

Remarks of the Russian Federation on the Draft Code of Conduct for Adjudicators In Investor-State Dispute Settlement developed by the UNCITRAL Secretariat

The Russian Federation thanks the UNCITRAL Secretariat for preparing the Draft Code of Conduct for Adjudicators In Investor-State Dispute Settlement (hereinafter – the Draft Code) and considers it expedient to improve it regarding the following areas:

I. General remarks:

We support the necessity to solve the problem of the relation between the Draft Code and other existing and applicable rules and principles of resolving conflict of interests in international arbitration (in particular, those developed by other non-governmental organizations (for example, the Guidelines of the International Bar Association).

II. Remarks on the Draft Code:

1) *Article 1.* We do not see the need to define the term “State” for the purpose of the Code (Paragraph 22 of the commentaries to the Draft Code), as well as provide for the list of persons who can be regarded as subjects that have the right to act on behalf of the State/regional economic integration organization (Paragraph 4 of Article 1). In this regard, we suggest to exclude the words “, or any constituent subdivision of the State or an agency of the State or the REIO”.

2) *Article 5.* It is required to supplement the Draft Code with the provision that disclosure of information by the adjudicator as such does not confirm existence of conflict of interests but, first and foremost, serves the purpose of ensuring transparency and awareness of the parties.

Apart from that, we think it is necessary to develop a form as an appendix to the Draft Code that would be filled by the adjudicators before the hearings and in which an adjudicator would indicate circumstances that may cause doubts regarding his or her independence and impartiality.

We suggest making a correction to Paragraph 2. According to the meaning of this Paragraph the list of information subject to disclosure is not exhaustive. Paragraph 2 of Article 4 of the Draft Code provides for non-exhaustive character of the elements of independence and impartiality listed in this Article by using an introductory word “*in particular*”. At the same time, Paragraph 2 of Article 5 of the Draft Code does not contain this word. For uniformity the introductory word “*in particular*” should be added to the Paragraph 2 of that Article. Thus, we suggest the following version of Paragraph 2 of Article 5: “*Disclosure made pursuant to Paragraph (1) shall, in particular, include the following:*”.

We suppose that it is possible to enumerate the circumstances included in the notion of “*indirect financial interest*” of the third party in Paragraph 2(b).

Paragraph 3 provides that adjudicators shall have a continuing duty to promptly make disclosures about conflicts of interest. At the same time, we consider it expedient to establish general rules of conduct for persons if they detect any inconsistencies or doubts about their independence or impartiality.

3) *Article 7*. Paragraph 4 provides for the obligation of adjudicators not to delegate their decision making function to any other person. However, the Draft Code does not contain the definition of “*decision making function*”. We suggest to develop such definition or clarify in the Paragraph under consideration what is meant by it. At the same time, we suppose that this should mean a direct prohibition for persons making decisions to delegate drafting and adopting a decision of a case to any other persons, including assistants.

We suggest making explicit provisions excluding not only making decisions by assistants instead of adjudicators but also drafting them. For this we consider it necessary to clarify the definition of “*drafting*” in Paragraph 2 of Article 1 of the Draft Code. From the current version of the “assistants” definition it is unclear what part of drafting a document can be entrusted to assistants. In particular, it is unclear whether this definition includes drafting a decision of case.

In the current version the Draft Code does not contain clear and unambiguous provisions that exclude adopting and drafting decisions by assistants instead of adjudicators.

4) *Article 8*. We do not see expediency of establishing quantitative restrictions for adjudicators to serve in arbitration proceedings (Paragraph 2). At the same time, we claim that it is necessary to include to the Draft Code the provisions establishing the obligation for adjudicators to disclose information on quantity of arbitration proceedings in which such an adjudicator simultaneously serves.

5) *Article 9*. It is expedient to extend the non-disclosure obligations established in Paragraphs 1(a), 1(b) and 1(c) of Article 9 for the period after the end of proceedings.

The aforementioned remarks by the Russian Federation are of a preliminary nature and cannot be regarded as limiting the position of the Russian Federation in course of a subsequent discussion of the Draft Code of Conduct for Adjudicators In Investor-State Dispute Settlement, as well as the position of the Russian Federation on any existing or any future potential investor-state dispute.