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International Trade Law  
Working Group III (Investor-State Dispute  
Settlement Reform)  
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## Possible reform of investor-State dispute settlement (ISDS)

### Draft Code of Conduct

### Note by the Secretariat

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## I. Introduction

1. The Working Group, at its thirty-seventh session in April 2019, requested the Secretariat to undertake preparatory work on a code of conduct jointly with the International Centre for Settlement of Investment Disputes (ICSID) Secretariat. It was suggested that such work could cover how such a code could be implemented in the current ISDS regime and also in the context of a structural reform, and how obligations in such a code would be enforced, particularly when the function or term of an arbitrator or adjudicator was terminated ([A/CN.9/970](#), para. 84).
2. Based on the background information provided by the secretariats ([A/CN.9/WG.III/WP.167](#)), general support was expressed for developing a code of conduct at the thirty-eighth session in October 2019, during which the Working Group provided concrete instructions on how to progress the work ([A/CN.9/1004](#), paras. 67 to 77). While a draft code of conduct ([A/CN.9/WG.III/WP.201](#)) was prepared for the fortieth session of the Working Group in February 2021, deliberations were deferred to a future session due to the limited time available at that session ([A/CN.9/1050](#), para. 116).
3. At its forty-first session in November 2021, the Working Group considered articles 1 to 8 of the draft code of conduct based on a draft prepared by the secretariats ([A/CN.9/WG.III/WP.209](#)). The Working Group also had before it a note by the secretariats on means of implementation and enforcement ([A/CN.9/WG.III/WP.208](#)). Based on the deliberations at that session ([A/CN.9/1086](#), paras. 17–143), a revised version of articles 1 to 8 were prepared and presented at the following session ([A/CN.9/1092](#), annex).
4. At the forty-second session in February 2022, the Working Group considered articles 9 to 11 of the code of conduct as contained in document [A/CN.9/WG.III/WP.209](#). While the Working Group was able to conduct a first reading of the code, it was not in a position to submit a draft for consideration by the Commission ([A/CN.9/1092](#), paras. 79–130). Accordingly, the Working Group requested the secretariats to prepare a revised version of the code and the accompanying commentary for the following session scheduled in the second half of 2022 ([A/CN.9/1092](#), para. 129).
5. During the above-mentioned period and subsequent to the forty-second session, a number of informal meetings took place to consider the contents and the form of the code.<sup>1</sup> A series of meetings were held between the secretariats to ensure consistency in the text and to identify policy questions that need to be clarified by the Working Group.
6. This note contains a revised version of the Code of Conduct for adjudicators in international investment dispute proceedings (hereinafter, the Code) prepared jointly by the secretariats of ICSID and UNCITRAL reflecting the decisions and deliberations of the Working Group at previous sessions. To assist the Working Group in its deliberations, each article is followed by a note identifying issues that require further consideration and decision by the Working Group.
7. As the Working Group agreed to consider provisions applicable to arbitrators and judges in parallel ([A/CN.9/1086](#), para. 27), the Code includes provisions for arbitrators as well as judges, while indicating, where necessary, that the article or the paragraphs therein apply only to arbitrators or only to judges. The Working Group may wish to consider how it wishes to present the Code to the Commission, including

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<sup>1</sup> Informal meetings on the code of conduct took place on 18 November 2020, 3–4 and 8 March 2021, 7–10 June 2021, 6–10 December 2021, 20 January 2022, 23–24 March 2022 and 7–10 June 2022 (see <https://uncitral.un.org/en/codeofconduct>). The purpose of the meetings was to present the draft working papers on the code of conduct prepared by the secretariats for the sessions of Working Group III, to support the secretariats in the preparation of the working papers, and to support delegations in their preparation for the sessions. No decisions were taken at those meetings.

whether it should be structured differently. The Working Group may wish to ensure that the provisions in the Code are clear, which would allow potential adjudicators to clearly understand and comply with their obligations, particularly as they would have limited information about the disputing parties and the dispute.

8. The Working Group may wish to note that the commentary to the Code (the “Commentary”) is under preparation by the secretariats with the aim to clarify the content of each article, to discuss practical implications, and to provide examples (A/CN.9/1086, para. 20).

9. 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. The Working Group may wish to also consider how the Code could be implemented by other arbitral institutions administering ISDS cases.

## II. Draft Code of Conduct

### Article 1 – Definitions

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 or agency of a State or a 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 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) “Judge” means a person who is a member of a standing mechanism for the resolution of an IID;

(d) “Adjudicator” means an Arbitrator or a Judge;

(e) “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet [been appointed] [accepted the appointment], or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and

(f) “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks [, as agreed with the disputing parties];

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

### Note to the Working Group

10. The order of the definitions has been revised to enhance coherence and consistency. The definition of ex parte communication has been included in the article, while it previously appeared in article 7 (see para. 41 below).

11. The words “for resolution” have been inserted after the words “submitted” in subparagraph (a) to indicate the purpose of the submission. To ensure consistency, subparagraph (c) also refers to the “resolution” of the IID instead of its “settlement”.

12. The terms “arbitrator” and “judge” are defined in article 1 as those who are current members of an arbitral tribunal or a standing mechanism. Therefore, it might not be necessary to include a specific temporal scope of their respective obligations in the following articles of the Code. Such phrases have been placed within square brackets or deleted in the respective articles for consideration by the Working Group (for example, articles 3(1), 7 and 10, see paras. 20 and 42 below).

13. With respect to subparagraph (e), the Working Group may wish to note that in the ICSID context, a person does not become a member of an arbitral tribunal until he or she accepts the appointment and that acceptance has been notified by ICSID. To allow for such practice, the Working Group may wish to replace the words “who has not yet been appointed” with the words “who has not yet accepted the appointment” (see para. 65 below).

14. With regard to subparagraph (f), the Commentary could explain that the usual practice is that the disputing parties are consulted about the identity of the assistant and the tasks to be performed by the assistant. Therefore, the Working Group may wish to consider whether it would be necessary to retain the phrase “as agreed with the disputing parties” in the definition.

#### **Article 2 – Application of the Code**

1. The Code applies to [an Adjudicator or a Candidate in] an IID proceeding. The Code may be applied in any other dispute by agreement of the disputing parties.
2. If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.
3. An Adjudicator shall take all reasonable steps to ensure that his or her Assistant is aware of and complies with the Code, including by requiring the Assistant to sign a declaration that he or she has read and will comply with the Code.

#### **Note to the Working Group**

15. As the Code is to apply to individuals involved in the resolution of IIDs and not to the IID itself, the Working Group may wish to insert the words “an Adjudicator or a Candidate” in paragraph 1. Paragraph 1 has been split into two sentences, with the second sentence aiming to reflect the understanding of the Working Group that it would be possible for the disputing parties to agree on the application of the Code to any other types of disputes, including between States.

16. The first sentence of paragraph 2 has been simplified by referring to “provisions on the conduct of an Adjudicator or a Candidate” instead of “provisions on ethics or a code of conduct for Adjudicators or Candidates”. This is because the term “ethics” might be unclear and the use of the word “code” with the word “the Code” in the same sentence might be confusing. The second sentence has also been simplified to refer to “any inconsistency between the Code and such provisions” rather than “an inconsistency between an obligation of the Code and an obligation in the instrument upon which consent to adjudicate is based”.

17. The Working Group may wish to note that whereas paragraph 2 refers to “the instrument upon which consent to adjudicate is based”, other articles of the Code make reference to “the applicable rules or treaty” (for example, articles 7 to 11). Considering that there may be an overlap between the two notions, the Working Group may wish to consider whether the current distinction is appropriate and whether it would be sufficient to address the relationship in the Commentary.

18. The Working Group may wish to consider how best to express the complementary nature of the Code as the words “shall be construed as complementing” in paragraph 2 might be understood as merely providing guidance on interpretation. Another option would be to retain only the second sentence of paragraph 2 for the purposes of indicating the rule on which provision shall prevail in case of any inconsistency.

19. With regard to the application of the Code, the Working Group may wish to consider the extent to which the disputing parties would be able to exclude or vary the provisions of the Code (see paras. 24–26 below).

### Article 3 – Independence and Impartiality

1. An Adjudicator shall be independent and impartial [at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceeding or until the end of his or her term of office].
2. Paragraph 1 includes the obligation not to:
  - (a) Be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing Treaty Party, or any of their legal representatives;
  - (b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding;
  - (c) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];
  - (d) Use his or her position to advance [any significant] [a] financial or personal interest he or she might have in one of the disputing parties or in the outcome of the IID proceeding;
  - (e) Assume a function or accept a 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

20. The Working Group may wish to consider whether the temporal scope provided for in paragraph 1 (the square bracketed language) is necessary considering the definition of “arbitrator” and “judge” in article 1. The retention of the phrase in square brackets may raise issues, particularly with regard to the “conclusion” of the IID proceeding, which would differ depending on the case at hand (see para. 28 below). For example, questions might arise whether an arbitrator who has resigned or has been disqualified would continue to be bound by article 3 if the IID proceedings were to continue.

21. With regard to subparagraph (a), the Working Group may wish to provide guidance on the meaning of the term “loyalty” and from whose perspective loyalty should be assessed, both of which could be elaborated in the Commentary.

22. With regard to subparagraph (c), the Working Group may wish to delete the phrase “or judgment” as that would likely be covered by the word “conduct”. In order to align the drafting with that of subparagraph (a), the Working Group may also wish to consider modifying subparagraph (c) as follows: “Be influenced by any past or present financial, business, professional or personal relationship”.

23. With regard to subparagraph (d), the Working Group may wish to consider replacing the words “any significant” with the word “a”. This is because it is the fact that the position is used to advance financial or personal interest that is problematic rather than the extent or level of the interest sought. The Commentary could, however, elaborate that where the interest unintentionally gained by the adjudicator was trivial or de minimis, it would not necessarily amount to a breach of subparagraph (d).

**Article 4 – Limit on multiple roles**

*[Paragraphs applicable to Arbitrators only]*

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 treaty.

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.

*[Paragraphs applicable to Judges only]*

3. 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 or impartiality, or with the demands of [a full-time] [term of] office. In particular, a Judge shall not act as a legal representative or expert witness in another IID proceeding.

4. A Judge shall declare any other function or occupation to the [President] of the standing mechanism. Any question [on the application of] [regarding] paragraph 3 shall be settled by the decision of the standing mechanism.

5. A former Judge shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which he or she had dealt with, before the end of his or her term of office.

6. A former Judge shall not act as a legal representative of a disputing party or [third][non-disputing] party [in any capacity] in an IID proceeding initiated after his or her term of office 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**

*Derogation and modification by the disputing parties*

24. With regard to the phrase “unless the disputing parties agree otherwise” in paragraph 1, the Working Group may wish to consider the extent to which the disputing parties may waive the application of paragraph 1. A related question would be whether the same phrase should be replicated in paragraph 2 or whether the obligation in that paragraph is one that cannot be waived by the disputing parties. With regard to paragraph 2, the Working Group may wish to confirm that it would be the arbitrator that would need to determine whether the legal issues are substantially so similar.

25. The Working Group may wish to consider further whether the disputing parties are free to agree to deviate from other articles of the Code. If so, one approach could be to revise article 2(1) as follows: “The Code applies to an Adjudicator or a Candidate in an IID proceeding subject to any modifications as the disputing parties may agree.” Another approach would be to include a paragraph in article 2 or 11 stating: “The disputing parties may agree to exclude the application of the Code or derogate from or vary the effect of its provisions”. This would avoid the need to repeat the phrase “unless the disputing parties agree otherwise” in the relevant articles.

26. However, the ability of the disputing parties to derogate and modify the application of the Code might need to be restricted with regard to certain articles (for example, article 3) and may be further restricted if the instrument upon which consent to adjudicate is based (for example, a treaty) provides so in accordance with article 2(2). Furthermore, the Working Group may wish to consider whether the disputing parties would be able to exclude or modify the application of the Code in the context of a standing mechanism.

*Temporal scope of the limitation*

27. The Working Group may wish to consider whether to retain the three-year period as provided for in square brackets in paragraphs 1 and 2, or any other period of time following the IID proceeding.

28. If the Working Group were to retain such a period of time, it would be necessary to clarify when that period commences. This is because the “conclusion of the IID proceeding” referred to in paragraphs 1 and 2 could differ depending on the circumstances of the case, thus making it difficult to implement.

29. Article 4 would be an instance where the obligation of an adjudicator extends beyond his or her term (similar to article 8 on confidentiality). In other words, the article would aim to regulate the conduct of a former adjudicator. The Working Group may wish to consider this issue in light of the definition of “arbitrator” and “judge” in article 1 and the scope of application in article 2(1) (see paras. 12 and 20 above).

30. The Working Group may wish to also consider how article 4 would apply to an arbitrator who had been disqualified or had resigned from an IID proceeding. Such an individual would no longer be subject to the concurrent limitation in article 4 as he or she is no longer an Arbitrator in accordance with article 1(b). On the other hand, imposing the three-year limitation “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 and the limitation commencing only after the proceeding. As article 4 limits the participation in “another” IID proceeding, it may also be possible for the arbitrator who had been disqualified or had resigned to act as a legal representative or an expert witness in the same IID proceeding.

31. Accordingly, the Working Group may wish to clarify the extent to which the Code should regulate the conduct of former adjudicators. One way to do so would be to use the formulation in paragraphs 5 and 6 (“former” judge) and refer also to “former” arbitrator in the context of paragraphs 1 and 2. In any case, the Working Group may wish to provide guidance on how any remedy can be enforced on an individual who is no longer an “Adjudicator” within the meaning of the Code as well as the relationship between articles 3 and 4.

*Other issues*

32. While a suggestion had been made to include the words “a Judge” before the words “a legal representative” in paragraphs 1 and 2, both paragraphs aim to regulate the practice of double-hatting, where one individual functions both in an advocacy role and an adjudicatory role. Therefore, the paragraphs would not aim to prevent an arbitrator from taking another case as an adjudicator. Instead, whether an arbitrator can act concurrently as a judge would likely be regulated by the terms of office of the judge. The Working Group may wish to confirm this understanding and consider whether an additional paragraph should be included in article 4 preventing a judge from acting as an arbitrator, which would have the same effect.

33. With regard to subparagraph 1(c), the Working Group may wish to consider the effect such regulation could have with regard to multilateral treaties (for example, the Energy Charter Treaty).

34. The Working Group may wish to consider providing guidance as to the meaning and scope of the term “same” that is used throughout subparagraphs 1 (a) to (c), as

the factors for identification might differ between “measures”, “parties” and “provisions”.

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

*[Paragraph applicable to Arbitrators only]*

1. An Arbitrator shall:
  - (a) Perform his or her duties diligently throughout the IID proceeding;
  - (b) Devote sufficient time to the IID proceeding;
  - (c) Render all decisions in a timely manner;
  - [(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner;] and
  - (e) Not delegate his or her decision-making function.

*[Paragraph applicable to Judges only]*

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

#### **Note to the Working Group**

35. The Working Group may wish to consider whether subparagraph (d) could be deleted as it would be covered by subparagraph (a) or retained as a separate paragraph in order to make the obligation explicit. If subparagraph (d) is deleted, the Commentary could explain that under subparagraph (a), an arbitrator shall refuse such concurrent obligations.

36. The Working Group may wish to consider whether subparagraph (e) might be placed in article 6 as the obligation to not delegate decision-making function would fit better as an obligation of integrity. This could be further elaborated in the Commentary.

37. The Working Group may wish to further confirm that a breach of the obligations in articles 5 and 6 could be presented as a fact when a disputing party asserts that the obligation of independence or impartiality in article 3 had been breached.

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

1. An Adjudicator shall:
  - (a) Conduct the IID proceedings in accordance with high standards of integrity, fairness[, civility] and competence;
  - (b) Treat all participants in the IID proceeding with civility; and
  - (c) Make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties.

*[Paragraph applicable to Arbitrator candidates only]*

2. A Candidate shall accept an appointment only if he or she has the necessary competence and skills, and is available to perform the duties of an Arbitrator.

*[Paragraph applicable to Judge candidates only]*

3. A Candidate shall possess the necessary competence and skills to perform the duties of a Judge.



**Note to the Working Group**

38. The Working Group may wish to confirm that the proposed heading of article 6, “Integrity and competence” is adequate as a replacement for the previous heading “Other duties”.

39. The Working Group may wish to consider whether subparagraph (b) is necessary if the additional wording in square brackets were to be inserted in subparagraph (a).

40. The Working Group may wish to consider whether paragraphs 2 and 3 would need to be retained in article 6 considering that paragraph 2 requires the Arbitrator candidate to make a self-judgment on his or her competence and skills, and that the necessary competence and skills of a Judge candidate would likely be assessed in the selection phase. The Working Group may wish to consider this question in conjunction with the question on whether to include article 11(2) in the Code (see para. 67 below).

**Article 7 – Ex parte communication**

*[Paragraphs applicable to Arbitrators and Arbitrator candidates only]*

1. Ex parte communication is prohibited except:

(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;

(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Arbitrator, if the disputing parties so agree;

(c) If permitted by the applicable rules or treaty or by agreement of the disputing parties.

2. In any case, ex parte communication shall not address any procedural or substantive issue relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate will arise in the IID proceeding.

*[Paragraph applicable to Judges and Judge candidates only]*

3. Ex parte communication is prohibited.

**Note to the Working Group**

41. Article 7 has been revised to clarify the default rule regarding ex parte communication as well as the exceptions thereto. The definition of “ex parte communication” is now provided in article 1(g) and has been slightly redrafted to read: “Ex parte communication means any communication by a Candidate or an Adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person concerning the IID, without the presence or knowledge of the other disputing party or parties.”

42. While the previous version of article 7 had a temporal scope on when ex parte communication would be prohibited (“prior to the initiation of the IID proceeding and until the conclusion thereof”), that phrase had been deleted considering the definition of the terms “candidate”, “arbitrator” and “judge” (see para. 12 above). The deletion of that phrase would also avoid needing to make a reference to the “conclusion” of the IID proceeding, which posed some concerns (see paras. 20 and 27–31 above).

43. The Working Group may wish to confirm that it would be possible for an arbitrator who had rendered the award or had been disqualified to engage with the parties as they would no longer be bound by article 7. Otherwise, it would be necessary to stipulate a time period during which ex parte communication would be prohibited similar to article 4.

44. The Working Group may wish to confirm that subparagraph 1(b) would allow an arbitrator appointed by a disputing party (or an arbitrator candidate to be appointed by a disputing party) to discuss with the disputing party or its legal representative the qualifications of a potential candidate for the presiding arbitrator. Yet this would be subject to the agreement of the other disputing party that this can be done. However, if the condition (the disputing parties so agree) is met, such a discussion might not fall under the definition of ex parte communication as the other disputing party would be aware of the communication.

45. The Working Group may wish to confirm that a complete prohibition of ex parte communication for Judges and Judge candidates as provided in paragraph 3 is appropriate.

### **Article 8 – Confidentiality**

1. A Candidate and an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, an IID proceeding unless:

(a) The information is publicly available [in accordance with the applicable rules or treaty,]; or

(b) Permitted under the applicable rules or treaty or by agreement of the disputing parties.

2. An Adjudicator shall not disclose the contents of the deliberations in the IID proceeding [or any view expressed during the deliberation].

3. An Adjudicator shall not comment on a decision in the IID proceeding [unless it is publicly available].

4. An Adjudicator shall not disclose any draft decision in the IID proceeding.

5. The obligations in this article shall survive the IID proceeding [and continue to apply indefinitely].

6. The obligations in this article shall not apply to the extent that a Candidate or Adjudicator 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.

### **Note to the Working Group**

46. Paragraph 1 has been revised to provide a clearer rule on the exceptions to the obligation of confidentiality. The words “except for the purposes of that proceeding” have been deleted as the article does not intend to regulate such disclosure, which are inherently allowed. The Commentary could further elaborate on this point. It should be noted that if that phrase is re-introduced in paragraph 1, it would also need to be replicated in the other paragraphs.

47. The Working Group may wish to consider the extent to which the information being “publicly available” would form an exception in subparagraph 1(a). The square bracketed language suggests that only when the information is publicly available in accordance with the applicable rules or treaty, the non-disclosure obligation in paragraph 1 would be lifted. In other words, if the information is available to the public de facto (for example, it was leaked in violation of the applicable rules or treaty or was posted on a public website by a third party), this would not fall under the exception in subparagraph 1(a). The Working Group may wish to confirm this understanding.

48. The Working Group may wish to consider whether the exception in subparagraph 1(b) should also apply to paragraphs 2 to 4. If so, it might be preferable to provide for a general exception similar to paragraph 6 along the following lines: “The obligations in this article shall not apply to the extent permitted under the applicable rules or treaty or by agreement of the disputing parties.”

49. The Working Group may wish to delete the words “or any view expressed during the deliberation” in paragraph 2, as such views would form part of the “contents” of the deliberation.

50. Paragraphs 3 and 4 have been revised in light of the fact that whether or not the adjudicator has participated or taken part in the rendering of the decision is not a factor to be considered when imposing the obligation. Therefore, the words “in which they participated” in paragraph 3 and “prior to rendering it and any decision they have rendered” in paragraph 4 have been deleted.

51. With regard to paragraph 3 addressing the obligation to not comment on a decision, the Working Group may wish to consider: (i) whether the obligations should be limited to “prior to the conclusion of the IID proceeding” which would allow the adjudicator to comment on a decision after the proceeding; and (ii) whether the decision being publicly available (currently in square brackets) should be an element to be taken into account. With regard to the latter, if the words “unless it is publicly available” were to be retained, the formulation in paragraph 1(a) should be used (see para. 47 above).

52. Considering that a “draft decision” referred to in paragraph 4 falls under “any information concerning, or acquired in connection with, an IID proceeding” referred to in paragraph 1, the Working Group may wish to consider deleting the paragraph leaving it to the Commentary to explain this aspect.

53. Paragraph 5 has been revised to avoid referring to the “conclusion” of the proceedings (see paras. 20 and 30 above). The Working Group may wish to delete the words in square brackets “and continue to apply indefinitely” as they might be redundant. The Working Group may wish to consider how the obligation in paragraph 5 would be enforced as the individual would not be subject to the Code following the IID proceeding (see paras. 30–31 above).

#### **Article 9 – Fees and expenses**

*[Article applicable to Arbitrators and Arbitrator Candidates only]*

1. 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 by the sole or presiding Arbitrator.
2. [Unless the applicable rules or treaty provide otherwise,] a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before [or immediately upon] the constitution of the arbitral tribunal.
3. An Arbitrator shall conclude any discussion concerning the fees and expenses of an Assistant with the disputing parties prior to engaging any Assistant.
4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and ensure that an Assistant also keeps an accurate record of the time and expense.
5. An Arbitrator shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

#### **Note to the Working Group**

54. Article 9 has been restructured to set out the process of determining the fees and expenses in the sequence they usually occur. The Working Group may wish to first confirm that the order of the paragraphs is adequate and that it would only be applicable to Arbitrators and Arbitrator candidates.

55. The Working Group may wish to confirm that paragraph 2 reflects best practice – that it would be ideal if the discussions concerning fees and expenses are not only conducted but also concluded prior to the constitution of the arbitral tribunal. If so,

the Working Group may wish to consider deleting the square bracketed language “or immediately upon”. The Commentary could, however, explain that such discussions could take place immediately upon the constitution, for example, at the first procedural meeting.

56. With regard to paragraph 4, the Working Group may wish to consider whether the responsibility to keep an accurate record of time and expenses spent by any assistant lies with the arbitrator or the assistant. In any case, the arbitrator should put in place a mechanism to ensure that an assistant does so. This could be explained in the Commentary.

57. The Working Group may wish to consider whether the reasonableness of fees should be addressed in the Code or in the Commentary, as this would be reflective of best practice. For instance, it is addressed in article 41(1) of the UNCITRAL Arbitration Rules. The Commentary could explain that the reasonableness of fees and expenses would depend on the amount in dispute, the complexity of the subject-matter, the time spent by arbitrators and any other relevant circumstances of the case.

#### **Article 10 – Disclosure obligations**

*[Article applicable to Arbitrators and Arbitrator candidates only]*

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. The 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 the annex prior to or upon [acceptance of the] appointment to the disputing parties, other

Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.

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.

### **Note to the Working Group**

58. Article 10 has been revised to apply only to Arbitrators and Arbitrator candidates. The Working Group may wish to confirm the extent to which the paragraphs would apply to Judges and Judge candidates. A comparative table is provided as an appendix to this Note to assist the Working Group's consideration.

59. The Working Group may wish to address the relationship between the two different standards in paragraph 1 and the possible inconsistency ("likely to give rise to justifiable doubts", provided, for instance, in article 11 of the UNCITRAL Arbitration Rules, and "in the eyes of the disputing parties"), which would make it difficult for arbitrators and arbitrator candidates to understand the extent to which disclosure shall be made.

60. The Working Group may wish to consider a situation where the arbitrator did not disclose a circumstance with the belief that a reasonable third person would not question his or her independence or impartiality based on that circumstance, but a disputing party considers it as raising doubts. The Working Group may wish to consider specifying the highest threshold rather than incorporating two standards.

61. The Working Group may wish to confirm that the information listed in paragraph 2 needs to be disclosed even if it is not so required under paragraph 1. In other words, regardless of whether the information to be provided in accordance with paragraph 2 is likely to give rise to justifiable doubts as to the arbitrator's independence or impartiality, the arbitrator would be required to disclose such information. This can be further elaborated in the Commentary.

62. The Working Group may wish to consider whether the reference to "an entity identified by a disputing party" in subparagraphs (a)(i) and (b)(iii) is appropriate. The Commentary could explain that the word "entity" would cover both legal and natural persons. In that context, the Working Group may wish to consider whether the formulation in subparagraph (a)(iv) is appropriate.

63. The Working Group may wish to delete the words in square brackets at the beginning of paragraph 3 as the need to make reasonable/best efforts applies throughout the article and is not necessarily limited to paragraphs 1 and 2. The Working Group may wish to decide whether to use the term "reasonable" or "best". For reference, article 6(1)(c) refers to "best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties". The Working Group may wish to also consider whether the word "circumstance" is broad enough to cover the list of items mentioned in paragraph 2 (relationship, interests, proceedings, appointment).

64. The Working Group may wish to note that paragraph 4 (formerly numbered paragraph 5) was moved and placed closer to paragraph 3, as both paragraphs deal with the manner in which an arbitrator or a candidate shall make the disclosure in accordance with paragraphs 1 and 2.

65. The Working Group may wish to insert the words "acceptance of the" in paragraph 5 in light of the ICSID practice (see para. 13 above).

66. Paragraph 7 aims to clarify that non-compliance with the disclosure requirements in article 10 does not necessarily amount to a breach of other provisions in the Code, in particular with regard to the obligation of independence and impartiality in article 3. The Working Group may wish to determine which formulation is to be used, including whether to refer to specific articles of the Code.

#### **Article 11 – Compliance with the Code**

1. An Adjudicator and a Candidate shall comply with the applicable provisions of the Code.
- [2. A Candidate shall not accept an appointment and an Adjudicator shall resign or recuse him/herself from the IID proceeding if he or she is not in a position to comply with the applicable provisions of the Code.]
3. Any disqualification and removal procedure, or any sanction and remedy, provided for in the applicable rules or treaty shall [apply to the Code] [continue to apply irrespective of the Code].
4. An Adjudicator shall remove an Assistant who is in breach of the Code.

#### **Note to the Working Group**

67. The Working Group may wish to consider whether paragraph 1 is necessary. Paragraph 2 was added to highlight how candidates and adjudicators should act in the case of non-compliance or the likeliness of non-compliance. While it would be a voluntary obligation that would not be subject to any remedy under the Code, the Working Group may wish to consider whether to retain the text and if so, whether articles 6(2) and (3) are necessary (see para. 40 above).

68. The Working Group may wish to consider whether paragraph 3 captures the understanding of the Working Group that any challenge procedure (including standards for challenge) or any remedy provided for in the applicable rules or treaty would continue to apply to the adjudicator. Accordingly, non-compliance with an article of the Code would not in itself form the basis for such challenge or remedy, which would be provided for in the applicable rules or treaty.

69. The Working Group may wish to consider whether paragraph 4 is appropriate considering that the Code does not contain specific articles applicable to assistants. In addition, the Working Group may wish to consider what would be the consequences of adjudicator's non-compliance with paragraph 4.

#### **Annex to the Code of Conduct – Declaration and disclosure form**

Annex to the Code of Conduct

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 [Arbitrator][Judge] 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 10 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.

**Note to the Working Group**

70. The Working Group may wish to confirm that the following declaration would be presented in the Annex to the Code.

**Appendix – Disclosure obligation for Judges and Judge candidates**

Article 10 – Disclosure obligation	
For Arbitrators and Arbitrator candidates	For Judges and Judge candidates
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.	<Same> <i>except for the clause “in the eyes of the disputing parties” which would not be applicable to Judges and Judge candidates</i>
2. The 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;	* <i>A Judge shall include the following information in the disclosure:</i>  (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) <i>Expert witnesses</i> 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) [ <i>Does not apply</i> ]
(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.	* <i>A Judge candidate shall include the following information in the disclosure:</i>  (c) All IID and related proceedings in which <i>the Candidate</i> is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and  (d) [ <i>Does not apply</i> ]
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].	<Same>

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 the Annex prior to or upon appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and any other persons prescribed by the applicable rules or treaty.	5. A Candidate shall make the disclosure [ <i>using the form in the Annex</i> ] to the <i>standing mechanism</i> prior to or upon <i>confirmation as a Judge</i> .
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.	6. A Judge shall make the disclosure [ <i>using the form in the Annex</i> ] to [the President] of the <i>standing mechanism</i> as soon as <i>he or she becomes aware of the circumstances mentioned in paragraph 1</i> 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.
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].	<Same>
8. The disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.	<Does not apply>