

**Draft Code of Conduct for
Adjudicators in International
Investment Disputes
Version Two
(Published April 19, 2021)**

**Comments by State/Commenter
as of May 25, 2021**

VERSION 2 DRAFT

**CODE OF CONDUCT FOR ADJUDICATORS IN INTERNATIONAL INVESTMENT
DISPUTES**

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Singapore

As a general editorial comment, we have replaced “part(y)(ies)” with “disputing part(y)(ies)” for clarity.

To respond to Article 1(4), we note that Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates. A “Candidate” currently includes a potential Judge. We would like to seek clarification if the intent is for these articles to apply to the selection of ad hoc Judges, similar to the ad hoc judges of the International Court of Justice, rather than permanent Judges of any investment court. If so, we suggest inserting the words “ad hoc” in the definition of a Candidate.

In our view, Articles 6(2), 7(1) and 7(2) are not applicable to permanent Judges of an investment court (including a person proposed but not yet confirmed as a Judge of a standing mechanism). For Article 6(2), the rules for a standing mechanism would lay out the requirements on competence, skills or availability of the permanent Judges. Articles 7(1) and 7(2) are not applicable to potential permanent Judges who may be assigned to a specific case, as a standing mechanism would likely not provide for the party-appointment of permanent Judges, and have its own rules on the selection of permanent Judges for a particular proceeding.

On our suggested edits to Article 2(4), please see our comments on Article 7(3). We are supportive of the suggestion in Article 2(5) to include a provision addressing the interplay between this Code and any treaty-specific Code of Conduct.

Singapore welcomes the insertion of the word “concurrently”. As set out in our written comments on version 1 of the draft COC, an outright prohibition against double hatting should be limited to: (i) cases where the adjudicators play different inconsistent roles simultaneously, and (ii) roles that are more likely to give rise to a clear conflict of interest, ie, counsel, or party-appointed expert or witness. On (ii), we propose to replace “expert witness” with “party-appointed expert or witness”. The mere fact that an adjudicator acts as an expert or witness in another IID case is not sufficient to give rise to an apparent conflict of interest. For instance, the adjudicator may be appointed by another IID Tribunal as a neutral third party to provide expert evidence on a discrete point of law.

In relation to Article 6(1)(c), it is unclear who the “participants in the proceeding” are. Article 8(4) of version 1 of the COC (on which this paragraph is based), stated that “Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties”. We seek clarification on whether “participants in the proceeding” is intended to replace “the parties and one another”, or whether it is intended to refer to a broader category of persons in the proceedings, such as witnesses and experts.

For the reasons set out in our comments on Article 1(4), Article 7(1) and (2) should not apply to potential permanent judges.

On Article 7(2), Singapore reiterates our comments in version 1 of the COC that the contents of pre-appointment communications should be disclosed.

On Article 7(3), Singapore supports Switzerland’s proposal to insert “during the proceeding” to make clear that this obligation only applies when the proceeding is ongoing. In our view, it is too restrictive to include a prohibition against an adjudicator making ex parte communications with a disputing party after the conclusion of the proceedings, as interests of impartiality and transparency no longer apply. We have therefore proposed to delete this paragraph from the surviving obligations in Article 2(4).

We note the intent of Article 8(3) and thank the Secretariat for ensuring that the obligations in Article 8 are surviving obligations. Based on the SSDS COC in the CPTPP, surviving obligations are indicated in the relevant paragraph itself by explicitly referring to former panellists (see paragraphs 2, 3(b), 7 and 8(a)-(c)). In our view, this approach is optically clearer and avoids having to make cross-references. We propose to adopt a similar approach here. For this reason, we suggest deleting paragraph 3.

In relation to Article 9(3), the obligation to keep an accurate and documented record of time and expenses should apply to all adjudicators, rather than those remunerated on a non-salaried basis. Even if an adjudicator’s fees are fixed, we think that it is important to keep such records for the purposes of transparency and accountability to the disputing parties.

In relation to the inclusion of the square bracketed phrase “non-IID proceedings” in Article 10(2)(a)(ii) and 10(2)(c) for disclosure, we are supportive. We think involvement in or appointment by any of the disputing parties in other non-ISDS international arbitrations, mediations or conciliations are also relevant and should be disclosed.

In relation to Article 10(5), we have suggested drafting changes to take into account the suggestion that this Article should not be subject to the enforcement procedures in Article 11 (see explanatory paragraph 56). We understand and support this intent, which is to limit frivolous challenges to adjudicators, especially where the failure to disclose is in good faith or unintentional. However, the obligation of disclosure is a key obligation that provides legitimacy to the system of IIAs. We are concerned that Article 10 might be viewed as a “second tier” obligation if we were to expressly provide that it is not subject to enforcement procedures. To bridge both sets of concerns, we have suggested language that explicitly provides that disclosure of an interest is without prejudice to whether the interest falls under this Article, or whether it warrants disqualification.

In some cases, the disputing parties might not agree on whether there is a violation of the Code in the first place, and the applicable rules may set out the applicable procedures if there is a dispute. We have therefore suggested edits to take this into account. That said, we have no objections to maintaining the current text. We would also prefer not to exclude certain articles from enforcement, as elaborated in our comments on Article 10(5).

PUBLIC STAKEHOLDERS – International Organizations

ORGANIZATION Name

PUBLIC STAKEHOLDERS – Individuals (Alphabetically by last name)

LAST NAME, First Name

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