

Draft Code of Conduct for Adjudicators in International Investment Disputes

Version Three – September 22, 2021

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

**CODE OF CONDUCT FOR ADJUDICATORS IN
INTERNATIONAL INVESTMENT DISPUTES
VERSION 3 DRAFT**

COMMENTS BY STATE/COMMENTER

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PUBLIC STAKEHOLDERS – International Organizations

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 3 of the ICSID/UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes, released in September 2021 (“Version 3”). 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 3 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.

Article 1 – Definitions

No comments

Article 2 – Application of the Code

The Watch Group proposes that the discussion of draft Article 2 (“Application of the Code”) during the 15 – 19 November 2021 session be combined with the discussion of draft Article 11 (“Compliance with the Code of Conduct”) as both concern the interaction between the Code of Conduct and the treaty, contract, rules or other instrument by which the Code becomes applicable to an IID.

Article 2(4): The Watch Group starts from the assumption that the Code of Conduct will become applicable to an IID by means of a specific provision contained in a treaty, a contract, rules or another instrument.

On this basis, and in line with its comment on Article 2(5) of Version 2, the Watch Group considers that the possible interaction between the Code of Conduct and another code of conduct should be governed by the treaty, contract, rules or other instrument pursuant to the provisions of

which the Code of Conduct is made applicable to the relevant IID, in order to avoid potential incompatibility.

As such, Article 2(4) of Version 3 could simply be deleted from the Code.

Alternatively, Article 2(4) could 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.”

If the Working Group prefers to adopt one of the two options for Article 2(4) currently provided in Version 3, the Watch Group would support Option 1. With respect to which parties may agree on whether (and to what extent) the Code should apply in instances where the treaty upon which consent to arbitrate already contains a code of conduct for adjudicators, the Watch Group would be in favour of leaving this determination to disputing parties.

Article 3 – Independence and Impartiality

No comments

Article 4 - Limit on multiple roles

As noted in its comments on Versions 1 and 2 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.

In line with its comments on Version 2, the Watch Group supports Option 3 for draft Article 4. Article 4 would thus mandate disclosure of multiple roles rather than impose a complete bar. In light of the matters disclosed, the relevant decision-maker would assess, under the applicable rules, whether the Adjudicator possessed the requisite independence and impartiality or whether, conversely, a challenge against the Adjudicator should be upheld.

If the proposal that Article 4 function as a specific disclosure regime (per Option 3) rather than a ban finds support within the Working Group, the Working Group may wish to consider whether to extend the relevant period of enquiry to 3 to 5 years before the commencement of the IID.

The Watch Group seeks more clarity on the term “related parties” in Option 3 and queries whether the language used in Option 2 of draft Article 4 (c) – “one of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise” – may replace “related parties” in Option 3 to provide guidance on the extent of the disclosure obligation contained therein. Alternatively, the intended scope of the term “related parties” could be addressed in the Commentary.

Regarding Options 1 and 2, the Watch Group queries whether the prohibition (with option to consent) could motivate parties to withhold their consent for tactical reasons, rather than due to legitimate fears that an Adjudicator or Candidate’s multiple roles would affect that person’s impartiality or independence.

Should the Working Group prefer that Article 4 function as a ban on the performance of multiple roles, the Watch Group notes that the ban should be carefully tailored to its objective, bearing in

mind the restriction it would impose on a disputing party's ability to appoint the Adjudicator of its choice.

Article 5 – Duty of diligence

No comments

Article 6 – Other duties

No comments

Article 7 – *Ex Parte* Communications of a Candidate or Adjudicator

Article 7(1): The Watch Group notes the change in drafting of Article 7(1) of Version 3, namely that “concerning the expertise” has been replaced by “to determine ... the expertise”. The Watch Group queries whether the wording “to determine” might misplace the emphasis on the party's or counsel's *purpose* in engaging in pre-appointment communication with a Candidate rather than on the obligation incumbent on Candidates themselves to limit any pre-appointment communication to the points listed in Article 7(1) (a) to (c).

The Watch Group notes the reference in Article 7(1)(a) and (b) to a Candidate's “expertise, experience, ability, availability, and the existence of any potential conflicts of interest”, whereas Article 7(1) of Version 2 referred to “expertise, experience, and availability of the Candidate and the absence of any conflict of interest.” The Watch Group understands that the revised language draws from Guideline 8(a) of the IBA Guidelines on Party Representation in International Arbitration.

The Watch Group queries whether the inclusion of the term “ability” in Article 7(1)(a) and (b) is intended to cover a topic of communications not already covered by “expertise, experience, and availability”. If that is the intention, the Watch Group seeks further clarity on the nature of that topic. The Watch Group queries whether including the term “ability” in addition to “expertise” and “experience” may unintentionally suggest that parties may or should exclude qualified Candidates for arbitral appointments on the basis of a disability.

Article 8 – Confidentiality

Article 8(1): The Watch Group notes the change in drafting of Article 8(1)(a) from “disclose or use any non-public information” in Version 2, to “disclose or use any information” in Version 3. This change appears to follow the earlier change in drafting from Article 9(1)(b) in Version 1 “any such information” (that is, “any non-public information concerning or acquired from a proceeding” in Article 9(1)(a)) to Article 8(1)(b) of Version 2, referring to “any information concerning, or acquired in connection with, a proceeding”.

The Watch Group queries the intention behind the decision to prohibit disclosure of any information concerning or acquired in connection with an IID, rather than limiting the obligation to non-public information.

Article 8(2)(d): Consistent with its comments on Version 1 of the Code, if Article 8(2)(d) is to be included, the Watch Group supports the inclusion of the bracketed language within Article 8(2)(d).

Regarding Article 8(1)(a), 8(1)(b) and 8(2)(d) more generally, the Watch Group considers that the purpose of those provisions should be clarified in order that more tailored rules could be considered.

Article 9 – Fees and Expenses

No comments

Article 10 – Disclosure Obligations

Article 10: The Watch Group reiterates its earlier suggestion that Article 10 address the situation where confidentiality obligations applicable to another case or role prevent a Candidate or Adjudicator from fully disclosing that case or role.

On this general point, the Commentary could refer to the standard practice that candidates decline appointments should a confidentiality obligation bar them from disclosing a conflict.

Article 10(1): The Watch Group recalls that the ICSID Secretary General emphasised during the informal Working Session on 7 June 2021 that a matter must be disclosed if it falls within the terms of either or both Article 10(1) and (2). The Watch Group understands that the obligation under Article 10(1) is broader than that under

Article 10(2), meaning that a situation that may not fall under Article 10(2) could still warrant disclosure under Article 10(1). The Watch Group reads the new drafting to suggest that the matters in Article 10(2) constitute an exhaustive list of matters that must be disclosed per the general obligation in Article 10(1).

To avoid confusion, the Watch Group recommends that the Code should clarify that a Candidate or Adjudicator must make disclosures required by Article 10(1) even if they do not fall within the terms of Article 10(2).

Article 11 – Compliance with the Code of Conduct

Article 11(2): The Watch Group welcomes the new drafting in Article 11(2), which better aligns with its preference that the Code itself not prescribe the disqualification and removal procedures. The Watch Group believes that the determination of such procedures should be left to the instrument that incorporates the Code by reference.

As noted above, the Watch Group suggests that Articles 2 and 11 be considered together at the next Working Group session.

Swiss Arbitration Association (ASA)

The Swiss Arbitration Association (ASA) has followed with great interest ICSID's and UNCITRAL's work on the Draft Code of Conduct for Adjudicators in International Investment

Disputes. Further to your invitation of April 19, 2021, we offer the following comments and suggestions on the third version of the draft code, published in September, 2021. As a general remark, we note that the third draft is much more aligned with general best standards and practical needs and thus a clear improvement over the second draft.

The feedback below focuses on those issues we consider would benefit most from further consideration, namely to make the envisaged rules both effective and acceptable by all stakeholders in investor-State arbitration.

The fact that we have not commented on a specific provision does not mean that we necessarily endorse its content.

Ad Article 2 – Application of the Code

The scope of application of the Code is a political issue for the States to be decided. From a practical perspective it is advisable to adopt a solution that is sufficiently easy to apply. We support, in this respect, the concerns raised in Comment 39. In particular, any combination of two different, but overlapping regulations potentially leads to confusion and even dispute.

Ad Article 3 – Independence and Impartiality

We note that according to Comment 48, the examples listed in para. 2 may fall within the common standard of para. 1. In light of the very broad language of, e.g., Article 3(2)(a) we do indeed see a high risk of frivolous challenges. E.g. "*political considerations*" might well *need* to be taken into account in IID cases that concern environmental, social or health policies of the state. Similarly, "*assuming an obligation [...] that could interfere with the performance of their duties*" (Article 3(2)(f)) could in principle prevent an arbitrator from taking on any other assignment during the course of the proceedings as any other assignment might affect availability for hearings or deliberations and delay the drafting of orders and awards.

There should, therefore, be a clarification that para. 2 is not intended to widen the scope of para. 1 but rather to illustrate what might be considered a lack of independence and impartiality. This is particularly important if pursuant to Article 11(2) any violation of Article 3 allows a party to challenge an arbitrator (see also our comments on Article 11). A broad and vague test in Article 3(2) facilitates vexatious challenges that risk undermining the integrity of the arbitral process.

Ad Article 4 – Limit on Multiple roles

We understand that Article 4 seeks to introduce more stringent rules on multiple roles than are currently in place in the existing system, in order to address so-called “double-hatting”. We welcome the approach set out in the latest version of the Draft Code which provides several

options (and sub-options) for the States' discussions. As discussed below, putting in place limitations on multiples roles in ISDS proceedings entails both advantages and disadvantages and involves the balancing of different, and at times conflicting, concerns. We are of the view that the outcome of such balancing exercise depends on the importance which States assign to each of the various concerns at stake. With this in mind, we do not express any preference on one or the other solution conceivable in this area but rather set out the pros and cons of each possible solution. Some of the options discussed below are substantively captured by the three options (and sub-options) set out in Version Three of the Draft Code; some of the other options outlined below are offered to provide further food for thought for delegations. In following this approach, we hope to assist States in making an informed decision.

Options 1 and 2 below provide for an outright ban on multiple role (Option 1) and no limitations on double-hatting (Option 2), respectively. They correspond, respectively, to Options 1 and 3 in Version Three of the Draft Code. They thus are two solutions at the poles. Options 3-6 below seek to identify alternative solutions in between these "extremes". In particular, Options 3, 4, and 5 below are inspired by the same intent which we understand inspires "OPTION 2 'MODIFIED PROHIBITION'" in the latest version of the Draft Code. We have, however, preferred to spell out separate options (rather than group them all in one), as we are of the view that this allows for a clearer identification of the concerns reflected in each option.

Option 1: States could decide to opt for an outright ban on multiple roles. One such formulation is now offered under "OPTION 1: 'FULL PROHIBITION'" in Version Three of the Draft Code.

Such a ban would have to be accompanied by appropriate disclosure obligations (such as those that, for instance, are currently provided in draft Article 10(2)(c), whereby a candidate must disclose "[a]ll IID [and all related proceedings] in which the Candidate or Adjudicator has been involved in the past [five/ten] years or is currently involved in as a legal representative, expert witness, or Adjudicator"). If a solution of this kind is adopted, the interplay between Article 4 and Article 10 would entail that:

- (i) the default position would be no concurrent double hatting (Article 4);
- (ii) if an individual performs multiple roles and is appointed as arbitrator, he/she must make a disclosure under Article 10(2)(c);
- (iii) if either disputing party objects in light of the disclosure and if his/her other role is concurrent, the candidate must withdraw from either role (in accordance with Article 4); failing such withdrawal, he/she may be challenged on such ground;
- (iv) if neither party objects, the arbitrator will be confirmed. Indeed, it appears appropriate to allow for double hatting if both disputing parties consent to it (or at least waive the prohibition by not objecting to the appointment once a disclosure has been made) (Article 4, first sentence: "unless ...").

An outright ban on double-hatting has the benefit of clarity and may strengthen the perception of impartiality (which has often been raised as an equally important concern as that of actual impartiality amongst delegations in WGIII). On the other hand, an outright ban would create obstacles to the promotion of diversity and to the expansion of the pool of arbitrators. Indeed, most new entrants would not be able to afford accepting an appointment because a ban would prevent the arbitrator from working on other investment treaty disputes as counsel or expert for the duration of that single arbitration, which would typically last several years. While arbitrators acting as counsel/expert in *commercial* arbitration could still sit as arbitrator in IID cases, they would not benefit from the practical experience made as counsel in investment treaty disputes. While some individuals may start an arbitrator career from academia, the number of academics with the required practical experience in managing complex disputes, as well as knowledge of and expertise in the business underlying the investment treaty dispute in question, might be limited.

Experience as counsel does allow adjudicators to get a better understanding of the viewpoints of parties and counsel, which contributes to making them better adjudicators. Preventing them from accepting adjudicator mandates would thus remove a large number of candidates with very relevant experience and expertise from the pool of potential adjudicators.

Option 2: The opposite solution would be to provide for no limitations on multiple roles, with, however, a duty of full disclosure. This option is substantively captured by “OPTION 3: ‘FULL DISCLOSURE’ (WITH OPTION TO CHALLENGE)” in Version Three of the Draft Code. The advantages/disadvantages of this solution would be the reverse of those mentioned in connection with a ban, i.e., just to recall the main ones, the pool of arbitrators would be wider, however concerns with the perception of impartiality might not be adequately addressed. If such a solution were to be preferred, Article 4 could, in our view, be eliminated altogether. By contrast, the duty of disclosure in Article 10(2)(c) should be maintained, but it would be clear that absent a ban, a disputing party will have no right to challenge the arbitrator on the basis of his/her multiple roles alone.

Option 3: As a “mid-way” between the first two options, a ban could be limited to those cases involving the same factual background and at least one of the same parties. A rule of this kind could be formulated along these lines:

“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.*”

This rule would be narrower than the new Option 3 in Version Three of the Draft Code (other aspects of Option 3 of Version Three are addressed by our Options 4 and 5 below). It has the advantage of addressing at least the most obvious cases in which a dual role might be perceived as problematic. For instance, if an individual is acting as counsel for a party in a dispute

involving a given State measure, he/she could not adjudicate a different dispute arising out of the same State measure even though it involves a different investor. On the other hand, one might consider that such a situation should already be disclosed, and perhaps even be impermissible, in the existing system, as in and of itself it may give rise to justifiable doubts on the arbitrator's impartiality. Under such a view, there would be no need for Article 4. It is also unclear whether a provision of this kind would adequately cover "issue conflicts", which are in fact one of, if not the, main reason for seeking to regulate double hatting. For instance, if an individual acts as counsel in an investor- State dispute under the IIA between State A and State B, the suggested text might not limit his/her role as arbitrator in a different dispute under a similarly (or even identically) worded IIA between C and D in which the same legal issue arises. In sum, while this rule might cover the most obvious cases of perceived impropriety arising out of multiple roles, it might leave other relevant situations unaddressed.

Option 4: An alternative solution is to limit the performance of multiple roles under the same IIA. A limitation of this kind is included in the recent USMCA (which replaces NAFTA).¹ It could be formulated along the following lines:

“Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID proceeding *under the same IIA*”.

A treaty-specific limitation would have the benefit of clarity. However, it would leave unaddressed "issue conflicts" arising out of different treaties which may contain provisions which are worded similarly or even identically.

Option 5: An alternative approach is to address issue conflicts squarely. Multiple roles would only be prohibited in situations in which there is an issue conflict, i.e. "*a situation in which there is an appearance of bias on the part of an adjudicator based on his or her commitment to a particular idea, related to a material issue in dispute*"². Such issue conflict could occur if, for instance, an adjudicator is called to decide on a jurisdictional issue under an IIA in an IID proceeding and is advocating the same jurisdictional issue (albeit under a different IIA) in a different IID proceeding.

A ban limited to issue conflicts would have the benefit of addressing what appears to be the main concern behind double hatting. On the other hand, questions surrounding the precise definition,

¹ See USMCA, Annex 14-D Mexico-US Investment Disputes, Art. 14.D.6.5(c) ("Arbitrators appointed to a tribunal for claims submitted under Article 14.D.3.1 shall: [...] 14-D-7 (c) not, for the duration of the proceedings, act as counsel or as party- appointed expert or witness in any pending arbitration under the annexes to this Chapter").

² Lucy Reed and Dafina Atanasova, "Issue Conflict: International Arbitration", in Max Planck Encyclopedia of International Procedural Law (last viewed 8 August 2021).

limits, and regulation of issue conflicts are complex, as the 2016 ICCA/ASIL Report highlights³. In addition, a prohibition of this kind might not be easy to implement. When an arbitrator is appointed, he/she normally has very little information on the issues that will actually arise in a given IID case. He/she might thus not be in a position to disclose the (potential) issue conflict until the relevant issue is raised by a party in the course of the proceeding.

Option 6: Finally, an alternative option is to provide for a ban on multiple roles, limited however to the chairperson only. A rule of this kind could read as follows:

“Unless the disputing parties agree otherwise, an Adjudicator *who presides over* an IID proceeding shall not act concurrently as counsel or expert witness in another IID case”.

A rule of this kind implies that, while double hatting is viewed as impermissible for the chairperson, it is seen as harmless if one or both party-appointed arbitrators act as counsel in a different matter and this is disclosed (Article 10.2(c)). This solution may however be seen as problematic in that it could be seen to imply a different level of perceived impartiality on the chairperson than on the co- arbitrators. In addition, this option may impact on the arbitral institutions’ efforts to promote

diversity and to expand the pool of arbitrators through their role of appointing authority which is often exercised in appointing the chairperson.

Ad Article 5 – Duty of Diligence

We agree with the deletion of the reference to “*competing obligations*” in Article 5(1). As previously formulated, it could exclude any other appointment or mandate and even invite vexatious challenges, particularly in connection with Article 11(2).

Ad Article 6 – Other Duties

We fully agree with the deletion of Article 6(1)(b) for the reasons provided in Commentary 73.

Ad Article 7 – *Ex Parte* Communications of a Candidate or Adjudicator

We generally agree with the revision of the previous text. We particularly welcome the deletion of the full disclosure obligation in Article 7(1) of the previous draft since, in the very early stages of a case, it is likely that not all counsel or candidates are aware of this provision and of a suggestion to keep a recording. In the absence of such recording, it may be very difficult, if not

³ See *Report of the ASIL-ICCA Joint Task Force On Issue Conflicts In Investor-State Arbitration*, The ICCA Reports No. 3, 17 March 2016.

impossible, to “fully” disclose the contents of such pre-appointment communications, as there may be things that may have escaped human recollection.

We note, however, that the new draft only partly matches Guideline 8 of the IBA Guidelines on Party Representation on which it is declared to be based: there is no equivalent rule to Guideline 8(b), which reads: "*(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.*" We wonder whether this omission was on purpose. As it is crucial that the parties can be heard on the selection of the presiding arbitrator and as such communications are standard in international arbitration, we deem it necessary to clarify this point. We suggest either to add a rule similar to Guideline 8(b) or to specify at least in the comments that such communications are permissible with agreement between the parties.

Ad Article 8 – Confidentiality

We agree with the revised version and, in particular, with the inclusion of a new para. 4 in line with other arbitral rules that contain similar language (see, e.g., Art. 30.1 of the LCIA Rules).

Ad Article 9 – Fees and Expenses

We support the revision of Article 9(1) for the reasons indicated in Commentary 96.

We suggest amending para. 2 in order to allow the presiding arbitrator to delegate the fee discussion to the co-arbitrators. Such delegation is sometimes done. It allows the presiding arbitrator to avoid fee discussions that might unnecessarily encumber the presiding arbitrator's relationship with the parties. A sentence could be added to para. 2 as follows: "*The presiding Arbitrator may also delegate such discussion to the two co-arbitrators.*"

Ad Article 10 – Disclosure Obligations

Ad Article 10(1)

Lack of clarity about disclosure is a notorious source of discussions and disputes. A provision on disclosure is, therefore, necessary. The current draft goes into the right direction but should be improved in order to avoid lack of clarity that could give rise to misunderstandings or even frivolous challenges. We suggest applying the same test as the UNCITRAL Model Law. Its Article 12(1) states that an arbitrator "*shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*". The same formulation is used in Article 11 of the UNCITRAL Arbitration Rules.

The UNCITRAL Model Law applies the *objective test* of justifiable doubts. The current draft applies the *subjective test* of "*in the eyes of the parties*". This subjective test is sometimes applied, most notably by the ICC in Article 11.2 of the Arbitration Rules and in General Standard 3(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration.

A subjective test is notoriously difficult to apply in practice as the IBA Guidelines themselves implicitly confirm in the Explanation to General Standard 3(a) by explaining that certain situations in particularly those set out in the Green List, need not be disclosed, thus setting an objective standard in contradiction to the General Standard 3(a). We note that Commentary 108 refers to the IBA Guidelines' Application Lists for guidance, and thus again to an objective standard. Wing arbitrators, in particular, are typically contacted by one party and need to rely on very limited information about the parties and their potential expectations about disclosure. In practice, arbitrators resort to applying the objective test.

We recommend, therefore, aligning the Code of Conduct with the other UNCITRAL arbitration texts.

Further, we support the deletion of the additional wording "*or demonstrate bias, conflict of interest, impropriety or an appearance of bias*", which could cause confusion. The use of the connector "*or*" suggested a different standard compared to independence and impartiality, although the criteria listed in this wording appear to be included in the general test of independence and impartiality.

Ad Article 10(2)

Concerning the question whether disclosures should cover the last five or ten years, we deem a time period of five years to be sufficient and easier to apply. We suggest specifying at least in the comments, however, that the five-year time period runs from the end of a relationship, not from the moment of appointment or retention. This seems to be implicit in Article 10(2)(a) and (c), but seems not to apply in Article 10(2)(d) in its current version.

Ad Article 10(2)(d)

With regard to the bracketed text, it would seem indeed appropriate to extend the disclosure also to non-IID proceedings, as it is the number of appointments and not the subject-matter of the proceeding that is relevant in this respect (the situation is thus different from letter (c)). We note that (d) is already included in (a), but may warrant separate mentioning due to the importance of repeated appointments. As rightly noted in Comments 121/122 confidentiality obligations might prevent disclosure and thus require a Candidate/Adjudicator to withdraw.

In respect of the duty to disclose “*all appointments*” within a certain time period we would suggest applying a five-year time limit, but with the time period starting to run with the end of the respective professional relationship, not with the appointment. Since IID proceedings may take several years, a five-year time period from appointment might allow almost seamlessly repeated appointments and thus impact an adjudicator's (appearance of) impartiality. Alternatively, a 10-year time period running from the appointment should be chosen.

Ad Article 10(2)(c)

We agree with the limitation of (c) to IID (and related) proceedings (unlike in Art. 10(2)(d)), because these are most prone to potential issue conflicts (as rightly noted in Comment 115) Further, in our view, a 5-year time limit would seem appropriate in this case.

Ad Article 10, Comment 54 of Draft Version Two

In light of the concerns frequently raised in the WGIII discussions, we query whether an outright and clear limitation of repeat appointments would not better address the concern. For instance, a rule could be set providing for a maximum number of appointments by the same party or the same counsel within a given number of years. A rule of this kind would not only address the perceived issues of independence and impartiality that are linked to repeat appointments, but would also assist in diversifying the pool of potential arbitrators, which was repeatedly raised in WGIII as a separate goal and provide welcome clarity and predictability. By contrast, the mere mention that a repeat appointment would “*remain permissible unless it rises to the level of a lack of independence or impartiality under Article 3 of the Code*” might be too vague as to be effective and only lead to distracting discussions or even challenges. Hence, we would invite the WGIII to further consider this issue.

Ad Article 11 – Compliance with the Code of Conduct

According to the Comments 127/128 to Version Three, Article 11(2) does not create additional grounds for disqualification and removal. This is in our view a crucial clarification that might require explicit inclusion in Article 11(2).

The slightly different wording of Article 11(2) in Draft Version Two raised major concerns due to a high risk of fostering frivolous challenges. The following comments, having been prepared before the issuance of Draft Version Three address the wording of Draft Version Two, but might be relevant for discussion of Draft Version Three as well:

We understand the Draft’s desire to ensure that the obligations imposed on Adjudicators (and where applicable, Candidates) are not just aspirational, but binding and enforceable. However, the application of removal procedures to a breach by an arbitrator of duties of conduct, as

proposed, raises serious concerns both of principle and degree. These concerns are discussed below, both as a general matter and in respect to each of the sanctioned provisions. Finally, we propose concrete recommendations to alleviate these concerns.

Concerns of principle

Arguably the most serious infraction causing prejudice to a party, or the parties, is a biased arbitrator lacking impartiality or independence. Virtually all rules therefore contain removal procedures for arbitrators lacking impartiality and independence. However, it is debatable whether additional grounds for removal of an arbitrator are necessary or desirable.

For example, the UNCITRAL Rules only provide for the removal of an arbitrator if (i) there are justifiable doubts as to the arbitrator's impartiality and independence; (ii) the arbitrator lacks agreed qualifications; or (iii) the arbitrator is legally or factually *incapable of performing* his or her duties or else is in *unjustified delay*. With regard to other infractions that an arbitrator may commit, the policy choice in the UNCITRAL Rules is not to remove the arbitrator but instead provide grounds for challenging the award. For example, misconduct by arbitrators that prevents parties from adequately presenting their case or that are so egregious as to violate procedural public policy, typically justify the setting aside of the award as a protection of the parties' fundamental procedural rights.

Similarly, the ICSID Rules of Arbitration provide for the removal of an arbitrator for two reasons only: (i) a disqualification pursuant to Rule 9 in conjunction with Article 57 of the ICSID Convention because the arbitrator lacks the qualifications of Article 14(1) of the ICSID Convention; or (ii) pursuant to Rules 8 and 9 because an arbitrator becomes incapacitated or unable to perform the duties of their office.⁴ Beyond this, the parties' procedural rights are safeguarded through the possibility of annulment of the award, e.g. because of a serious departure of fundamental rules of procedure.

In our view, there are strong arguments, therefore, to delete the proposed Article 11(2) altogether. In line with established principles both in the UNCITRAL and ICSID regimes, and in wider arbitral practice, disqualification should be limited to a lack of independence or impartiality or required (or agreed) qualifications.

⁴ It is true that the removal of arbitrators under Articles 14(1) and 57 of the ICSID Convention are broadly drafted to foresee the disqualification of an arbitrator for lack of "high moral character" or "recognized competence." However, there is no published case known to us in which an arbitrator was removed on the basis that they lacked character or competence. In any event, Article 14 speaks to the qualification of an arbitrator, not to an arbitrator's conduct during the proceedings, and so is functionally equivalent to Article 12(2) of the UNCITRAL Rules.

Other infractions by an arbitrator are sanctioned by a challenge to the award - if the infraction is serious and violates fundamental procedural rights. Indeed, examining an arbitrator's conduct at the award review stage also ensures that only such infractions are taken into account that have caused actual prejudice by adversely affecting the outcome of the arbitration for a party. In contrast, reviewing arbitrator conduct other than lack of impartiality *during* the proceedings is not only risking further delay, but also runs the risk of engaging with issues that ultimately have no effect on the outcome of the case.

Concerns of degree

The language of Article 11(2) seeks to extend the removal procedure in the applicable rules to breaches of the duties set out in Articles 3-8. This is problematic because other than prescribing certain, often broadly-formulated duties in Articles 3-8, the proposed Code of Conduct does not provide a substantive test as to how existing removal mechanisms should be applied to infractions of the Code.

As a result, the text of Article 11(2), which does not contain any moderating standard, seems to sanction just any breach of arbitrator duties in Articles 3-8 with removal, without examining whether the breach was minor or significant; whether it was committed in passing or intentionally; and whether it had no adverse effect on the proceedings or the award or else caused real prejudice.

In our view, Article 11(2) as drafted will therefore lead to an unacceptable proliferation of tactical and meritless challenges to arbitrators, based on the broad language of Articles 3-8, that will undermine, and not protect, the integrity of the arbitral process.

Specific concerns in regard to Articles 3-8

An analysis of the individual provisions that the draft purports to cover ("breaches of Articles 3-8") bears this out.

- In terms that we believe are overly broad (*see comments above*), Article 3 prescribes independence and impartiality of Adjudicators. However, we agree in principle that a lack of independence and impartiality should be grounds for disqualification. This is of course already so provided in virtually all applicable rules.
- Article 4 imposes a limit on multiple roles. In a sense, this provision broadly falls in the category of rules that ensure impartiality and independence (in the specific context of investment arbitration) and that requires certain qualifying characteristics of the Adjudicator. We therefore agree that, if a certain limit on multiple roles is imposed, a violation of this rule can be grounds for disqualification. However, this is

an aspect that administering institutions can take into account when assessing an arbitrator's alleged lack of impartiality and independence: it does not require Article 11(2).

- Article 5 imposes multiple duties under the heading of due diligence:
 - a. *A general duty to “perform ... diligently.”* We consider that a general disqualification rule for a purported failure of diligence is inappropriate. While independence and impartiality are established standards in public international law, arbitrator “diligence” is not. If the failure to perform diligently rises to the level of default or unacceptable delay, the arbitrator can be removed under existing procedures. If the lack of ‘diligence’ were to rise to a denial of the right to be heard, or to the level of a violation of fundamental procedural rights, then the parties are better protected through the provisions that permit the challenge or annulment of an award.

Has an arbitrator who is 15 minutes late to a hearing failed to perform their duties diligently? Perhaps in some sense, but this is obviously not disqualifying conduct under any rule - yet Article 5 and Article 11(2) do not provide moderating language to eliminate minor infractions without prejudice to the parties. The vague nature of the underlying obligation in conjunction with the broadly worded sanction opens the door for tactical challenges.

- b. *A duty to “refuse competing obligations.”* Leaving aside that such a duty is in itself overly broad,⁵ the acceptance of competing obligations is not necessarily a concern that would justify the removal of the arbitrator. In reality, competing obligations cause prejudice *only* if they prevent the arbitrator from performing their primary duties. Such a situation, however, would already be covered by Article 14 of the UNCITRAL Arbitration Rules (an arbitrator is legally or factually incapable of performing his or her duties or else is in unjustified delay) and Rules 8 and 9 of the ICSID Arbitration Rules (because an arbitrator becomes incapacitated or unable to perform the duties of their office).

Indeed, the removal of the arbitrator is a drastic measure that in itself can cause significant delay, and thus prejudice, to the parties. The provision as currently drafted is highly problematic because it purports to allow the removal of the arbitrator without regard to whether the ‘competing obligation’ has any actual effect on the the arbitrator’s commitment to the case. The provision is therefore over-reaching as a matter of degree as well.

- c. *Duty “to be reasonably available to the parties and the administering institution, [to] dedicate the necessary time and effort [to] the proceeding, and [to] render all decisions in a timely manner.”* The same considerations apply as to (b). If the arbitrator is in such default, whether by choice or not, as to significantly delay the proceedings or the rendering of the award, they can already be removed under the UNCITRAL Rules, the ICSID Arbitration Rules, and virtually all other institutional rules of arbitration.

In addition, the proposed provisions will encourage a constant debate whether each individual decision, procedural or substantive, was rendered in a timely manner; whether an arbitrator was in each instance “reasonably available” to the parties; and has “dedicated” the “necessary time and effort” to the proceedings: it is questionable how one polices obligations of “effort” and thus highly problematic to link an obligation of dedicating “effort” to such drastic a sanction as removing the arbitrator.

There is no doubt in our view, therefore, that the broad articulation of Article 5, if linked to the removal of an arbitrator, is prone to breed tactical and dilatory challenges that would undermine the very arbitral efficiency that Article 5 appears intended to protect.

- d. *Duty “not [to] delegate [...] decision-making function to an Assistant or to any other person.”* The duty of an arbitrator to discharge their primary decision-making functions without delegation is undisputed. If an arbitrator is unwilling to discharge their primary function, then this is arguably functionally equivalent to an incapacitated arbitrator unable or unwilling to perform their duties. At the award review or annulment stage, an arbitrator having abrogated their personal decision-making function will typically constitute a serious departure of fundamental rules of procedure that results in setting-aside or annulment of the award.
- Article 6 specifies “other duties” of arbitrators. Again, the provision is drafted in very broad terms and it is, in our view, highly debatable that a removal mechanism is the appropriate sanction.
 - a. *Duty “to display high standards of integrity, fairness, and competence.”* Unlike Article 14(1) of the ICSID Convention, which requires arbitrators to have certain characteristics, this provision frames the requirements of integrity, fairness and competence not as a matter of qualification, but textually (“displays”) as an ongoing duty of conduct: the arbitrator must not only be in possession of certain skills and standing, they must continuously

demonstrate high standards of integrity, fairness and competence, however exactly that is achieved.

Again, the proposed Code of Conduct sanctions an inherently aspirational obligation with the drastic measure of removal without limiting the sanction to serious and prejudicial cases. Because the removal mechanism is not moderated by degree - that is, not limited to serious violations of fundamental obligations - any display of what an aggrieved party may perceive as unfairness or incompetence will immediately trigger a request for disqualification. The obvious and real risk is an endless procession of minor grievances framed as violations of Article 6 and turned into disqualification requests: a breeding ground for tactical misconduct.

Indeed, whether a procedural decision, even if objectively unfair, has caused actual prejudice depends on the ultimate outcome of the proceeding, i.e. the award. An arbitrator can make a bad procedural decision and still reach the correct conclusion for the case. Reviewing and potentially sanctioning each individual interaction between arbitrators and parties against standards of fairness and competence without considering the fairness and correctness of the final result is premature and counter-productive.

- b. *Duty “to make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties.”* As stated before, it is virtually impossible to police, let alone sanction, obligations of effort. To open the door to disqualification requests simply because a party believes, or asserts, that an arbitrator has “not tried hard enough” to invest in their continued education – or indeed has not made enough of an effort to “enhance” undefined (and ultimately undefinable) qualities – is a recipe for disruption and tactical maneuvering.

The proposed draft again makes no difference between minor deficiencies and major transgressions that undermine the integrity of the process and/or prejudice a party - leaving aside that parties are protected against such major transgressions through available remedies against the award (at a stage when it can actually be determined whether the infraction affected the ultimate decisions and so caused prejudice).

- c. *Duty “to treat all participants ... with civility.”* The option to disqualify an arbitrator because they are not sufficiently “civil” raises the same serious concerns. Where the lack of civility evidences apparent bias, existing removal grounds and mechanisms are sufficient. Beyond those cases, an endless debate whether a wrong look, a smirk, the failure to return a greeting and

many other instances of social interaction bear the mark of sufficient civility is in our view entirely counter-productive.

- d. *Duty to “decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfil their duties.”* If an arbitrator lacks required qualifications, or if they are in severe delay in the performance of their duties (including because they are unavailable or overextended), they can be removed. In addition, the acceptance of an appointment on false premises of competence or availability may give rise to a claim of damages against the arbitrator. As a result, a separate removal mechanism does not appear necessary in our view.
- Article 7 prohibits *ex parte* communications by an arbitrator with a party (other than communications relating to their appointment). To the extent that such prohibited *ex parte* communications are evidence of bias, removal is already possible on the usual basis of lack of impartiality and independence, which renders the proposed removal mechanism redundant.
 - Article 8 prohibits the disclosure of confidential information by an arbitrator. A breach of this obligation may already give rise to a claim of damages against the arbitrator and, if an expression of bias, constitute grounds for removal.

Conclusion and Recommendation

On the basis of the foregoing, we recommend the following approaches to sanctioning breaches by arbitrators of the obligations set out in the proposed Code of Conduct.

- *Proposed Article 11(2) is removed entirely.* In that case, the removal mechanisms already existing in applicable rules (pertaining to lack of impartiality/independence; lack of agreed or required qualifications; and inability to perform) will apply, which in our view would be both sufficient and preferable. These existing removal mechanism and standards are tried and tested and restrict the removal of an arbitrator to serious infractions. Violations of the Code of Conduct would still be sanctioned under this alternative, because, to the extent the Code of Conduct applies in a given case, the duties it prescribes would have to be taken into account in applying the removal mechanisms in existing rules.
- *Articles 5 and 6 are eliminated from the scope of Article 11(2) (and the scope of Article 3(2) is clarified as suggested there).* As discussed above, the vague and aspirational nature of the obligations contained in Articles 5 and 6 makes them particularly unsuitable for the sanction of arbitrator removal. It is virtually

impossible to police an arbitrator’s “best effort” to enhance their “qualities,” nor does it necessarily make sense to disqualify an arbitrator who is grumpy, but ultimately fair just because they violated a standard of “civility”. Articles 5 and 6, and potentially also Article 3(2) if interpreted broadly, therefore carry a particular risk of tactical and dilatory challenges that far outweighs the benefits of the sanction of removal.

- Proposed Article 11(2) is amended, at the very least, to restrict the potential removal of arbitrators to major transgressions against the rules. To alleviate the concerns of degree articulated above, we propose that, at a minimum, the Proposed Article 11 be restricted to serious violations of arbitrator duties. For example, an amended provision could read:

*The disqualification and removal procedures in the applicable rules shall apply to lack of independence and impartiality as well as serious breaches of other provisions of Articles [...] **that can impede the parties’ fundamental rights to a fair proceeding or are otherwise capable of causing serious prejudice to them.***

At the very least, this provision would alleviate the risk of tactical challenges and would ensure that only major transgressions are sanctioned with the consequence of arbitrator removal. This is important because the removal of an arbitrator is a drastic measure that itself has the potential to disrupt and delay the resolution of the dispute, so that the perceived benefits of removal have to be weighed against the risk of obstruction and delay.

PUBLIC STAKEHOLDERS – Individuals (Alphabetically by last name)

HANOTIAU, Bernard

I refer to the last draft of the Code of Conduct. With all due respect, I consider like many arbitrators that Article 10 is unreasonable and unacceptable. The proper test, which is the one included in the IBA Guidelines, refers to any doubts in the eyes of a reasonable third party. I note here that the word “reasonable” has disappeared and that the test only refers to the eyes of the disputing parties. You have therefore to speculate what might be the subjective thinking of somebody that you do not know and who might not share the same common sense than yourself on grounds of personality or culture. The absence of reference to reasonableness is shocking.

This provision also offers on a golden plate to the losing party that wants to challenge the award, a unique opportunity to do so. Which adjudicator will remember all the professional or other relationships that he or she might have had with a then affiliate of a disputing party or a then member of the firm representing one of the parties or an expert or a witness, during a period of ten years. I find this totally unreasonable and unacceptable.

Unfortunately, arbitration is no longer the peaceful method of dispute settlement that it was thirty years ago. By introducing provisions such as this one, institutions put in jeopardy the efficiency of the process and the finality of international awards and play the game of those who are anti-arbitration.

(...)

I encourage the drafters to amend this provision because it is totally unreasonable, unfair, unduly burdensome and counterproductive.

STERN, Brigitte

I fully agree with what Bernard's concerns