



**United Nations Commission on
International Trade Law**
Fifty-sixth session
Vienna, 3–21 July 2023

Draft code of conduct for arbitrators in international investment dispute resolution and commentary

Note by the Secretariat

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I. Introduction

1. At its forty-third session in September 2022, Working Group III worked towards presenting two separate texts to the Commission for its consideration – a code of conduct for arbitrators for adoption by the Commission and a code of conduct for judges for adoption in principle, which would provide flexibility to revisit any pending issues and make any necessary adjustments once the deliberations on the standing mechanism had progressed (A/CN.9/1124, para. 204). At its forty-fourth and forty-fifth sessions in January and March 2023, the Working Group approved the draft code of conduct for arbitrators in international investment dispute resolution with accompanying commentary and the draft code of conduct for judges in international investment dispute resolution and requested the Secretariat to present them to the Commission for its consideration at the fifty-sixth session in 2023 (A/CN.9/1130, para. 117 and A/CN.9/1131, para. 86).

2. Accordingly, this note contains the draft code of conduct for arbitrators in international investment dispute resolution with accompanying commentary for consideration by the Commission reflecting the deliberations of Working Group III. The draft code of conduct for judges and the accompanying commentary is contained in A/CN.9/1149.

II. Draft code of conduct for arbitrators in international investment dispute resolution and commentary

A. Text of the draft code of conduct

3. The text of the draft articles of the code of conduct for arbitrators in international investment dispute resolution (the “Code”) reads as follows.

Article 1 - Definitions¹

For the purposes of the Code:

(a) “International investment dispute (IID)” means a dispute between an investor and a State or a regional economic integration organization (REIO) or any constituent subdivision of a State or agency of a State or an REIO submitted for resolution pursuant to an instrument of consent;

(b) “Instrument of consent” means:

(i) A treaty providing for the protection of investments or investors;

(ii) Legislation governing foreign investments; or

(iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO,

upon which the consent to arbitrate is based;

(c) “Arbitrator” means a person who is a member of an arbitral tribunal or an International Centre for Settlement of Investment Disputes (ICSID) ad hoc Committee, who is appointed to resolve an IID;

(d) “Candidate” means a person who has been contacted regarding a potential appointment as an Arbitrator, but who has not yet been appointed;

(e) “Ex parte communication” means any communication concerning the IID by a Candidate or an Arbitrator with a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the other disputing party (parties) or its legal representative; and

¹ See A/CN.9/1130, paras. 64–67 and 70, and A/CN.9/1131, para. 57.

(f) “Assistant” means a person who is working under the direction and control of an Arbitrator to assist with case-specific tasks.

Article 2 – Application of the Code²

1. The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding, or a former Arbitrator. The Code may be applied in any other dispute resolution proceeding by agreement of the disputing parties.
2. If the instrument of consent contains provisions on the conduct of an Arbitrator, a Candidate or a former Arbitrator, the Code shall complement such provisions. In the event of any incompatibility between the Code and such provisions, the latter shall prevail to the extent of the incompatibility.

Article 3 – Independence and impartiality³

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

Article 4 – Limit on multiple roles⁴

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:
 - (a) The same measure(s);
 - (b) The same or related party (parties); or
 - (c) The same provision(s) of the same instrument of consent.
2. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same measure(s) unless the disputing parties agree otherwise.
3. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same or related party (parties) unless the disputing parties agree otherwise.
4. For a period of one year, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same provision(s) of the same instrument of consent unless the disputing parties agree otherwise.

² See [A/CN.9/1130](#), paras. 71–72 and 74, and [A/CN.9/1131](#), para. 58.

³ See [A/CN.9/1130](#), paras. 75–76 and 78, and [A/CN.9/1131](#), para. 59.

⁴ See [A/CN.9/1130](#), paras. 79–92, and [A/CN.9/1131](#), para. 77.

Article 5 – Duty of diligence⁵

An Arbitrator shall:

- (a) Perform his or her duties diligently;
- (b) Devote sufficient time to the IID proceeding; and
- (c) Render all decisions in a timely manner.

Article 6 – Integrity and competence⁶

An Arbitrator shall:

- (a) Conduct the IID proceeding competently and in accordance with high standards of integrity, fairness and civility;
- (b) Possess the necessary competence and skills and make all reasonable efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties; and
- (c) Not delegate his or her decision-making function.

Article 7 – Ex parte communication⁷

1. Unless permitted by the instrument of consent, the applicable rules, the agreement of the disputing parties or paragraph 2, ex parte communication is prohibited.
2. Ex parte communication is permitted when a Candidate engages in a communication with a disputing party that has contacted him or her regarding a potential appointment as a party-appointed Arbitrator for the purpose of determining the Candidate's expertise, experience, competence, skills, availability and the existence of any potential conflict of interest.
3. When permitted under this article, ex parte communication shall not, in any case, address any procedural or substantive issues relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate would arise in the IID proceeding.

Article 8 – Confidentiality⁸

1. Unless permitted by the instrument of consent, the applicable rules or the agreement of the disputing parties, a Candidate or an Arbitrator shall not:
 - (a) Disclose or use any information concerning, or acquired in connection with, the IID proceeding; or
 - (b) Disclose any draft decision in the IID proceeding.
2. An Arbitrator shall not disclose the contents of the deliberations in the IID proceeding.
3. The obligations in paragraphs 1 and 2 shall survive the IID proceeding.
4. An Arbitrator may comment on a decision rendered in the IID proceeding only if it is publicly available.
5. Notwithstanding paragraph 4, an Arbitrator shall not comment on a decision while the IID proceeding is pending or the decision is subject to a post-award remedy or review.
6. The obligations in this article shall not apply to the extent that an Arbitrator, a Candidate or a former Arbitrator is legally compelled to disclose the information in a

⁵ See [A/CN.9/1130](#), paras. 95–96 and 98, and [A/CN.9/1131](#), para. 60.

⁶ See [A/CN.9/1130](#), paras. 99 and 101, and [A/CN.9/1131](#), para. 61.

⁷ See [A/CN.9/1130](#), paras. 102–103 and 105.

⁸ See [A/CN.9/1130](#), paras. 106–110 and 113, and [A/CN.9/1131](#), para. 62.

court or other competent body or needs to disclose such information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body.

Article 9 – Fees and expenses⁹

1. Fees and expenses of an Arbitrator shall be reasonable and in accordance with the instrument of consent or the applicable rules.
2. Any discussion concerning fees and expenses shall be concluded with the disputing parties as soon as possible.
3. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated to the disputing parties by the sole or presiding Arbitrator.
4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Article 10 – Assistant¹⁰

1. Prior to engaging an Assistant, an Arbitrator shall agree with the disputing parties on the role, scope of duties and fees and expenses of his or her Assistant.
2. An Arbitrator shall make all reasonable efforts to ensure that his or her Assistant is aware of and acts in accordance with the Code, including by requiring the Assistant to sign a declaration to that effect, and shall remove an Assistant who does not act in accordance with the Code.
3. An Arbitrator shall ensure that the Assistant keeps an accurate record of his or her time and expenses attributable to the IID proceeding.

Article 11 – Disclosure obligations¹¹

1. A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.
2. Regardless of whether required under paragraph 1, the following information shall be disclosed:
 - (a) Any financial, business, professional or close personal relationship in the past five years with:
 - (i) Any disputing party;
 - (ii) The legal representative(s) of a disputing party in the IID proceeding;
 - (iii) Other Arbitrators and expert witnesses in the IID proceeding; and
 - (iv) Any person or entity identified by a disputing party as being related or as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder;
 - (b) Any financial or personal interest in:
 - (i) The outcome of the IID proceeding;
 - (ii) Any other proceeding involving the same measure(s); and
 - (iii) Any other proceeding involving a disputing party or a person or entity identified by a disputing party as being related;

⁹ See [A/CN.9/1130](#), paras. 114–116, and [A/CN.9/1131](#), para. 63.

¹⁰ See [A/CN.9/1130](#), paras. 15–19 and 21, and [A/CN.9/1131](#), para. 64.

¹¹ See [A/CN.9/1130](#), paras. 22–44 and 49, and [A/CN.9/1131](#), para. 66.

(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness;

(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years; and

(e) Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding.

3. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered circumstances and information as soon as he or she becomes aware of such circumstances and information.

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

5. A Candidate and an Arbitrator shall err in favour of disclosure if he or she has any doubt as to whether a disclosure shall be made.

6. A Candidate and an Arbitrator shall make the disclosure prior to or upon appointment to the disputing parties, other Arbitrators in the IID proceeding, any administering institution and any other persons prescribed by the instrument of consent or the applicable rules.

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

Article 12 – Compliance with the Code¹²

1. An Arbitrator and a Candidate shall comply with the Code.

2. A Candidate shall not accept an appointment and an Arbitrator shall resign or recuse himself or herself from the IID proceeding, if he or she is not able to comply with the Code.

3. Any challenge or disqualification of an Arbitrator or any other sanction or remedy is governed by the instrument of consent or the applicable rules.

B. Text of the annexes to the draft code of conduct

Annex 1 (Candidates/Arbitrators)

Declaration, disclosure and background information

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the “Code of Conduct”) and I undertake to comply with it.

2. To the best of my knowledge, there is no reason why I should not serve as an Arbitrator in this proceeding. I am impartial and independent and have no impediment arising from the Code of Conduct.

3. I attach my current curriculum vitae to this declaration.

4. In accordance with article 11 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[INSERT AS RELEVANT]

5. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I shall make further disclosures based on new or newly

¹² See [A/CN.9/1130](#), paras. 50–61 and 63.

discovered circumstances and information as soon as I become aware of such circumstances and information.

Annex 2 (Assistants)

Declaration

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the “Code of Conduct”) and I undertake to act in accordance with it.
2. I confirm that at the date of this declaration, I am not aware of any circumstance that would preclude me from acting in accordance with the Code of Conduct.

C. Text of the draft commentary

1. [At its fifty-sixth session in July 2023, UNCITRAL adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution (the “Code”) and the accompanying commentary.] The commentary provides guidance on the Code by clarifying the contents of the articles, addressing their practical implications and providing examples. It does not create any new obligation. It provides guidance for arbitrators, candidates and former arbitrators, as well as for disputing parties and States in applying the Code.

Article 1 – Definitions

2. Article 1 provides the definitions of key terms used in the Code. As indicated in the chapeau, the definitions operate only in the application of the Code and are not intended to alter the meaning or scope of such terms in treaties, legislation, investment contracts or the applicable arbitration rules.

International investment dispute

3. The term “international investment dispute (IID)” refers to a dispute between an investor and a State or a regional economic integration organization (REIO) on the basis of an instrument of consent to arbitrate.¹³ Accordingly, it does not include disputes between States. However, pursuant to article 2(1), States may agree to apply the Code to arbitrators in a proceeding to resolve disputes between States (see para. 14 below). The phrase “IID proceeding” in the Code refers to the arbitral process of resolving an IID or the annulment procedure by an International Centre for Settlement of Investment Disputes (ICSID) ad hoc Committee.

4. The term “REIO” refers to an organization constituted by States to which they have transferred certain competence, including the authority to make decisions binding on them in respect of IID matters. A “constituent subdivision of a State or agency of a State or an REIO” may also be a party to the IID.¹⁴ However, the inclusion of that phrase in defining an IID is not intended to have any bearing on: (i) whether there is a legal relationship between a particular State or an REIO and a constituent subdivision or agency, including whether a particular entity is an agency of the State or the REIO; (ii) whether a measure of a constituent subdivision or an agency is attributable to the State or the REIO; and (iii) whether a constituent subdivision or an agency has consented to arbitration.¹⁵ The term “constituent subdivision” includes a decentralized or federated organ of a State, such as a municipality or a provincial or regional entity. The term “agency” includes an entity that performs public functions on behalf of a State or an REIO or any of a State’s constituent subdivision, regardless of whether the entity is private or public, is government-owned or has a distinct legal personality.

¹³ See A/CN.9/1130, para. 65.

¹⁴ See A/CN.9/1124, para. 205.

¹⁵ See A/CN.9/1124, paras. 206–207.

Instrument of consent

5. The term “instrument of consent” refers to an instrument that forms the basis of consent of the disputing parties to submit their dispute to arbitration. Although the disputing parties may refer to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) in their consent to arbitration, the Convention does not contain the disputing parties’ consent to arbitration, which is captured in a separate agreement. Accordingly, while the ICSID Convention may provide the framework for the settlement of an IID, it is not an “instrument of consent”.

6. The phrase “investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO” in subparagraph (b)(iii) refers to an agreement regarding an investment made in the territory of a State or a State of an REIO (for example, a contract relating to a mining concession in State X concluded between an agency of State X and an investor with the nationality of State Y). Article 2(1), however, provides the flexibility to the disputing parties to apply the Code to arbitrators in a proceeding when the consent to arbitration is included in an investment contract concluded between a State and a domestic investor or any other type of contract (see para. 14 below).

7. The Code does not address the question of what constitutes an “investment” or who qualifies as an “investor” or a “foreign” investor under an instrument of consent.¹⁶

Arbitrator and Candidate

8. The term “Arbitrator” refers to an individual appointed as a member of an arbitral tribunal to resolve an IID or as a member of an ICSID ad hoc Committee established under article 52 of the ICSID Convention. Whether the arbitration is ad hoc or administered by an institution or how an arbitrator is appointed is irrelevant. For example, the term includes an arbitrator appointed by a disputing party or by an appointing authority on its behalf (“party-appointed Arbitrator”), a presiding arbitrator and a sole arbitrator.

9. The term “Candidate” refers to an individual contacted by a disputing party, an appointing authority or an arbitral institution with regard to a possible appointment as an Arbitrator for a specific IID proceeding. In the case of a Candidate for the role of presiding arbitrator, the contact may also be initiated by a party-appointed Arbitrator.

10. A Candidate is bound by the Code as soon as he or she is contacted and ceases to be bound when he or she: (i) declines the consideration or an eventual appointment; (ii) is no longer considered for appointment; or (iii) is not eventually appointed as an Arbitrator. The obligation of confidentiality under article 8(1), however, continues (see article 8(3)). Upon becoming a member of an arbitral tribunal, the obligations as a Candidate also cease and the obligations as an Arbitrator commence. The time when a Candidate becomes a member of an arbitral tribunal may vary depending on practice and the applicable rules.¹⁷

Ex parte communication

11. Article 7 regulates ex parte communication by a Candidate or an Arbitrator, which is defined in article 1(e). The term “ex parte communication” refers to any communication concerning the IID with a disputing party, its legal representative, affiliate, subsidiary or other related person (for example, a parent company of the disputing party or a third-party funder) and taking place without the other disputing party or its legal representative being present or having knowledge of the communication taking place. “Presence” in this context does not necessarily mean that the other party or its legal representatives must be physically present during the

¹⁶ See A/CN.9/1124, para. 206.

¹⁷ See, for instance, ICSID Arbitration Rules, Rules 15 to 21.

communication. For example, if an Arbitrator poses a question via e-mail to a disputing party copying the other disputing party, that disputing party would be considered “present” during the communication. On the contrary, a disputing party being merely aware of the communication should not be considered as having “knowledge”. For example, if a disputing party accidentally finds out that there was ongoing communication between the Arbitrator and the other disputing party on an issue relating to the IID, that would not make the communication permissible retroactively. “Knowledge” in this context means that a disputing party or its legal representative is provided adequate notice and given an opportunity to take part in the communication (see paras. 50-51 below).¹⁸

Assistant

12. The term “Assistant” refers to an individual, who is assigned specific tasks by the Arbitrator to assist with the IID proceeding (for instance, an associate in the Arbitrator’s firm or chamber).¹⁹ It does not include staff members of arbitral institutions (for example, tribunal secretaries, paralegals, clerks, or registry assistants), because as employees of the institution, they are bound by institution-specific ethical obligations and/or by their respective terms of employment. The term also does not include tribunal-appointed experts, as they act in their independent capacity.

Article 2 – Application of the Code

[*Note to the Commission:* The application of the Code would largely depend on how the Code is implemented. Considering that the Code has been prepared as a standalone text, the Commission may wish to consider possible means of implementation and recommend ways for disputing parties, institutions, States as well as arbitrators to make use of the Code.²⁰ In that context, its relationship with the UNCITRAL Arbitration Rules, the ICSID Arbitration Rules and other arbitration rules may need to be considered. The Commission may wish to further consider how a multilateral instrument on ISDS reform could provide the means to implement the Code, including by modifying the instrument of consent or the applicable rules (see para. 102 below). The Commission may wish to note that the ICSID Secretariat would be consulting its member States consistent with its usual process with regard to the implementation of the Code.]

Scope of application

13. The Code applies primarily to an Arbitrator and a Candidate, prior to the initiation of an IID proceeding and throughout the proceeding. However, the obligations in article 8(1) and (2) survive the proceeding and the obligations in article 4(2) to (4) apply to individuals, who were a member of an arbitral tribunal or an ICSID ad hoc Committee (“former Arbitrator”) (see para. 21 below).

14. The second sentence of paragraph 1 recognizes that disputing parties may agree to apply the Code in a proceeding to resolve a dispute that does not fall under the definition of an IID (for example, a dispute between States or a dispute which does not pertain to investments).²¹ Accordingly, the disputing parties may agree to apply the Code to individuals other than Arbitrators with necessary adjustments.²²

Complementary nature of the Code

15. The first sentence of paragraph 2 indicates that if the instrument of consent contains provisions regulating the conduct of an Arbitrator, a Candidate or a former Arbitrator, those provisions apply as complemented by the articles of the Code. In

¹⁸ See A/CN.9/1130, para. 67.

¹⁹ See A/CN.9/1124, para. 210.

²⁰ See A/CN.9/1131, para. 86.

²¹ See A/CN.9/1124, para. 217.

²² See A/CN.9/1130, para. 72.

that case, an Arbitrator, a Candidate or a former Arbitrator is expected to comply with the obligations in those provisions as well as the articles of the Code.

16. If the instrument of consent is silent with regard to the conduct regulated in the Code, the articles of the Code will apply complementing the instrument of consent.²³ If the instrument of consent contains a stricter obligation than the Code, the obligation in the instrument of consent will apply and by complying with the obligation therein, one would likely be complying with the Code. If the instrument of consent contains a more lenient obligation than the Code, the Code would complement the provisions in the instrument of consent. For example, if the instrument of consent requires an Arbitrator to not disclose “non-public” information concerning a proceeding, article 8 of the Code would complement that provision and an Arbitrator would be required to not disclose any information regardless of whether it is public or not (see para. 58 below). Similarly, if the instrument of consent prohibits an Arbitrator from commenting on a decision rendered in the IID proceeding only when that proceeding is pending or subject to further review, the Code would complement that provision by allowing comments only when the decision is publicly available (see para. 61 below). Another example may be when the instrument of consent requires a narrower scope of disclosure than that required under article 11 of the Code. In that case, a Candidate or an Arbitrator would need to comply with the disclosure obligations in both the instrument of consent and the Code, as the latter complements the former.

17. The second sentence of paragraph 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 not merely differ but also are inconsistent and irreconcilable with those of the Code, insofar as an Arbitrator, a Candidate or a former Arbitrator would not be able to comply with those provisions and the articles of the Code at the same time. In those circumstances, the provisions in the instrument of consent prevail.

18. Certain articles of the Code expressly address the relationship between the Code and the instrument of consent (see the phrase “unless permitted by the instrument of consent” in articles 7 and 8), and a situation of “incompatibility” may be rare. However, this could occur, for example, where the instrument of consent requires disclosure of circumstances and information only within the recent three years and no further (in contrast to five years in article 11(2)). In that case, only the provisions of the instrument of consent would apply in accordance with article 2(2) as they prevail.

Article 3 – Independence and impartiality

Independence and impartiality

19. Article 3(1) requires an Arbitrator 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 an Arbitrator’s decision. “Impartiality” refers to the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceeding.

20. Existing standards prepared by international organizations may provide useful guidance in this regard. For example, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”) list and categorize situations that may entail conflicts of interests and link them with the duty of disclosure.²⁴ According to the Guidelines, situations addressed in the Red List, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence and are instances where an objective conflict of interest exists from the view of a reasonable third person having knowledge of relevant facts and circumstances. The Red List consists of a non-waivable and a waivable list depending on the seriousness of the situations. Situations in the Orange

²³ See A/CN.9/1130, para. 106.

²⁴ See A/CN.9/1130, para. 75.

List, also depending on the facts of a given case, may give rise to doubts as to the arbitrator's impartiality and independence in the eye of the disputing parties. Situations addressed in the Green List are where no appearance or no actual conflict of interest exists from an objective point of view.²⁵

[*Note to the Commission:* The Commission may wish to confirm that the commentary should make a general reference to the IBA Guidelines and describe the Red, Orange and Green list approach taken in the IBA Guidelines, without referring to concrete situations listed therein. The Commission may wish to further note that a task force has been established by the IBA to review the Guidelines.]

Temporal scope of the obligation

21. The obligation of independence and impartiality begins when an individual becomes a member of an arbitral tribunal and continues until the Arbitrator ceases to exercise his or her functions. For example, the obligation will end: (i) when the Arbitrator resigns or is disqualified; (ii) when the proceeding is discontinued or terminated; or (iii) when the final award is rendered. However, the obligation will continue if the Arbitrator takes part in a post-award remedy proceeding involving the interpretation, correction or revision of the award.

Paragraph 2 – Non-exhaustive list of obligations

22. Paragraph 2 clarifies the obligation in paragraph 1 by providing a non-exhaustive list of examples where an Arbitrator could be found to lack independence or impartiality. The word “includes” in the chapeau emphasizes the illustrative nature of the list. Circumstances not listed in paragraph 2 may also implicate an Arbitrator's lack of independence or impartiality.²⁶ Whether the circumstances listed therein actually amount to a breach of independence or impartiality would depend on the specific facts of the case.

23. 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. The subparagraph does not regulate “loyalty” itself. Rather, it prevents an Arbitrator from allowing such loyalty to influence his or her conduct or judgment.²⁷ In this regard, the mere fact of bearing similarities with another person, such as having graduated from the same school, having the same nationality or having served in the same law firm, would not in itself establish that an Arbitrator is influenced by loyalty.

24. The phrase “any disputing party or any other person or entity” in subparagraph (a) captures a wide range of parties or entities to whom loyalty may be owed and is not limited to the disputing parties or “related” persons or entities (see paras. 37 and 87 below).²⁸ Therefore, the phrase includes, among others: (i) a person or entity that is not a party to the dispute but has been given the arbitral tribunal's permission to file a written submission in the proceeding (a “non-disputing party”); (ii) 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”); (iii) another member of the arbitral tribunal or the ICSID ad hoc Committee; (iv) third-party funders; (v) expert witnesses; and (vi) legal representatives of the disputing parties.²⁹

25. Subparagraph (b) requires an Arbitrator 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. The term “instruction” refers to any order, direction, recommendation or guidance, which may be implicit and may originate from diverse private or public sources, including

²⁵ IBA Guidelines, Part II: Practical Application of the General Standards, paras. 2, 3 and 7.

²⁶ See A/CN.9/1124, para. 227.

²⁷ See A/CN.9/1124, para. 228.

²⁸ See A/CN.9/1130, para. 76.

²⁹ See A/CN.9/1124, para. 228.

ministries, agencies, State-owned entities, business organizations or associations. The phrase “any matter addressed in the IID proceeding” refers to factual, procedural or substantive issues considered in the course of the proceeding.

26. By contrast, subparagraph (b) would not prevent an Arbitrator from, for example: (i) complying with binding interpretations issued by a joint committee pursuant to the underlying investment treaty; (ii) taking into account the views of the Treaty Parties (including non-disputing Treaty Parties) on matters of interpretation; (iii) acting in accordance with the disputing parties’ agreement or in line with any guidance material provided by the arbitral institution; (iv) making reference to decisions by other arbitral tribunals or courts; and (v) considering the disputing parties’ arguments, non-disputing party submissions and expert findings.

27. Subparagraph (c) mentions the types of relationships that could influence an Arbitrator’s conduct, which may have existed in the past, may be continuing or may be reasonably foreseen. The word “prospective” indicates that the independence or impartiality of an Arbitrator in the IID proceeding should not be affected by a relationship that he or she can reasonably anticipate to arise in the future, including functioning as a legal representative or an expert witness in another proceeding (see article 4(2) to (4)). The mere existence of a relationship listed in subparagraph (c) does not establish that an Arbitrator lacks impartiality or independence. Rather, the relationship must have an impact on the Arbitrator’s conduct, including judgments made or decisions taken.

28. Subparagraph (d) refers to the “use” of an Arbitrator’s position to advance any financial or personal interest in a disputing party or in the outcome of the proceeding. Accordingly, it is the use of the position to advance such interest that is determinative and whether the interest was realized or the extent of the interest realized 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. The subparagraph, however, does not affect the legitimate expectation of an Arbitrator to be paid fees (see para. 86 below).³⁰

29. The phrase “assume any function” in subparagraph (e) refers to an Arbitrator 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 Arbitrator’s duty in an independent and impartial manner (on the limits of a former Arbitrator undertaking functions as a legal representative or an expert witness, see article 4(2) to (4)). The term “benefit” in the same subparagraph refers to any gift, advantage, privilege or reward.

30. Subparagraph (f) indicates that an action taken or an omission by an Arbitrator, which creates the appearance of a lack of independence or impartiality, may result in a breach of the obligation in paragraph 1 to be independent and impartial. The subparagraph emphasizes that an Arbitrator 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

31. The Code addresses conflicts of interest in a number of ways, for example, by requiring an Arbitrator to be independent and impartial (article 3) and to make disclosures (article 11). Considering that performing multiple roles in IID proceedings could give rise to conflicts of interest or the appearance thereof, article 4 limits an Arbitrator from undertaking certain other roles while functioning as an Arbitrator and for a certain period of time after serving as an Arbitrator.

Temporal scope

32. Under paragraph 1, an Arbitrator is prohibited from acting as a legal representative or an expert witness while serving as an Arbitrator (“concurrently”).

³⁰ See A/CN.9/1124, para. 231.

Under paragraphs 2 and 3, a former Arbitrator is prohibited from acting as a legal representative or an expert witness for a period of three years after serving as an Arbitrator and under paragraph 4, for a period of one year.³¹ The limitations in paragraphs 2 to 4 begin when an Arbitrator ceases to exercise his or her functions, which may vary depending on when the IID proceeding is concluded (see para. 21 above).³²

Limited roles

33. Article 4 limits an Arbitrator or a former Arbitrator from acting as a legal representative or an expert witness. In paragraph 1, the limitation applies to such functions in “any other proceeding”, whereas the limitation in paragraphs 2 to 4 applies to those functions in “any other IID or related proceeding”. The latter phrase includes any international or domestic proceeding directly related to the IID proceeding, such as a set-aside or enforcement proceeding (see para. 89 below). Article 4, however, does not limit an Arbitrator from performing other adjudicatory functions, such as functioning as an arbitrator in another proceeding or as a judge (if permitted by the rules applicable to the judge).

Circumstances triggering the limitation

34. The limitation in paragraph 1 applies only if the other proceeding: (i) addresses the same measure or measures; (ii) involves the same or related party or parties; or (iii) addresses the same provision or provisions of the same instrument of consent. In those circumstances, an Arbitrator would be prohibited from concurrently acting as a legal representative or an expert witness in the other proceeding. The term “same” in the subparagraphs means identical and not merely similar.

35. However, even when the circumstances in paragraph 1 are not met, an Arbitrator should not act as a legal representative or an expert witness in another proceeding if that would lead to a breach of article 3.

The same measure or measures

36. The first circumstance triggering the limitation in paragraph 1 is if the other proceeding deals with the same measure or measures. A “measure” includes any law, regulation, procedure, requirement, conduct or practice of a State or an REIO that allegedly affects the investor’s protected rights in breach of an instrument of consent. For example, if three separate foreign investors initiate three separate proceedings with regard to a single regulation implemented by a State, an individual appointed as an Arbitrator in one of the IID proceedings would be prohibited from concurrently serving as a legal representative or an expert witness in the other two proceedings.

The same or related party or parties

37. The second circumstance triggering the limitation in paragraph 1 is if the other proceeding involves the same or related party or parties. This includes a disputing party as well as any of the disputing parties’ subsidiaries, affiliates or parent entities including any constituent subdivision of a State (see para. 87 below). For example, an Arbitrator may not concurrently serve as: (i) a legal representative of the parent company of the investor claimant in another proceeding; or (ii) an expert witness in another proceeding involving a ministry or department of the State respondent.

The same provision or provisions of the same instrument of consent

38. The third circumstance triggering the limitation in paragraph 1 is if the other proceeding addresses the same provision or provisions in the same instrument of consent.³³ This means that the interpretation of the same provision is at issue and not

³¹ See A/CN.9/1131, para. 77.

³² Ibid.

³³ See A/CN.9/1124, para. 241.

merely that the same provision was the basis for initiating the proceeding. For example, an Arbitrator handling a claim based on article 13 of the Energy Charter Treaty on expropriation may not concurrently act as a legal representative in another proceeding addressing the same article. However, that Arbitrator may act as a legal representative in a proceeding addressing only article 10 of the Treaty on fair and equitable treatment even though both proceedings had been initiated based on the same article 26 of the Treaty. Furthermore, the limitation in paragraph 1 is not triggered merely because the IID and the other proceeding both involve the ICSID Convention, as the Convention is not an instrument of consent (see para. 5 above).

Party autonomy

39. As indicated by the phrase “unless the disputing parties agree otherwise” in the respective paragraphs, article 4 can be varied or waived by the disputing parties. In other words, the disputing parties can jointly vary or waive the limitations in article 4 depending on the level of concern (for example, the disputing parties may agree to lift the limit on multiple roles entirely or agree to a shorter or longer period than that prescribed in paragraphs 2 to 4). This requires the express agreement of all disputing parties. For paragraph 1, “disputing parties” refer to the parties to the proceeding that the Arbitrator is adjudicating or is expected to adjudicate. For paragraphs 2 to 4, the same phrase refers to the parties to the proceeding that the former Arbitrator had adjudicated and not the parties to the proceeding in which the former Arbitrator is expected to act or is acting as a legal representative or an expert witness.

[*Note to the Commission:* The Commission may wish to note that a concern has been expressed that it may not always be practical for a former Arbitrator to obtain an express agreement by all of the disputing parties. In that context, the Commission may wish to consider inserting an additional paragraph on the meaning of the agreement of the disputing parties to waive the obligations in article 4(2) to (4) as follows:

40. *“However, a former Arbitrator obtaining an express agreement by all of the disputing parties may not always be practical. For instance, an individual may have passed away or a corporate entity may have dissolved. There may also be instances where the disputing party does not respond to the former Arbitrator’s or the other party’s request for an agreement. In such circumstances, the former Arbitrator should take all reasonable steps to obtain the agreement of the disputing parties (or from their legal representatives) and the absence of an objection within a reasonable period of time after having taken those steps may be deemed to constitute an agreement of the disputing parties for the purposes of paragraphs 2 to 4.”]*

Disclosure requirement under article 11(2)(e)

41. The disclosure requirements in article 11, in particular paragraph 2(e) (“any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding”), would assist the disputing parties to be aware of any potential non-compliance with article 4 and to possibly assess whether to seek a challenge or disqualification or any other sanction or remedy in accordance with the instrument of consent or the applicable rules (see article 12(3) and paras. 44 and 91 below).

Article 5 – Duty of diligence

Perform his or her duties diligently and devote sufficient time

42. Article 5 complements the requirements in the applicable arbitration rules and terms of appointment requiring an Arbitrator to perform his or her duties diligently and to conduct the proceedings so as to avoid unnecessary delay and expense by adopting effective measures.

43. The phrase “devote sufficient time” in subparagraph (b) captures the requirement that an Arbitrator should be available to perform the duties attached to his or her functions. An Arbitrator should not take on additional cases or responsibilities if they would impede his or her ability to perform the duties in a diligent and timely manner or would cause delays in the proceeding.³⁴ Should a Candidate anticipate not being able to fulfil this obligation, he or she should not accept the appointment as an Arbitrator pursuant to article 12(2).³⁵

44. A Candidate would usually inform the disputing parties of his or her availability over a certain period of time (for example, 24 months) by indicating the number of IID and other proceedings as well as other activities, in which he or she has a substantial commitment.³⁶ The disclosure required under article 11(2)(e) would assist the disputing parties in assessing the availability of the Arbitrator to devote sufficient time to the IID proceeding.

Render all decisions in a timely manner

45. Subparagraph (c) requires an Arbitrator to abide by any time frame in the instrument of consent, the applicable rules or as agreed by or with the disputing parties.³⁷ An Arbitrator should also ensure that the proceeding is conducted in an efficient manner and that the award and any other decision is rendered within a reasonable period of time. Even though decisions are usually made by the arbitral tribunal as a whole, each Arbitrator has the duty to ensure that the arbitral tribunal renders decisions in a timely manner.³⁸ The amount of time needed to render decisions may differ depending on the circumstances of the case, such as the complexity of the factual and legal issues that arise in the proceeding. The time required to meet the due process requirements, for example, to give the parties the opportunity to present their case, should also be taken into consideration.

Article 6 – Integrity and competence

Necessary qualities in the conduct of the proceedings

46. Subparagraph (a) lists elements commonly expected from an Arbitrator and found in existing instruments.³⁹ The term “civility” means being polite and respectful when interacting with participants in the IID proceeding. It is also associated with the Arbitrator’s demonstration of professionalism.⁴⁰

Necessary competence and skills of an Arbitrator and the obligations of a Candidate

47. The phrase “necessary competence” in subparagraph (b) should be understood in a broad sense to include, for instance, professional knowledge and experience in investment law and public international law as well as linguistic skills.⁴¹ Subparagraph (b) should be read in conjunction with article 12(2), which requires a Candidate to accept an appointment only if he or she is able to comply with the Code, in other words, possesses the necessary competence and skills and is available to discharge the duties of an Arbitrator.

³⁴ See A/CN.9/1124, para. 247.

³⁵ See A/CN.9/1124, para. 247.

³⁶ See A/CN.9/1086, para. 115.

³⁷ See A/CN.9/1130, para. 96.

³⁸ Ibid.

³⁹ See e.g., ICSID Convention, article 14: “Persons 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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” See also ICSID, Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels.

⁴⁰ See A/CN.9/1124, para. 250.

⁴¹ See A/CN.9/1124, para. 251.

No delegation of decision-making functions

48. Decision-making is the core function of an Arbitrator and therefore cannot be delegated.⁴² However, subparagraph (c) does not prevent an Arbitrator from having his or her Assistant prepare portions of preliminary drafts of decisions or awards under his or her direction, as long as the drafts are carefully reviewed by the Arbitrator so that the final text represents the reasoning and determination of the Arbitrator and not those of the Assistant (see para. 72 below).⁴³

49. The prohibition in subparagraph (c) is without prejudice to applicable arbitration rules, which may stipulate that certain decision-making functions can be delegated, for example, to the presiding Arbitrator.⁴⁴

Article 7 – Ex parte communication*General prohibition*

50. Paragraph 1 introduces a general prohibition on ex parte communication. Based on the definition provided in article 1(e) (see para. 11 above), the prohibition applies if the following three criteria are met: (i) there is a written or oral communication between a Candidate or an Arbitrator on the one hand and a disputing party, its legal representative, affiliate, subsidiary or other related person on the other; (ii) the communication concerns the IID; and (iii) the communication is made without the presence or knowledge of the other disputing party or parties or their legal representatives.⁴⁵

51. A communication not meeting all these criteria (for example, a phone call regarding a matter distinct from the IID or a meeting with a disputing party where the other parties' legal representative participated) would not be prohibited under article 7. If the other party was present via remote means or was otherwise on notice of the contents of the communication, such a communication would not be prohibited. Furthermore, if the other disputing party or its legal representative was invited to take part in the communication or otherwise informed that the communication was taking place but did not take part or object to the communication taking place, such a communication would also not be prohibited. By contrast, the mere fact that the other disputing party or its legal representative became aware of the communication would not make the communication permissible, as the other disputing party would need to be informed prior to the communication and given an opportunity to take part. Further, if a communication takes place despite an objection by the other disputing party, while that communication might not fall under "ex parte communication" as the other disputing party had knowledge, it could result in a breach of due process requirements under the applicable rules.

Exception in paragraph 1 – Unless permitted by the instrument of consent, the applicable rules or the agreement of the disputing parties

52. Where the instrument of consent or the applicable rules authorize ex parte communication as defined in article 1(e) of the Code, the prohibition in paragraph 1 does not apply. The term "applicable rules" in paragraph 1 and elsewhere in the Code refers not only to applicable arbitration rules but also to rules in domestic legislation applicable to the arbitral proceeding.⁴⁶

53. Ex parte communication is also not prohibited if agreed by the disputing parties. For instance, when interviewing a Candidate for the role of a sole Arbitrator or presiding Arbitrator, the presence or the knowledge of the other disputing party or its legal representative is required (in which case, the interview would not be prohibited as an ex parte communication). Alternatively, the disputing parties may agree that ex

⁴² See A/CN.9/1124, para. 248.

⁴³ See A/CN.9/1130, para. 17.

⁴⁴ See A/CN.9/1130, para. 99.

⁴⁵ See A/CN.9/1130, para. 67.

⁴⁶ See A/CN.9/1130, para. 60.

parte interviews are permissible. This also applies when a party-appointed Arbitrator (or a Candidate for that role) wishes to communicate with the disputing party that has appointed him or her or its legal representative concerning a Candidate for the presiding Arbitrator.⁴⁷

Exception in paragraph 2 – Pre-appointment interview of a Candidate for a party-appointed Arbitrator

54. Paragraph 2 permits a Candidate to take part in ex parte interviews with a disputing party or its legal representative for the role of a party-appointed Arbitrator. Such an interview may address the expertise, experience, competence, skills, willingness, availability and the existence of a possible conflict of interest of the Candidate as well as expected fees (see para. 69 below).

Absolute restriction regarding procedural or substantive issues relating to the IID

55. Even when ex parte communication is permitted under paragraphs 1 or 2, any substantive procedural aspects or issues of merit that can be anticipated to arise in the IID proceeding should not be discussed in accordance with paragraph 3. For example, a Candidate or an Arbitrator's views on the jurisdiction of the tribunal, the substance of the dispute or the merits of the claims are not to be discussed. As it is often difficult to anticipate the issues that might arise in the IID proceeding, a Candidate and an Arbitrator should refrain from discussing issues of jurisdiction or the merits other than for the purposes of determining any potential conflict of interest.

56. The limitation in paragraph 3 would not prevent a Candidate from obtaining basic information about the dispute and sharing information about himself or herself, which would be necessary for the disputing parties to determine his or her competence and assess any potential conflict of interest.⁴⁸ For instance, pre-appointment communications permitted under paragraph 2 may include a general description of the IID, including the identity of the disputing parties and their legal representatives as well as other Arbitrators or Candidates, if known. The legal basis of the dispute including the instrument of consent, applicable rules or other agreements between the disputing parties concerning the language, seat, timetable or any administrative aspects may also be discussed.

Article 8 – Confidentiality

Obligation of confidentiality

57. Article 8 imposes an obligation of confidentiality on a Candidate or an Arbitrator. Paragraphs 1 and 2 list the extent of confidentiality and paragraph 3 provides the temporal scope, indicating that the obligations continue to apply indefinitely even after the IID proceeding.⁴⁹

58. Paragraph 1(a) prohibits a Candidate or an Arbitrator from disclosing or using any information concerning the IID proceeding or acquired during the IID proceeding. In accordance with paragraph 1(b), an Arbitrator is also prohibited from disclosing any draft decision prepared in conjunction with the IID proceeding. The term “disclose” refers to the sharing or circulation of information or material by making it available to anyone without the authorization to access the information or material, including by making it publicly available. The term “use” refers to availing oneself of such information or material outside the IID proceeding, possibly taking advantage of having access to such information or material.⁵⁰

⁴⁷ See A/CN.9/1130, para. 103.

⁴⁸ See A/CN.9/1124, para. 257.

⁴⁹ See A/CN.9/1124, para. 272.

⁵⁰ See A/CN.9/1124, para. 262.

Exceptions to confidentiality

59. Paragraph 1 does not limit the disclosure or use of information for the purposes of the IID proceeding and as such, members of an arbitral tribunal could discuss among themselves information provided by the disputing parties or otherwise acquired during the proceeding. Paragraph 1 does not also hinder disclosure of information required, for example, under article 11(2)(c) to provide basic information about the IID proceeding in which an individual had been involved as an Arbitrator.

60. As provided for in paragraph 1, the obligation of confidentiality does not apply if disclosure or use of information is permitted by the instrument of consent, the applicable rules or the agreement of the disputing parties (see para. 52 above). For instance, the instrument of consent or the applicable rules may foresee that an Arbitrator would make a draft of the award available to the disputing parties or the arbitral institution for comments.⁵¹ This exception, however, is not provided for in paragraph 2, which relates to the contents of the deliberation, including views expressed by other Arbitrators during the deliberation.⁵²

Commenting on a decision

61. Paragraph 4 indicates that an Arbitrator may comment on a decision rendered during the IID proceeding only if such decision is publicly available. The phrase “publicly available” means that the decision was made public in accordance with the instrument of consent or the applicable rules. Therefore, an Arbitrator would not be permitted to comment on a decision that was made public in violation of such instrument or rules.⁵³

[*Note to the Commission:* The Commission may wish to consider whether the last sentence in paragraph 61 should be retained in light of the concerns expressed that this would impose an obligation on the Arbitrator to verify whether the decision was made public in breach of the instrument of consent or the applicable rules. While views were expressed that this may be too burdensome on the Arbitrator, it was also stated that the fact a decision was leaked should not lift the obligation of the Arbitrator to not comment on that decision.]

62. Paragraph 4 does not relieve an Arbitrator from being bound by the obligations in paragraphs 1 and 2. In other words, paragraph 4 does not allow an Arbitrator to make statements about, or discuss publicly, why the arbitral tribunal reached a decision in a particular IID proceeding or the manner in which that tribunal handled the merits of the case, as those aspects would be considered contents of the deliberations (see article 8(2)). On the other hand, publishing or contributing to an academic article for educational purposes (for example, listing the legal issues dealt with in the IID proceeding, addressing the procedural aspects of the proceeding and describing the stated reasoning of the award) would be permitted under paragraph 4.⁵⁴ In any event, comments by an Arbitrator should not be of a nature that would lead to questioning the integrity of the IID proceeding, decisions rendered or the independence or impartiality of the Arbitrator or other members of the arbitral tribunal.

63. The ability to comment on a publicly available decision is nevertheless restricted by paragraph 5 when the IID proceeding is ongoing or when the decision is subject to post-award remedies or review. The phrase “post-award remedy” refers to a process involving the interpretation, correction or revision of the award, or making of an additional award, by the arbitral tribunal, as well as an annulment process. The word “review” refers to a process where a disputing party seeks to set aside the award and where the enforcement of an award is being challenged.

⁵¹ See [A/CN.9/1130](#), para. 106.

⁵² See [A/CN.9/1130](#), para. 107.

⁵³ See [A/CN.9/1124](#), paras. 260–263; [A/CN.9/1130](#), paras. 108–109, and [A/CN.9/1131](#), para. 62.

⁵⁴ See [A/CN.9/1130](#), para. 109.

General exception

64. Paragraph 6 provides for a general exception to the obligations in the previous paragraphs of article 8. This is where: (i) a Candidate, an Arbitrator or a former Arbitrator is legally required to disclose the information in a court or any other competent body; or (ii) a Candidate, an Arbitrator or a former Arbitrator must disclose the information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body. For instance, paragraph 6 addresses a situation where an Arbitrator is compelled to disclose confidential information in accordance with a subpoena issued by a domestic court.⁵⁵

Article 9 – Fees and expenses

65. Article 9 relates to the fees of an Arbitrator as well as travel and other expenses incurred by the Arbitrator in the IID proceeding.

Reasonableness

66. Paragraph 1 provides that in accordance with the instrument of consent or the applicable rules, the fees and expenses shall be reasonable. This phrase reflects the fact that some investment treaties and applicable rules provide that the fees and expenses of an Arbitrator shall be reasonable in amount, taking into account, among others, the complexity of the factual and legal issues that arise in relation to the IID, the amount in dispute, the time spent by the Arbitrator and any other relevant circumstances of the case.⁵⁶ Some applicable rules prescribe fixed rates and specific methods to calculate the expenses of an Arbitrator, whereas others provide for a process to determine the fees and expenses.⁵⁷

Timing of the discussions

67. Pursuant to paragraph 2, discussions concerning fees and expenses shall be concluded as soon as possible. Such discussions are usually concluded prior to or immediately after the constitution of the arbitral tribunal and at the latest, during the first procedural meeting.⁵⁸ This avoids a situation where an Arbitrator requests fees higher than originally contemplated at a later stage of the proceedings, which would put the disputing parties in an awkward position.⁵⁹ However, the time frame for concluding the discussions differs depending on the applicable rules and whether the arbitral proceeding is administered by an institution.

68. During the discussions, the expected schedule of payment and methodology of calculating fees and expenses (for instance, the basis for calculation or rate of the fees, or the different categories of expenses to be disbursed) would be confirmed. This, however, does not mean that the actual amount of fees and expenses would be determined or fixed during the discussions.

Proposal on fees and expenses

69. Paragraph 3 addresses how a proposal on fees and expenses should be communicated. Such a proposal is to be communicated through the administering institution if there is one. In ad hoc arbitration, such a proposal should be communicated by the sole Arbitrator or the presiding Arbitrator. The limitation on ex parte communication in article 7 applies to such communication (see paras. 50-56 above).⁶⁰

⁵⁵ See [A/CN.9/1130](#), para. 110.

⁵⁶ See for instance, UNCITRAL Arbitration Rules, article 41(1).

⁵⁷ See for instance, UNCITRAL Arbitration Rules, article 41(2).

⁵⁸ See [A/CN.9/1130](#), para. 115, and [A/CN.9/1124](#), para. 276.

⁵⁹ See [A/CN.9/1130](#), para. 115.

⁶⁰ See [A/CN.9/1124](#), para. 278.

Maintenance and availability of accurate records

70. An Arbitrator is required to keep accurate records of time and expenses spent on the IID proceeding in accordance with paragraph 4. This minimizes the likelihood of disputes regarding fees and expenses.⁶¹ Paragraph 4 further requires that the record should be provided when requesting the payment of fees or expenses or upon the request of any disputing party. When the proceeding is administered by an institution, such records are usually transmitted to the institution and not directly to the disputing parties.

Article 10 – Assistant*Engaging an Assistant*

71. Before engaging an Assistant, an Arbitrator is required to consult the disputing parties and obtain their agreement to hire an Assistant, as well as on the role and duties to be performed by the Assistant. For that purpose, an Arbitrator should provide to the disputing parties the name and affiliation of Assistant candidates and indicate the possible tasks to be performed by the Assistant.⁶² This would allow a disputing party to raise concerns about the proposed Assistant or tasks to be performed.

72. Tasks typically carried out by an Assistant include legal research, review of pleadings and evidence, case logistics, attendance at deliberations and other similar assignments. While an Assistant may prepare preliminary drafts of decisions or awards, an Assistant should always perform such tasks upon instructions from and under the direction of an Arbitrator and should not exercise any decision-making function (see para. 48 above).

73. Paragraph 1 further requires an Arbitrator to obtain the agreement of the disputing parties on the anticipated fees and expenses of the proposed Assistant. This does not mean that the exact or total amount of fees and expenses of the Assistant need to be agreed at that stage – for example, the Arbitrator and the disputing parties may agree on the method of calculation of such fees and expenses.⁶³

Acting in accordance with the Code

74. While the Code does not apply to an Assistant (see article 2(1)), an Arbitrator should ensure that the Assistant is informed about the Code. This obligation is incumbent on the Arbitrator engaging the Assistant⁶⁴ and the Arbitrator could, for instance, require the Assistant to sign the declaration provided in Annex 2.⁶⁵ The Arbitrator should also oversee the activities of the Assistant throughout the proceedings and ensure that he or she acts in accordance with the Code (for example, articles 3, 5, 6, 7, 8 and 9). The requirement for an Assistant to act in accordance with the Code does not entail a different standard of compliance than that of an Arbitrator.⁶⁶

75. Paragraph 2 also requires an Arbitrator to remove an Assistant who does not act in accordance with the Code. For example, a disputing party concerned that the Assistant is not acting in accordance with the Code could raise the concern with the Arbitrator and request the Assistant to be removed or replaced. If the instrument of consent or the applicable rules provide specific sanctions with regard to an Assistant, those rules would apply. An Arbitrator who does not remove an Assistant as required in paragraph 2 may also be subject to sanctions or other remedies provided for in the instrument of consent or the applicable rules (see article 12(3)).

76. Paragraph 3 requires an Arbitrator to ensure that the Assistant keeps an accurate record of his or her time and expenses attributable to the IID proceeding.

⁶¹ See [A/CN.9/1130](#), para. 115.

⁶² See [A/CN.9/1130](#), para. 16, and [A/CN.9/1124](#), para. 210.

⁶³ See [A/CN.9/1130](#), paras. 16–17.

⁶⁴ See [A/CN.9/1130](#), para. 19.

⁶⁵ See [A/CN.9/1124](#), para. 224.

⁶⁶ See [A/CN.9/1130](#), para. 19, and [A/CN.9/1124](#), para. 224.

Article 11 – Disclosure obligations

77. Article 11 addresses the disclosure obligations of a Candidate and an Arbitrator. Disclosure allows the disputing parties to obtain information which in turn allows them to assess whether a Candidate is able to meet the requirements of independence and impartiality and that an Arbitrator is independent and impartial. Based on the information provided, disputing parties may pose questions and express concerns that acting or continuing to act in the proceeding may be in breach of the Code, the applicable arbitration rules or any other agreements of the parties. Such breach may lead to a challenge, disqualification or other sanction or remedy (see para. 100 below).⁶⁷

Standard and scope of disclosure

78. The standard and 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 an Arbitrator. Doubts are justifiable if any person, whether a disputing party or a third person, having knowledge of the relevant facts and circumstances, would reasonably reach the conclusion that there is a likelihood that a Candidate or an Arbitrator may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.⁶⁸

[*Note to the Commission:* The Commission may wish to note that Working Group III at the forty-fourth session in January 2023 decided to delete the phrase “, including in the eyes of the disputing parties,” which had been placed after the words “justifiable doubts” in article 11(1). One of the reasons for doing so was to align the language with article 11 of the UNCITRAL Arbitration Rules, which provide the same standard of disclosure. In addition, the Working Group agreed to include text along the lines of paragraph 78 in the commentary.⁶⁹

In preparing the revised version of the commentary following the forty-fifth session of Working Group III held in March 2023, a concern was raised by the ICSID Secretariat about the phrase “if any person, whether a disputing party or a third person,” due to the fact that the standard of challenge under article 12 of the UNCITRAL Arbitration Rules was the existence of circumstances that give rise to justifiable doubts. The Commission may wish to consider whether the inclusion of that phrase in paragraph 78 could lead to confusion about the standard of challenge and possibly result in an increased number of challenges. The Commission may wish to further consider whether guidance on the need to disclose circumstances likely to give rise to doubts in the eyes of the disputing parties could be provided in conjunction more generally in the context of the breadth of the duty to disclose (see, for example, paragraph 5). More specifically, the Commission may wish to consider the following reformulation of paragraph 78.

“78. The standard and 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 an Arbitrator. Doubts are justifiable if a reasonable person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that a Candidate or an Arbitrator may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.

78 bis. A Candidate or an Arbitrator shall err in favor of disclosure in accordance with paragraph 5 and should therefore ensure that his or her

⁶⁷ See [A/CN.9/1130](#), para. 92.

⁶⁸ See [A/CN.9/1130](#), para. 22.

⁶⁹ *Ibid.*

disclosure includes circumstances that may, in the eyes of a disputing party, give rise to doubts as to his or her impartiality or independence.”]

79. For instance, a Candidate should inform the disputing parties of any publications and presentations that he or she has made as well as any activities of his or her law firm or organization, which are likely to give rise to justifiable doubts about his or her independence or impartiality.⁷⁰ The IBA Guidelines provide useful practical guidance as to the types of circumstances that require disclosure under paragraph 1 (see para. 20 above).

80. The circumstances to be disclosed under paragraph 1 are not limited in time. For example, a circumstance, which arose more than five years before the Candidate was contacted, would need to be disclosed if it is likely to give rise to justifiable doubts.⁷¹

Paragraph 2 and its relationship with paragraph 1

81. Paragraph 2 includes a mandatory list of information that needs to be disclosed, regardless of whether it is likely to give rise to justifiable doubts under paragraph 1. In other words, paragraph 2 does not merely extend the scope of disclosure required under paragraph 1 but provides a minimum disclosure requirement, which is independent of that required under paragraph 1. This is because information disclosed in accordance with paragraph 2 may assist in identifying any potential conflict of interest. Paragraphs 1 and 2 combined require extensive disclosure on the part of a Candidate and an Arbitrator as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraph 2 and vice versa.

Scope of disclosure under paragraph 2

82. Subparagraph (a) requires disclosure of information related to potential conflicts arising from a financial, business, professional or close personal relationship that a Candidate or an Arbitrator might have with other persons or entities involved in the IID proceeding.⁷²

83. “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.

84. “Professional” relationship includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same law firm as another person involved in the IID proceeding. Such a relationship may also include 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 with another person involved in the IID proceeding would usually not constitute a professional relationship.

85. “Close personal” relationship includes a relationship involving a degree of intimacy which is beyond that of a financial, business or professional relationship, (for instance, where a Candidate or an Arbitrator is a close family member or has a long-term friendship with the legal representative of one of the disputing parties). However, being in the same class in school, casual or social acquaintances or distant family ties would not necessarily establish a close personal relationship.

86. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the IID proceeding or in any other proceedings involving the same measure, the same disputing party or a person or entity identified by a disputing party as being related. The phrase “financial interest” in subparagraph (b) does not include remuneration of fees or reimbursement of expenses incurred in the IID proceeding (see para. 28 above).

⁷⁰ See A/CN.9/1130, paras. 33 and 103.

⁷¹ See A/CN.9/1130, para. 25.

⁷² See A/CN.9/1130, para. 27.

87. The phrase “person or entity identified by a disputing party as being related” in subparagraphs (a)(iv) and (b)(iii) refers to, for instance, parent companies, subsidiaries or affiliates of a disputing party that have been identified by that disputing party as being related or relevant. A Candidate or an Arbitrator should invite the disputing parties to identify such related persons or entities, which would allow him or her to make the necessary disclosure and to assess any potential conflict of interest.

88. Similarly in accordance with subparagraph (a)(iv), a Candidate or an Arbitrator should invite the disputing parties to identify any person or entity that has a direct or indirect interest in the outcome of the proceeding, including any third-party funder. While not expressly referred to in subparagraph (b)(iii) as the subparagraph deals with a “proceeding” involving such a person or entity, if a Candidate or an Arbitrator has any financial or personal interest in that person or entity, that would also need to be disclosed in accordance with subparagraph (a).⁷³

89. Subparagraph (c) requires disclosure of all IID and related proceedings in which a Candidate or an Arbitrator is or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness. The phrase “related proceedings” refers to any international or domestic proceeding directly linked with an IID proceeding, such as a set-aside or enforcement proceeding. A proceeding is not “related” merely because it deals with the same disputing parties or same measure or is based on the same instrument of consent. However, such a proceeding may need to be disclosed under other subparagraphs.⁷⁴

90. Subparagraph (d) requires disclosure of information regarding the proceedings in which a Candidate or an Arbitrator has been appointed as an Arbitrator, a legal representative or an expert witness by one of the disputing parties or their legal representatives over the past five years. Subparagraph (d) addresses repeat appointments by the same party or its legal representative. It does not require disclosure of appointments made prior to five years, even if the Candidate or the Arbitrator continues to serve as an Arbitrator, a legal representative or an expert witness in that proceeding. Such circumstances may nonetheless need to be disclosed under paragraphs 1 and 2(c) if the conditions therein are met⁷⁵ and may also be prohibited under article 4.

91. Subparagraph (e) allows the disputing parties to know in advance, to ask questions and to raise any concerns that they may have if they believe that a Candidate or an Arbitrator acting concurrently as a legal representative or an expert witness in any other IID or related proceeding would violate articles 3 or 4 of the Code.⁷⁶

92. Information to be disclosed under subparagraphs (a), (c) and (d) of paragraph 2 is limited in time and covers certain relationships, proceedings or appointments within the past five years of disclosure.⁷⁷

Continuing obligation of disclosure

93. Paragraph 3 provides a continuing obligation of disclosure. If any new relevant circumstance or information within the scope of paragraphs 1 or 2 emerges or is brought to the attention of an Arbitrator during the IID proceeding, he or she should disclose such circumstance or information promptly. Arbitrators should remain vigilant and be proactive with regard to their disclosure obligations during the entire course of the IID proceeding.

⁷³ See A/CN.9/1131, para. 66.

⁷⁴ See A/CN.9/1130, para. 31.

⁷⁵ See A/CN.9/1130, para. 32.

⁷⁶ See A/CN.9/1130, para. 92.

⁷⁷ See A/CN.9/1130, para. 25.

Obligation to make all reasonable efforts and to disclose in case of doubt

94. Paragraph 4 requires a Candidate and an Arbitrator to be proactive to the best of his or her ability to identify the existence of circumstances and information identified under paragraphs 1 to 3 to ensure proper disclosure. For example, this involves reviewing relevant documentation already in the possession of a Candidate or an Arbitrator, conducting relevant conflict checks or requesting the persons or entities involved in the IID proceeding to provide further information in case of doubt or if deemed necessary to conduct proper assessment.⁷⁸ Paragraph 5 requires a Candidate and an Arbitrator to make a disclosure when he or she has a doubt as to whether the disclosure is required or not [(see para. 74 bis above)].

Form and timing of the disclosure

95. Paragraph 6 provides when and to whom the disclosure shall be made. The disclosure shall be made prior to or upon appointment to the disputing parties, the other Arbitrators, the administering institution and any other person as prescribed by the instrument of consent or the applicable rules. A Candidate and an Arbitrator can make the disclosure using the form in Annex 1. This form is a simplified one and its use is not mandatory. In any event, a Candidate and an Arbitrator should ensure that the relevant circumstances or information to be disclosed are conveyed in a comprehensive manner.

96. The phrase “prior to or upon” appointment in paragraph 6 does not mean that two separate disclosures are required, initially as a Candidate and again as an Arbitrator. One complete disclosure would suffice for the purposes of paragraph 6 and the timing of the disclosure will depend on who is receiving the disclosure and at what stage of the IID proceeding the disclosure is made.

Failure to disclose

97. Paragraph 7 clarifies that non-compliance with the disclosure requirements in article 11 does not necessarily establish a lack of independence or impartiality in itself. Rather, it is the content of the disclosed or omitted information that determines whether there is a violation of article 3. Paragraph 7 should, however, not be understood as an invitation or permission to not comply with the disclosure requirement in article 11. Indeed, a failure to disclose may be factually relevant when establishing a breach of the obligation to be independent and impartial, taking into account the information that was not disclosed as well as any other relevant circumstances.⁷⁹

98. Upon disclosure, a Candidate or an Arbitrator may request the disputing parties to confirm that they have no objection with respect to the circumstances disclosed. In that case, it may be possible under the applicable rules for a disputing party to waive its rights to raise an objection (including to raise a challenge) under the same rules.⁸⁰

Confidentiality and disclosure obligation

99. When a Candidate or an Arbitrator is bound by confidentiality obligations and is not in a position to disclose all of the required circumstances or information, he or she should disclose as much as possible.⁸¹ For example, with regard to the list of proceedings in subparagraph 2(c) (see para. 89 above), 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 are likely to give rise to justifiable doubts, he or she should decline the appointment in accordance with article 12(2).

⁷⁸ See A/CN.9/1130, para. 35.

⁷⁹ See A/CN.9/1130, para. 42.

⁸⁰ See A/CN.9/1130, para. 43.

⁸¹ See A/CN.9/1092, para. 93.

Article 12 – Compliance with the Code

100. Article 12 addresses the compliance with the Code. One way to promote adherence is to require a Candidate or an Arbitrator to sign a declaration upon appointment (see Annex 1). Another is through the obligation in paragraph 2 requiring a Candidate or an Arbitrator to decline an appointment or to resign, for example, when his or her impartiality or independence would be compromised and the conflict of interest cannot be eliminated, or when he or she lacks the competence for the purposes of the IID proceeding. However, an Arbitrator would not need to resign or recuse himself or herself due to an inadvertent non-disclosure as long as all reasonable efforts were made (see article 11(7) and para. 97 above).⁸² Compliance with the Code may also be sought by bodies or institutions established to monitor any breach and impose sanctions.⁸³

101. Paragraph 3 provides that the process and the standard of challenge, disqualification, sanction and remedy are governed by the instrument of consent or the applicable rules (including any domestic legislation, see para. 52 above). Any breach of the Code could be taken into account in that process.

102. Article 12 takes into account the possible development of additional means to implement the Code and to ensure compliance through an instrument which may modify the instrument of consent or the applicable rules.

⁸² See [A/CN.9/1130](#), para. 58.

⁸³ See [A/CN.9/1130](#), para. 60.