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**Draft note**

**Means of implementation of the Code of conduct for adjudicators in international investment disputes (IID) and enforcement of the obligations contained therein**

The Secretariats of ICSID and UNCITRAL have jointly developed a draft Code of conduct for adjudicators handling international investment disputes (“IID”) (hereinafter, the “Code”). The Code seeks to reflect the joint discussions organized by the UNCITRAL and ICSID Secretariats on the contents of the Code and the deliberations of UNCITRAL Working Group III (ISDS reform) to date, taking into consideration that the Code should be binding and contain concrete rules rather than guidelines ([A/CN.9/1004\*](http://undocs.org/en/A/CN.9/1004), paras. 52 and 68). It aims at providing a uniform approach to requirements applicable to adjudicators in IID and to give more concrete content to broad ethical notions and standards used in the applicable instruments.

On this basis, article 11 of the Code addresses the consequences of non-compliance by adjudicators.[[1]](#footnote-1) Paragraph 1 establishes the principle of voluntary compliance and paragraph 2 refers to the disqualification and removal procedures that are usually provided for in procedural rules. The Code indeed does not operate in isolation and is meant to apply during proceedings in conjunction with procedural rules of either arbitral institutions or of a standing mechanism.

Section 1 briefly outlines the possible means of implementation of the Code as a binding standard. It should be noted that the different means of implementation are not exclusive and can be used concomitantly. Section 2 explores the possible sanctions in case of non-compliance by adjudicators Considerations on sanctions and their application could be further developed in a Commentary to the Code.

1. **Means of implementation**
2. **Incorporation in investment treaties**
3. **Incorporation through a multilateral instrument**

The Code is meant to serve as a unique and universal standard that would permit a harmonized approach to ethical requirements for adjudicators in IID. Implementation of the Code through a mechanism adopted at a multilateral level would be most efficient to achieve harmonized application.

The Code could be made part of a multilateral instrument on the implementation of ISDS reforms (see [A/CN.9/WG.III/WP.194](https://undocs.org/en/A/CN.9/WG.III/WP.194)), by including in the instrument a general statement of applicability or by incorporating the contents of the Code, reflecting the agreement of the States to apply the Code to IID arising under their investment treaties. This would mean that the Code would be made applicable to IID cases arising under the treaties covered by the multilateral instrument (i.e. treaties between such States that are also Parties to the multilateral instrument).

This approach would raise some questions, including how to address any inconsistencies between the Code and ethical requirements contained in applicable procedural rules or in investment treaties which form the basis of consent to the IID settlement. One possible way to address the inconsistency might be to provide that the Code, as incorporated in the multilateral instrument, would supersede the applicable rules and treaty standards on the topic.

1. **Incorporation on a treaty-by-treaty basis**

The Code could also be available for use as a template by States Parties to investment treaties and could be incorporated in such treaties. Incorporation in treaties would mean that the Code would apply to all IID cases arising under such treaties, which would thereby reduce the potential for multiple applicable codes.

Such means of implementation relies on States Parties to investment treaties and would ensure that disputing parties abide by such provisions in investment treaties. This approach might however take time and might not guarantee wide (or quick) acceptance. The incorporation into investment treaties on an individual basis could be encouraged by a recommendation of the UN General Assembly in support of the wide use of the Code and its application through appropriate mechanisms. It could further be complemented by the preparation of a multilateral instrument as described above (see 1. A. (i)).

1. **Agreement of disputing parties**

Disputing parties would be bound to apply the Code if it is made mandatory under the relevant investment treaty.

If the relevant investment treaty is silent on the application of the Code or does not provide for the application of other standards, disputing parties could agree to the application of the Code voluntarily, ideally before the appointment of the adjudicators. This would mean that the Code would be binding on the adjudicators in those disputes where the parties have decided to apply the Code and the adjudicator could confirm this by signing the declaration provided by the Code.

This case-by-case approach would not guarantee wide and uniform application.

1. **Incorporation in procedural rules, adjudicators’ declaration or court rule and regulation**
2. **Incorporation in the applicable procedural rules**

The Code could be incorporated into the applicable procedural rules of arbitral institutions, which may require amending the rules and addressing possible discrepancies between the rules and the Code.

* *ICSID*

The Code could be added as an annex to the ICSID Convention Arbitration Rules and the Additional Facility Arbitration Rules or be incorporated into the arbitrator declaration which is referred to in these Rules. No further changes would be required under the proposed amended rules (see [ICSID’s Working Paper No. 4](https://icsid.worldbank.org/resources/rules-amendments)).

It should be noted that disqualification procedures are governed by Articles 14, and 56 through 58 of the ICSID Convention and that arbitrators (and conciliators) cannot be disqualified for other reasons. These provisions are compatible with the current draft of the Code.

Several aspects of the Code may require further discussion with members of the ICSID Administrative Council. For example, would the Code apply just to IID cases at ICSID (as the current version proposes) or would it also apply to contract and foreign law cases? Similarly, if a complete prohibition on double hatting were to be adopted, ICSID would be unable to appoint designees to the ICSID Panel of Arbitrators who act as counsel and arbitrators. ICSID is called upon to appoint from this Panel in numerous cases under the ICSID Convention. Because many designees on the list act in both roles, such a prohibition would exclude many highly qualified candidates, reducing considerably the pool of potential appointees. Unless the designees resign from the ICSID Panel, ICSID Member States would need to wait until the expiration of the mandate (6-year term) of the relevant designee to replace that person.

* *UNCITRAL*

The Code could be added as an appendix to the UNCITRAL Arbitration Rules. The section “Disclosures by and challenge of arbitrators” (articles 11 to 13 UNCITRAL Arbitration Rules) would be complemented by the Code.

Given the generic applicability of the UNCITRAL Arbitration Rules, it would be necessary to clarify that the Code in the appendix applies only to IIDs.

Further clarifications and adjustments might be needed. For instance, it should be made clear that article 11 of the UNCITRAL Arbitration Rules on disclosures is amended by article 10 of the Code.

Given the ad hoc nature of the UNCITRAL Arbitration Rules, if sanctions, in addition to challenge and removal procedures, are provided for in the Code, consideration should be given as to which authority would have the capacity to apply such sanctions.

Therefore, incorporation of the Code might imply further amendments to the Rules.

* *Arbitral institutions*

Should arbitral institutions active in the field of IID agree to incorporate the Code in their rules, similar considerations would apply in relation to consistency of the Code with their own institutional rules (or code of conduct, if so prepared).

1. **Incorporation in the arbitrators’ declaration, as an annex to the declaration**

Procedural rules of ICSID, UNCITRAL and arbitral institutions active in the field usually include a model declaration by arbitrators regarding their independence, impartiality and availability. Such disclosure declaration usually must be filed by arbitrators upon acceptance of nomination. Incorporating the Code in the arbitrators’ declaration would mean that arbitrators would undertake to be bound by the Code.

Such approach would require amending the current declarations as annexed to the applicable rules.

The extent to which candidates under consideration to act as arbitrator would be bound might need further consideration. Indeed, as the declaration is likely to be signed upon constitution of the tribunal, after the arbitrator is selected, it would not apply to “candidates”. A possible means to address this would be for the relevant institution to make a general statement that it expects candidates and arbitrators to comply with the Code.

1. **Incorporation into the legal framework of standing mechanism**

The Code has been designed to be applicable to adjudicators in IID, which also includes judges in a standing mechanism if one were to be established. It is contemplated that the standing mechanism would be composed of a first instance level and/or a standing or ad hoc appellate mechanism. It should be considered whether the Code should apply, as currently provided for, without any distinction as to the level of adjudication.

The Code could be made part of the founding instruments of the standing mechanism or be part of the rules and regulations of the standing mechanism.

1. **Sanctions and their application (article 11 of the Code)**

Pending further consideration of possible sanctions in case of non-compliance with the obligations contained in the Code, it may be noted that some sanctions are already provided for in applicable procedural rules and would apply in accordance with the provisions of those rules.

1. **Existing sanctions**

One of the prevalent means to enforce obligations in procedural rules is removal or challenge of arbitrators, which may differ depending on the applicable rules. This comes in addition to the possibility for an adjudicator to recuse him/herself should a potentially disqualifying fact arise in the course of tribunal constitution or subsequently.

These sanctions are enforced in accordance with the applicable rules, by the institution concerned or by an appointing authority where relevant.

1. **Possible additional sanctions**

Additional sanctions have been mentioned at the thirty-eighth session of UNCITRAL Working Group III, such as reduced remuneration and disciplinary measures ([A/CN.9/1004\*](http://undocs.org/en/A/CN.9/1004), paras. 62-64 and 77).

In the field of international arbitration, institutions may have administrative means of addressing non-compliance, for example by reducing fees, publishing information about the timeliness of rulings, or otherwise. Parties may have recourse to complaints under professional accreditation bodies, for example bar associations.

Should a standing mechanism be created as part of the reform options, the responsibility of enforcing the Code could be given to its registrar, to the court in its plenary or to its President.

1. Article 11 – Enforcement of the Code of conduct, provides as follows: “*Every Adjudicator and Candidate shall comply with the applicable provisions of this Code. 2. The disqualification and removal procedures in the applicable rules shall apply to breaches of Articles 3-8 the Code. 3. [Other options based on means of implementation of the Code]*.” According to article 1(1) of the draft Code, “Adjudicator” means an arbitrator, and a judge appointed to a standing mechanism for IID settlement. [↑](#footnote-ref-1)