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Possible reform of investor-State dispute settlement (ISDS)

Draft Code of Conduct

The following provides a revised draft of the Code of Conduct based on the discussions of the Working Group at its forty-first and forty-second sessions. The previous version of the draft is contained in document A/CN.9/WG.III/WP.209.

Article 1 – Definitions

For the purposes of this 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, 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(s) 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

- The words “for resolution” has been inserted 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”.
- The terms “arbitrator” and “judge” are defined 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 in the Code. The Working Group may wish to consider such phrases placed within square brackets in the respective articles.
- With regard to subparagraph (f), the commentary would explain that the practice is that the person to work as an Assistant and the tasks to be performed by the Assistant are agreed with the disputing parties. The Working Group may wish to consider whether it is necessary to retain the phrase “as agreed with the disputing parties” in the definition.
- The Working Group may wish to consider whether a single Code should be prepared for arbitrators and judges or whether the provisions should be separated.

Article 2 – Application of the Code

1. This 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, this Code shall [be construed as complementing][complement] such provisions. In the event of any inconsistency between this 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 this 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

- As the Code is to apply to individuals involved in the resolution of IIDs and not the IID itself, the Working Group may wish 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 Code to apply to any other types of disputes (regardless of the form of the dispute resolution), if the disputing parties so agree.
- Paragraph 2 has been simplified by referring to provisions “on the conduct” of an Adjudicator or a Candidate rather than provisions on “ethics or a code of conduct” as the term “ethics” was unclear and the use of the term “code” might be confusing with the word “the Code”.
- 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” is understood to provide guidance on interpretation. The Working Group may wish to consider whether the second sentence may suffice for the purposes of indicating which provision shall prevail.
- The reference to inconsistencies between an obligation of this Code and an obligation in the instrument upon which consent to adjudicate has been generalized to refer to inconsistency between the provisions of this Code and

provisions on the conduct of an Adjudicator or a Candidate, which are contained in the instrument upon which consent to adjudicate is based ("such provisions").

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 the matters addressed in the IID proceeding;

[(c) Delegate his or her decision-making function;]

(d) Allow any past or present financial, business, professional or personal relationship to influence his or her conduct [or judgment];

(e) Use his or her position to advance any [significant] financial or personal interest she or he might have in one of the disputing parties, or the outcome of the IID proceeding;

(f) Assume a function or accept a benefit that would interfere with the performance of his or her duties; or

(g) Take any action that creates the appearance of a lack of independence or impartiality.

Note to the Working Group

- 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 the terms "adjudicator" and "judge". The retention of the phrase in square brackets may raise issues, for example, as the "conclusion" of the IID proceeding could be different depending on the case at hand. For example, shall an arbitrator who has been disqualified continue to be independent and impartial? On the contrary, if the award had been rendered but one of the parties has requested the award to be set aside, would the IID proceeding be deemed to have been concluded? It may be preferable for the commentary to explain when the duty of independence and impartiality commence and terminate as factual aspects possibly with examples.
- With regard to subparagraph (a), the Working Group may wish to consider providing further guidance in the commentary as to the meaning of the term "loyalty", and from whose perspective loyalty should be assessed.
- The Working Group may wish to confirm that subparagraph (c), which had previously been placed under the article on diligence, should be placed in this articles as delegation of any decision-making to Assistants should be a breach of the duty to be independent and impartial. The Working Group may further wish to consider providing guidance as to the meaning of "decision-making functions" in the commentary.
- With regard to subparagraph (d), the Working Group may wish to delete the phrase "or judgment" as that is sufficiently covered in the word "conduct". In order to align it with subparagraph (a), the Working Group may also wish

to consider redrafting the subparagraph as follows: “Be influenced by any past or present financial, business, professional or personal relationship”.

- With regard to subparagraph (e), the Working Group may wish to consider deleting the word “significant”, as it is the fact that the position was used to advance financial or personal interest that is problematic rather than the extent or level of the interest sought. The commentary could, however, provide examples whereby insignificant gains in interest without any intent to use his or her position as an Adjudicator would not result in breach of the obligations of independence and impartiality.
- The Working Group may wish to consider whether paragraph (f) should be placed in article 5 relating to the duty of diligence.
- The Working Group may wish to consider the use of the term “duty” or “duties” throughout the Code. Whereas those terms in subparagraph (f) refer to the functions to be carried out by an Adjudicator, in other articles (for example, in article 5), it could imply that non-compliance with such “duties” are grounds for challenge.

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. 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

- With regard to the phrase “unless otherwise agreed by the parties” in paragraph 1, the Working Group may wish to consider the extent to which the disputing parties may exclude the application of this Code. A related question would be whether the same phrase should be replicated in paragraph 2 and in other articles.
- If the disputing parties are free to agree otherwise, one approach could be to revise article 2(1) as follows: “This 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 this Code or derogate from or vary the effect of its provisions”. The Commentary may further explain that such party autonomy is restricted with regard to certain provisions of the Code (for example, article 3) and may be further restricted if the instrument upon which consent to adjudicate is based provides otherwise (for example, if the conduct is regulated in a Treaty). The Working Group may further wish to consider how the above-mentioned clause would interact with article 10(8).
- The Working Group may wish to consider whether the disputing parties would be able to exclude the application of the Code in the context of a standing mechanism.
- If the Working Group were to decide to limit double-hatting for a certain period after the IID proceeding, it would be necessary to clarify the meaning of the phrase “conclusion of the IID proceeding” as it would differ depending on the circumstances of the case.
- Article 4 would also be an instance (similar to the obligation of confidentiality) where the obligation extends beyond the term of the adjudicator. Accordingly, the Working Group may wish to provide guidance on how to enforce any remedy on an individual who is no longer an “adjudicator” within the meaning of the Code. In practice, this would mean that the Code would not only apply to Candidates or Adjudicators but also apply to legal representatives or expert witnesses that had functioned as an Adjudicator prior to such functions.
- While a suggestion had been made to include the term “a Judge” before the words “a legal representative” in paragraph 1, article 4 aims to regulate the practice of double-hatting, where one individual functions both an advocacy role and an adjudicatory role. Therefore, the article would not prevent an arbitrator from taking another case as an adjudicator. Instead, whether an arbitrator can act concurrently as a Judge and vice versa would be regulated by the terms of office of the Judge. The Working Group may wish to confirm this understanding or consider whether the Code should have a provision preventing Judges from acting as an arbitrator.
- 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). The Working Group may wish to confirm that the reference to “same treaty” is intended to limit double-hatting in the context of treaty-based IIDs and not based on other “instrument upon which consent to adjudicate is based”. If not, the Working Group may wish to consider using the same terminology.
- The Working Group may wish to consider whether to retain the three-year limitation period in paragraphs 1 and 2, and if/how the commentary should explain that this temporal limitation relates to the obligation of independence and impartiality under article 3.
- The Working Group may wish to consider providing further guidance as to the meaning/scope of the term “same” that is repeatedly used throughout

paragraph 1 (a) to (c), as the identification factors 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; and

[(d) Refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner].

[*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

- Considering that a breach of articles 5 and 6 in itself would not constitute grounds for challenge (unless stipulated in the applicable rules or treaty), the Working Group may wish to avoid using the term "duty" or "duties", which might be interpreted as creating a basis for challenge.
- The Working Group may wish to further confirm that breach of the obligation in article 5 and 6 could nonetheless be presented as evidence that the duty of independence and impartiality had been breached.
- The Working Group may wish to consider whether subparagraph (d) is necessary as it would already be covered by subparagraph (a) and the commentary would explain that under subparagraph (a), an arbitrator shall refuse such concurrent obligations. If this approach were to be taken, the Working Group may wish to consider aligning the paragraphs 1 and 2, considering that arbitrators and Judges equally have a duty to perform their functions diligently.
- The Working Group may wish to consider whether the same rules on diligence should apply to both judges and arbitrators, as such obligations of judges would usually be found under their terms of office.

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 his or her duties.

[*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

- The Working Group may wish to confirm whether the proposed heading of article 6 is appropriate.
- The Working Group may wish to consider whether subparagraph (b) can be covered in subparagraph (a) (with the additional wording) or subparagraph (c). If not, some guidance on the meaning of treating all participants with "civility" would be preferred.
- 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 to make a self-judgement on his or her competence and skills, and the necessary competence and skills of a Judge candidate would be assessed in the selection phase. An alternative approach would be to include a general provision as found in article 11(2).

Article 7 – Ex parte communication

[*Paragraphs applicable to Arbitrators and Arbitrator candidates*]

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 Adjudicator, 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 Adjudicator can reasonably anticipate will arise in the IID proceeding.

[*Paragraph applicable to Judges and Judge candidates*]

3. Ex parte communication is prohibited.

Note to the Working Group

- Article 7 has been revised to clarify the default rule and the exceptions regarding ex parte communication, a definition of which is now provided in article 1. While the previous version 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), such wording might not be necessary considering the definition of the term "Candidate" and "Arbitrator". The deletion of that phrase would avoid needing to make a reference to the "conclusion" of the IID proceeding.
- 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.
- The Working Group may wish to consider whether subparagraph (b) falls under the definition of "ex parte communication" as the disputing parties would have to be aware of the fact in order to agree. The same applies to the

phrase (permitted by the disputing parties) in subparagraph (c), unless it is foreseen that the disputing parties can allow ex parte communication upfront.

- The Working Group may wish to consider whether to retain paragraph 2 in the Code, which could alternatively be addressed in the commentary.

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:

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

(b) unless 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 a decision 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

- Paragraph 1 has been revised to provide a clearer rule on the exceptions. The words “except for the purposes of the proceeding” have been deleted as the article does not intend to regulate such disclosure, which are allowed inherently. The commentary could further elaborate on this point. It should be noted that if that phrase is retained, it would also need to be replicated in the other paragraphs as an exception.
- The Working Group may wish to consider the extent to which the information being “publicly available” would form an exception to the non-disclosure obligation in paragraph 1. It is suggested that only when such 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 someone else), this would not fall under the circumstance in paragraph (a), where the adjudicator would no longer have to abide by the non-disclosure obligation.
- The Working Group may wish to confirm whether the exception “unless permitted under the applicable rules or treaty or by agreement of the disputing parties” which is currently found in paragraph 1(b) is adequate. The Working Group may wish to consider whether the reference to “applicable rules or treaty” should be broadened to “instruments upon which consent to adjudicate is based” as found in article 2(2) (see also articles 7 and 9 where the same term is used).
- The Working Group may wish to consider whether the exception in paragraph 1(b) should also apply to paragraphs 2 to 4. If so, a possible formulation

would be to combine those words into paragraph 6, which provides a general exception to the non-disclosure obligation.

- The Working Group may wish to delete the words "or any view expressed during deliberation" in paragraph 2 as such views form part of the "contents" of the deliberations.
- Paragraphs 3 and 4 have been revised taking into account 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. Therefore, the words "which he or she participated " or "prior to rendering it nor any decision he or she has rendered" have been deleted.
- The Working Group may wish to confirm that the obligation in paragraph 3 to not comment on a decision would not need to be qualified with the words "prior to the conclusion of the IID proceeding". The Working Group may also wish to consider whether the obligation would differ depending on whether the decision is publicly available or not. If the words "unless a decision is publicly available" are retained, the formulation in paragraph 1(a) should be used.
- Paragraph 5 has been revised to not refer to the "conclusion" of the proceedings, which was unclear. The Working Group may wish to delete the words in square brackets "and continue to apply indefinitely" as they are 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. This could be possibly explained in the commentary, particularly in relation to article 2.

Article 9 – Fees and expenses

[*Provision applicable to Arbitrators and Arbitrator Candidates*]

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 the presiding Arbitrator.

2. [Unless otherwise regulated by the applicable rules or treaty,] 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

- Article 9 has been restructured to set out the process of determining the fees and expenses in the order they usually occur. The Working Group may wish to confirm that the order of the paragraphs is adequate. The article is only applicable to Arbitrators and Arbitrator Candidates and do not apply to Judges.
- The Working Group may wish to consider whether the reference to "applicable rules or treaty" should be broadened to "instruments upon which

consent to adjudicate is based" as found in article 2(2). (see relevant discussion with regard to article 8)

- The Working Group may wish to confirm that paragraph 2 is aspirational in nature – 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. The commentary would explain that such discussions could take place immediately upon the constitution, for example, at the first procedural meeting. The Working Group may therefore wish to consider whether the bracketed language "or immediately upon" could be deleted and instead be explained in the commentary.
- With regard to paragraph 4, the Working Group may wish to confirm that the responsibility to keep an accurate record of time and expenses spent by any Assistant lies with the Assistant, while the Arbitrator should put in measures to ensure that an Assistant does so.
- The Working Group may wish to consider whether the fees and expenses of arbitrators shall be reasonable in amount, and whether this should be addressed in the commentary or the Code itself. The issue of reasonableness of fees is usually addressed in the applicable arbitration rules, as for instance 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

[*Paragraphs applicable to Arbitrators and Arbitrator 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.

2. The following information shall be included in the disclosure made in accordance with paragraph 1:

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

(i) Any disputing party or other entities 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 other 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 other entities 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 his or her disclosure in the form of Annex 1 prior to or upon appointment to the disputing parties, other Adjudicators in the IID proceeding, any administering institution and 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

- The Working Group may wish to address the concern expressed about paragraph 1 as containing two different sets of standards ("likely to give rise to justifiable doubts" and "likely to give rise to justifiable doubts in the eyes of the disputing parties"), which could make it difficult for an Arbitrator or Arbitrator Candidate to understand the extent to which disclosure should be made. It was mentioned that the standard for disclosure would need to be considered in light of the consequence for non-compliance as well as in conjunction with other standards (for example, for challenges). The Working Group may wish to consider a situation where the Arbitrator did not disclose a circumstance with the belief that a reasonable third party would not question his or her independence or impartiality based on that circumstance, but one of the disputing parties consider it as raising doubts. The Working Group may wish to consider whether such a situation could lead to the breach of other articles in the Code (for example, article 3) or to disqualification, even if the same standard were not found in the applicable rule.
- The Working Group may wish to confirm that subparagraphs (a)(i) and (b)(iii) can refer to "other" entities and not "related" entities as such entities would in any case need to be identified by the disputing parties and their "relevance" is not essential in nature. In that case, the commentary would explain that not any entity could be identified by a disputing party, but only those that bear relevance in the IID in accordance with paragraph 1. This would protect the disclosure obligation under article 2(a)(i) to be used as a possible dilatory tactic by a disputing party.
- The Working Group may wish to consider whether the formulation in subparagraph (a)(iv) is appropriate also in relation to the phrase in subparagraph (a)(i) "other entities identified by a disputing party".
- The Working Group may wish to delete the words in square brackets in 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 referenc, 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 note that paragraph 4 was moved and placed closer to paragraph 3, as both deal with the manner in which an Arbitrators/Candidate should make the disclosure in accordance with paragraphs 1 and 2.

- The Working Group may wish to note that the words “Upon appointment or confirmation” at the beginning of paragraph 1 was deleted as the term “Adjudicator” already incorporates that notion.
- Paragraph 7 intends to clarify that non-compliance with the disclosure requirements in article 10 does not amount to a breach of other provisions in the Code, mainly the obligation of independence and impartiality. The Working Group may wish to determine the formulation to be used, including whether to refer to specific articles of the Code.
- Article 10 has been revised to apply only Arbitrators and Arbitrator Candidates. The Working Group may wish to consider the extent to which the paragraphs therein would apply to Judge and Judge Candidates, recognizing that to whom the disclosure is to be made (for example, to the president of the standing mechanism) and at which point (prior to confirmation or assignment of a case) would likely differ.

Article 11 – Compliance with the Code of Conduct

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 sanctions and remedies, 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 this Code.

Note to the Working Group

- The Working Group may wish to consider whether paragraph 1 is indeed necessary as it is a general statement that they shall comply with the Code.
- Paragraph 2 was added to highlight the possible consequence of non-compliance or the likeliness of non-compliance and how Candidates and Adjudicators should act in such case. However, paragraph 2 is a voluntary obligation to be complied with by Candidates and Adjudicators and it would be difficult to enforce otherwise.
- The Working Group may wish to consider whether paragraph 3 captures the understanding of the Working Group that any challenges to the Adjudicator or any remedy provided for in the applicable rules or treaty would continue to apply to the Adjudicators, including the standards therein. This would mean that non-compliance with the article of the Code would not form the basis of such challenges or remedies, unless provided for in the applicable rules or treaty.
- The Working Group may wish to consider whether paragraph 4 is appropriate considering that the Code does not contain specific provisions applicable to Assistants. In addition, the Working Group may wish to consider what would be the consequences of non-compliance with paragraph 4.