family*” relationship and of “*any person having a controlling influence in one of the parties.*”
- 5.9. Regarding the obligation stated in Article 10.2(c) to disclose all IID and non-IID arbitration cases in which an adjudicator has been involved within the past 5 or 10 years, I am concerned about the disproportionate burden of this obligation. The obligation of independence and impartiality already mandates arbitrators to disclose their involvement in any proceedings that could give rise to potential conflicts of interest. There is no need to go beyond that.
- 5.10. As currently drafted, Article 10.2(c) also raises the issue of confidentiality. If the IID proceeding is *ad hoc* and/or confidential, adjudicators may be precluded from disclosing their involvement. Article 10.2 should therefore provide for an exception to the disclosure requirement to account for a confidentiality obligation.
- 5.11. I suggest excluding the disclosure obligation for non-IID arbitration cases. I note that the provision does not refer to non-arbitral IID or non-IID proceedings, such as mediation. I consider that the same standard should apply *mutatis mutandis*, to wit, only IID mediations and the like should be disclosed.
- 5.12. If this obligation of disclosure were to be maintained, a five-year threshold seems reasonable, as a relationship that existed before such threshold, would still be subject to a duty of disclosure under Article 10.1.
- 5.13. With regard to Article 10.2(a)(iv), I support the disclosure of any relationship with a third-party funder, as the presence of third-party funders in arbitration proceedings is now common. The concern for the disclosure of third-party funders is an important and current issue. A similar provision was incorporated in the 2021 International Chamber of



Commerce Arbitration Rules at Article 11(7): “*in order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.*” I welcome the resulting broader transparency and note that this standard is increasingly emulated in other institutional rules.

- 5.14. Finally, I note that the first version referred to a duty of disclosure by the adjudicators of “[a] list of all publications by the adjudicator or candidate [and their relevant public speeches].” I consider this requirement to be unreasonable, and excessively burdensome on adjudicators, especially when almost all publications are now available online. Paradoxically, the resulting burden is likely to be particularly onerous for the adjudicators who, while prolific in their writings such as academics, lack the administrative staff support to whom they could delegate the listing of their publications. I also believe that it is the counsel’s responsibility to conduct, if deemed necessary, a due diligence on the potential candidates.

## **6. Article 8 – Confidentiality**

- 6.1. Article 8.1 of the Code of Conduct provides that:  
(...)
- 6.2. With regard to Article 8.1(b), I suggest that this provision make clear that adjudicators, when all the parties so request, have the possibility to share a draft decision with the parties to solicit their comments before finalisation. I suggest that, in such situation, that draft should not be deemed a decision, a ruling, or an award.

## **7. Article 11 – Enforcement of the Code of Conduct**

- 7.1. Article 11 of the Code of Conduct states that:  
(...)
- 7.2. With regard to the implementation of the Code of Conduct, I consider that Article 11.3 should provide that the Code’s provisions be (a) incorporated into investment treaties or applicable procedural rules and/or (b) agreed on by the parties on a case-to-case basis.
- 7.3. The Commentary under Article 11 raises the question as to whether Article 6 could be used as a ground to challenge an arbitrator. I strongly believe that the duties set out in Article 6 should not be used, to that end, especially Article 6.1(c) which relates to the obligation to “*treat all participants in the proceeding with civility.*” This Article could

potentially lead to abusive challenges. The term “*civil*” is particularly polysemous. Sometimes, during a hearing, an arbitrator might need to remind the parties of certain rules as to, for example, the length of the pleadings or the type of questions counsel may ask. If a party or its counsel takes issue with the reminder or warning, it could potentially, using Article 6, challenge the arbitrator based on an alleged breach of the standard of civility. This could lead to abusive challenges. I suggest deleting this provision to prevent the misuse of Article 6 as a ground for challenge.

- 7.4. In the Commentary, it is suggested that the failure to disclose should not be an independent ground of challenge. I approve this statement. The failure to disclose does not automatically amount to the existence of a conflict of interest.

## BREKOULAKIS, Stavros; MISTELIS, Loukas; and LEW, Julian

1. Regulation of the conduct of ISDS decision makers and counsel appears uncontroversial. Evidence suggests that a Code of Conduct for ISDS Adjudicators (the “**Code**”), such as the one produced jointly by ICSID and UNCITRAL is widely accepted in principle.<sup>16</sup> It is particularly welcome that such a project was jointly undertaken by two international organisations with significant experience in law-making (UNCITRAL and ICSID) and administering ISDS disputes (ICSID). Ultimately, once formally adopted the Code will be further developed on the basis of experience and practices associated with its use.

### **Article 2 Application of the Code**

2. Under Article 2(4) a specific timeframe should be introduced for the application of the restrictions under Articles 7(3) and 8 of the Code. The current text, which refers to application “after the conclusion of the IID proceedings” is open-ended and, therefore, unduly restrictive. One could perhaps suggest a period of 5 years in respect of Article 7(3). The obligation of confidentiality may be unlimited or have a longer period.

### **Article 3 Independence and Impartiality**

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<sup>16</sup> See the QMUL and CCIAG Survey on Investors’ Perceptions of ISDS Reforms, p 14 et seq, available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>. In particular, “respondents believe the introduction of such a code would be a welcome development. A sizeable portion of respondents (63%) were of the view that the introduction of a universal code of conduct for arbitrators would improve the current ISDS system. None of the respondents believe that a universal code of conduct would, if introduced, have a significantly detrimental impact on the ISDS system.”

3. While the text of Article 3(1) introduces an unlimited and absolute duty of independence and impartiality it qualifies this duty substantially with the phrase that the duty is discharged by “reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias”. As a result, the lower test of appearance of bias set out under Article 3(1) might not reconcile with the existing tests of impartiality under national arbitration laws and the existing jurisprudence. And most certainly the reasonable steps standard would exonerate most adjudicators who may be challenged. Under certain national laws, for example, the test of impartiality – specifically for arbitrators – is based on appearance of bias, which is articulated in different forms, such as “justifiable doubts” as to an arbitrator’s impartiality<sup>17</sup> or “real possibility” that an arbitrator is biased<sup>18</sup>. Without further qualification, the test of independence and impartiality under Article 3(1) although prima facie strict, it appears to be lower than the existing tests under national laws, which may cause confusion and disagreements as to the required standards of impartiality for Adjudicators. A suggestion would be for Article 3(1) to simply retain the requirement that “Adjudicators shall be independent and impartial” and omit any reference to the reasonable steps and the applicable test of impartiality.
4. The indicative list in Article 3(2) is well formulated and would be of guidance.

#### **Article 4**

##### **Limit on Multiple Roles**

5. The aim of Article 4 to address the issue of overlapping roles as counsel or expert witness and Adjudicator is welcome. This article appears to wish to cover effectively both double-hatting and the so-called issue conflict. The issue of double-hatting is a real concern that has contributed to perceptions of structural and widespread bias in ISDS proceedings, although recent empirical evidence does not support this perception<sup>19</sup>. However, the double-hatting

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<sup>17</sup> UNCITRAL Model Law on International Commercial Arbitration Art. 12 (2) and Swiss Private International Law Act Art. 180.

<sup>18</sup> See *Halliburton v Chubb Ltd* [2020] UKSC 48; *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 134---135 (English Court of Appeal).

<sup>19</sup> As per the QMUL and CCIAG Survey cited above in note 1, the finding, at p 15, is that “A significant portion of respondents has no concerns about arbitrators taking up other roles in other proceedings, such as acting as counsel or expert witnesses. 61% of respondents said arbitrators participating in ISDS should be allowed to act as counsel in other in ISDS proceedings. 57% of respondents indicated that arbitrators should be allowed to act as an expert witness in other ISDS disputes. Respondents were asked what impact restrictions would have on the activities ISDS arbitrators can undertake. With the caveat that the response rate of this question was lower than a 50%, the two most cited impacts of such restrictions were the availability (65%) and diversity (54%) in the pool of arbitrators parties can choose from. A smaller percentage of respondents thought such restrictions would have an impact on the consistency of decisions (21%), the correctness of decisions (33%), the quality of decisions (48%), and the expertise (42%) and experience of arbitrators (44%).”

concern needs to be addressed in a pragmatic and proportionate manner which does not create unintentional adverse effects on other important considerations. If one were to consider as adjudicators under the Code only the members of a Multilateral Investment Court, then prohibition of double-hatting is fully justified.

6. In some instances, double hatting would facilitate adjudicators to gain valuable experience in IID / ISDS proceedings as experts or counsel before they are appointed as adjudicators. Specifically, a full prohibition on double-hatting may set back the real progress that has been achieved in the last few years on more diverse arbitration appointments, especially on the part of arbitration institutions, notably ICSID.
7. It is commonplace that the existing pool of the most popular arbitrators comes from a narrow range of age, gender, and geographic diversity<sup>20</sup>. Popular arbitrators with an established and busy arbitration practice can afford to pursue the profession of being a full-time arbitrator. By contrast, younger arbitrators (increasingly representative of a more diverse arbitration community) who receive occasional appointments, typically from an arbitration institution, may not have sufficient appointments to constitute a full-time arbitrator's workload<sup>21</sup>. Presented with the option to either continue to work as counsel or work solely as an arbitrator, competing with highly experienced, popular and established arbitrators, younger practitioners are likely to choose the safer, and more financially secure option of their counsel practice.
8. To prevent an adverse impact on the increasing diversity of appointments and address the core concern of double-hatting a targeted and proportionate limit is the most appropriate and workable/pragmatic approach to overlapping roles. This is, in principle, the approach of the Version 2 of the Code.
9. We support the proposed amended provision with the bracketed text which aims to prohibit concurrently acting as counsel/expert witness and Adjudicator where the cases involve "the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity".
10. Alternatively, another formulation of this principle could be considered as potentially generating broader consensus between the different stakeholders. The "and" in the proposed

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<sup>20</sup> See, for example, Andrea Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil & Emilia Onyema, "The Diversity Deficit in International Investment Arbitration" (2020) 21 (2-3) *The Journal of World Investment and Trade* 410; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 *Journal of International Economic Law* 301, 313.

<sup>21</sup> Langford, Behn and Hilleren Lie identify that some of the active double hatters "represent a new generation of actors that may be transitioning to full time arbitration roles." Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 *Journal of International Economic Law* 301, 325.

amended provision could be replaced with “or”. This amendment would thereby prohibit acting concurrently as counsel/expert witness and Adjudicator where the cases involve *either* “the same factual background” *or* “at least one of the same parties or their subsidiary, affiliate or parent entity.” Each of these situations is likely to raise concerns about conflict of interest or bias. Accordingly, the prohibition should apply where *either* of these situations arises rather than only where both of these situations arise.

### **Article 5 Duty of Diligence**

11. The current duty of Adjudicators to “refuse competing obligations” appears generic and open-ended. It is also unclear whether it overlaps with Article 4 and the prohibition of double hatting. Unless the duty is specified, possibly with certain examples the duty may be rendered meaningless. Empirical evidence suggests that ISDS users would prefer a cap on the number of cases an arbitrator or adjudicator may hear at any given time and the most commonly cited numbers were 5 (57%) or 10 cases (31%)<sup>22</sup>.

### **Article 6 Other duties**

12. A welcome provision which rightly emphasises the importance of arbitrators displaying high standards of integrity, fairness and competence.
13. There exists one query. Under Articles 6(1)(a) and 6(1)(b) Adjudicators are required to display and maintain “*competence*” and “*knowledge, skills and qualities necessary to fulfil their duties*”. On the other hand, Article 14 of the ICSID Convention requires adjudicators to be persons of “*recognized competence in the fields of law, commerce, industry or finance*” and have “[c]*ompetence in the field of law*”. It might be worth considering whether these two provisions require overlapping skills of competence which may give rise to confusion and, potentially, frivolous challenges.

### **Article 7 Communications with a Party**

14. The provision largely reflects the general practice of *ex parte* contacts at the pre-appointment stage. Given the general acceptance of such practice, the requirement for disclosing pre-appointment communications under Article 7(2) is not expected to give rise to

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<sup>22</sup> As per the QMUL and CCIAG Survey cited in note 1, p 15, “with the caveat that the response rate for this question was lower than 50%, those who did respond overwhelmingly felt that arbitrators should disclose the number of their ongoing ISDS appointments as part of the appointment process (80%). They also felt (82.5%) that there should be a maximum number of ISDS appointments an arbitrator should be involved in at any one time. There was a clear preference from respondents to cap the number of ISDS appointments at 5 (57%), with the second most popular response being no more than 10 ongoing ISDS appointments (31%).”

challenges. Transparency and a clear record of *ex parte* pre-appointment communications are key here and adding text to that effect would be helpful. It would be helpful if, by way of Code commentary, there are examples and attempts to define acceptable pre- appointment communications that may be relevant to the case, how they are recorded and reproduced for purposes of transparency,

15. A point of clarification may be necessary under Article 7(2): the current text is unclear as to who is required to disclose the pre-appointment communications. Is it the arbitrator or the party which engaged in *ex parte* contact? Logic dictates that it should be the arbitrator who is required to make the disclosure, but text clarifying the position would be helpful. There may also be an issue of perception here. For example, a party and an adjudicator may have had a pre- appointment communication which may have touched upon the dispute; the discussion, however, may have been generic on a point of law and at a time that the adjudicator was fully unaware that this may be linked to an appointment. Arguably then the disclosure obligation would exist only when the adjudicator makes the link of the discussion to the case.

### **Article 8 Confidentiality**

16. The provision introduces straightforward and clear obligations of confidentiality for the Adjudicators and (rightly also) Candidates.
17. Article 8 might raise questions on the possible sanctions for breach of the duty of confidentiality, especially in relation to Candidates and in case of post-award breaches. While Article 11 provides that an Adjudicator's breach of confidentiality under Article 8 may engage the disqualification and removal procedure, this sanction can be applicable to Adjudicators who breach the confidentiality duty in the course of an arbitration. However, the sanctions provision of Article 11 cannot be engaged in the case of a Candidate's breach of confidentiality or post-award breach.
18. It is anticipated, however, that this question might go beyond the scope and purpose of the Code.

### **Article 9 Fees and Expenses**

19. Again, a straightforward and welcome provision on the question of fees and expenses.
20. In some *ad hoc* arbitrations, also under the UNCITRAL Rules, there are occasions where each party-appointed arbitrator discusses and agrees their fees and remuneration directly with the party who appoints them. In those circumstances, it sometimes occurs that the arbitrator appointed by one party agrees on a higher (occasionally substantially higher) hourly rate than the hourly rate agreed by the arbitrator appointed by the other party. While at first instance,

the fees for each arbitrator will be borne by the party who appointed them, at the end (and depending on the outcome of the award) the higher fees of one arbitrator may be allocated against the party who did not agree on the higher rate in the first place. It might be worth considering inserting a provision addressing this matter.

### **Article 10 Disclosure obligations**

21. An improved provision on disclosure obligations which is largely aligned with the generally accepted approach of the IBA Guidelines on Conflicts of Interest. The introduction of a time limit on the disclosure of past relations under Article 10(2)(a) is welcome. It might be worth considering reducing the time-limit to three years in line with the timeline provided by the IBA Guidelines on Conflicts of Interest. The abolition of the requirement to disclose past speeches and writings is particularly welcome, as the previous approach might have stifled scholarly discourse, which is all too important, especially in the field of investment law and investment dispute settlement.
22. Two observations only: first, the test for disclosure under Article 10(1) requires clarification as it confusingly provides for cumulative formulations of bias, namely “doubts” as to the Adjudicators’ “independence or impartiality”, “bias”, “conflict of interest”, “impropriety” or “appearance of bias”. It is unclear whether the different formulations of bias intend to introduce different tests for disclosure or what exactly is the difference in the scope of their application. It is apprehended that they will give rise to confusion and satellite disputes over which circumstances warrant disclosure.
23. Second, the term “personal relationship” under Article 10(2)(a) would benefit from clarification. The current formulation appears overly broad and generic and might encompass a wide range of relationships. At the same time the current expression has a cultural neutrality and allows adjudicators to consider this disclosure on the basis of the cultural context relevant to them. Whether this cultural neutrality would also allow for differing standards to emerge, is a matter to be revisited in a future iteration of the Code.

### **Article 11 Enforcement of the Code of Conduct**

24. The exclusion of Article 10 from the scope of the sanctions provided under Article 11 is sensible and welcome. As is generally accepted, including by recent decisions of national courts<sup>23</sup>, the mere failure of disclosure on the part of an Adjudicator is not of and in itself a valid ground for their disqualification and removal.

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<sup>23</sup> See *Halliburton v Chubb Ltd* [2020] UKSC 48.

25. See above comments under Article 8 and in relation to sanctions for breach of confidentiality on the part of a Candidate or at a post-award stage.

GIORGETTI, Chiara

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[The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?](#)

On April 19, 2021, the Secretariats of the International Centre for Settlement of Investment Disputes ([ICSID](#)) and the United Nations Commission on International Trade Law ([UNCITRAL](#)) released the second draft of the [Code of Conduct for Adjudicators in International Investment Disputes](#), a key feature of the Investor-State Dispute Settlement (ISDS) reform process which is presently under way at [UNCITRAL Working Group III](#) (WGIII).

The second draft builds on the [first draft](#) that was published in May 2020 and reflects extensive [comments](#) received by the two Secretariats (organized by [State/commenter here](#), and by [Article and Topic here](#)), as well as important disseminations and discussion events (for example [here](#)) that the ICSID and UNCITRAL Secretariats organized with member States and other stakeholders. The new version is streamlined and more concise and reflects the general consensus that has so far been shown to exist among stakeholders. The second draft will be discussed next on June 7<sup>th</sup>, 2021 at a [joint event](#) organized by ICSID and UNCITRAL. It will then go for further review at the next meeting of WGIII in November with a possible early adoption of a Code of Conduct to follow shortly thereafter.

In this contribution, I will briefly explain and assess the most salient novel aspects of the new draft.

### **Changes to the Overall Format and Structure of the Code**

The format of the second Draft has changed as compared to the first Draft: it now has 11 articles instead of the 12 articles, and overall the language is tighter and clearer. There are fewer repetitions and the Code is more readable. The second draft also includes some significant changes related to the definition of certain terms and the applicability of certain provisions.

The new version of the Code rearranges its provisions so that the substantive provisions of the Code are now grouped together in the central part of the Code (Articles 3-9) followed by the



obligations related to disclosures, which are now contained in Article 10 (of which more later). Article 11 relates to the enforcement of the Code (with some interesting new language analyzed below) after which a new Annex I containing a Declaration, Disclosure and Background Information is introduced.

The revised Code also includes clearer definitions of key terms. In Article 1, containing definitions, for example, there is a clearer definition of the term ‘adjudicator’ which includes ‘arbitrator’ and ‘judge’. The meaning of ‘arbitrator’ is further defined as “a member of an *ad hoc* tribunal or panel, or member of an ICSID *ad hoc* Committee who is appointed to resolve an ‘International Investment Dispute’ [IID].” IID is then defined in the same provision as “a dispute arising pursuant to the investment promotion and protection provisions in an international treaty.” This new language means that the Code will only apply to disputes arising from certain provisions of international investment treaties, and will not apply – as the previous draft did – to those arising from contracts or domestic law provisions.

Article 1 also introduces a separate definition of ‘judge’ as a person “appointed to a standing mechanism for IID settlement.” This is a helpful clarification which takes into consideration the comments of those countries, especially from the European Union, whose ISDS reform agenda includes the creation of a permanent court for investment. This distinction is carried out throughout the commentary of the second draft to explain what provisions specifically apply to judges versus adjudicators. Throughout the explanation of the changes to the second draft, moreover, there are ample references to a future commentary to be written to clarify the content of each provision. This highly desirable commentary will be an invaluable tool for the application of the Code.

Article 2 then specifies in details which provisions apply to adjudicators and candidates, and which provisions will continue to apply after the conclusion of proceedings. It also stipulates that adjudicators must take reasonable steps to ensure that their assistants (defined in Article 1 as a person working under the direction and control of the Adjudicator) are aware of and comply with the Code.

Article 3 sets out, in a new a tighter language, the fundamental obligation of independence and impartiality, which is the key to any ethics code and common in all such codifications. It also sets out the related obligations to take reasonable steps to avoid bias, conflict of interest, impropriety and the appearance of bias.

Other general duties included in the Code are the duty of diligence (which in this version has its own provision in Article 4) the duties of integrity, fairness and competence, the obligation for adjudicators to engage in continued education activities, the duty to treat the parties with civility and the obligation to refuse an appointment should one be too busy or lack competence and

necessary skills (Article 6). Article 8 addresses confidentiality and Article 9 relates to fees and expenses.

### **Three Key Issues**

In my previous contribution to this blog on the first draft of the Code ([here](#)), I highlighted three key ethical issues that have generated strong views from State negotiators and other stakeholders, namely: issue conflict, double-hatting and repeat appointments.

The new draft makes some important changes on each of these issues.

Issue conflict was addressed only indirectly in the first draft by requiring an adjudicator to disclose all publications and all relevant public speeches. The commentary of the first draft also referred to issue conflict directly. Issue conflict generated a lot of discussion. The second draft of the Code does not contain similar disclosure obligations and there is no reference to issue conflict at all. Issue conflict is notably difficult to define and regulate (see the excellent explanations and discussions [here](#)) and the new draft reflects the lack of agreement expressed by States on this topic. Besides, an issue conflict would continue to be challengeable as it amounts to a lack of independence and impartiality.

Double hatting is regulated in Article 4 of the new draft, with the heading ‘limit on multiple roles,’ which is the same as the prior draft, where it was regulated in Article 6. There are several significant modifications in the new draft. First, as suggested by some delegates, disputing parties may expressly agree to an adjudicator serving in multiple roles. Second, the limitation on multiple roles is narrowed to counsel and expert only, and does not include ‘witness, judge, agent or any other relevant role.’ While some of the prior drafting was redundant (e.g. judge) the general (though possibly too open-ended) reference to ‘any other relevant role’ was useful in including other positions (such as advisor to third party financing firms). Third, the new limitation only includes concurrent representations and eliminates the reference (which in the first draft was in bracketed text) to a temporal limitation. Fourth, the text now provides bracketed text that can limit the otherwise extensive prohibition on double hatting. Without the bracketed text, no adjudicator will be able to serve concurrently as counsel or expert in other IID cases without the disputing parties’ agreements. Conversely, the bracketed text, if added, would limit considerably the provision by restricting the prohibition of multiple roles to cases involving the same factual background and at least one of the same parties, subsidiary, affiliate or parent entity. This new, and clearer, provision tries to strike a new balance among the multiple ways to regulate double hatting and will be surely discussed extensively in the forthcoming negotiations. The text without the bracketed language seems to be more in line with the most recent treatment of the issue in new investment treaties (see [here](#) for some examples).

The issue of repeat appointment is still (as in the first draft) treated as a matter of disclosure. Article 10 requires ample and continuous disclosure, including of all prior and concurrent

appointments as adjudicator, counsel and expert witness. The provision contains numerous instances of bracketed text that would restrict or broaden the required disclosure to non-IID proceedings and introduce a temporal limitation to disclosure obligations of 5 to 10 years. The Code does not prohibit repeat appointments, which would remain permissible unless it raises concerns related to lack of independence and impartiality. In the previous draft, repeat appointment was regulated when it interfered with the availability of the adjudicator (in former Article 8), which was difficult to assess. This prohibition is not included in the new draft.

### **Disclosure Obligations and Enforcement of the Code**

Disclosure obligations play an important role in the architecture of the Code, even if the provision was moved to the back of the Code. Adjudicators are required to provide extensive disclosure and have a continuous duty to disclose and should err in favor of disclosure.

In addition to the comments made above in relation to issue conflict and repeat appointments, the new draft contains some noteworthy novelties. First, it specifies that adjudicators disclosure is to be seen as related to matters that could give rise to doubts as to their independence and impartiality in eyes of the parties. Second, it states specifically that the mere fact of non-disclosure does not establish a breach of the Code. Indeed, Article 11 on enforcement indicates that disqualification and removal procedures will not apply to Article 10. It is therefore unclear what the consequences of a lack of disclosure would be under the system. A failure of disclosure would be relevant to assess the provisions in articles 3 to 8, but by itself it cannot give rise to challenges. Third, a new Annex 1 appointment includes a simplified disclosure form to be filled prior to or upon accepting appointments.

Article 11 addresses enforcement. It still includes the bracketed text for further consideration of possible sanctions. A new section indicates the limits of disqualification and removal procedures to the specific breaches of Article 3-8. A new [Draft Note](#) on the implementation and enforcement of the Code has just been released by the UNCITRAL Secretariat.

Both Articles 10 and 11 will surely be the focus of substantial discussions in the forthcoming negotiations. Indeed, the negotiations themselves and their outcome will play an important part for the success and viability of the Code.

### **Next Steps**

The second draft of Code of the Conduct advances the drafting process towards a final text, agreeable to all parties. It is a compromise that reflects well the comments received from multiple stakeholders. The upcoming negotiations in June and November 2021 remain key to finalize an approved common text, yet a WGIII agreement on a Code of Conduct seems closer.

As practitioners with significant experience in investor-state arbitrations, we appreciate the ICSID and UNCITRAL Secretariats' invitation for comments on Version Two of the Draft Code of Conduct for Adjudicators (the *Draft Code of Conduct*) in the context of UNCITRAL Working Group III and ICSID's amendment of its procedural rules. We also commend the Secretariats for the manner in which they have presented their proposals to the public and engaged in dialogue with states, practitioners, and other stakeholders about the proposals. To participate in that public dialogue, we wish to provide the Secretariats with certain comments concerning Version Two of the Draft Code of Conduct published in April 2021.

The following comments are those of individual practitioners within our firm and should not be taken to reflect the views of the firm or any of its clients. They are intended to be of practical assistance in contributing to the objectives of the Draft Code of Conduct, i.e., *inter alia*, to “provid[e] a uniform approach to requirements applicable to ISDS tribunal members”, to “clarify[] the content of the standards, thereby furthering harmonization and clarification of the different existing requirements”, and to “give more concrete content to broad ethical notions and standards used in the applicable instruments”.<sup>24</sup>

Our comments are set out in two sections: *first*, we offer some general observations about the overlap between the Draft Code of Conduct and existing standards (*I*); *second*, we offer comments on specific provisions of the Draft Code of Conduct (*II*).

## **I. OVERLAP BETWEEN THE DRAFT CODE OF CONDUCT AND EXISTING APPLICABLE STANDARDS**

It is important to have uniform rules in international arbitration concerning an arbitrator's duties. Such rules are however only effective if they are clear, consistent and represent a consensus of the international arbitration community.

Much has already been achieved over the last two decades to provide such clarity and consistency and to develop such consensus. In the sphere of an arbitrator's duty to disclose possible conflicts of interest, the International Bar Association (*IBA*) published in 2004 the IBA Guidelines on Conflicts of Interest in International Arbitration (*IBA Guidelines on Conflicts of Interest*) in order to provide uniformity in applicable norms concerning conflicts of interest, disclosure, and challenges of arbitrators. The IBA Guidelines on Conflicts of Interest were updated in 2014 to reflect the latest norms and to clarify the standards applying to arbitrators and parties based on evolving arbitral practice.

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<sup>24</sup> Note by the UNCITRAL Secretariat, “Possible reform of investor-State dispute settlement (ISDS) – Background information on a code of conduct”, Thirty-eighth session, 14–18 October 2019, available at <https://undocs.org/A/CN.9/WG.III/WP.167>, paras 12–13.

The IBA Guidelines on Conflicts of Interest represent the most comprehensive set of standards on conflicts of interest in international arbitration to date, defining the framework through which arbitrator independence and impartiality can be assessed effectively and consistently. Since their publication, the IBA Guidelines on Conflicts of Interest have been widely used and adopted by the international arbitration community in both commercial and investor-state arbitration. They are routinely relied upon by parties challenging arbitrators, and by arbitral tribunals, arbitral institutions and national courts in determining arbitrator challenges. They reflect prevailing international practice and consensus.

That the IBA Guidelines on Conflicts of Interest represent international consensus was confirmed most recently in 2020 in the UK Supreme Court’s judgment in *Halliburton v Chubb*. In that well-known case, all parties, including interveners such as the International Court of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration, among others, relied on the IBA Guidelines on Conflicts of Interest as representing international consensus and submitted that it was important to ensure that English law did not depart from that international consensus. Even more importantly, the UK Supreme Court recognised this consensus and relied with confidence on the IBA Guidelines on Conflicts of Interest in its judgment, which was drafted carefully so as to not depart from that international consensus.<sup>25</sup>

Similarly, in 2013, the IBA published the IBA Guidelines on Party Representation in International Arbitration (***IBA Guidelines on Party Representation***). These Guidelines regulated counsel conduct and party representation in international arbitration proceedings in order to promote consistent rules and integrity norms for counsel, including in counsel’s dealings with arbitrators. In our experience, the IBA Guidelines on Party Representation are frequently and voluntarily adopted by parties and counsel in international arbitration and too have come to represent an established international consensus.

Before turning to our specific comments, we would make the general comment that we would urge the ICSID and UNCITRAL Secretariats to exercise considerable caution in developing the Draft Code of Conduct in a manner that is inconsistent with existing standards that are considered accurately to reflect the international consensus, such as these IBA Guidelines. Any attempt to depart from established consensus risks creating uncertainty around these important issues and goes against the Draft Code of Conduct’s overarching objective of “providing a uniform approach” that “harmoniz[es] and clarif[ies]” the existing standards.

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<sup>25</sup> *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at para 71 (“The IBA Guidelines 2014 set out good arbitral practice which is recognised internationally ...”). One of the undersigned, Constantine Partasides QC, represented the International Court of Arbitration of the International Chamber of Commerce before the UK Supreme Court in *Halliburton v Chubb*.

## II. COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT CODE OF CONDUCT

### A. ISSUES ALREADY REGULATED BY THE IBA GUIDELINES ON CONFLICTS OF INTEREST

Several proposed provisions of the Draft Code of Conduct cover either precisely or substantially the same ground as the IBA Guidelines on Conflicts of Interest, and, in some instances, propose new obligations not foreseen in those Guidelines. We recognise ICSID’s and UNCITRAL’s preference for a mandatory Code of Conduct to apply to arbitrators in investor-state arbitrations that are administered under those arbitration rules. However, any inconsistency between the provisions of such a mandatory Code and the IBA Guidelines risks creating unhelpful confusion for the users of international arbitration. Some examples follow.

#### 1. Article 3 (“Independence and Impartiality”)

Article 3 of the Draft Code of Conduct proposes duties on “Adjudicators” to be independent and impartial. Article 3 of the Draft Code covers substantially the same ground as General Standard 1 of the IBA Guidelines on Conflicts of Interest (which mandates that “[e]very arbitrator shall be impartial and independent ...”).

General Standard 1, consistent with major arbitral rules and legislation around the world, reinforces that the principles of independence and impartiality focus on the factual circumstances that give rise to, or evidence, a risk of dependence or partiality. However, Article 3 of the Draft Code proposes to go further by requiring that arbitrators not be influenced by emotions. For example, Article 3(2)(a) of the Draft Code provides, *inter alia*, that “Adjudicators shall not be influenced by ... fear of criticism ...”. While the strength of character to withstand criticism may (arguably) be a welcome virtue in international arbitrators, its inclusion in the Code of Conduct as a mandatory *requirement* would elevate that virtue into a duty. In doing so, it would create a whole new category of potential challenges to arbitrators and their decisions. What is more, it is also not clear how such challenges would be evaluated, as proving or disproving a “fear of criticism” would not be a straightforward exercise.

In addition, one might also question the benefit of including such a requirement. It is not obvious that a fear of criticism—an emotion which might compel an arbitrator to consider the perspectives of others—should necessarily be discouraged. Indeed, there is force in the argument that arbitrators who do not think about criticism may not be the best adjudicators.

For these reasons, we respectfully suggest that the final text of Article 3 of the Code be faithful to existing standards of independence and impartiality, consistent with the IBA

Guidelines, and, in particular, not include this kind of appreciation of an arbitrator's character.

## **2. Article 10 (“Disclosure Obligations”)**

Article 10 of the Draft Code addresses an Adjudicator's “Disclosure Obligations”. It covers substantially the same ground as General Standard 3 of the IBA Guidelines on Conflicts of Interest (“Disclosure by the Arbitrator”). As discussed above, the IBA Guidelines in this specific area are especially widely accepted to represent an international standard of best practice. Therefore, we would urge that that the Secretariats act with considerable caution to avoid any unintentional impression that the Draft Code departs from or otherwise undermines those IBA Guidelines.

Article 10 of the Draft Code would in our view risk doing precisely that. As drafted, it is not clear whether the disclosure obligations in Article 10 are intended to be the same as those set down in the IBA Guidelines, or a departure? If they are intended to be the same, then Article 10 might make this express or even incorporate General Standard 3 by reference. But if they are intended to be a departure, would that mean that the ICSID and UNCITRAL Secretariats consider that the IBA Guidelines do not represent an international consensus on disclosure standards?

We note that while substantially similar, Article 10 includes obligations that go beyond those laid down in General Standard 3 of the IBA Guidelines. For example, Article 10(2)(c) of the Draft Code requires an arbitrator to disclose “[a]ll IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.” There is a justified concern that such a disclosure obligation casts the net too wide. It may not be realistic to expect arbitrator candidates, who frequently will have been involved (as arbitrators, counsel and perhaps less so as expert witnesses) in dozens of cases over that time period (if one includes commercial arbitrations), to provide the extremely fulsome disclosures required by Article 10(2)(c). Furthermore, the cumbersome disclosures in respect of commercial arbitrations (the existence of some of which will simply and properly be and remain confidential) may be of limited utility as they are far less likely to be relevant to the issues that arise in a treaty case.

As noted, we would urge that that the Secretariats act with considerable caution to avoid any unintentional impression that the Draft Code departs from or otherwise undermines those IBA Guidelines.

## **3. Article 5 (“Duty of Diligence”) and Article 6 (“Other Duties”)**

We also note that Articles 5 and 6 of the Draft Code appear to depart from the prevailing international consensus, by imposing new, ancillary arbitrator duties not previously reflected in the IBA Guidelines. Three examples follow.

*First*, Article 5(1) of the Draft Code obliges Adjudicators to “refuse competing obligations”. While the “explanation of changes” included with Version Two of the Draft Code suggest that the intention here is to ensure that Adjudicators are “available for the proceeding”, the language of Article 5(1) is much broader. Its proposed duty on an arbitrator to “refuse competing obligations” strikes us as being vague and difficult to police. In the strictest sense, all of an arbitrator’s varying professional and personal obligations compete with each other because each new commitment necessarily leaves less time for previous commitments. Moreover, whether an arbitrator’s acceptance of a second, third or fourth appointment as arbitrator might constitute a breach of any such obligation is inherently subjective and personal; so much so that it is very difficult to see what a duty to “refuse competing obligations” could hope to achieve that the already well-accepted requirement that an arbitrator be “reasonably available” to the parties does not. The vaguer “shall refuse competing obligations” would appear vulnerable to tactical challenges by disappointed parties in situations where, say, an award is delivered two years after the close of the final hearing and a disappointed party seeks to suggest that an arbitrator decided the case wrongly because of distractions caused by over-commitment.

*Second*, in another example of the elevation of virtues to duties, we are concerned that Article 6(1)(a) of the Draft Code requires arbitrators to “display high standards of ... competence”. While it is certainly expected that arbitrators will display high standards of competence, elevating such a virtue to a duty would again appear to allow parties to advance tactical challenges to arbitrators and their decisions. For example, a party may claim that an arbitrator has failed to display a required standard of competence simply because s/he arrived at a decision that the challenging party considers to be wrong. There is, therefore, a risk that this duty may be used as a back door to a right of an appeal for a mistake of law.

*Third*, Article 6(1)(b) of the Draft Code requires arbitrators to “make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties”. It is not entirely clear what this duty would require of the arbitrators. What “knowledge” is required: international arbitration jurisprudence or some subject matter expertise relevant to the case at hand? What “qualities” are envisaged? Does this provision constitute a continuing legal education requirement to “enhance” one’s “knowledge, skills and qualities”? If yes, how may compliance with this duty be evaluated? This duty too would appear vulnerable to a tactical challenge by a disappointed party who, believing the arbitrators to have made the wrong decision, argues that the arbitrators failed to maintain and enhance their knowledge, skills and qualities as would be *required* by the Code.



For these reasons, we respectfully suggest that these kinds of additional duties be excluded from the Draft Code.

## **B. ISSUES ALREADY ADDRESSED BY THE IBA GUIDELINES ON PARTY REPRESENTATION**

### **1. Article 7 (“Communications with a Party”)**

Article 7 of the Draft Code addresses pre-appointment and *ex parte* communications between arbitrators and parties. Article 7 therefore covers substantially the same ground as Guidelines 7 and 8 of the IBA Guidelines on Party Representation, which generally prohibit *ex parte* communications between arbitrators and party representatives and outline the limited circumstances in which those communications will not be improper, respectively.

While Article 7 of the Draft Code does not expressly mention “party representative” or “counsel”, it appears implicit that it is intended to apply to communications between arbitrator candidates and counsel (as party representatives). Here again, however, it is unclear what the interplay between Article 7 and the existing IBA Guidelines is intended to be. Is Article 7 intended to be the same as the IBA Guidelines or a departure? If they are intended to be the same, then again Article 7 might make this express. But if Article 7 is intended to be a departure, would that mean that the ICSID and UNCITRAL Secretariats consider that the IBA Guidelines do not represent an international consensus on what is and is not an improper communication between an arbitrator and counsel?

## **C. THE ISSUE OF DOUBLE-HATTING IN ARTICLE 4 IS A LEGITIMATE QUESTION FOR POSSIBLE REGULATION**

Article 4 of the Draft Code (“Limit on Multiple Roles”) addresses the concern surrounding “double-hatting”. This subject is presently not fully addressed in existing international standards (although the IBA Guidelines on Conflicts of Interest do list a number of scenarios that could constitute double-hatting in the “Orange List”) and presents a legitimate question for possible additional regulation.

Having reviewed the existing comments that have already been offered to ICSID and UNCITRAL on this Article, we have chosen to focus our comments for now on other provisions of the Draft Code that do not only implicate investment treaty arbitration.

We hope that these comments and suggestions will be of interest, and helpful to you. We would be happy to engage in further dialogue with the ICSID and UNCITRAL Secretariats as the drafting process continues.

Comments on Explanation Paragraph 7: It is submitted that the mandate and role of conciliators, factfinders or mediators is different from adjudicators and ought not to be included in this Code of Conduct

Comments on Explanation Paragraph 9: Agree

Comments on Explanation Paragraph 10: Agree

Comments on Explanation Paragraph 11: Agree

Comments on Explanation Paragraph 12: Agree

Comments on Explanation Paragraph 13: Agree with the first sentence  
The second sentence is unnecessary

Comments on Explanation Paragraph 14: Agree

Comments on Explanation Paragraphs 15-20: Agree

Comments on Explanation Paragraph 21-23: Agree

Comments on Explanation Paragraphs 24: Unnecessary

Comments on Explanation Paragraph 25: Unnecessary  
24 and 25 will cause confusion

Comments on Article 5: Our proposed edits:

- ~~1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations.~~ AdjudicatorsThey shall be reasonably available to the administering institution and, shall dedicate the necessary time and effort for the proceeding, and shall render all decisions in a timely manner. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations.
2. Adjudicators shall in particular be under a duty to arrive at their adjudication and steps in decision making and will not delegate their functions to anyone else.~~not~~

~~delegate their decision-making function to an Assistant or to any other person.~~

Note: Timelines are useful to promote expedition. There should be a provision making it obligatory for the adjudicator(s) to complete the adjudication within a time specified and stated, with a provision that such time could be extended by the organization itself, giving reasons for the same.

Comments on Article 9: Remove 9(1) ; Don't agree.

Comments on Explanation Paragraph 54: Omit sentence 4

## NAIR, Promod

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In addition to comments submitted with Fali Nariman and George Pothan Poothicote:

Proposed edits to Article 1:

2. "Arbitrator" means a member of an *ad hoc*, **permanent or institutional** tribunal or panel, or member of an ICSID ~~*ad hoc*~~ Committee who is appointed to ~~resolve~~**adjudicate** an "International Investment Dispute" (IID);
3. "Assistant" means a person working under the direction and control of an Adjudicator. to assist with case-specific tasks, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, as agreed with the parties;
4. "Candidate" means a person who has been contacted regarding potential appointment as an **Adjudicator**~~Arbitrator~~, or who is under consideration for selection as a Judge, but who has not yet been confirmed in such role;

Comments on Explanation Paragraph 9: edit to "~~Commentary noting~~ note to the effect"

Comments on Explanation Paragraph 13: Agree with the first sentence  
The second sentence is unnecessary

Proposed edits to Article 3:

1. Adjudicators shall be independent and impartial, and shall take **reasonable necessary** steps to avoid bias, conflict of interest, impropriety, or apprehension of

bias;

Proposed edits to Article 5:

1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. Adjudicators~~They~~ shall be reasonably available to the administering institution and, shall dedicate the necessary time and effort for the proceeding, and shall render all decisions in a timely manner.

Proposed edits to Article 6(1)(c):

- (c) treat all participants in the proceeding with equality and civility.

Proposed edits to Article 7(3):

3. An Adjudicator shall not have any *ex parte* contacts or communication with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

Comments on Article 8: [Paragraphs 1 and 2 are seemingly contradictory. If the Tribunal is not constituted, then there would be no presiding arbitrator in place who would be able to communicate any discussion regarding fees to the parties. Second, in practice, fees in ad hoc proceedings are discussed between the arbitrators and parties after the constitution of the Tribunal- it would be practically difficult, if not impossible, for such a discussion to take place before the constitution of the Tribunal. We would therefore suggest that paragraph 1 be deleted.]

Proposed edits to Article 10(2)(a)(i):

the parties, and any subsidiary, affiliate or parent entity identified by the parties including all appointments as Arbitrator, [Judge], counsel, or expert witness made by a party or any legal subsidiary, affiliate or parent entity identified by a party in any IID [and non-IID] proceedings;