United Nations A/CN.9/WG.III/WP.223

General Assembly

Distr.: Limited
23 November 2022

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Forty-fourth session
Vienna, 23–27 January 2023

Possible reform of investor-State dispute settlement (ISDS)

Draft Codes of Conduct and Commentary

Note by the Secretariat

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V.22-26694 (E)

I. Introduction

1. At the forty-third session in September 2022, the Working Group considered the draft code of conduct for adjudicators based on document A/CN.9/WG.III/WP.216 and requested the Secretariat to prepare, based on its deliberations, two separate texts, a code of conduct for arbitrators and a code of conduct for judges, to be accompanied by commentary (A/CN.9/1124, paras. 204 and 279).

2. Accordingly, this note contains a revised version of a draft code of conduct for arbitrators in international investment dispute resolution (referred to as the "Code for Arbitrators") and a draft code of conduct for judges in international investment dispute resolution (referred to as the "Code for Judges"), jointly referred to as "the Codes". The drafts have been prepared jointly by the secretariats of ICSID and UNCITRAL.

3. To facilitate the Working Group's consideration of both Codes, articles of the Codes are presented in sequence with articles of the Code for Arbitrators preceded by the letter "A" and articles of the Code for Judges preceded by the letter "J". Each article is then followed by commentary, which aims to clarify the content of the article, discuss practical implications, and provide examples. The commentary to the Code for Judges would be largely based on that for Arbitrators, with adjustments. This document also includes notes to the Working Group identifying issues that require further consideration.

4. The Working Group may wish to consider means of implementation and enforcement of the Code as contained in document A/CN.9/WG.III/WP.208 and how the Code for Arbitrators could be implemented by arbitral institutions administering international investment disputes.

II. Draft codes of conduct and commentary

Article 1 – Definitions

Code for Arbitrators – Article A1

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:

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

(ii) legislation governing foreign investments; or

(iii) an [international] investment contract;

(b) "Arbitrator" means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee who is appointed to resolve an IID;

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

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

(e) "Assistant" means a person working under the direction and control of an Arbitrator to assist with case-specific tasks.

Code for Judges – Article J1

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:

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

(ii) legislation governing foreign investments; or

(iii) an [international] investment contract;

(b) "Judge" means a person who is a member of a standing mechanism for the resolution of an IID;

(c) "Candidate" means a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and

(d) "Ex parte communication" means any communication by a Candidate or a Judge with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence of the other disputing party(parties) or its legal representative.

Note to the Working Group

5. The square bracketed language in subparagraph (a) in both Codes has been slightly revised to refer to a constituent subdivision of only a State and not an REIO.[1] The Working Group may wish to consider whether to retain the square bracketed language considering the commentary to that subparagraph (see paras. 15–16 below).

6. The Working Group may wish to consider introducing a definition of "instrument of consent" as an additional subparagraph, which could read as follows:

> "Instrument of consent" means: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an [international] investment contract, upon which the consent to resolve an international investment dispute is based.

7. The inclusion of that definition would shorten the definition of IID in subparagraph (a)[2] and would make it easier to refer to such instruments of consent, instead of referring only to a treaty (see articles 4, 7, 8, 9, 11 and 12).

8. The Working Group may wish to consider whether to insert the word "international" before "investment contract" (see para. 17 below).

9. The Working Group may also wish to consider whether article J1 should include a definition of "international investment dispute" considering that the scope of disputes to be handled by a standing mechanism is yet to be determined. Instead, the commentary to article J1 could note that a standing mechanism refers to a permanent body established to resolve a dispute between an investor and a State or an REIO pursuant to an instrument of consent. The Working Group may wish to confirm that an "Assistant" would not need to be defined in the Code for Judges (see para. 105 below).

10. The Working Group may wish to consider the definition of "ex parte communication" in conjunction with articles A7 and J7 (see paras. 81–84 below).

[1] See article 2(2) of the ICSID Additional Facility Rules.

[2] Subparagraph (a) would read: "International investment dispute" (IID) means a dispute between an investor and a State or a regional economic integration organization (REIO) […] submitted for resolution pursuant to an instrument of consent.

Commentary to article A1

11. 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 and scope of such terms in treaties, legislation, investment contracts, or in the applicable arbitration rules.

International investment dispute

12. 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: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an [international] investment contract. The instruments listed in subparagraph (a) form the basis of consent of the disputing parties to resolve a dispute through arbitration. The phrase "IID proceeding" also used in the Code refers to the arbitral process of resolving the IID.

13. As defined, the term "IID" does not include disputes between States. However, pursuant to article 2(1), States may agree to apply the Code in proceedings to resolve disputes between States.

14. "Regional economic integration organization (REIO)" means an organization constituted by States to which they have transferred certain competences, among others, the authority to make decisions binding on them in respect of IID matters.[3]

15. A "constituent subdivision of a State or agency of a State or an REIO" may also be a disputing party to the IID and the reference in subparagraph (a) ensures that the Code would apply in such circumstances (A/CN.9/1124, paras. 205).[4] [References to a State or an REIO in the Code as well as in the Commentary include a constituent subdivision of a State, or an agency of the State or the REIO.][5] The term "constituent subdivision" includes any 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 its constituent subdivisions, regardless of whether the entity is private or public, is government-owned or has a distinct legal personality.

16. The inclusion of the phrase "or any constituent subdivision of a State or agency of a State or an REIO" in the Code does not imply that an action or a measure of a constituent subdivision or an agency is attributable to the State or the REIO. It does not establish any legal relationship between a State or an REIO and a constituent subdivision or agency, including whether an entity is an agency of the State or the REIO. It also does not imply that a constituent subdivision or an agency has consented to arbitration or to the application of the Code (A/CN.9/1124, paras. 206–207).

17. "[International] investment contract" refers to an agreement entered into between a foreign investor and a State or an REIO regarding an investment made in the territory of that State or REIO.

18. The Code does not address the question of what constitutes an "investment" under any instrument of consent or the ICSID Convention (A/CN.9/1124, para. 206).

[3] 2022 ICSID Additional Facility Rules, Article 1(4): "Regional Economic Integration Organization" or "REIO" means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of such matters.

[4] Article 25(1) of the ICSID Convention states that the jurisdiction of ICSID shall extend to disputes involving not only a Contracting State but also any constituent subdivision or agency of a Contracting State designated by that State.

[5] If the square bracketed language in article 1(a) is deleted, this sentence could be added in the Commentary.

Arbitrator and Candidate

19. An "Arbitrator" is defined as 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 administered by an institution or is being conducted ad hoc is therefore irrelevant. The term includes an arbitrator who is appointed by a disputing party (referred to as a "party-appointed Arbitrator") as well as a presiding Arbitrator.

20. A "Candidate" is an individual contacted by a disputing party, an appointing authority, or an arbitral institution about the possible appointment as an Arbitrator for a specific IID. In the case of a Candidate for the role of a presiding Arbitrator, contact may be initiated by one of the party-appointed Arbitrators. A Candidate is bound by the Code as soon as he or she is contacted and ceases to be bound when he or she declines the appointment or is eventually not appointed.

21. Upon appointment, the obligations as a Candidate cease and the obligations as an Arbitrator commence. The time when a Candidate becomes an Arbitrator may vary depending on practice. For example, in the ICSID context, an individual who is appointed has a short time frame within which he or she can accept the appointment and becomes a member of the arbitral tribunal when he or she "accepts" the appointment, and the disputing parties are notified of the acceptance.

Ex parte communication

22. The Code regulates communications by a Candidate or an Arbitrator concerning the IID with a disputing party, its legal representative or other related person (for example, the parent company of the disputing party or a third-party funder), when it takes place without the other disputing party or parties being present. Considering that article 7 contains exceptions to this limitation, the definition should be read in conjunction with that article (see paras. 81–90 below).

Assistant

23. The term "Assistant" refers to an individual, for instance, an associate in the Arbitrator's firm or chamber, who is assigned specific tasks by the Arbitrator to assist with the IID proceeding (A/CN.9/1124, para. 210).

24. The term "Assistant" does not include staff members of arbitral institutions, for example, tribunal secretaries, paralegals, clerks, or registry assistants. This is because as employees of the institution, they do not work under the direction or control of an Arbitrator. Furthermore, they are bound by institution-specific ethical obligations and by their respective terms of employment. The term also does not include tribunal-appointed experts, as they act in their independent capacity.

Commentary to article J1

Judge and Candidate

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

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

Article 2 – Application of the Code

Code for Arbitrators – Article A2

1. The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding. The Code may be applied in any other dispute resolution proceeding by agreement of the disputing parties.

2. If the [instrument upon which consent to adjudicate is based] [instrument of consent] contains provisions on the conduct of an Arbitrator or a Candidate [in an IID proceeding], 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.

Code for Judges – Article J2

1. The Code applies to a Judge or a Candidate.

2. If the [instrument upon which consent to adjudicate is based] [instrument of consent] contains provisions on the conduct of a Judge or a Candidate [in an IID proceeding], 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.

Note to the Working Group

27. With regard to paragraph 2, the Working Group may wish to consider replacing the phrase "instrument upon which consent to adjudicate is based" with the phrase "instrument of consent" (see para. 6 above) and deleting the phrase "in an IID proceeding" as that phrase does not apply to a "Candidate" and the notion is already captured in the definitions of an "Arbitrator" and a "Judge". In addition, the Working Group may wish to confirm that the replacement of the word "inconsistency" with the word "incompatibility" in line with the terminology used in the Vienna Convention on the Law of Treaties is appropriate (A/CN.9/1124, paras. 220).

28. Lastly, the Working Group may wish to consider whether the Code for Judges could complement (and, in case of incompatibility, be superseded by) provisions in an instrument of consent, as such an instrument would most likely not include provisions on the conduct of Judges.

Commentary to article A2

Scope of application

29. The Code applies to individuals involved in an IID proceeding (an Arbitrator or a Candidate) and not to the proceeding itself. Accordingly, the Code may apply prior to the initiation of an IID proceeding and will likely apply throughout the proceeding. Certain obligations of the Code survive the proceeding and apply to individuals who were a member of an arbitral tribunal or an ICSID ad hoc Committee (see articles [4] and 8).

30. The second sentence of article 2(1) allows the disputing parties to apply the Code in a proceeding to resolve a dispute, which might not necessarily fall under the scope of an IID (for example, a dispute between States or a dispute involving a non-investor) (A/CN.9/1124, para. 217). As the sentence allows the disputing parties to apply the Code to any dispute resolution proceeding, they may agree to apply the Code to persons other than arbitrators (for example, conciliators and fact-finders), possibly with necessary adjustments. Such an agreement should be in writing and may be concluded at any time, including prior to the dispute (for example, by States parties to a treaty containing dispute resolution provisions).

Complementary nature of the Code

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

32. The second sentence of article 2(2) refers to a situation where the provisions in the instrument of consent and articles of the Code are incompatible. This means that the obligations contained in those provisions are inconsistent and irreconcilable with those of the Code and that a Candidate or an Arbitrator would not be able to comply with those provisions and the articles of the Code at the same time. When the articles of the Code are incompatible with the provisions in the instrument of consent, those provisions prevail.

Commentary to article J2

[Note to the Working Group: Paragraphs 29 to 32 above would be adjusted in the context of a Code for Judges.]

Article 3 – Independence and Impartiality

Code for Arbitrators – Article A3

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 might have 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.

Code for Judges – Article J3

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;

(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 might have 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.

Note to the Working Group

33. The Working Group may wish to note that paragraph 2(a) has been revised to reflect the understanding of the Working Group that an Arbitrator or a Judge should not be influenced by loyalty to any person or entity, including any of the disputing parties. The previous version aimed to reflect that same understanding by including a list of persons or entities (any disputing party, non-disputing party, non-disputing Treaty Party, or their legal representative). However, the term "non-disputing party" usually refers to a person or entity that is not a party to a dispute but has been given permission by the arbitral tribunal to file a written submission in the proceeding. As such, the list did not necessarily cover third-party funders (A/CN.9/1124, para. 228) while the newly suggested wording would. The commentary further elaborates on this aspect (see para. 39 below).

34. The Working Group may wish to consider including the word "prospective" in paragraph 2(c) to indicate that an Arbitrator or a Judge shall not be influenced by a potential relationship that may arise in the future (A/CN.9/1124, para. 230).

Commentary to article A3

Independence and impartiality

35. 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" means the absence of bias or predisposition of an Arbitrator towards a disputing party or issues raised in the proceedings.

Temporal scope of the obligation

36. The obligation to be independent and impartial begins upon appointment and continues until the Arbitrator ceases to exercise his or her functions. For example, the obligation will end when the Arbitrator resigns or is disqualified, when the proceeding is discontinued or terminated, or when the final award is issued. If a request for interpretation, correction or revision of the award is upheld, the obligation will continue to apply during such proceedings.

Non-exhaustive list – paragraph 2

37. 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" emphasizes the illustrative nature of the list in paragraph 2. Circumstances not listed in paragraph 2 may also implicate an Arbitrator's lack of independence and impartiality (A/CN.9/1124, para. 227).

38. The phrase "be influenced by loyalty" in subparagraph (a) refers to a sense of obligation or alignment towards a person or entity, which might arise from a number of external factors. This subparagraph does not aim to regulate "loyalty" itself. Rather, it is an Arbitrator allowing such loyalty to influence his or her conduct or judgment that is prohibited (A/CN.9/1124, para. 228). The mere fact of similarities, such as having graduated from the same school or having served in the same law firm, does not indicate in itself an influence by loyalty.

39. The phrase "any disputing party or any other person or entity" in subparagraph 3(2)(a) captures a wide range of parties to whom loyalty may be owed, among others, a person or entity that is not a party to the dispute but has been given the tribunal's permission to file a written submission in the proceeding (referred to as a "non-disputing party"), a State or an REIO that is a party to the underlying investment treaty but is not a party to the dispute (a "non-disputing Treaty Party"), third-party funders, expert witnesses as well as the legal representatives of the disputing parties (A/CN.9/1124, para. 228).

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

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

42. The following list of examples taken from the IBA Guidelines on Conflict of Interest in International Arbitration (the "IBA Guidelines") could provide guidance as to the types of relationship that could be problematic in the context of subparagraph (c). Whether the relationship between an Arbitrator (X) and a disputing party (Y) leads to a violation of article 3 would depend largely on the circumstances of the case.

- X had given legal advice or provided an expert opinion on the dispute involving Y or one of its affiliates;
- X currently represents or advises Y, one of its affiliates or its legal representative;
- X is a manager, director or member of the governing board of Y, or has a controlling influence in an affiliate of Y, that has an interest in the outcome of the proceeding;
- X's law firm has a significant commercial relationship with Y; and
- X has a close family relationship with a manager, director or member of the governing board of Y.

[Note to the Working Group: The Working Group may wish to consider whether one or two concrete examples of challenges where an Arbitrator was found to lack independence and impartiality should be provided instead of the list-approach in paragraph 42 above.]

43. 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, whether the interest was realized, and the extent of the interest is irrelevant. Even if the advantage gained was insignificant or de minimis, it would lead to a violation of article 3, if the position was intentionally used to pursue that interest. However, the subparagraph does not affect the legitimate expectations of an Arbitrator to be paid fees (A/CN.9/1124, para. 231).

44. Subparagraph (e) refers to taking on a professional responsibility, for example, becoming a board member of an entity closely affiliated with a disputing party, which would make it difficult to perform the Arbitrator's duty in an independent and impartial manner. The term "benefit" in the same subparagraph refers to any gift, advantage, privilege, or reward.

45. Subparagraph (f) indicates that an action taken by an Arbitrator (or an inaction) which creates the appearance of a lack of independence or impartiality could result in a breach of the obligation to be independent and impartial in paragraph 1. This

subparagraph emphasizes that an Arbitrator must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias.

Commentary to article J3

[Note to the Working Group: Paragraphs 35 to 45 above would be adjusted in the context of a Code for Judges. For example, the commentary to article J3(2) could mention that a first-tier Judge referring to or relying on a binding judgment or interpretation of an appellate tier of the same standing mechanisms would not be considered as "taking instruction" within the meaning of subparagraph (b).]

Article 4 – Limit on multiple roles

Code for Arbitrators – Article A4

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,] as a legal representative or an expert witness in another IID proceeding [or 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. [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.

Code for Judges – Article J4

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 expert witness in another IID proceeding.

2. A Judge shall declare any other function or occupation to the [President 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 IID 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 IID proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

Note to the Working Group

Cooling-off period

46. The Working Group may wish to consider whether to introduce a time period within which an Arbitrator would be limited from undertaking a role as a legal representative or an expert witness ("cooling-off period") and if so, the appropriate duration of the cooling-off period (A/CN.9/1124, paras. 232–236).

47. If a cooling-off period is introduced, the Working Group may wish to consider when that period should commence, as the phrase "the conclusion of the IID proceeding" depends largely on the circumstances, making it difficult to implement the cooling-off period (particularly in light of the possible post-award remedies which might not have a fixed time frame for making the request). An option would be to

refer to “the end of his or her functions as an Arbitrator”, which could also reflect the possible resignation by, or disqualification of, an Arbitrator[6], termination of the proceedings as well as an Arbitrator being requested to undertake post-award remedies (in which case, he or she will continue to function as an Arbitrator).

48. If a cooling-off period is introduced, article 4 would impose an obligation on an Arbitrator that extends beyond his or her term (similar to article 8 on confidentiality). The Working Group may wish to consider a formulation similar to articles J4(3) and (4) referring to “former Judges”.

or any other proceeding

49. The Working Group may wish to consider whether to include the phrase “or any other proceeding” in both paragraphs of article A4, which would broaden the limitation to non-IID proceedings (A/CN.9/1124, paras. 237–238). The phrase may refer to a wide range of proceedings before international or regional courts (such as the International Court of Justice, the World Trade Organization and the European Court of Human Rights), arbitral tribunals or other domestic courts for setting aside or enforcement of an award. The phrase may need to be aligned with the phase in article 2(1), “in any other dispute resolution proceeding” (see para. 30 above).

Same instrument of consent

50. The Working Group may wish to confirm that the reference to the same “treaty” in subparagraph 1(c) in the previous draft of the Code (A/CN.9/WG.III/WP.216) may be replaced with “instrument of consent”, if that phrase is defined in the Code (see para. 6 above).

Paragraph 2

51. The Working Group may wish to consider whether paragraph 2 should be retained in article 4, taking into account the possible inclusion of the word “prospective” in article 3(2)(c) and how individuals would be able to determine whether the conditions in that paragraph are met (A/CN.9/1124, paras. 243–246; see also para. 34 above). If retained, the Working Group may wish to consider whether the disputing parties would be able to waive the limitation in article 4(2).

Commentary to article A4

[Note to the Working Group: The following commentary to articles A4 and J4 would be further elaborated following the deliberations of the Working Group.]

52. The Code aims to address conflicts of interest in a number of ways, for example, by requiring an Arbitrator to be independent and impartial (article 3) and to make certain disclosures (article 11). Considering that performing multiple roles in IID proceedings could give rise to conflicts of interest or the appearance thereof, article 4 sets forth limitations on Arbitrators in undertaking certain other roles while functioning as [and for a certain period of time after serving as] an Arbitrator.

Temporal scope

53. Paragraphs 1 and 2 set forth the temporal scope of the prohibition. Arbitrators are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding [and for a period of three years after serving as an Arbitrator].

[6] Imposing a cooling-off period “following” the conclusion of the IID proceeding might inadvertently result in the individual being able to freely act as a legal representative or an expert witness until the conclusion of that proceeding.

Limited roles

54. Paragraph 1 limits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding. It does not limit an Arbitrator from performing other adjudicatory functions, such as functioning as an Arbitrator or a Judge in another proceeding (see para. 65 below).

Criteria triggering the limitation

55. The limitation in paragraph 1 only applies if the other IID proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same instrument of consent. If any of these criteria is met, an Arbitrator would be prohibited from acting as a legal representative or an expert witness in the other proceeding.

56. The use of the term "same" throughout paragraph 1 means that the elements under scrutiny in the proceeding must be identical and not merely similar. Thus, the threshold to trigger the limitation is high.

57. It should, however, be noted that even when any of the criterion is not met, an Arbitrator may be precluded from acting as a legal representative or an expert witness in another proceeding if that would lead to a breach of article 3.

The same measures

58. The first criterion triggering the limitation in paragraph 1(a) is if the other proceeding deals with "the same measure(s)". Generally speaking, a "measure" includes any law, regulation, procedure, requirement, conduct or practice[7] of a State or an REIO that allegedly affects the investor's investment or protected rights. For example, if a respondent State implemented a regulation that was alleged to adversely affect three foreign investors, and all three foreign investors brought claims, an individual appointed as an Arbitrator in one of the IID proceedings would be prohibited from serving as a legal representative or an expert witness in the other two proceedings.

The same or related party(parties)

59. The second criterion in paragraph 1(b) relates to the "same or related party(parties)". This includes a disputing party as well as any of the disputing parties' subsidiaries, affiliates or parent entities. For example, an Arbitrator may not serve as legal representative of the parent or subsidiary company of one of the disputing parties in another proceeding.

The same provision(s) of the same instrument of consent

60. The third criterion in paragraph 1(c) relates to the same provision in the same instrument of consent (A/CN.9/1124, para. 241). Reliance on the same provision in the ICSID Convention would not meet this criterion.

Party autonomy

61. The term "unless the disputing parties agree otherwise" in paragraph 1 means that the limitation prescribed in that paragraph could be waived by the disputing parties. To allow the disputing parties to make an informed decision on a waiver, the Arbitrator should disclose relevant information about the role currently undertaken or to be undertaken, in accordance with article 11.

Another IID proceeding involving legal issues that are substantially so similar

62. Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another proceeding that involves legal issues which are substantially

[7] See United States-Mexico-Canada Agreement, article 1.5, which defines "measure" as including any law, regulation, procedure, requirement, or practice.

so similar that assuming such a role by an Arbitrator would amount to a lack of independence or impartiality in breach of article 3. This includes assuming a role which would create the appearance of a lack of independence or impartiality as provided for in article 3(2)(f). This may also be the case when an Arbitrator is appointed as an expert witness in another IID proceeding to address a similar provision in an investment treaty which is different from the treaty being addressed in the proceeding in which he or she sits as an Arbitrator.

Non-compliance and implementation

63. Compliance with article 4 would rely on a self-judgment by an Arbitrator, while the disclosure requirements in article 11 would allow disputing parties to be aware of any non-compliance.

Commentary to article J4

Prohibition to exercise any political or administrative function

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

65. A Judge has an obligation not to engage in any other professional occupation which is incompatible with his or her obligation of independence or impartiality and with the demands of a full-time office. In particular, pursuant to the second sentence of paragraph 1, a Judge would be prohibited from exercising concurrent roles as a legal representative or expert witness in another IID proceeding.[8] The terms of office of a Judge could require him or her to resign from any duties as an Arbitrator prior to being confirmed as a Judge.

[Note to the Working Group: The Working Group may wish to consider whether the obligations in article J4 would differ depending on whether the individual was a full-time or a part-time Judge in a standing mechanism.]

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

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

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

[8] See Practice Directions VII of the International Court of Justice and Rule 28(2) of the Rules of Court of the European Court of Human Rights.

69. Paragraph 4 addresses an IID proceeding initiated after the Judge's term of office.[9] 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

Code for Arbitrators – Article A5

An Arbitrator shall:

(a) Perform his or her duties diligently throughout the IID proceeding;

(b) Devote sufficient time to the IID proceeding; and

(c) Render all decisions in a timely manner.

Code for Judges – Article J5

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

Commentary to article A5

Perform his or her duties diligently and devote sufficient time

70. Article 5 complements requirements in the applicable arbitral rules and terms of appointment requiring an Arbitrator to conduct the proceedings so as to avoid unnecessary delay and expense.

71. The phrase "devote sufficient time" in subparagraph (b) captures the general requirement that an Arbitrator should be available to perform the duties attached to his or her functions, and not take on new cases or responsibilities that would impede his or her ability to perform the duties in a diligent manner and could unduly delay the proceedings (A/CN.9/1124, para. 247). Should a Candidate anticipate that he or she would not be able to fulfil this obligation, he or she should not accept the appointment as an Arbitrator pursuant to article 12(2) (A/CN.9/1124, para. 247).

72. A Candidate should generally inform the disputing parties of his or her availability over a certain period of time (for example, 24 months) by indicating the number of IIDs or other proceedings in which he or she has a substantial commitment.[10]

Render all decisions in a timely manner

73. The amount of time needed for an Arbitrator to render decisions can differ depending on the circumstances of the case, such as the complexity of the factual and legal issues that arise in the IID proceeding. The time required to meet the due process requirements, for example, to give the parties the opportunity to present their case, would also need to be taken into consideration.

74. In order to render decisions in a "timely manner" in accordance with subparagraph (c), an Arbitrator should make efforts to abide by any time period in the instrument of consent, the applicable rules or as agreed upon with the parties. An

[9] See Practice Directions VIII of the International Court of Justice and Rule 4(2) of the Rules of Court of the European Court of Human Rights.

[10] See for example, ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, para. 33. "Arbitrators have a duty to devote to the arbitration the time necessary to conduct the proceedings as diligently, efficiently and expeditiously as possible. Accordingly, prospective arbitrators must indicate in the Statement the number of arbitrations in which they are currently acting, specifying whether they are acting as president, sole arbitrator, co-arbitrator or counsel to a party, as well as any other commitments and their availability over the next 24 months."

Arbitrator should also make efforts to ensure that the proceeding is conducted in an efficient manner and that the award (or any other decision) is made within a reasonable period of time.

Commentary to article J5

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

Article 6 – Integrity and competence

Code for Arbitrators – Article A6 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 best 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.
Code for Judges – Article J6 A Judge 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 best 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.

Commentary to article A6

Necessary qualities in the conduct of the proceedings

76. The elements listed in subparagraph (a) are commonly expected from any Arbitrator and are based on provisions found in existing instruments.[11] 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 (A/CN.9/1124, para. 250).[12]

Obligations of a Candidate

77. Subparagraph (b) should be read in conjunction with article 12(2), which requires a Candidate to accept an appointment only if he or she possesses the necessary competence and skills and is available to discharge the duties of an

[11] 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 ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: "All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process."].

[12] See e.g., ICCA Guidelines on Standards of Practice in International Arbitration, Section I.A.: "All participants shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process."

Arbitrator. This is a self-assessment to be conducted by the Candidate. The terms "necessary competence" should be understood in a broad sense so as to include for instance professional experience and linguistic skills (A/CN.9/1124, para. 251).

No delegation of decision-making functions

78. Decision-making is the core function of an Arbitrator and can therefore not be delegated (A/CN.9/1124, para. 248). However, this does not prevent an Arbitrator from having his or her Assistant prepare a preliminary draft of a decision or portions thereof under his or her direction, as long as the draft is carefully reviewed by the Arbitrator so that the final conclusions represent the judgment of the Arbitrator and not that of his or her Assistant. Subparagraph (c) should be read together with article 10 (see para. 107 below).

79. The prohibition in subparagraph (c) is without prejudice to applicable arbitral rules or procedural orders issued during an IID proceeding, which may stipulate that certain decision-making functions can be delegated, for example, to the presiding Arbitrator.

Commentary to article J6

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

Article 7 – Ex parte communication

Code for Arbitrators – Article A7

1. Unless permitted by the [instrument of consent] or the applicable rules or by agreement of the disputing parties, 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 will arise in the IID proceeding.

Code for Judges – Article J7

Ex parte communication is prohibited.

Note to the Working Group

81. Article 1(d) defines "ex parte communication" as any communication by a Candidate or an Arbitrator "without the presence of the other disputing party(parties) or its legal representative". In this regard, the Working Group may wish to reinsert the words "or knowledge" after the word "presence" (A/CN.9/1124, para. 256). This is because if the words "without presence" are interpreted literally, it could restrict the Arbitrator's ability to communicate with the disputing parties, for example, on certain matters of procedure. As ex parte communication is generally prohibited in article A7(1), this might also allow one of the disputing parties to obstruct or frustrate such communication, or at a later stage argue that the Candidate or the Arbitrator did not comply with the Code, by intentionally not being present.

82. “Presence” should not be understood as meaning that the other party (or its legal representatives) need to be physically present during the communication. If the other party was present via remote means or was otherwise in a position to be aware of the contents of the communication (for instance, by being copied in an email), such a communication should 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 nor objected to the communication taking place, such a communication should not be prohibited. Lastly, article A7 should not limit an Arbitrator from continuing the arbitral proceeding in accordance with the applicable rules on “default” (as provided for example in article 30(2) of the UNCITRAL Arbitration Rules) simply because it was without the “presence” of one of the disputing parties, who failed to participate in the proceedings without sufficient cause. In other words, article A7 should not inadvertently prohibit communication with a non-defaulting party.

83. Considering the above, the Working Group may wish to consider reinserting the words “or knowledge” in article 1(d), with the commentary explaining that the other disputing party or its legal representative merely being aware of the communication would not make a communication permissible under the Code. The other disputing party would need to be invited to be present or be informed prior to the communication. The commentary could further explain that if the communication were to take place despite an objection of the other party, it would no longer be an ex parte communication as the other party had knowledge, but could result in a breach of the due process requirements.

84. With respect to article J7, the Working Group may wish to consider whether the exceptions in article A7 should also apply to Judges, for instance, where the instrument of consent or the applicable rules authorize such communication.

Commentary to article A7

General prohibition

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

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

86. There may be circumstances where the [instrument of consent] or the applicable rules authorize ex parte communication, in which case, the general prohibition would be lifted. Ex parte communication is also permitted if agreed by the disputing parties. The phrase “by agreement of the disputing parties” in paragraph 1 aims to cover a wide range of circumstances in which communications between an Arbitrator or a Candidate with a disputing party or its legal representative would be permissible.

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

87. Paragraph 2 permits a Candidate to take part in a pre-appointment interview 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 possible existence of a conflict of interest of the Candidate as well as expected fees.

88. Paragraph 2, however, does not address a situation where a Candidate for a presiding Arbitrator[13] takes part in a pre-appointment interview. To take part in such an interview, the presence of the other disputing party or its legal representative is required (in which case, the interview would no longer be an "ex parte communication") or the disputing parties would need to "agree" to that interview as stipulated in paragraph 1 (A/CN.9/1124, paras. 252–254). The same applies when a party-appointed Arbitrator (or a Candidate for that role) communicates with the disputing party that has appointed him or her, or its legal representative, to determine the qualities and any conflict of interest of a Candidate for a presiding Arbitrator.

Absolute limitation on procedural or substantive issues relating to the IID

89. Even when ex parte communication is permitted under paragraphs 1 and 2, matters pertaining to procedural or substantive aspects of the IID proceeding or those 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 prospective views on the jurisdiction of the tribunal, the substance of the dispute, or the merits of the claims are not to be discussed.

90. However, the limitation in paragraph 3 would not prevent a Candidate from obtaining basic information about the dispute and sharing information about him or herself, which would be necessary to determine his or her competence on the issues and assess any potential conflict of interest (A/CN.9/1124, para. 257). For instance, pre-appointment communications 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 other administrative aspects, could be conveyed. A Candidate may 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 might raise concerns about his or her independence or impartiality.

Article 8 – Confidentiality

Code for Arbitrators – Article A8

1. Unless permitted by the [instrument of consent] or the applicable rules or by 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; and

(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 only if it is publicly available, unless the IID is pending, or the decision is subject to a post-award remedy or review.

5. The obligations in this article shall not apply to the extent that a Candidate or an Arbitrator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

[13] The notion of "presiding Arbitrator" includes a sole Arbitrator as well as the chair of an arbitral tribunal consisting of three or more Arbitrators.

Code for Judges – Article J8

1. Unless permitted by the [instrument of consent] or the applicable rules or by agreement of the disputing parties, a Candidate or a Judge shall not:

(a) disclose or use any information concerning, or acquired in connection with, the IID proceeding; and

(b) disclose any draft decision in the IID proceeding.

2. A Judge 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. A Judge shall not comment on a decision in an IID proceeding before the standing mechanism.

5. The obligations in this article shall not apply to the extent that a Candidate or a Judge is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect his or her rights in a court or other competent body.

Commentary to article A8

91. Article 8 imposes an obligation of confidentiality on an Arbitrator and a Candidate. Paragraphs 1 and 2 list the extent of confidentiality and paragraph 3 provides the temporal scope, that the obligations continue to apply indefinitely even after the IID proceeding (A/CN.9/1124, para. 272).

92. 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 made in the IID proceeding. The term "disclose" refers to the circulation of information or material by making it publicly available or making it accessible to persons or entities that are not participating in the IID proceeding. In contrast, the term "use" refers to availing oneself of such information or material outside the IID proceeding, possibly taking advantage of the access to such material (A/CN.9/1124, para. 262).

93. Paragraph 1 does not limit the disclosure or use of such 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 would also not prevent disclosure of information required under article 11, for example, to provide basic information about the IID proceeding in which an individual had been involved as an Arbitrator under article 11(2)(c). Paragraph 1 does not address the admissibility of evidence provided by the disputing parties (A/CN.9/1124, para. 262).

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

[Note to the Working Group: The Working Group may wish to consider how paragraph 1 would operate when, for example, the instrument of consent does not address confidentiality obligations (A/CN.9/1124, paras. 271). In that case, in accordance with article 2(2) of the Code, article 8 could complement the instrument of consent and impose an obligation of confidentiality. Accordingly, it should not be interpreted that the instrument of consent "permits" disclosure. The Working Group may wish to consider whether the same would apply in case the instrument of consent imposes a confidentiality obligation only with regard to non-public information. The

same questions arise when the applicable rules do not contain provisions on confidentiality or limit confidentiality to certain types of information.]

95. Paragraph 4 lists the conditions under which an Arbitrator may comment on a decision made during the IID proceeding and thus generally restricts the Arbitrator from commenting on such decisions. The first condition in paragraph 4 is that an Arbitrator may comment only when the decision is publicly available in accordance with the instrument of consent or the applicable rules or by agreement of the parties. The second condition is that even when the decision is publicly available, an Arbitrator shall not comment on it while the IID is pending or when the decision is subject to a post-award remedy or review (A/CN.9/1124, paras. 265 and 268). In any case, the Arbitrator would continue to be bound by the obligations in paragraphs 1 and 2 (A/CN.9/1124, para. 267).

96. The phrase "post-award remedy" in paragraph 4 refers to a process where a disputing party requests the arbitral tribunal to make clerical corrections, give an interpretation of the award, revise the award, or render an additional award. The phrase "review" refers to a process where a disputing party seeks annulment or the setting aside of the award or challenges the recognition or enforcement of the award.

[Note to the Working Group: The Working Group may wish to confirm that an Arbitrator should be prohibited from commenting on a decision during the period of time where the final award may be subject to post-award remedy or review, while this obligation should not be an indefinite one when there is no fixed time period for seeking post-award remedies or review.]

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

Commentary to article J8

[Note to the Working Group: Paragraphs 91 to 97 above would be adjusted in the context of a Code for Judges. For example, the commentary to article J8(4) would explain that a Judge would not be able to comment on any decision made by a standing mechanism.]

Article 9 – Fees and expenses

Code for Arbitrators – Article A9

1. Fees and expenses of an Arbitrator should be reasonable and in accordance with the [instrument of consent] or the applicable rules.

2. 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.

3. 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.

Code for Judges – Article J9

No provision on fees and expenses of a Judge.

Note to the Working Group

98. The Working Group may wish to note that the paragraphs relating to the fees and expenses of an Assistant have been placed in article 10 and that the paragraph on

the timing of the discussions on fees and expenses has been deleted from article 9 (see paras. 101–102 below). The Working Group may wish to confirm that the fees and expenses of a Judge need not be addressed in the Code for Judges as it would likely be addressed in an instrument establishing the standing mechanism (including for ad hoc Judges).

Commentary to article A9

99. Article 9 relates to the fees and expenses of an Arbitrator in an IID proceeding.

Reasonableness

100. The phrase "fees and expenses" in article 9 refers to the fees of an Arbitrator as well as travel and other expenses incurred by the Arbitrator. Certain applicable rules (and some recent treaties) provide that the fees and expenses of an Arbitrator shall be reasonable in amount, taking into account the complexity of the factual and legal issues that arise in the IID, the amount in dispute, the time spent by the Arbitrator and any other relevant circumstances of the case.[14] Certain applicable rules prescribe fixed rates and specific methods to calculate the expenses of an Arbitrator, whereas other applicable rules provide for a process to determine the applicable fees and expenses.[15]

101. Discussions concerning fees and expenses should be concluded prior to or as soon as possible after the constitution of the arbitral tribunal. This would avoid a situation where an Arbitrator requests fees higher than originally contemplated once the proceedings have commenced, putting the disputing parties in an awkward position to either refuse the request or agree to higher fees. However, the time frame for concluding the discussions may differ depending on the applicable rules and whether the arbitral proceeding is administered by an institution.

102. Typically, such discussions would be held at the latest during the first procedural meeting (A/CN.9/1124, para. 276). During the discussions, the expected schedule and methodology for calculation (for instance, the basis for calculation or rate of the fees, or the different categories of expenses to be disbursed) would be confirmed. This does not mean that the actual amount of fees and expenses to be paid through the course or at the end of the IID proceeding would be determined or fixed during the discussions.

Proposal on fees and expenses

103. Paragraph 2 addresses how a proposal on fees and expenses should be communicated. Any such proposal is to be communicated through the administering institution if there is one. In an ad hoc setting, the proposal should be communicated by the sole Arbitrator or the presiding Arbitrator. The limitation on ex parte communication in article 7 applies to such proposals (A/CN.9/1124, para. 278).

Maintenance and availability of accurate records

104. Paragraph 3 reflects the usual practice of requiring an Arbitrator to keep accurate records of time and expenses spent on the IID proceeding. This avoids any dispute regarding fees and expenses. Paragraph 3 requires that the record shall be provided when requesting the payment of fees or expenses or upon the request of any disputing

[14] UNCITRAL Arbitration Rules, article 41(1).

[15] UNCITRAL Arbitration Rules, article 41(3): "Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal."

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

Code for Arbitrators – Article A10

1 Prior to engaging an Assistant, an Arbitrator shall consult the disputing parties and conclude any discussion concerning the fees and expenses of the Assistant.

2. An Arbitrator shall take all reasonable steps 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 is in breach of that declaration.

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

Code for Judges – Article J10

No provision on assistants.

Note to the Working Group

105. The provisions relating to Assistants have been compiled in article 10 of the Code (A/CN.9/1124, para. 223). The definition of an "Assistant" is found in article 1(e). The Working Group may wish to confirm that the Code for Judges would not address assistants of a Judge, on the assumption that they would be employees of a standing mechanism.

Commentary to article A10

Engaging an Assistant

106. Before engaging an Assistant, an Arbitrator is required to consult the parties indicating the name and affiliation of any potential candidate as well as the possible tasks to be performed by the Assistant (A/CN.9/1124, para. 210) This would allow a disputing party to raise concerns about the proposed Assistant or tasks to be performed.

107. 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. 78 above).

108. Paragraph 1 further requires an Arbitrator to conclude any discussion on the anticipated fees and expenses of an Assistant with the disputing parties prior to engaging the Assistant. This, however, does not mean that the amount of fees and expenses of an Assistant would be fixed during the discussions.

Acting in accordance with the Code

109. Paragraph 2 provides that an Arbitrator, in engaging and assigning tasks to an Assistant, shall ensure that the Assistant is informed about the Code and acts in accordance with the Code. While the Code does not apply directly to an Assistant (article 2), most of the articles of the Code (articles 3, 5, 6, 7, 8, 9 and 11) are relevant to the conduct of an Assistant (A/CN.9/1124, para. 224).

110. One way to ensure that the Assistant is aware of and acts in accordance with the Code would be the Arbitrator requiring the Assistant to sign a declaration to that effect (see Annex A2) (A/CN.9/1124, para. 224). The Arbitrator shall monitor the Assistant

throughout the proceedings to ensure that he or she acts in accordance with the Code. The obligation in paragraph 2 is incumbent on the Arbitrator engaging the Assistant.

111. Paragraph 2 further requires an Arbitrator to remove an Assistant who has not complied with the declaration. In practice, a disputing party concerned that the tasks being performed by an Assistant are not in accordance with the Code could raise the concern with the Arbitrator and ask that the Assistant be removed or replaced. If the instrument of consent or the applicable rules provide specific sanctions with regard to an Assistant, those rules could be applicable. 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 (article 12(3)).

112. Similar to article 9(3), 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.

Article 11 – Disclosure obligations

Code for Arbitrators – Article A11

1 A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to his or her independence or impartiality.

2. [Regardless of whether required under paragraph 1,] [t]he following information shall be included in the disclosure:

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

(i) Any disputing party or an entity identified by a 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 entity identified by a disputing party 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 IID proceeding involving the same measure(s); and

(iii) Any other proceeding involving a disputing party or an entity identified by a disputing party;

(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; and

(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.

3. [For the purposes of paragraphs 1 and 2,] [a] Candidate and an Arbitrator shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].

4. A Candidate and an Arbitrator shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

5. A Candidate and an Arbitrator shall make the disclosure using the form in Annex A1 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.

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

7. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of article 3 to 6 of the Code].

[8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.]

Code for Judges – Article J11

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,] [t]he following information shall be included in the disclosure:

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

(i) Any disputing party or an entity identified by a disputing party;

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

(iii) Expert witnesses in the IID proceeding; and

(iv) [Any entity identified by a disputing party 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; and

(ii) Any other IID proceeding involving the same measure(s).

3. A Candidate shall include in the disclosure all IID and related proceedings in which the Candidate is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness.

4. [For the purposes of paragraphs 1 to 3,] A Candidate and a Judge shall make [reasonable][best] efforts to become aware of such circumstances [, interests, and relationships].

5. A Candidate and a Judge shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

6. A Candidate shall make the disclosure [using the form in the Annex] to the standing mechanism prior to or upon confirmation as a Judge.

7. A Judge shall make the disclosure [using the form in the Annex] to [the President] of the standing mechanism as soon as he or she becomes aware of the circumstances mentioned in paragraph 1 and shall have a continuing duty to make further disclosures based on new or newly discovered information as soon as he or she becomes aware of such information.

8. The fact of non-disclosure does not in itself establish [a lack of impartiality or independence] [a breach of article 3 to 6 of the Code].

Note to the Working Group

113. With regard to articles A11(1) and J11(1), the Working Group may wish to determine the standard of disclosure, including whether to refer to two separate standards. The phrase “likely to give rise to justifiable doubts as to his or her independence and impartiality” is found in article 11 of the UNCITRAL Arbitration

Rules.[16] The phrase "in the eyes of the disputing parties" is found in the IBA Guidelines, General Standard 3(a),[17] which provides for a broader disclosure obligation (see para. 120–121 below).

114. With regard to paragraph 2, the phrase "regardless of whether required under paragraph 1" has been added to clarify the relationship between paragraphs 1 and 2 (see paras. 122–124 below). The Working Group may wish to confirm the inclusion of the additional phrase.

115. The Working Group may wish to delete the phrase "for the purposes of paragraphs …" at the beginning of articles A11(3) and J11(4) as the need to make reasonable/best efforts applies throughout the article. The Working Group may also wish to decide whether to use the term "reasonable" or "best" (see article 6(1)(b)). The Working Group may wish to consider deleting the square bracketed text ([, interests, and relationship]) as the word "circumstance" seems broad enough to cover the list of items mentioned in the previous paragraphs (relationship, interest, proceeding, and appointment).

116. The Working Group may wish to determine which formulation to use in articles A11(7) and J11(8), including whether to refer to specific articles of the Code.

117. Considering that the Code addresses the conduct of an Arbitrator and a Candidate, the Working Group may wish to delete paragraph 8 of article A11. Whether and how a disputing party can waive their rights to raise an objection is usually addressed in the applicable rules (see para. 139 below).

118. The Working Group may wish to consider whether the approach in article J11 for a Judge and a Candidate is appropriate.

Commentary to article A11

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

Standard and scope of disclosure

120. The standard for disclosure in paragraph 1 ("likely to give rise to justifiable doubts") is based on article 11 of the UNCITRAL Arbitration Rules.[18] Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that 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.

121. The phrase "in the eyes of the disputing parties" originates from General Standard 3(a) of the IBA Guidelines, which requires an Arbitrator to disclose facts or circumstances that may give rise to doubts as to his or her impartiality or independence "in the eyes of the parties".

[16] UNCITRAL Arbitration Rules, article 11: "When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."

[17] IBA Guidelines, General Standard 3(a): "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment 7 or, if thereafter, as soon as he or she learns of them."

[18] See also article 12(1) of the UNCITRAL Model Law on International Commercial Arbitration.

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

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

124. Accordingly, 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. As noted, this is to identify any potential conflict of interest and the mere fact of disclosure does not mean that a Candidate or an Arbitrator lacks independence or impartiality (see para. 138 below).

125. When a Candidate or an Arbitrator is bound by confidentiality obligations and is not in a position to disclose the required circumstances or information, he or she should disclose as much as possible (A/CN.9/1092, para. 93). For example, with regard to the list of proceedings in paragraph 2(c) (see para. 93 above), a Candidate or an Arbitrator could redact certain information and disclose the region where the claimant or the respondent is located, the relevant industry or sector, the applicable rules as well as the fact that he or she is bound by a confidentiality obligation. However, if a Candidate is unable to disclose circumstances that is likely to give rise to justifiable doubts, he or she should decline the appointment.

Scope of disclosure under paragraph 2

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

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

128. “Professional” relationship includes, for instance, where a Candidate or an Arbitrator was an employee, associate or partner in the same law firm as another person involved in the IID. 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 along with another person involved in the IID proceeding would likely not constitute a professional relationship.[19]

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

[19] This is one of the examples found in the Green List of the IBA Guidelines (non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view). Referring only to this example in the commentary and not others on the Green List does not mean that disclosure of the other relationships would be required under article 11(2) of the Code.

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

[Note to the Working Group: The Working Group may wish to consider the meaning and the scope of the phrase "any other proceeding" or "related proceedings" in paragraph 2 (see paras. 30 and 49 above).]

131. 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, legal representative or an expert witness.

132. 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.

[Note to the Working Group: The Working Group may wish to consider whether the Commentary should indicate the number of arbitrator appointments by the same disputing party within a specified timeframe, which could give rise to justifiable doubts as to an Arbitrator's independence or impartiality. The IBA Guidelines provide that an arbitrator who has, within the past three years, been appointed as Arbitrator on two or more occasions by one of the parties or by an affiliate of one of the parties, is a circumstance that must be disclosed as that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence (Orange list 3.1.3).]

Obligation to make [reasonable][best] efforts

133. The phrase "[reasonable] [best] efforts to become aware" in article 11(3) means that a Candidate or Arbitrator must be proactive to the best of his or her ability to identify the existence of circumstances [, interests and relationships] identified under paragraphs 1 and 2. In other words, paragraph 3 concerns the means to be deployed by a Candidate or an Arbitrator to ensure proper disclosure. By way of illustration, the obligation under paragraph 3 could involve 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.

134. Article 11(4) requires a Candidate or an Arbitrator to make a disclosure when there are doubts as to whether the disclosure is required or not.

Form and timing of the disclosure

135. Article 11(5) provides when, how 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 prescribed by the instrument of consent or the applicable rules. The disclosure form in Annex A1 is a simplified one and its use is not mandatory as long as the relevant information is conveyed in a comprehensive manner.

136. The phrase "prior to" or "upon" appointment in paragraph 5 does not imply that two separate disclosures are required, initially as a Candidate and again after being appointed as an Arbitrator. One complete disclosure would suffice for the purposes of paragraph 5 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. An Arbitrator would, in any case, have a continuing duty to make further disclosures in accordance with paragraph 6.

Continuing obligation of disclosure

137. Article 11(6) provides a continuing obligation of disclosure. If new relevant 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 must disclose such information promptly and without delay in accordance with paragraph 5. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the IID proceeding.

Failure to disclose

138. Article 11(7) clarifies that non-compliance with the disclosure requirements in article 11 does not in itself establish a lack of impartiality or independence or a breach of other articles of the Code. It is the content of the disclosed or omitted information that determines whether there is a breach. Even though non-compliance with the disclosure requirements might not be in itself a ground for disqualification, repeated failures may be factually relevant when establishing a breach of article 3 of the Code.

Possible waiver by the disputing parties

139. 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. 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.

[Note to the Working Group: It might not be suitable for a Code for Arbitrators and the commentary to address the questions of whether and how the disputing parties could waive their rights (including whether the parties could do it independent of each other and whether could be done implicitly).]

Commentary to article J11

[Note to the Working Group: The commentary to article J11 would be prepared based on paragraphs 120 to 139 above and following the deliberations of the Working Group.]

Article 12 – Compliance with the Code

Code for Arbitrators – Article A12

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

2. A Candidate shall not accept an appointment and an Arbitrator shall resign or recuse him/herself from the IID proceeding if he or she is not able to comply with the provisions of 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.

Code for Judges – Article J12

[To be considered by the Working Group]

Note to the Working Group

140. The Working Group may wish to consider whether paragraph 3 correctly captures the understanding that any challenge procedure (including the standards for challenge) or any sanctions provided for in the instrument of consent or the applicable rules would apply to an Arbitrator or a Candidate (with regard to an Assistant, see para. 111 above). The Code does not contain rules on or bases for challenge, disqualification, removal or other sanctions to address a breach of the Code. Paragraph 3 affirms that existing measures provided for in the instrument of consent or the applicable rules apply.

141. The Working Group may wish to consider whether the Code should foresee other types of sanctions to address any non-compliance with the Code.

142. The Working Group may wish to consider whether compliance with the Code needs to be addressed in the Code for Judges similar to article A12.

Commentary to article A12

Principle of voluntary compliance

143. Article 12 addresses compliance with the Code. One way to promote the adherence is to require an Arbitrator to sign a declaration upon appointment (see Annex A1). Another is through the obligation in paragraph 2 where a Candidate or an Arbitrator shall refrain from taking an appointment or resign, for example, where his or her impartiality or independence would be compromised and the conflict cannot be eliminated, or his or her competence is lacking for the purposes of the IID.

Annex to the Codes of Conduct – Declaration and disclosure form

Code for Arbitrators

Annex A1 (Arbitrators)

Declaration, Disclosure and Background Information

1. I acknowledge that I have read and understood the attached 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 understand that I shall make further disclosures based on new or newly discovered information as soon as I become aware of such information.

Annex A2 (Assistants)

Declaration

1. I acknowledge that I have read and understood the attached 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.

Code for Judges

Annex J1

Declaration, Disclosure and Background Information

1. I acknowledge that I have read and understood the attached 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. 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 understand that I shall make further disclosures based on new or newly discovered information as soon as I become aware of such information.