

## Text for the Commentary to the Code of Conduct for Judges

### This following text is for information purposes only.

Document [A/CN.9/WG.III/WP.223](#) contains the revised version of the codes of conduct for arbitrators and judges in international investment dispute resolution and the respective commentary. While the document includes text for the commentary to the code for judges, it also notes in places that the commentary to the code for arbitrators will be adjusted in the context of a code for judges. The following provides draft text that could appear as the commentary to the code for judges to facilitate the Working Group's discussion. It should, however, be noted that the following text would need to be further adjusted based on the decisions and deliberations of the Working Group on the code for judges and the commentary to the code for arbitrators, which the following text is based on.

For ease of reference and in order to facilitate comparison with the commentary to the code for arbitrators, the paragraph numbering of document [A/CN.9/WG.III/WP.223](#) has been kept. Paragraphs not applicable to the code for Judges have been marked as “[not applicable]”.

#### **Article 1 – Definitions**

##### **Commentary to article J1**

###### *Judge and Candidate*

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

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

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

##### **Commentary to article J2**

###### *Scope of application*

29. The Code applies to an individual (a Judge or a Candidate) and not to a proceeding. Accordingly, the Code may apply prior to the initiation of a proceeding and will likely apply throughout the proceeding. Certain obligations of the Code survive the proceeding and apply to former Judges (see articles [4] and 8).

30. *[not applicable]*

###### *Complementary nature of the Code*

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

32. The second sentence of article 2(2) refers to a situation where the provisions in the instrument of consent and articles of the Code are incompatible. This means that the obligations contained in those provisions are inconsistent and irreconcilable with

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those of the Code and that a Candidate or a Judge would not be able to comply with those provisions and the articles of the Code at the same time. When the articles of the Code are incompatible with the provisions in the instrument of consent, those provisions prevail.

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

#### **Commentary to article J3**

##### *Independence and impartiality*

35. Article 3(1) requires a Judge to avoid any conflict of interest, whether it arises directly or indirectly. “Independence” refers to the absence of any external control, in particular the absence of relations with a disputing party that might influence a Judge’s decision. “Impartiality” means the absence of bias or predisposition of a Judge towards a disputing party or issues raised in the proceedings.

##### *Temporal scope of the obligation*

36. The obligation to be independent and impartial begins upon appointment and continues until the Judge ceases to exercise his or her functions.

##### *Non-exhaustive list – paragraph 2*

37. Paragraph 2 clarifies the obligation in paragraph 1 by providing a non-exhaustive list of examples where a Judge could be found to lack independence or impartiality. The word “includes” emphasizes the illustrative nature of the list in paragraph 2. Circumstances not listed in paragraph 2 may also implicate a Judge’s lack of independence and impartiality.

38. The phrase “be influenced by loyalty” in subparagraph (a) refers to a sense of obligation or alignment towards a person or entity, which might arise from a number of external factors. This subparagraph does not aim to regulate “loyalty” itself. Rather, it is a Judge allowing such loyalty to influence his or her conduct or judgment that is prohibited. The mere fact of similarities, such as having graduated from the same school or having served in the same law firm, does not indicate in itself an influence by loyalty.

39. The phrase “any disputing party or any other person or entity” in subparagraph 2(a) captures a wide range of parties to whom loyalty may be owed, among others, a person or entity that is not a party to the dispute but has been given the standing mechanism’s permission to file a written submission in the proceeding, a State or an REIO that is a party to the underlying investment treaty but is not a party to the dispute (a “non-disputing Treaty Party”), third-party funders, expert witnesses as well as the legal representatives of the disputing parties.

40. Subparagraph (b) refers to taking any order, direction, recommendation or guidance concerning any factual, procedural or substantive issue considered in the course of the proceeding. Instructions may be implicit and originate from diverse private or public sources, including ministries, agencies or State-owned entities. In effect, this subparagraph requires a Judge to exercise his or her independent judgment in resolving the IID and not to be told what the outcome of the proceeding should be or how to address issues raised during the proceeding. By contrast, this subparagraph does not limit a Judge from: complying with binding interpretations issued by a joint committee pursuant to a treaty; taking into account the views of the Treaty Parties on matters of interpretation; acting in accordance with the disputing parties’ agreement or in line with guidance material provided by the standing mechanism; making reference to decisions by other courts or arbitral tribunals; or considering the disputing parties’ arguments or expert findings. Similarly, a first-tier Judge referring to or relying on a binding judgment or interpretation of an appellate tier of the same standing mechanisms would not be considered as “taking instruction” within the meaning of subparagraph (b).

41. Subparagraph (c) mentions the types of relationships that could influence a Judge's conduct. The existence of such a relationship does not necessarily mean that a Judge lacks impartiality or independence. Rather, the relationship must have had an impact on the Judge's conduct, including judgments made and decisions taken during the proceedings.

42. *[Not applicable]*

43. Subparagraph (d) refers to the "use" of a Judge's position to advance any financial or personal interest in a disputing party or in the outcome of the proceeding. Accordingly, whether the interest was realized, and the extent of the interest is irrelevant. Even if the advantage gained was insignificant or de minimis, it would lead to a violation of article 3, if the position was intentionally used to pursue that interest.

44. Subparagraph (e) refers to taking on a professional responsibility, for example, becoming a board member of an entity closely affiliated with a disputing party, which would make it difficult to perform the Judge's duty in an independent and impartial manner. The term "benefit" in the same subparagraph refers to any gift, advantage, privilege, or reward. The possibility for a Judge to undertake any professional responsibility outside his or her terms of office is further conditioned upon the obligation to declare such functions under article 4(2).

45. Subparagraph (f) indicates that an action taken by a Judge (or an inaction) which creates the appearance of a lack of independence or impartiality could result in a breach of the obligation to be independent and impartial in paragraph 1. This subparagraph emphasizes that a Judge must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias.

#### **Article 4 – Limit on multiple roles**

##### **Commentary to article J4**

###### *Prohibition to exercise any political or administrative function*

64. Paragraph 1 prohibits a Judge from carrying out any "political or administrative function" outside of the standing mechanism. A Judge would be prohibited, for instance, from acting as a leader or holding any office in a political organization, publicly endorsing or opposing a candidate for public office, making speeches for a political organization or candidate, or soliciting funds for or donating to a political organization or candidate. The limitation does not apply to political or administrative functions that a Judge might carry out in a standing mechanism in accordance with the applicable rules of such mechanism or with his or her terms of office. For example, a Judge would be able to function as President elected through a vote (and cast such vote) or head a committee on finance and budget of the standing mechanism.

65. A Judge has an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of [a full-time office]. In particular, pursuant to the second sentence of paragraph 1, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.<sup>1</sup> The terms of office of a Judge could require him or her to resign from any duties as an arbitrator prior to being confirmed as a Judge.

66. In accordance with paragraph 2, before assuming any other function or occupation, a Judge should inform the [President of the] standing mechanism, who would determine whether such function or occupation is prohibited under paragraph 1. For example, whether a Judge can function as an arbitrator in another IID proceeding outside the standing mechanism would be determined by the standing mechanism.

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<sup>1</sup> See Practice Directions VII of the International Court of Justice and Rule 28(2) of the Rules of Court of the European Court of Human Rights.

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67. Paragraphs 3 and 4 apply to former Judges and limit the roles that they can undertake after their term of office. Both limit a former Judge from being involved in a proceeding that is before the standing mechanism.

68. Paragraph 3 addresses a proceeding that was initiated prior to the end of the Judge's term. This includes a proceeding which the Judge dealt with before the expiration of his or her term. The scope of the prohibition is quite broad and covers any involvement including, but not limited to, acting as an ad hoc judge, legal representative, expert witness, third-party funder or amicus curiae. The prohibition is a continuing one.

69. Paragraph 4 addresses a proceeding initiated after the Judge's term of office.<sup>2</sup> For a period of three years after his or her term of office, a former Judge would not be able to act as a legal representative or an expert witness in a proceeding before the standing mechanism.

#### **Article 5 – Duty of diligence**

##### **Commentary to article J5**

75. Article 5 addresses the availability of a Judge to perform his or her duties. The specific duties are to be found under his or her terms of appointment or in the other applicable instruments of a standing mechanism.

#### **Article 6 – Integrity and competence**

##### **Commentary to article J6**

80. Typically, the appointing authority within the standing mechanism would assess the skills and competence required of a Candidate. In the selection process, particular consideration could, for instance, be given to a Candidate's previous experience in handling IIDs, as well as his or her knowledge of public international law or international investment law.

#### **Article 7 – Ex parte communication**

##### **Commentary to article J7**

85. Article 7 introduces a general prohibition on ex parte communication. Based on the definition of ex parte communication in article 1, the prohibition applies if three criteria are met: (i) the communication is made by a Candidate or a Judge with a disputing party, its legal representative, affiliate, subsidiary or other related person; (ii) the communication concerns the dispute; and (iii) the communication is made without the presence of the other disputing party or parties or their legal representatives. A communication not meeting all these criteria, for example, a communication regarding a matter distinct from the dispute [, or an email copying the other parties,] would not be prohibited under article 7.

86 to 90. *[Not applicable]*

#### **Article 8 – Confidentiality**

##### **Commentary to article J8**

91. Article 8 imposes an obligation of confidentiality on a Judge and a Candidate. Paragraphs 1 and 2 list the extent of confidentiality and paragraph 3 provides the temporal scope, that the obligations continue to apply indefinitely even after the proceeding.

92. Paragraph 1(a) prohibits a Candidate or a Judge from disclosing or using any information concerning the proceeding or acquired during the proceeding. In accordance with paragraph 1(b), a Judge is also prohibited from disclosing any draft

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<sup>2</sup> See Practice Directions VIII of the International Court of Justice and Rule 4(2) of the Rules of Court of the European Court of Human Rights.

decision made in the proceeding. The term “disclose” refers to the circulation of information or material by making it publicly available or making it accessible to persons or entities that are not participating in the proceeding. In contrast, the term “use” refers to availing oneself of such information or material outside the proceeding, possibly taking advantage of the access to such material.

93. Paragraph 1 does not limit the disclosure or use of such information for the purposes of the proceeding and as such, members of the tribunal could discuss among themselves information provided by the disputing parties or otherwise acquired during the proceeding. Paragraph 1 would also not prevent disclosure of information required under article 11(3), for example, to provide basic information about the IID proceeding in which an individual had been involved as an arbitrator, a legal representative or an expert witness. Paragraph 1 does not address the admissibility of evidence provided by the disputing parties.

94. The obligation of confidentiality in paragraph 1 does not apply if disclosure or use of information is permitted pursuant to the instrument of consent or the applicable rules of the standing mechanism. This exception does not apply to paragraph 2 relating to the contents of the deliberation. The term “contents” refers not only to the material generated, but also views expressed by other Judges, during the deliberations.

95. Paragraph 4 provides that a Judge may not comment on a decision in a proceeding before the standing mechanism. Exceptions may be provided for in the applicable rules of the standing mechanism.

96. *[Not applicable]*

97. Paragraph 5 provides for a general exception to the obligations in the remaining paragraphs of article 8. This is: (i) where a Candidate or a Judge is legally required and requested to disclose the information in a court or any other competent body; and (ii) where a Candidate or a Judge must disclose the information to protect his or her rights in a court or other competent body.

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

*[No provision for Judges]*

#### **Article 10 – Assistant**

*[No provision for Judges]*

#### **Article 11 – Disclosure obligations**

##### **Commentary to article J11**

119. Article 11 addresses the disclosure obligations of a Candidate or a Judge. The obligations therein are central to the Code as they assist in identifying any potential conflict of interest that could implicate a lack of independence and impartiality as set out in article 3 of the Code.

##### *Standard and scope of disclosure*

120. The standard for disclosure in paragraph 1 (“likely to give rise to justifiable doubts”) follows the standard in article 11 of the UNCITRAL Arbitration Rules. Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that a Judge may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.

121. *[Not applicable]*

122. The scope of disclosure in paragraph 1 is broad and covers any circumstances, including any interest, relationship or other matters, likely to give rise to justifiable doubts as to the independence or impartiality of a Candidate or a Judge.

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123. Paragraphs 2 and 3 extend the scope of disclosure and requires a Candidate or a Judge to include the information listed therein, regardless of whether it gives rise to justifiable doubts as contemplated in paragraph 1. Such information may assist in identifying any potential conflict of interest. However, subparagraph (a) and paragraph 3 contain a temporal scope requiring disclosure of relationships, proceedings and appointments within the past five years. In contrast, the circumstances to be disclosed under paragraph 1 are not limited in time, meaning that a circumstance which arose more than five years before a person became a Candidate would need to be disclosed if it is likely to give rise to justifiable doubts.

124. Accordingly, paragraphs 1 to 3 combined require extensive disclosure on the part of a Candidate and a Judge as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraphs 2 and 3 and vice versa. As noted, this is to identify any potential conflict of interest and the mere fact of disclosure does not mean that a Candidate or a Judge lacks independence or impartiality.

125. When a Candidate or a Judge is bound by confidentiality obligations and is not in a position to disclose the required circumstances or information, he or she should disclose as much as possible. For example, with regard to the list of proceedings in paragraph 3, a Candidate could redact certain information and disclose the region where the claimant or the respondent is located, the relevant industry or sector, the applicable rules as well as the fact that he or she is bound by a confidentiality obligation. However, if a Candidate is unable to disclose circumstances that is likely to give rise to justifiable doubts, he or she should decline the appointment.

#### *Scope of disclosure under paragraph 2*

126. Subparagraph (a) addresses disclosure of information related to potential conflicts arising from a financial, business, professional, or personal relationship that a Candidate or a Judge might have with other persons or entities involved in the proceeding.

127. “Business” relationship means any past or present connection related to commercial activities usually with a shared financial interest, either directly with the persons or entities listed in the subparagraphs or indirectly through another person or entity, with or without their knowledge.

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

129. The phrase “an entity identified by a disputing party” in subparagraphs (a)(i) and (a)(iv) refers to, for instance, parent companies, subsidiaries or affiliates of a disputing party identified by that party. A Judge should invite the disputing parties to identify such related entities so as to allow him or her to make the necessary disclosure and to assess any potential conflict of interest.

130. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the proceeding or other proceedings involving the same measure, the same disputing party or an entity identified by a disputing party. Financial interest does not include remuneration as a Judge or the reimbursement of expenses incurred in the proceeding.

#### *Scope of disclosure under paragraph 3*

131. Paragraph 3 requires disclosure of all IID and related proceedings in which a Candidate is or has been involved in the past five years as an arbitrator, legal representative or an expert witness.

132. *[Not applicable]*

*Obligation to make [reasonable][best] efforts*

133. The phrase “[reasonable] [best] efforts to become aware” in article 11(4) means that a Candidate or a Judge must be proactive to the best of his or her ability to identify the existence of circumstances [, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or a Judge to ensure proper disclosure. By way of illustration, the obligation under paragraph 4 could involve reviewing relevant documentation already in the possession of a Candidate or a Judge, conducting relevant conflict checks, or requesting the persons or entities involved in the proceeding to provide further information in case of doubt or if deemed necessary to conduct proper assessment.

134. Article 11(5) requires a Candidate or a Judge to make a disclosure when there are doubts as to whether the disclosure is required or not.

*Form and timing of disclosure by a Candidate*

135. Article 11(6) provides how, to whom and when a Candidate shall make the disclosure. It shall be made to the standing mechanism prior to or upon confirmation as a Judge. The disclosure form in Annex 1 is a simplified one and its use is not mandatory as long as the relevant information is conveyed in a comprehensive manner.

136. The phrase “prior to” or “upon confirmation” in paragraph 6 does not imply that two separate disclosures are required, initially as a Candidate and again after being appointed as a Judge.

*Form, timing and continuing obligation of disclosure by a Judge*

137. Article 11(7) provides how, to whom and when a Judge shall make the disclosure. It shall be made to the standing mechanism as soon as he or she becomes aware of the circumstances mentioned in paragraphs 1 and 2. It also provides a continuing obligation of disclosure. If new relevant information within the scope of paragraphs 1 emerges or is brought to the attention of a Judge during the proceeding, he or she must disclose such information promptly and without delay to the [President of the] standing mechanism. Judges should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the proceedings.

*Failure to disclose*

138. Article 11(8) clarifies that non-compliance with the disclosure requirements in article 11 does not in itself establish a lack of impartiality or independence or a breach of other articles of the Code. It is the content of the disclosed or omitted information that determines whether there is a breach. Even though non-compliance with the disclosure requirements might not be in itself a ground for disqualification, removal or recusal, repeated failures may be factually relevant when establishing a breach of article 3 of the Code.”

**Article 12 – Compliance with the Code**

Article J12 would first need to be agreed by the Working Group.

**Commentary to article J12**

143. Article 12 addresses compliance with the Code. One way to promote the adherence is to require a Judge to sign a declaration upon appointment (see Annex 1). Another is through the obligation in paragraph 2 where a Candidate or a Judge shall refrain from taking an appointment or resign, for example, where his or her impartiality or independence would be compromised and the conflict cannot be eliminated, or his or her competence is lacking for the purposes of the standing

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mechanism. Sanctions for breaches of the Code may be provided in the applicable rules of the standing mechanism.

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*informal draft*