



United Nations
UNCITRAL



ICSID

**International Centre for
Settlement of Investment Disputes**
WORLD BANK GROUP

Draft Code of Conduct

Joint Webinar of UNCITRAL and ICSID Secretariats

March 3-4, 2021

Overview of Meeting

- Introduction and general issues
- Consideration of article-by-article proposals
 - Working from Powerpoint which reflects comments received to date
- Next steps

General Issues for Consideration

- Application of the Code to arbitration and court models
- Need to ensure ease of application to avoid unmeritorious challenges

Code for the Arbitration and Court Models

- There are areas where arbitration and court models might/might not require different Code provisions – e.g.:
 - Method for selecting and appointing adjudicators
 - Timing and method of disclosures in general selection process and/or for case-by-case assignment
 - Enforcement & sanctions for violation of Code

Ensuring Specificity and Ease of Application

- Stakeholders agreed with the general principles in the draft Code, but many wanted increased specificity to ensure ease of application and to avoid an increase in challenges
 - Application of a Code is highly fact-specific
 - But drafting needs to provide concrete rules that are clear to the reader and capable of being understood and complied with
 - Should know when a challenge is warranted or not

ARTICLE 1 – DEFINITIONS

Art 1(1) – Adjudicators

“Adjudicators” means arbitrators, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;

Art 1(1) – Adjudicators – Who is Covered?

SUGGESTED APPROACH:

- (1) The scope refers to “Adjudicators”, as defined (including arbitrators and judges) – It does not include mediators, conciliators, witnesses and counsel, as different considerations may apply to them
- (2) It focuses on resolution of ISDS disputes by tribunals and courts established for this purpose – It does not apply to domestic courts and specialized courts

Art 1(1) – Adjudicators – Qualifications

Points raised in the comments received :

- Whether the code should address:
 - qualifications, in particular, nationality, or is this best left to the instrument of consent (treaty; contract; law) and/or the applicable rules;
 - diversity of adjudicators/Judges

Art 1(2) – Assistants

“Assistants” means persons working under the direction and control of the adjudicators, who assist them with case-specific tasks, including research, review of documents, drafting and other relevant assignments as agreed in the proceeding;

Art 1(2) – The Extent to which the Code Apply to Assistants

Points raised in the comments received :

- Adjudicators must take “appropriate” steps to ensure assistants comply with obligations (Art. 2(1)) – could replace by “...*all reasonable steps*”

Art 1(2) – Assistants – Role in Proceedings

Points raised in the comments received :

- Whether assistants:
 - Should be limited to performing administrative and logistical tasks
 - Could draft documents, review evidence, etc., so long as adjudicators do not delegate their duties (see: Art 9(4))
- Whether these matters should be regulated by the Code or left for determination by adjudicators and parties or relevant instrument

Art 1(3) – Candidates

“Candidates” means persons who have been proposed or contacted for selection and potential appointment as adjudicator but have not yet been confirmed in this role;

Art 1(4) – Investor-State Dispute Settlement

“Investor-State dispute settlement” (ISDS) means a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute.

Art 1(4) – Investor-State Dispute Settlement

Points raised in the comments received :

- Whether the Code would apply to non-treaty based ISDS (*i.e.*, domestic investment law and investment contract cases)
- Whether this definition capture investment chapters in FTAs -
– Suggestion received to replace “investment treaty” by
“*...treaty with investment protection provisions*”
- Whether “constituent sub-division of the State or an agency of the State” is clear enough, and whether this includes autonomous institutions - Consistency with ILC Articles on State Responsibility (esp. Art 4-6, 8)

ARTICLE 2 – APPLICATION OF THE CODE

Article 2 – Application of the Code

1. This Code applies to all persons serving as adjudicators in ISDS proceedings. Adjudicators shall take appropriate steps to ensure that their assistants are aware of, and comply with, the relevant provisions of this Code.

2. Candidates must comply with the relevant provisions of the Code as soon as they are contacted in relation to a possible appointment.

Article 2 – Application of the Code

Points raised in the comments received

- Temporal Scope Issues:
 - Application to former adjudicators
 - Application “as soon as contacted in relation to possible appointment”
- Personal Scope Issues
 - Direct or indirect responsibility of assistants (experts / staff members)
 - “relevant provisions” – clarification of scope of provisions applicable to candidates / former adjudicators / assistants

Article 2 – Application of the Code

SUGGESTED APPROACH: Add provision(s) to Article 2

- Clarifying the application to former adjudicators
- Specifying the provisions applicable to candidates / former adjudicators / assistants

ARTICLE 3 – DUTIES AND RESPONSIBILITIES

Article 3 – Duties and Responsibilities

At all times, adjudicators shall:

(a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias;

(b) Display the highest standards of integrity, fairness and competence;

(c) Be available and act with diligence, civility and efficiency;

(d) Comply with any confidentiality and non-disclosure obligations.

Art 3 – Chapeau – “At all times...”

Points raised in the comments received :

- Whether the phrase “at all times” is necessary or accurate
 - E.g.: not expected to always be “available”, and some duties do not survive appointment
 - Suggestion to delete “at all times” and specify temporal application as needed in specific provisions

Art 3 – Relationship of Article 3 to Articles 4-10

- Art. 3 is an umbrella provision that is elaborated upon in Art. 4-10
- *Points raised in the comments received* :
 - Whether the relationship of Arts. 3-10 be stated more clearly
 - Whether it would it be helpful to set out the specific conduct that violates Art. 3-10
 - Some delegations suggested such information could be in a non-exhaustive list (like IBA) or in a Commentary

Art 3(a) – List of Obligations

Points raised in the comments received :

- Whether the obligations listed in Art. 3(a) are stand-alone obligations or simply a reference to Art 4 and following
 - Does each have separate content?
- Concern about ambiguity and overlap raised by some commentators
- Whether the absence of clear definition of these concepts might invite increased challenges to arbitrators
 - Could overlap be clarified in text, explained in a commentary, or otherwise addressed?

Art 3(a) – Independence and Impartiality

Points raised in the comments received :

- Whether the definitions of impartiality and independence should be included in Art. 3(a)
 - Case law uniformly defines independence as the absence of a business, financial, personal, employment or other relationship between the adjudicator and the parties, whereas impartiality refers to the absence of bias or predisposition toward a party

Art 3(a) – “Direct or Indirect” Conflict of Interest

Points raised in the comments received :

- Subjectivity of standards may create difficulty in identification for disclosure and compliance
 - e.g.: What is an “indirect” conflict of interest?
- How can an adjudicator identify “indirect” conflicts of interest for the purposes of disclosure
- Whether “indirect” conflict of interest should be subject to reasonable efforts to discover and disclose
 - How to address subjectivity in a reasonable and effective manner

Art 3(a) – Appearance of Bias

- Similar issue raised concerning an “appearance” of bias:
Whether the phrase “*appearance of impropriety or apprehension of bias*” would be preferable
- Whether it is necessary to elaborate from whose perspective the appearance/apprehension would be assessed. E.g.: – a reasonable third party apprised of the relevant circumstances

Art 3(b) – Integrity, Fairness and Competence

Points raised in the comments received :

- How are these measured:
 - Initially by appointing party in arbitration model and by selection process in Court Model
 - Standard should reflect a reasonable and objective assessment rather than a purely subjective one in the eyes of a party
- Whether a party could challenge for lack of integrity, fairness or competence and whether this should be subject to challenge or other sanction - If not, whether this should be in a separate article of attributes of adjudicators that are not subject to challenge

Art 3(c) – Be Available & Act with Diligence, Civility and Efficiency

Points raised in the comments received:

- Proposal to modify language, e.g., “*be available to perform their duties thoroughly, fairly, diligently and expeditiously*”
- Whether Court model would be different, e.g.: ICJ Art. 23(3) where Judges “*hold themselves permanently at the disposal of the Court*”

Art 3(d) – Comply with Confidentiality & Non-Disclosure Obligations

Points raised in the comments received :

- Proposals to add a requirement that Art. 3(d) state: “*any applicable confidentiality and non-disclosure obligations*”
 - NB Code Art. 9 which addresses confidentiality obligations of adjudicators

ARTICLE 4 – INDEPENDENCE AND IMPARTIALITY

Article 4 – Independence and Impartiality

1. Adjudicators shall be independent and impartial.

2. In particular, adjudicators shall not:

(a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party, or fear of criticism;

(b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;

(c) Take action that creates the impression that others are in a position to influence their conduct or judgement;

(d) Use their position to advance any personal or private interests; or

(e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties.

Art 4(1) – Independence & Impartiality

Points raised in the comments received:

- Is there a need to add text or commentary to elaborate on implications of independence & impartiality and give examples
 - e.g.: adjudicator should decline appointment if concerned as to their ability to be independent or impartial
 - e.g.: adjudicator should not take instructions from anyone outside the dispute, including a government or other organization
 - e.g.: should the Code add duty to be pro-active about independence and impartiality

Art 4(2) – In particular...

- *Points raised in the comments received*
- Whether examples in Art. 4(2)(a) – (e) are stand-alone duties or elaborate on independence and impartiality
- Whether the general duties are too broad or subjective - e.g.: are there difference between independence, impartiality, impropriety, bias, appearance of bias...?

Art 4(2)(a) – Potential Loyalties

Points raised in the comments received:

- Proposal to add “loyalty to a non-disputing party/non-disputing Treaty Party”, “loyalty to amicus curiae”
- Proposal to add “loyalty to a Party” in the context of Court Model

Art 4(2)(b) – Financial, Business and Other Relationships Affecting Adjudicator

Points raised in the comments received :

- Replace “ongoing” with “existing”
- Whether this should be revised to address foreseeable relationships/future relationships, not just past or existing relationships
 - If so, how can that be identified by adjudicator and disclosed, especially before it arises?
- Whether the language should be revised to make it more practical to apply

Art 4(2)(c) – Avoid impression that they can be influenced

Points raised in the comments received :

- Suggestion to replace “take action” with “act” – so as to ensure it covers commission and omission of relevant conduct
 - Whether the type of conduct that this would address is clear enough

Art 4(2)(e) – Directly or Indirectly Incur Obligation or Accept Benefit

Points raised in the comments received:

- Suggestion to replace “incur” with “assume”
- Clarification that “directly or indirectly” should apply to “accept a benefit” only
- Suggestion to apply this to past obligations and also to obligations or benefits incurred during the proceeding (“assume” encompasses this?)

ARTICLE 5 – CONFLICTS OF INTEREST: DISCLOSURE OBLIGATIONS

Article 5 – Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.

Art 5(1) – “... avoid any direct or indirect conflict of interest...”

Points raised in the comments received:

- Suggestion to revise the title to avoid confusion between conflict of interest and disclosure – “Disclosure Obligations”
- Suggestion to place Art. 5 on disclosure before or after the substantive standards (Arts 3-11) and make it clear that disclosure relates to all applicable standards

Art 5(1) – “... interest, relationship or matter that could reasonably be considered to affect their independence and impartiality”

Points raised in the comments received:

- The standard for disclosure should be clarified, in particular whether it is a subjective or an objective test
- Ensure extent of disclosure is reasonable so as to avoid unmeritorious challenges and lengthy declarations/questions and not deter good candidates

Art 5(1) – Disclosure Form and Procedure

Points raised in the comments received:

- Whether it should be clarified when, in what format and to whom should disclosure be made
- Whether Art. 5 should provide explicit process for disclosure or leave that to the applicable treaty or rules

Suggested Approach: Add disclosure form to Code and detail about the process in Art. 5

Art. 5(2) – Guidance on Disclosure

2. Disclosures made pursuant to paragraph (1) shall include the following:

(a) Any professional, business and other significant relationships, within the past [five] years with:

(i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];

(ii) The parties' counsel;

(iii) Any present or past adjudicators or experts in the proceeding;

(iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];

(b) Any direct or indirect financial interest in:

(i) The proceeding or in its outcome; and

(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

Art 5(2) – Guidance on Disclosure

Points raised in the comments received:

- Whether it is too exhaustive, and therefore hard to comply with
- Whether it will be reasonably uncover potential conflict
- Whether it will encourage challenges or deter good candidates
- Suggestion to adjust for Court Model where some of this information is disclosed during process of selection to Court and should not require further/repeat disclosure
 - Further disclosure for Judges should only be with respect to conflicts specific to an individual case

Art 5(2)(b) – Financial Interest in the Proceeding or a Related Proceeding

Points raised in the comments received:

- Whether there is a need to clarify that remuneration for work done as an adjudicator is not a financial interest in the proceeding and need not be disclosed
- Whether (ii) would be too broad: How can adjudicator reasonably identify whether another non-ISDS proceeding involves questions that may be decided in the ISDS proceeding

Art 5(2)(c) – Disclosure of Cases

Points raised in the comments received:

- Time frame and scope for disclosure of cases: May wish to limit – e.g.: ISDS cases which are pending or concluded in the last [10] years – avoids disclosure of likely irrelevant information and burden for those who have not maintained a record of past cases
- Other cases may need to be disclosed when they could reasonably be considered to affect independence or impartiality, e.g.: because the same party has appointed the adjudicator
- Whether (c) should require disclosure of all prior arbitration cases in which the adjudicator was appointed by the same parties or counsel

Art 5(2) and Repeat Appointments

Points raised in the comments received:

- The information in Art. 5(2)(a)-(c) will disclose whether an adjudicator has been appointed on a repeat basis, but the Code does not propose to prohibit repeat appointments per se
 - **See: ICSID Overview on Repeat Appointment for background to discussion**
- See IBA Guidelines on Conflicts of Interest (Orange List) for example:

When an adjudicator is appointed within the last three years

- twice or more by the same party or affiliate; or
- three or more times by the same counsel or law firm.

Art 5(2)(d) – Publications and Relevant Speeches

Points raised in the comments received :

- Concern that disclosure of publications and speeches is difficult (especially if published a long time ago) and will have a discourse-chilling impact
- On the other hand, parties always research past publications, so why not provide them pro-actively
- Debate as to extent to which an adjudicator should publish/discuss the issues they could be called upon to decide in a case – whether this creates reasonable apprehension of bias

Art 5(2) and Issue Conflict

Points raised in the comments received :

- Disclosure of cases and publications should provide any relevant information as to whether there might be an issue conflict
- No agreement on definition of issue conflict in case law or doctrine
 - **See: ICSID Overview on Issue Conflict for background to discussion**
- How should the Code address issue conflict?
 - Currently addressed under Arts 3, 4, 6

Art 5(3) – Continuous Duty of Disclosure

- (3) *Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.*

Art 5(3) –Timing of Disclosure

Points raised in the comments received :

- Duty of continuous disclosure should be accompanied by provision on timing (e.g.: “*disclosure upon appointment and as soon as possible thereafter for subsequently discovered information*”)

Art 5(4) – Err in Favor of Disclosure

- (4) *Candidates and adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.*

Art 5(4) – Err in Favor of Disclosure

Points raised in the comments received :

- Whether Art. 5 should specify that the mere fact of disclosure by an adjudicator does not create a presumption of the existence of a conflict
- Should “trivial” be better defined: Commentary could provide examples.
- Whether the Code should address the possibility of waiving a potential conflict of interest based on a disclosure
- Whether the consequence of a failure to disclose should be spelled out

ARTICLE 6 – LIMIT ON MULTIPLE ROLES

Article 6 – Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties and the same facts or] [the same treaty].

Article 6 – Definition

- No consensus on definition, but basic elements are that:
 - An adjudicator in an ISDS case
 - Is also counsel/witness/mediator in another ISDS case
 - Creating an actual or apprehended conflict of interest
- Has been addressed to date by considering whether, on the facts, there is a conflict of interest creating justifiable doubts as to (or a manifest lack of) impartiality and independence

SEE: ICSID Background Paper on Double Hatting

Context of Discussion of Multiple Roles

- Does not likely arise in the Court Model, where judging is a full-time occupation, but may require recusal for prior work as counsel and/or post-employment prohibitions for a certain time after leaving the Court
- Arises in the context of arbitration where adjudication is often not a full-time occupation
- Actual conflict is prohibited under Code (in Art. 3, 4, 7-11)
- Double hatting (Art. 6) addresses the special circumstance that a conflict may be perceived by virtue of an arbitrator simultaneously playing different roles in ISDS

Does Double Hatting...

- ... create an apprehension of bias that the adjudicator will (consciously or unconsciously) decide in a way that favors his other cases
- ... create a perception that brings ISDS into disrepute
- ... affect the availability of an individual adjudicator
- ... affect parties' freedom of appointment
- ... increase the availability of candidates with experience and expertise in ISDS
- ... allow newcomers and more diverse persons to transition to adjudicator roles and replenish the pool of candidates

Options Identified by Comments

- (1) Continue to address as currently: disclosure of multiple roles and factual determination of whether this creates a conflict
- (2) Prohibit all double hatting – eg: “ISDS arbitrator shall not also act as ISDS counsel during the arbitration”
- (3) Limit/regulate double hatting (as define) – could involve:
 - Disclosure of multiple roles
 - Allow with party consent after disclosure
 - Clearly define what is within the scope of the prohibition (definition)
 - Allow double hatting for new adjudicators (transition period)

Disclosure & Scope

Points raised in the comments received :

- Most comments support making relevant disclosures (Art. 5) and allowing parties to consent to double hatting if they want to, but on a case-by-case basis and after disclosure
- Also need to clearly define any prohibited overlap of multiple roles and to address concerns about the appearance of bias without being over- or under-inclusive
- Equally want to avoid an adverse effect on the pool of potentially available arbitrators, especially new arbitrators and gender and regionally diverse arbitrators

“An Adjudicator in an ISDS case shall not act as [ROLE] [WHEN] as they act in cases involving [NATURE OF OVERLAP]”

- **ROLE:**
 - adjudicator (ISDS; commercial; other international case),
 - counsel (in ISDS; Commercial)
 - witness (party-appointed; expert; tribunal-appointed),
 - mediator
- **WHEN:**
 - during/at same time,
 - period before - year(s) before appointment is made,
 - period after - year(s) after Award is issued
- **NATURE OF OVERLAP – CASES INVOLVING:**
 - Measures/Facts –the same government measures or the same facts
 - Parties - one or both of the same parties
 - Treaties –the same treaty
 - Obligations – the same obligation(s)

ARTICLE 7 – INTEGRITY, FAIRNESS AND COMPETENCE

Article 7 – Integrity, Fairness and Competence

- 1. Adjudicators shall have the highest standards of integrity and fairness. They shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.*
- 2. An adjudicator shall not engage in ex parte contacts concerning the proceeding.*
- 3. Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties. Candidates should only accept appointments for which they are competent.*
- 4. Adjudicators shall not delegate their decision-making function to any other person.*

Art 7(2)

Points raised in the comments received:

- Need to address acceptable *ex parte* communications: the pre-appointment contact to determine whether to select a person as adjudicator and the consultation on Presiding nominee where this is allotted to the wing adjudicators

SUGGESTED APPROACH: move to Art. 10 and specify that *ex parte* communications during the proceeding are prohibited, but for consultation on selection of presiding adjudicator

Art 7(3) - Competence

Points raised in the comments received :

- How is competence assessed:
 - Competence may be in the eye of the beholder....
 - Different for Court Model where competence is addressed in selection procedures and removal procedures
 - Whether the Code should include basic competence requirements such as investment law or public law, or is this better left to the treaty

ARTICLE 8 – AVAILABILITY, DILIGENCE, CIVILITY AND EFFICIENCY

Article 8 – Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.

2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]

3. Adjudicators shall be punctual in the exercise of their functions.

4. Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.

Art 8(2) – Cap on Cases

- Different views taken by commentators concerning a hard cap on the number of cases an adjudicator can participate in at any one time
- Most comments noted that capacity to adjudicate diligently depends on numerous factors including the adjudicator’s role (Presiding or wing); the complexity of the case; and the adjudicator’s experience and capability – would recommend deletion of Art. 8(2)
- In a Court model, this issue would likely be addressed by internal court management

Art 8(3) – Punctuality

Points raised in the comments received :

- Is this subsumed in Art. 8(1) and thus need not be repeated?
- Or should Art 8(3) focus on expedition and punctuality?

Art 8(4) – Duty of Collegiality

Points raised in the comments received :

- Unclear what acting in the best interests of parties means –
Whether this should be deleted

ARTICLE 9 – CONFIDENTIALITY

Article 9 – Confidentiality

Adjudicators shall not:

Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;

Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and

Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.

2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated].

Art 9 – Consistency with Disclosure Requirements

Points raised in the comments received:

- Whether Article 9 is inconsistent with Article 5:
 - If so, should Art. 5 note that it is subject to Art. 9 or is this evident

Art 9 – Exemption for Necessary Disclosures

Points raised in the comments received:

- Whether the duty of non-disclosure should be modified to exempt disclosures in certain circumstances
 - e.g.: court-ordered disclosure, party-agreed disclosure, disclosure to protect a legal right or disclosure required by applicable law
 - e.g.: “shall not...*disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding, save and to the extent that disclosure is required by a legal duty, to protect or pursue a legal right, or with consent of the parties*”;

Art 9 – Circulation of Draft Awards to the Parties

Points raised in the comments received:

- Whether the provision should be modified to allow for sharing a proposed decision or award, if envisaged in the applicable treaty or rules
- Whether this would be covered by an exemption for disclosure in accordance with applicable law

Art 9(2) – Post Award Arbitrator Comment

- Comments differed as to whether adjudicators should be permitted to comment on decisions/awards they were involved in after the decision has become public

ARTICLE 10 – PRE-APPOINTMENT INTERVIEW

Article 10 – Pre-appointment Interviews

1. Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.

2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]

Art 10(1) – Scope of Communications

- Numerous comments suggested Art. 10 should apply to pre-appointment “communications” rather than just a formal interview
 - **Suggested Approach:** Change title to “Pre-appointment Communications”
- Commentators suggested that expertise and experience of the adjudicator be included as an appropriate topic of pre-appointment communication
 - **Suggested Approach:** Include expertise and experience in first sentence
- How does adjudicator know what jurisdictional, procedural or substantive matters could potentially arise?
 - **Suggested Approach:** Could rephrase: “*matters that the adjudicator could reasonably anticipate would arise*”

Art 10(2) – Disclosure of Communications Upon Appointment

Points raised in the comments received

- Whether the contents of the pre-appointment communication should be disclosed upon appointment
 - Is a way to ensure compliance with Art. 10(1), but may be seen as overly burdensome on parties
 - If so, clarify this obligation relates to the content of the communication, not just the fact of communication

ARTICLE 11 – FEES AND EXPENSES

Article 11 – Fees and Expenses

1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding.

2. Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.

Art 11 – Fees and Expenses

Points raised in the comments received:

- Whether this should be a stand-alone provision or included in Art. 8 (diligence and efficiency)
- Whether this should be made subject to relevant arbitral rules governing fees
- Likely would not apply to Court Model where adjudicators are salaried, and their workload is assigned and monitored by the Court

ARTICLE 12 – ENFORCEMENT OF THE CODE OF CONDUCT

Article 12 – Enforcement of the Code of Conduct

- 1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.*
- 2. The disqualification and removal procedures in the applicable rules shall continue to apply.*
- 3. [Other options based on means of implementation of the code]*

Overlap Issues

Points raised in the comments received :

- How would the Code apply where the instrument of consent already contains an applicable Code?
 - Will depend in part on how the Code is adopted by States

Article 12 – Further Questions

Points raised in the comments received :

- Whether the obligations (Art. 3-11) are all subject to challenge
- What other options would be effective?

NEXT STEPS – FOR DISCUSSION

- April 19, 2021: Secretariats to send revised text of draft Code
- May 10, 2021: Follow-up Webinar to review revised text of draft Code