

**April 19, 2021**

# **Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two**

**VERSION 2 DRAFT**

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

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

**Version 2**

**Introduction**

1. Version 2 of the draft Code reflects comments and discussions to date. Version 1 (referred to as the “former version” in the explanation) is contained in document A/CN.9/WG.III/WP.201 and is on the UNCITRAL and ICSID websites.
2. Version 2 re-orders the provisions so that the Article on disclosure (now Article 10) follows the substantive requirements of the Code (Articles 3-9). It also streamlines the wording of the Code.
3. The proposed revised text is in the colored boxes. The explanation below each section addresses the changes proposed and suggests that a Commentary on the Code could be prepared to cover specific questions, as indicated in the explanation.
4. A paper addressing possible methods of implementation is under preparation and will be issued separately.

## DRAFT TEXT

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

#### Article 1 Definitions

For the purposes of this Code:

1. “Adjudicator” means Arbitrator and Judge;
2. “Arbitrator” means a member of an *ad hoc* tribunal or panel, or member of an ICSID *ad hoc* Committee who is appointed to resolve an “International Investment Dispute” (IID);
3. “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, as agreed with the parties;
4. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for selection as a Judge, but who has not yet been confirmed in such role;
5. “International Investment Dispute” (IID) means a dispute arising pursuant to the investment promotion and protection provisions in an international treaty;
6. “Judge” means a judge appointed to a standing mechanism for IID settlement.

#### *Explanation of Changes:*

5. Article 1(1) refers to Adjudicator as a generic term covering both Arbitrators and Judges.
6. Article 1(2) refers to arbitrators. It also includes a reference to “member of an ICSID *ad hoc* Committee” to identify this role precisely. It does not include counsel, witnesses, or other participants in the process.
7. Article 1(2) also does not include conciliators, factfinders or mediators. A matter for consideration is whether these roles ought to be included in this Code or whether the mandate and role of conciliators, factfinders or mediators is sufficiently different from Adjudicators, that they ought not be included in this Code.
8. Article 1(3) defines “Assistant”.

9. Article 1(3) could be accompanied by Commentary noting that “Assistant” does not include the staff of arbitral institutions or of standing mechanisms as these persons are employed by the institution/court seized of the dispute. Such staff do not work under the direction or control of the Adjudicator in the same manner as an Assistant and they are governed by institution or court-specific ethical and contractual obligations.
10. The Commentary could also note that the Adjudicator should discuss the name, CV, tasks, hearing attendance, and fees and expenses of the Assistant with the parties at the start of a proceeding.
11. “Candidate” covers a person not yet appointed as an Arbitrator and a person proposed but not yet confirmed as a Judge of a standing mechanism. The application of the Code to “Candidates” is addressed in Article 2(3).
12. “ISDS” has been replaced by “International Investment Dispute” (“IID”) because the Code may apply in both State-State and Investor-State disputes arising from international investment treaties.
13. This definition of IID would exclude coverage of contractual and foreign investment law cases arising under international investment dispute provisions and avoids the need to address sub-national entities (as in the former version). This could also be clarified in the Commentary. If delegates decide that IID for investment contracts and foreign investment law should be included, additional language would be required addressing the source of the disputes (contract or domestic law) and the potential parties (foreign investor and REIO/State or sub-national entities).
14. Article 1(6) defines “Judge” as a Judge appointed to a standing mechanism for IID. It assists in clarifying those obligations applicable to Adjudicators as well as those obligations applying differently to Arbitrators and Judges or inapplicable to Judges.

**Article 2**  
**Application of the Code**

1. Articles 3 to 5, 6(1), 7(3) and 8 to 11 of this Code apply to Adjudicators in IID proceedings.
2. Adjudicators shall take reasonable steps to ensure that their Assistants are aware of, and comply with, the Code.
3. Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates from the date they are first contacted concerning a possible appointment.
4. Articles 7(3) and 8 of this Code continue to apply to Adjudicators after the conclusion of the IID proceeding.

5. [This Code shall not apply if the treaty upon which consent to adjudicate is based contains a Code of Conduct for proceedings initiated pursuant to that treaty.]

*Explanation of Changes:*

15. Article 2 simplifies the “Application” section of the Code and expressly states which provisions apply to Arbitrators and to Judges for the period during which they play such role. In addition, it provides that the obligations in Articles 7(3) and 8 survive the end of the proceeding and apply to former Adjudicators indefinitely.
16. Article 2(2) now refers to “reasonable” steps (in replacement of the term “appropriate” steps in the former version). The Assistant does not have direct obligations under the Code; rather, the Adjudicator must take reasonable steps to ensure that the Assistant knows of, and complies with, the Code. Theoretically, an Adjudicator could be challenged for failure to take such reasonable steps. However, in practical terms, parties would likely ask for the Assistant to be removed if they had concerns.
17. Article 2(3) addresses application of the Code to Candidates. It provides that the obligations start from the moment the individual is first contacted for a possible appointment, and end once the individual is no longer a “Candidate”, save for the obligations in Articles 7(3) and 8 which survive the termination of the proceeding.
18. Article 2(4) applies to former Adjudicators.
19. A Commentary could note that Judges may also be subject to post-employment obligations specified by their contract or terms of appointment.
20. Article 2(5) addresses the interplay of this Code with any treaty-specific Code of Conduct and provides that the latter would be applicable in preference to this Code. It is bracketed for further consideration, including considerations arising from the implementation method ultimately adopted for the Code.

**Article 3**  
**Independence and Impartiality**

1. Adjudicators shall be independent and impartial, and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias;
2. In particular, Adjudicators shall not:
  - (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor;

- (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding;
- (c) take instruction from any organization, government or individual regarding the matters addressed in the IID;
- (d) allow any past or existing financial, business, professional or personal relationship to influence their conduct or judgement;
- (e) use their position to advance any personal or private interest; or
- (f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties.

*Explanation of Changes:*

21. The former version of Article 3, which generally listed the duties and responsibilities in the Code, has been deleted as it caused confusion.
22. Article 3 now sets out the fundamental obligation of independence and impartiality, with the related obligations to take reasonable steps to avoid bias, conflict of interest, impropriety, and the appearance of bias.
23. Article 3(2) expands on Article 3(1) by giving examples and is not exhaustive (“in particular”). It includes suggestions received concerning provisions on loyalty to participants in the process. It does not include language such as “directly or indirectly” as this was considered confusing and not necessary.
24. A Commentary could give examples of conduct falling within Article 3(1), for example, where:
  - (i) the Adjudicator is a legal representative or employee of a party to the proceeding;
  - (ii) the Adjudicator or a member of their family is employed by or has equity in a juridical entity that is a party to the proceeding;
  - (iii) an Adjudicator is instructed by a party during the proceeding.
25. Any examples should be caveated with the fact that a determination of whether there is a breach of the Code is highly fact dependent.

**Article 4**  
**Limit on Multiple Roles**

Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].

*Explanation of Changes:*

26. Article 4 reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties. Disclosure pursuant to Article 10 aims to ensure that such consent is given on an informed basis.
27. Article 4 is also limited to situations of concurrent multiple roles and does not include a prohibition or limitation for a period before or after being an Adjudicator (as in the former version).
28. It is very likely that Judges would not be permitted to play multiple roles concurrently under the terms of their appointment, so the reference to Judges would require further consideration.
29. Article 4 addresses overlapping roles as counsel/expert witness on the one hand, and decision-maker on the other hand. This appears to be the overlap that most likely creates conflict, and which is of greatest concern in terms of the legitimacy of IID settlement.
30. Article 4 without the bracketed text reflects a full prohibition on concurrently acting as counsel/expert witness and Adjudicator. Some comments urged a full prohibition due to concern that anything less would adversely affect the legitimacy of IID settlement.
31. Other comments suggested that Article 4 should be tailored to those situations most likely to cause conflict, given the adverse impact of a full prohibition on new entrants in the field and on party freedom of appointment. The bracketed text in Article 4 proposes a possible tailored provision that would prohibit concurrently acting as counsel/expert witness and Adjudicator where the cases involve “the same factual background” and “at least one of the same parties or their subsidiary, affiliate or parent entity”. If the more tailored provision is selected, the Commentary could give examples of when concurrent cases would be considered to address the same factual context or the same party.

**Article 5**  
**Duty of Diligence**

1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the

administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner.

2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.

*Explanation of Changes:*

32. Article 5(1) reflects the duty to be available for the proceeding. It applies to Adjudicators and complements requirements to act diligently and expeditiously in certain arbitral rules or the likely terms of appointment of Judges.
33. The former version suggested specific limitations on the number of cases that Adjudicators could concurrently handle. This has been deleted in light of comments noting that the number of cases an Adjudicator can reasonably address depends on many variable factors, including the stage of the case, its complexity, and the role of the Adjudicator (Presiding or wing).

**Article 6  
Other Duties**

1. Adjudicators shall:
  - (a) display high standards of integrity, fairness, and competence;
  - (b) make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties; and
  - (c) treat all participants in the proceeding with civility.
2. Candidates should decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfill their duties.

*Explanation of Changes:*

34. Article 6(1) incorporates necessary attributes of Adjudicators, as provided for in the former version of the Code.

**Article 7  
Communications with a Party**

1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and

availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.

2. [The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate.]
3. An Adjudicator shall not have any *ex parte* contacts with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

*Explanation of Changes:*

35. Article 7(1) addresses *ex parte* contacts in the pre-appointment stage. It accommodates the practice of pre-appointment interviews, but limits their scope to the expertise, experience, availability, and absence of conflict of the Candidate.
36. Article 7(1) would apply to Judges in the selection process stage, and likely would be supplemented by rules governing selection to a standing mechanism. A Commentary could confirm that Article 7(1) and (2) would not apply once the Judge is named to the standing body and is no longer a Candidate.
37. Article 7(2) is bracketed, reflecting different views in comments received. Some suggested that Article 7(2) was unnecessary and could be onerous if there were multiple contacts. Others suggested that a provision such as Article 7(2) could easily be complied with by a recording or transcript and was a useful guarantee of compliance with Article 7(1).
38. Article 7(3) prohibits *ex parte* communications concerning the proceeding other than as contemplated by the applicable rules or treaty. It necessarily applies during the proceeding but also survives the proceeding.
39. The Commentary to Article 7(3) could specifically state that Arbitrators (but likely not Judges) may communicate *ex parte* with the party that appointed them for the sole purpose of selection of a presiding Arbitrator by the co-Arbitrators, if such a selection method is offered by the relevant rules or treaty or where the parties consent to such a method.

**Article 8**  
**Confidentiality**

1. Candidates and Adjudicators shall not:
  - (a) disclose or use any non-public information concerning, or acquired in connection with, a proceeding except for the purposes of that proceeding;

(b) disclose or use any information concerning, or acquired in connection with, a proceeding to gain personal advantage, advantage for others, or to adversely affect the interests of others.

2. Adjudicators shall not:

(a) disclose the contents of deliberations or any view expressed by an Adjudicator during the deliberation;

(b) disclose any decision, ruling or award to the parties prior to delivering it to them, unless the applicable rules or treaty so permits;

(c) publicly disclose any decision, ruling or award in which they participated, except in accordance with the applicable rules or treaty.

3. The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.

*Explanation of Changes:*

40. Article 8(1) imposes a general duty not to use information obtained in respect of a proceeding except for the purposes of that proceeding. This obligation applies to Candidates and Adjudicators, and it applies indefinitely, including after the proceeding has concluded or a person ceases to be a Candidate or Adjudicator (see Article 8(3)).

41. Article 8(2) applies only to Adjudicators as it relates to information a Candidate would not acquire. It applies indefinitely according to Article 8(3).

42. Article 8(2)(b) would allow Adjudicators to circulate a draft ruling for comment to the parties if permitted by the relevant rules or treaty, or with party consent. This could specifically be noted in a Commentary.

43. Article 8(2)(c) underlines that Adjudicators must not disclose a decision, ruling or award unless it is in the public domain in accordance with the relevant rules on publication of such materials. This would prohibit verbal or written comment on such rulings until they are in the public domain.

44. Article 8(3) notes that the obligations in Article 8(1) and 8(2) are not extinguished by the end of the proceeding and continue to apply indefinitely. Potentially, a party could advise a relevant Bar or professional association of the breach of the confidentiality provisions after the conclusion of the proceeding.

**Article 9  
Fees and Expenses**

1. Unless otherwise regulated by the applicable rules, any discussion concerning fees shall be concluded before constitution of the adjudicatory body.
2. Any discussion concerning fees shall be communicated to the parties through the entity administering the proceeding, or by the presiding Arbitrator if there is no administering institution.
3. Adjudicators remunerated on a non-salaried basis shall keep an accurate and documented record of their time devoted to the procedure and of their expenses, as well as the time and expenses of any assistant.

*Explanation of Changes:*

45. Article 9 applies to Adjudicators. To the extent that Judges are salaried, there would be no discussion concerning fees, and hence the provision could be inapplicable or apply only to expenses.
46. The entity administering the proceeding referred to in Article 9(2) could be an arbitral institution or the administrative arm of a standing mechanism.

**Article 10  
Disclosure Obligations**

1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.
2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:
  - (a) Any financial, business, professional, or personal relationship within [the past five years] with:
    - (i) the parties, and any subsidiary, affiliate or parent entity identified by the parties;
    - (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;

(iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and

(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;

(b) Any financial or personal interest in:

(i) the proceeding or its outcome; and

(ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and

(c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.

3. Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.
4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information.
5. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not establish a breach of this Code.

*Explanation of Changes:*

47. Article 10 covers the disclosure obligations under the Code. It applies to Adjudicators. While Judges may have few disclosures to make due to the standing nature of the mechanism and any relevant pre-selection process, it is possible that they would make a disclosure in connection with a specific case.
48. Article 10 plays a central role as the disclosure obligations would ensure compliance with the Code and transparency of the process.
49. Article 10(1) requires disclosure of matters that may give rise to doubts “in the eyes of the parties”; it is complemented by Article 10(5) which notes that the mere fact of disclosure does not establish a breach of the Code.

50. Article 10(2)(a) addresses disclosures and information related to potential conflict arising from the relationships of the Adjudicator with others involved in the IID.
51. Article 10(2)(b) addresses disclosures and information related to the individual Adjudicator. The Commentary could note, for avoidance of doubt, that the Adjudicator’s remuneration for work performed and reimbursement of expenses incurred in connection with the IID proceeding is not considered a financial interest for the purposes of Article 10.
52. Article 10(3) stipulates Annex 1 as the form for disclosure. Annex 1 is a simplified disclosure form. It need not be mandatory so long as the relevant information is conveyed. The administering institution referred to in Article 10(3) could be an arbitral institution or the administrative arm of a standing mechanism.
53. Article 10(4) provides a continuing obligation of disclosure.
54. The Code requires disclosure of information concerning prior and concurrent appointments in Article 10(2)(a) and 10(2)(c). It does not prohibit repeat appointment of Adjudicators. Repeat appointment would therefore remain permissible unless it rises to the level of a lack of independence or impartiality under Article 3 of the Code. The Commentary could suggest when a lack of independence or impartiality arising from repeat appointment might be presumed, for example if an Adjudicator is appointed by the same legal representative in more than [x] cases in the past [x] years. Any such limit is necessarily arbitrary, and comments received addressing this point suggested a high limit was appropriate. Most comments did not suggest a cap on the number of repeat appointments.

**Article 11**  
**Enforcement of the Code of Conduct**

1. 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]

*Explanation of Changes:*

55. A question for consideration is whether the obligations in Articles 6, 9 and 10 should be subject to challenge and removal provisions under Article 11(2). As drafted, Article 11(2) proposes that the removal provisions do not apply to Articles 9 and 10. The purpose of this is to avoid numerous or strategic challenges based on requirements that are not strictly related to ethics. For example, the failure to document fees properly in Article 9 is an administrative requirement but should not be a ground for a challenge.

56. Regarding disclosure (Article 10), cases to date hold that a failure to disclose is not proof of a conflict of interest, especially if the failure is in good faith or unintentional. As a result, Article 11(2) proposes that failure to disclose not be an independent ground of challenge. Certainly, a failure to disclose could be factually relevant to establishing a breach of Articles 3 to 8, but it is not in and of itself a ground for disqualification.
57. A question to consider is whether Article 6 creates duties that are subject to challenge. As drafted, they would be subject to challenge.
58. Article 11(3) remains bracketed for further consideration of possible sanctions. Institutions may have administrative means of addressing breach of obligations under the Code, 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.

**Annex 1**

**Declaration, Disclosures and Background Information**

|                                      |  |
|--------------------------------------|--|
| <b>IID Proceeding:</b>               |  |
| <b>Adjudicator Name:</b>             |  |
| <b>Adjudicator nationality(ies):</b> |  |

1. I acknowledge having received a copy of the Code of Conduct (attached) for this proceeding. I have read and understood this Code of Conduct.
2. To the best of my knowledge, there is no reason why I should not serve as Adjudicator/Judge in this proceeding. I am impartial and independent and have no impediment referred to in Articles 3 - 8 of the Code.
3. I understand that I have a continuing obligation to make further disclosures based on newly discovered information as soon as I become aware of such information in accordance with Article 10 of the Code.
4. I attach my current *curriculum vitae* to this declaration.
5. In accordance with Article 10 of the Code, I wish to make the following disclosures and/or provide the following information:
  - a. [INSERT AS RELEVANT] or
  - b. [STATE NO ADDITIONAL DISCLOSURE OR INFORMATION TO BE PROVIDED]

|               |  |
|---------------|--|
| <b>Signed</b> |  |
| <b>Date</b>   |  |

## About ICSID

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process.

## About UNCITRAL

The United Nations Commission on International Trade Law is the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernization and harmonization of rules on international business.