



# General Assembly

Distr.: General  
28 April 2023

Original: English

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

## **Draft code of conduct for judges 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 a draft code of conduct for judges 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 arbitrators and the accompanying commentary is contained in [A/CN.9/1148](#).

## II. Draft code of conduct for judges 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 judges in international investment dispute resolution (the “Code”) reads as follows.

#### Article 1 – Definitions<sup>1</sup>

For the purposes of the Code:

- (a) “Judge” means a person who is a member of the standing mechanism;
- (b) “Candidate” means a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
- (c) “Ex parte communication” means any communication concerning a proceeding before the standing mechanism by a Judge 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.

#### Article 2 – Application of the Code<sup>2</sup>

The Code applies to a Judge, a Candidate or a former Judge in accordance with the rules of the standing mechanism.

#### Article 3 – Independence and impartiality<sup>3</sup>

- 1. A Judge 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;

<sup>1</sup> See [A/CN.9/1130](#), paras. 68 and 70.

<sup>2</sup> See [A/CN.9/1130](#), para. 74, and [A/CN.9/1131](#), para. 79.

<sup>3</sup> See [A/CN.9/1130](#), para. 78, and [A/CN.9/1131](#), paras. 59 and 80.

(b) Take instruction from any organization, government or individual regarding any matter addressed in a proceeding before the standing mechanism;

(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 a proceeding, before the standing mechanism;

(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 roles<sup>4</sup>**

1. A Judge shall not exercise any political or administrative function. He or she shall not engage in any other occupation of a professional nature, which is incompatible with his or her obligation of independence and impartiality, or with the demands of the terms of office. In particular, a Judge shall not act as a legal representative or an expert witness in any other proceeding.

2. A Judge shall declare any other function or occupation in accordance with the rules of the standing mechanism. Any question regarding paragraph 1 shall be settled by the standing mechanism.

3. A former Judge shall not become involved in any manner in any proceeding before the standing mechanism, which was pending during his or her term of office.

4. A former Judge shall not act as a legal representative or an expert witness in any proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

#### **Article 5 – Duty of diligence<sup>5</sup>**

A Judge shall perform the duties of his or her office diligently in accordance with the terms of office.

#### **Article 6 – Integrity and competence<sup>6</sup>**

A Judge shall:

(a) Conduct proceedings 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 communication<sup>7</sup>**

Unless permitted by the rules of the standing mechanism, ex parte communication is prohibited.

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<sup>4</sup> See [A/CN.9/1130](#), paras. 68, 93 and 94.

<sup>5</sup> See [A/CN.9/1130](#), para. 98, and [A/CN.9/1131](#), para. 81.

<sup>6</sup> See [A/CN.9/1130](#), paras. 35, 68 and 101.

<sup>7</sup> See [A/CN.9/1130](#), paras. 104 and 105.

**Article 8 – Confidentiality<sup>8</sup>**

1. Unless permitted by the rules of the standing mechanism, a Judge or a former Judge shall not:

(a) Disclose or use any information concerning, or acquired in connection with, a proceeding before the standing mechanism;

(b) Disclose any draft decision in a proceeding before the standing mechanism; or

(c) Disclose the contents of the deliberations in a proceeding before the standing mechanism.

2. Unless permitted by the rules of the standing mechanism, a Judge shall not comment on a decision rendered in a proceeding before the standing mechanism and a former Judge shall not comment on a decision rendered in a proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

3. The obligations in this article shall not apply to the extent that a Judge or a former Judge is legally compelled to disclose the information in a 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 – Disclosure obligations<sup>9</sup>**

1. A Candidate and a Judge 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, a Candidate shall disclose all proceedings in which the Candidate is currently or has been involved in the past five years including as an arbitrator, a legal representative or an expert witness.

3. Regardless of whether required under paragraph 1, the following information shall be disclosed by a Judge with regard to a proceeding which he or she is expected to adjudicate or is adjudicating:

(a) Any financial, business, professional or close personal relationship in the past five years with:

(i) Any disputing party in the proceeding;

(ii) The legal representative(s) of a disputing party in the proceeding;

(iii) Expert witnesses in the 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 proceeding, including a third-party funder; and

(b) Any financial or personal interest in:

(i) The outcome of the 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.

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

5. A Candidate shall make the disclosure to the standing mechanism in accordance with the rules of the standing mechanism.

<sup>8</sup> See [A/CN.9/1130](#), paras. 27–28, 35, 40–41, 46–47, 68 and 113, and [A/CN.9/1131](#), paras. 82–84.

<sup>9</sup> See [A/CN.9/1130](#), paras. 27–28, 35, 40–41, 46–47 and 68, and [A/CN.9/1131](#), para. 85.

6. A Judge shall make the disclosure in accordance with the rules of the standing mechanism as soon as he or she becomes aware of the circumstances and information mentioned in paragraphs 1 and 3. A Judge shall have a continuing duty to make further disclosures based on new or newly discovered circumstances and information.

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

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

#### **Article 10 – Compliance with the Code<sup>10</sup>**

Compliance with the Code shall be governed by the rules of the standing mechanism.

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

#### **Annex 1 (Candidates)**

##### *Declaration, disclosure and background information*

1. I have read and understood the attached UNCITRAL Code of Conduct for Judges 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 a Judge and I have no impediment arising from the Code of Conduct.

3. In accordance with article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[INSERT AS RELEVANT]

4. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I understand that I shall make further disclosures based on new or newly discovered circumstances and information as soon as I become aware of such circumstances and information.

#### **Annex 2 (Judges)**

##### *Declaration and disclosure*

1. I have read and understood the attached UNCITRAL Code of Conduct for Judges 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 a Judge. I am impartial and independent and have no impediment arising from the Code of Conduct.

3. In accordance with article 9 of the Code of Conduct, I wish to make the following disclosure and provide the following information:

[INSERT AS RELEVANT]

4. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I understand that I shall make further disclosures based on new or newly discovered circumstances and information as soon as I become aware of such circumstances and information.

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<sup>10</sup> See [A/CN.9/1130](#), paras. 62 and 63.

## C. Text of the draft commentary

1. [At its fifty-sixth session in July 2023, UNCITRAL adopted the Code of Conduct for Judges in International Investment Dispute Resolution (the “Code”) and the accompanying commentary in principle.] The Code has been prepared on the assumption that a standing multilateral mechanism may be established in the future to adjudicate international investment disputes (referred to as the “standing mechanism”).

### Article 1 – Definitions

#### *Judge and Candidate*

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

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

#### *Ex parte communication*

4. Article 7 regulates ex parte communication by a Judge, which is defined in article 1(c). The term “ex parte communication” refers to any communication concerning a proceeding before the standing mechanism 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 communication. For example, if a Judge 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 an ongoing communication between a Judge and the other disputing party on an issue relating to a proceeding before the standing mechanism, 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.<sup>11</sup>

### Article 2 – Application of the Code

5. The Code applies primarily to a Judge and a Candidate, prior to the commencement of a proceeding before the standing mechanism, throughout such a proceeding as well as during the term of office of a Judge.<sup>12</sup> However, certain obligations in articles 4 and 8 survive the term of office of a Judge and apply to individuals who were a member of the standing mechanism (“former Judge”).

6. The rules of the standing mechanism will determine how the Code would apply to a Judge, a Candidate and a former Judge, and address any incompatibility between the articles of the Code and other provisions on their conduct included in rules of the standing mechanism or the underlying agreement.<sup>13</sup>

<sup>11</sup> See [A/CN.9/1130](#), para. 67.

<sup>12</sup> See [A/CN.9/1130](#), para. 74.

<sup>13</sup> See [A/CN.9/1131](#), para. 79.

### Article 3 – Independence and impartiality

#### *Independence and impartiality*

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

#### *Scope of the obligation*

8. The obligation of independence and impartiality begins upon appointment and continues until the Judge ceases to exercise his or her functions. The obligation relates to the functions as a Judge of the standing mechanism and is therefore not limited to proceedings that the Judge is adjudicating.

#### *Paragraph 2 – Non-exhaustive list of obligations*

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

10. 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 prohibits a Judge from allowing such loyalty to influence his or her conduct or judgment. 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 a Judge is influenced by loyalty.

11. 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 para. 45 below).<sup>14</sup> Therefore, it includes among others: (i) a person or entity that is not a party to the proceeding that the Judge is adjudicating but is a party to another proceeding before the standing mechanism; (ii) a person or entity that is not a party to the proceeding but has been given the permission to file a written submission in the proceeding (a “non-disputing party”); (iii) 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”); (iv) another member of the standing mechanism; (v) third-party funders; (vi) expert witnesses; and (vii) legal representatives of the disputing parties.

12. Subparagraph (b) requires a Judge to exercise his or her independent judgment in resolving the dispute 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” in subparagraph (b) refers to any order, direction, recommendation or guidance, which may be implicit and may originate from diverse private or public sources, including ministries, agencies, State-owned entities, business organizations or associations. The phrase “any matter addressed in a proceeding before the standing mechanism” refers to factual, procedural or substantive issues considered in the course of those proceedings.

13. By contrast, subparagraph (b) would not prevent a Judge from: (i) complying with binding interpretations issued by a joint committee pursuant to the underlying

<sup>14</sup> See [A/CN.9/1130](#), para. 76.



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 standing mechanism; (iv) making reference to decisions by the standing mechanism, other courts or arbitral tribunals; and (v) considering the disputing parties' arguments, non-disputing party submissions and expert findings. Depending on the structure and organization of the standing mechanism, a first-tier Judge referring to or relying on a binding judgment or interpretation of an appellate tier of the same standing mechanism would not be considered as taking instruction within the meaning of subparagraph (b).

14. Subparagraph (c) mentions the types of relationships that could influence a Judge'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 a Judge should not be affected by a relationship that he or she can reasonably anticipate to arise in the future.<sup>15</sup> The mere existence of such a relationship does not establish that a Judge lacks independence or impartiality. Rather, the relationship must have an impact on the Judge's conduct, including judgments made and decisions taken.

15. Subparagraph (d) refers to the "use" of a Judge's position to advance any financial or personal interest in a disputing party before the standing mechanism or in the outcome of a proceeding before the standing mechanism. Accordingly, it is the use of the Judge's position to advance such interest that is determinative and whether the interest was realized and the extent of the interest realized are 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.

16. The phrase "assume any function" in subparagraph (e) refers to taking on a professional responsibility (for example, becoming a board member of an entity closely affiliated with a disputing party), which would make it difficult to perform the Judge's duty in an independent and impartial manner. The term "benefit" in the same subparagraph refers to any gift, advantage, privilege or reward. The possibility for a Judge to undertake any professional functions outside his or her terms of office is further conditioned upon the obligation in article 4(1) and (2), including to declare any other function or occupation in accordance with the rules of the standing mechanism.

17. Subparagraph (f) indicates that an action taken or an omission by a Judge, 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 a Judge must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias.

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

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

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

<sup>15</sup> See [A/CN.9/1130](#), para. 78.

19. A Judge has an obligation not to engage in a professional occupation, which is incompatible with his or her obligation of independence or impartiality or with the demands of the terms of office. In particular, pursuant to the second sentence of paragraph 1, a Judge is prohibited from concurrently functioning as a legal representative or an expert witness in another proceeding, including those before the standing mechanism. While not regulated by the second sentence, the terms of office may limit a Judge from concurrently functioning as an arbitrator and may require a Candidate to resign from any duties as an arbitrator prior to being appointed as a Judge.

20. Paragraph 2 requires a Judge to make a declaration regarding any other function or occupation and do so in accordance with the rules of the standing mechanism. Upon the declaration, a determination will be made on whether such function or occupation is prohibited under paragraph 1. For example, whether a Judge can function as an arbitrator in a proceeding outside the standing mechanism would be determined by the standing mechanism based on its rules as well as the terms of office.<sup>16</sup>

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

22. Paragraph 3 relates to a proceeding that was initiated prior to the end of the Judge's term, regardless of whether the Judge adjudicated that proceeding. The scope of the prohibition is broad and covers any involvement including as an ad hoc judge, a legal representative, an expert witness, a third-party funder or an amicus curiae.

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

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

24. Article 5 addresses the availability of a Judge to perform his or her duties. The specific duties are to be found under the terms of office or in the rules of the standing mechanism.<sup>17</sup>

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

25. Subparagraph (a) lists elements commonly expected from a Judge. The term "civility" means being polite and respectful when interacting with participants in the proceeding. It is also associated with the Judge's demonstration of professionalism. With respect to subparagraph (b), the appointing authority within the standing mechanism would typically assess the skills and competence required of a Candidate before he or she becomes a Judge in accordance with the rules of the standing mechanism.<sup>18</sup>

26. The obligation to not delegate decision-making functions in subparagraph (c) is without prejudice to the rules of the standing mechanism, which may stipulate that certain decision making can be delegated, for example, to a Judge who functions as the president of the standing mechanism. The subparagraph also does not prevent a Judge from having a person, such as a law clerk, prepare portions of preliminary drafts of decisions under his or her direction as long as the drafts are carefully reviewed by the Judge so that the final text represents the reasoning and determination of the Judge.<sup>19</sup>

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<sup>16</sup> See [A/CN.9/1130](#), para. 93.

<sup>17</sup> See [A/CN.9/1130](#), paras. 97 and 98.

<sup>18</sup> See [A/CN.9/1130](#), para. 100.

<sup>19</sup> See [A/CN.9/1130](#), para. 17.

## Article 7 – Ex parte communication

27. Article 7 imposes a prohibition on ex parte communication as defined in article 1 (see para. 4 above), unless permitted by the rules of the standing mechanism.

## Article 8 – Confidentiality

28. Article 8 imposes an obligation of confidentiality on a Judge and a former Judge. The phrase “unless permitted by the rules of the standing mechanism” in paragraphs 1 and 2 foresees that the rules of the standing mechanism may provide further exceptions allowing a Judge or a former Judge to disclose or comment under certain circumstances.<sup>20</sup> For instance, the rules of the standing mechanism may provide that: (i) a Judge may disclose the contents of the deliberation to the president of the standing mechanism; (ii) a Judge may make a public statement as part of his or her official duties; or (iii) a former Judge may publish articles and make presentations within the three-year period upon receiving approval from the standing mechanism.

29. The obligations in paragraph 1 continue to apply indefinitely even after the proceeding and also survive the term of office of a Judge, thus applying also to a former Judge.<sup>21</sup> The obligations in paragraph 1 relate to any proceeding before the standing mechanism and is not limited to proceedings that the Judge is adjudicating or has adjudicated. The Code does not address the extent to which a Judge might have access to information concerning a proceeding that he or she is not adjudicating, including draft decisions prepared and contents of the deliberations of such proceeding, which would typically be addressed in the rules of the standing mechanism.

30. Paragraph 1(a) prohibits a Judge and a former Judge from disclosing or using any information concerning a proceeding, or acquired during a proceeding, before the standing mechanism. 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 proceeding, possibly taking advantage of the access to such material. The subparagraph, however, does not limit the disclosure or use of information for the purposes of the proceeding and as such, members of the standing mechanism could discuss among themselves information provided by the disputing parties or otherwise acquired during the proceeding.

31. Paragraph 1(b) prohibits a Judge and a former Judge from disclosing any draft decision prepared in a proceeding before the standing mechanism. Paragraph 1(c) prohibits a Judge and a former Judge from disclosing the contents of the deliberations in a proceeding before the standing mechanism.

32. Paragraph 2 provides that a Judge should not comment on a decision made in a proceeding before the standing mechanism. The prohibition extends to a former Judge for a period of three years following his or her term of office. This is in line with article 4(4), which prohibits a former Judge from acting as a legal representative or an expert witness in any proceeding before the standing mechanism for a period of three years.

33. Paragraph 3 provides for a general exception to the obligations in the previous paragraphs of article 8. This is where: (i) a Judge or a former Judge is legally required to disclose the information in a court or any other competent body; or (ii) a Judge or a former Judge 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.

<sup>20</sup> See [A/CN.9/1131](#), para. 82.

<sup>21</sup> See [A/CN.9/1130](#), para. 112.

## Article 9 – Disclosure obligations

34. Article 9 addresses the disclosure obligations of a Candidate and a Judge.

### *Standard and scope of disclosure*

35. 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 a Judge. 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 a Judge may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.<sup>22</sup>

[*Note to the Commission:* The Commission may wish to consider whether the proposed revisions to paragraph 78 in document [A/CN.9/1148](#) should also be made with regard to paragraph 35 above. Reference would be made in paragraph 78 bis to article 9(7), which requires a Candidate or a Judge to err in favour of disclosure.]

36. The circumstances to be disclosed under paragraph 1 are not limited in time. For example, a circumstance which arose more than five years before a Candidate was contacted would need to be disclosed if it is likely to give rise to justifiable doubts.<sup>23</sup> Similarly, a Candidate would need to disclose any publication or presentation that he or she has made seven years ago, if it is likely to raise justifiable doubts as to his or her independence or impartiality.<sup>24</sup>

### *Disclosure under paragraphs 2 and 3*

37. Paragraphs 2 and 3 include 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, the paragraphs do not merely extend the scope of disclosure required under paragraph 1 but provide a minimum disclosure requirement, which is independent of that required under paragraph 1. This is because information disclosed in accordance with paragraphs 2 and 3 may assist in identifying any potential conflict of interest. Paragraphs 1 to 3 combined require extensive disclosure on the part of a Candidate and a Judge as information not falling within the scope of paragraph 1 may still need to be disclosed in accordance with paragraphs 2 and 3 and vice versa.

38. Paragraph 2 requires disclosure of all proceedings in which a Candidate is or has been involved in the past five years. This includes proceedings where he or she served as an arbitrator, a legal representative or an expert witness, as well as proceedings where the Candidate served other functions (for example, a domestic court proceeding within which the Candidate functioned as a judge).<sup>25</sup>

39. Paragraph 3 requires a Judge to disclose certain information relating to the proceeding that he or she is expected to adjudicate or is adjudicating. Therefore, references to the “proceeding” in the subparagraphs refer to a specific proceeding and not to all proceedings before a standing mechanism.

40. Subparagraph (a) requires disclosure of information related to potential conflicts arising from a financial, business, professional or close personal relationship that a Judge might have with other persons or entities involved in the proceeding.<sup>26</sup> The information to be disclosed under subparagraph (a) is limited to the past five years.<sup>27</sup>

<sup>22</sup> See [A/CN.9/1130](#), para. 22.

<sup>23</sup> See [A/CN.9/1130](#), para. 25.

<sup>24</sup> See [A/CN.9/1130](#), para. 33.

<sup>25</sup> See [A/CN.9/1131](#), para. 85.

<sup>26</sup> See [A/CN.9/1130](#), para. 27.

<sup>27</sup> See [A/CN.9/1130](#), para. 25.

41. “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.

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

43. “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 Judge 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.

44. Subparagraph (b) requires disclosure of any financial or personal interest in the outcome of the 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 as a Judge or the reimbursement of expenses incurred during the proceeding.

45. The phrase “any 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 has been identified by the disputing party as being related or relevant. A Judge should invite the disputing parties to identify such persons or entities, which would allow him or her to make the necessary disclosure and to assess any potential conflict of interest.

46. Similarly in accordance with subparagraph (a)(iv), a Judge 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 a 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 a Judge has any financial or personal interest in that person or entity, that would also need to be disclosed in accordance with subparagraph (a).

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

47. Paragraph 4 requires a Candidate and a Judge 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 possession of a Candidate or a Judge, conducting relevant conflict checks or requesting the persons or entities involved in the proceeding to provide further information in case of doubt or if deemed necessary to conduct proper assessment. Paragraph 7 requires a Candidate or a Judge to make a disclosure when he or she has a doubt as to whether the disclosure is required or not.

*Form and timing of the disclosure*

48. Paragraphs 5 and 6 provide that a Candidate and a Judge shall make the disclosure in accordance with the rules of the standing mechanism.<sup>28</sup> For a Candidate, this will likely be before the confirmation as a Judge, and for Judges, it will be as soon as he or she becomes aware of the circumstances and information mentioned in paragraphs 1 and 3. A Candidate and a Judge can make the disclosure using the

<sup>28</sup> See A/CN.9/1130, para. 47, and A/CN.9/1131, para. 85.

respective forms in annexes 1 and 2. These are simplified forms and their use is not mandatory.

49. Paragraph 6 imposes a continuing obligation of disclosure on a Judge. If new relevant circumstance or information within the scope of paragraphs 1 or 3 emerges or is brought to the attention of a Judge during the proceeding, he or she should disclose such circumstance or information promptly. A Judge should remain vigilant and be proactive with regard to his or her disclosure obligations during the entire course of the proceeding.

#### *Failure to disclose*

50. Paragraph 8 clarifies that non-compliance with the disclosure requirements in article 9 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 8 should, however, not be understood as an invitation or permission to not comply with the disclosure requirement in article 9. 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 other relevant circumstances.<sup>29</sup>

#### *Confidentiality and disclosure obligation*

51. When a Candidate or a Judge is bound by confidentiality obligations and is not in a position to disclose all of the required circumstances or information, he or she should inform the appointing authority accordingly and disclose as much as possible. For example, with regard to the list of proceedings in paragraph 2, a Candidate could redact certain information and disclose the region where the parties are located, the relevant industry or sector, the applicable rules as well as the fact that he or she is bound by a confidentiality obligation.

### **Article 10 – Compliance with the Code**

52. Article 10 addresses the compliance with the Code, which is governed by the rules of the standing mechanism. Sanctions for any breach of the Code may be provided in the rules of the standing mechanism.<sup>30</sup>

53. One way to promote the adherence to the Code is to require a Candidate or a Judge to sign a declaration using the form in annexes 1 and 2.

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<sup>29</sup> See [A/CN.9/1130](#), para. 42.

<sup>30</sup> See [A/CN.9/1130](#), paras. 62 and 63.