NYIAC | New York International Arbitration Center

**COMMENTS ON ARTICLE 4(1)–(2) (LIMIT ON MULTIPLE ROLES FOR ARBITRATORS) OF VERSION 4 OF THE UNCITRAL-ICSID DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTMENT DISPUTES**

22 August 2022

The New York International Arbitration Center ("NYIAC") is grateful for the opportunity to comment on Version 4 of the UNCITRAL-ICSID Draft Code of Conduct for Adjudicators in International Investment Disputes of July 2022 (the "draft Code"), which will be considered at the 43rd session of UNCITRAL Working Group III in September 2022.

We offer these comments following the discussion at this year's Grand Central Forum—NYIAC's flagship annual event—held on July 13, 2022. Entitled "Exploring the UNCITRAL-ICSID Code of Conduct for Adjudicators," the event focused on the proposed limit on multiple roles for arbitrators in Article 4(1)–(2) of the draft Code. We seek here to distill and expand on the discussion from the Grand Central Forum. As at that event, we defer to Working Group III on policy questions surrounding the limit on multiple roles. Here, we offer technical observations based on our experience as arbitration scholars and practitioners with a view toward aiding consensus around a rule that is both productive and effective. We also limit our comments to how the draft Code would apply in investment arbitration as opposed to its application to judges in a permanent investment dispute mechanism.

Specifically, in these comments we (*i*) situate the debate on multiple roles in arbitrators' prevailing duty of independence and impartiality, (*ii*) suggest that disclosure plus clear delineation of the limits imposed in Article 4(1)–(2) is the most effective approach to addressing arbitrators' multiple roles, and (*iii*) address specific issues arising out of Article 4(1)–(2).

We offer these comments with the hope of stimulating close scrutiny of the draft Code's provisions related to multiple roles. They have not been considered by NYIAC's supporting firms or members, nor do they necessarily represent each of our views individually.

Respectfully submitted,

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## I. Independence and Impartiality across Multiple Roles

1. Article 3 of the draft Code incorporates arbitrators' prevailing duties of independence and impartiality, as reflected, for example, in the UNCITRAL Arbitration Rules and the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.[1] As the Chair of the ICSID Administrative Council summarized:

> Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both protect parties against arbitrators being influenced by factors other than those related to the merits of the case.[2]

Judicial and arbitral practice has developed well-established standards for assessing independence and impartiality, especially as regards issue conflicts.[3]

2. In our view, the independence-and-impartiality standard provides the appropriate analytical framework for assessing whether multiple roles as arbitrator, counsel, or expert would give rise to concerns of influence by factors other than those related to the merits of the case in a particular arbitral proceeding.

3. This is also the approach found in ICSID practice on arbitrator challenges.[4] In the NAFTA arbitration of *Gallo v. Canada*, for example, the claimant challenged Canada's appointee on the basis that he was providing legal advice to Mexico, a NAFTA State Party with a right to intervene in the arbitration. The ICSID Deputy Secretary-General instructed the arbitrator to choose between his representation of Mexico and his service as arbitrator, finding that an arbitrator in that situation "inevitably risks creating justifiable doubts as to his *impartiality and independence*."[5] Other ICSID decisions are in accord.[6]

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1 UNCITRAL Rules (2021), Article 12(1) ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."); IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 1 ("Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.").

2 *Abaclat et al. v. Argentina*, ICSID Case No. ARB/07/5, Disqualification Decision (4 February 2014), ¶ 75 (citation and internal quotation marks omitted).

3 *See generally* Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration (2016), §§ IV.B–C.

4 *See id*., ¶¶ 129–33.

5 *Gallo v. Canada*, PCA Case No. 2008-03, Challenge Decision (14 October 2009), ¶ 29 (emphasis added).

6 *See, e.g.*, *Blue Bank International & Trust (Barbados) v. Venezuela*, ICSID Case No. ARB/12/20, Challenge Decision (12 November 2013), ¶ 69 (concluding that a "third party would find an evident or obvious appearance of *lack of impartiality*" given the arbitrator's concurrent service as counsel (emphasis added)); *Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13, Disqualification Decision (27 February 2013), ¶ 84 (finding that "acting simultaneously as counsel for a party in one arbitration and as arbitrator in another case . . . can potentially raise doubts as to the *impartiality and independence* of the concerned individual in his role as arbitrator" (emphasis added)).

4. The draft Code itself acknowledges the relationship between multiple roles and independence and impartiality in Article 4(2) by barring concurrent service where it would violate Article 3. Consistent with the obligation of independence and impartiality, the parties cannot waive an arbitrator's compliance with Article 4(2).

5. Article 4(1), however, is not explicitly linked to the duty of independence and impartiality. Instead, it lists types of multiple roles that would disqualify the arbitrator or candidate, absent party agreement. The Working Group may wish to clarify, in the draft Code or its commentary, the relationship between the factors listed in Article 4(1) and the obligation of independence and impartiality.

## II. Disclosure of Multiple Roles

6. We welcome the obligations found in Article 10 requiring arbitrator candidates to disclose any circumstances likely to give rise to justifiable doubts as to their independence or impartiality. As the Acting PCA Secretary-General has stated, "[f]ull disclosure by an arbitrator upon appointment is indispensable . . . to allow the parties to assess whether they wish to exercise their rights to challenge an arbitrator . . . if they are of the view that the arbitrator does not meet the requisite standard of *independence and impartiality*."[7]

7. In our view, the same principle applies to assessing the effect of a candidate's multiple roles under Article 4. Full disclosure allows the parties to evaluate whether the arbitration will involve the same measures, the same or related parties, or the same provision(s) of the treaty of another IID proceeding, to take the formulation in Article 4(1). This is because it may be difficult for an arbitrator candidate to assess at the outset of a case all the circumstances that could lead to an overlap in another case in which he or she is sitting. The parties, by contrast, may more deeply understand the circumstances surrounding the dispute at the start of the arbitration.

8. Article 10 would clearly oblige candidates to disclose circumstances relevant to assessing whether their multiple roles would run afoul of Article 4(2). It is less clear, however, whether Article 10 imposes an obligation to make disclosures relevant to the assessment under Article 4(1), given that some of those factors are not explicitly linked to independence and impartiality. It would appear natural for the draft Code to create such a disclosure obligation—*e.g.*, to disclose the measures (Article 1(b)) at issue in any concurrent cases in which the arbitrator candidate is serving as counsel or expert witness—given that Article 4(1) allows the disputing parties to consent to an arbitrator candidate's additional role, and it may be helpful to state that obligation expressly.

[7] *Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, PCA Case No. 2012-10, Challenge Decision (8 August 2012), ¶ 83 (emphasis added).

## III. Specific Issues Regarding Article 4(1)–(2)

| Draft Provision | Comment |
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| 1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] | ***Timing and three-year tail.*** The Working Group may wish to clarify, either in the text or the commentary, the point at which the arbitrator's service in his or her other role ends for purposes of the limit on multiple roles.[8] Several options could include the date of the final award, the end of annulment proceedings for cases brought under the ICSID Convention, or the end of enforcement proceedings. As the Secretariats note, special thought should be given to how Article 4 would apply to an arbitrator who had been disqualified or had resigned from an IID proceeding.[9]<br><br>***Enforcement.*** The Working Group may wish to further consider how a limit on multiple roles could be enforced during the three years following the conclusion of an IID proceeding in which he or she sat as arbitrator. The rule in Article 4 could be enforced against an arbitrator candidate or sitting arbitrator by way of challenge or disqualification, but it is unclear how the draft Code envisions that that control would be exercised over an arbitrator who takes on a concurrent role as counsel or expert in a different proceeding within the proposed three-year tail. The draft Code could be taken to impose a duty on the arbitrator not to take on the second role, but it is not clear whether that would be anything more than a moral duty. Further, given that an advocate is not expected to be impartial and independent, it is not clear that imposing a ban on serving as counsel following the end of an arbitrator's serve would advance the purpose of the draft Code. |
| as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:<br><br>(a) the same measure(s); | ***"[O]r any other proceeding."*** We believe that this text, currently in brackets, would helpfully clarify that the obligations related to multiple roles also apply to contract-based arbitrations involving States or State-run entities, which share some features with treaty-based arbitrations, as well as enforcement or set-aside proceedings for both investor-State awards and contract-based arbitrations.<br><br>***Article 4(1)(a)–(c).*** The Working Group may wish to clarify, in the text or the commentary, whether this list is exhaustive or exclusive. |

[8] *See* Draft Code, Secretariats' Note to the Working Group, ¶ 28.

[9] *See id*., ¶ 30.

| Draft Provision | Comment |
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| (b) the same or related party [parties]; or | ***"[R]elated party (parties)."*** The Working Group may wish to consider defining "related party (parties)" with more specificity, either in the text or in the commentary. The draft text in Version 3, Article 4(c) of Option 2—"one of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise"—could be a useful clarification.[10] |
| (c) the same provision(s) of the same treaty. | ***"[S]ame provision(s)."*** The proposed application of the limit on multiple roles to service involving the "same provision(s) of the same treaty" risks being both over- and under-inclusive. It may be over-inclusive because two cases argued under the same treaty provision may implicate different elements of that provision (e.g., different elements of the obligation to accord fair and equitable treatment). The effect of this over-inclusiveness may be compounded for multilateral treaties, such as the Energy Charter Treaty, where the limit on multiple roles could preclude an arbitrator's service in two disputes where the parties in the first dispute are wholly unrelated to the parties in the second one.[11] It may also be over-inclusive in cases where the statement of claim is deliberately broad and puts forth multiple heads of claims even though the case might ultimately turn on only one or a narrower set of provisions.<br><br>It may be under-inclusive because it would place no restriction on an arbitrator serving in multiple roles with respect to identical provisions under two different treaties (e.g., the obligation to respect contractual obligations).<br><br>To avoid this potential under- and over-inclusiveness, it may be preferable to remove this provision and address service in cases involving the same provision of the same treaty in the commentary to draft Article 3 (Independence and Impartiality). |

[10] *Cf. id*., ¶ 34 (inviting the Working Group to consider providing guidance as to the meaning and scope of the term "same" throughout draft Article 4(1)(a)–(c)).

[11] *Cf. id*., ¶ 33 (inviting the Working Group to "consider the effect [draft Article 4(1)(c)] could have with regard to multilateral treaties").

| Draft Provision | Comment |
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| 2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would be in breach of article 3. | ***Party agreement.*** Because Article 4(2) links multiple roles to arbitrators' obligations under Article 3, the bracketed text relating to party agreement, if adopted, would seemingly permit disputing parties to agree to an exception to the duty of independence and impartiality. This may be inconsistent with Article 3, which on its face permits no such exception. If the Working Group does make Article 4(2) subject to party agreement, it may wish to consider clarifying this point in the text or commentary of Articles 3 and 4.<br><br>***"[L]egal issues."*** It appears that Article 4(2) would function as a *de facto* total ban on multiple roles. This is because it is impossible for an arbitrator candidate to know what legal issues might arise in a case before accepting an appointment. To eliminate the risk, an arbitrator would need to consider declining all appointments within the scope of the rule. If the Working Group does not intend for Article 4(2) to function as a total ban on multiple roles, it may wish to consider revisions to that effect. |