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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fifth session (New York, 27–31 March 2023)

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I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.[1] From its thirty-eighth to forty-fourth session, the Working Group considered concrete solutions for ISDS reform.[2]

2. At its fifty-fifth session in 2022, the Commission expressed its satisfaction with the progress made by the Working Group.[3] The Commission also heard an outline of the work to be conducted by the Working Group during the four weeks of session scheduled until the fifty-sixth session of the Commission in 2023. The Working Group was encouraged to submit to the Commission for its consideration a code of conduct with commentary and texts on alternative dispute resolution mechanisms.[4]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fifth session in New York from 27 to 31 March 2023.

4. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malawi, Malaysia, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Azerbaijan, Bahrain, Benin, Burkina Faso, Cambodia, Costa Rica, Egypt, El Salvador, Equatorial Guinea, Estonia, Gabon, Georgia, Grenada, Guatemala, Guinea, Haiti, Jamaica, Latvia, Lebanon, Lesotho, Lithuania, Luxembourg, Madagascar, Maldives, Myanmar, Netherlands, New Zealand, Norway, Pakistan, Paraguay, Philippines, Portugal, Romania, Sierra Leone, Slovakia, Sri Lanka, Sweden, and Uruguay.

6. The session was also attended by observers from the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: Economic Commission for Latin America and the Caribbean (ECLAC), International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: African Development Bank (AFDB), Asian-African Legal Consultative Organization (AALCO), Cooperation Council for the Arab States of the Gulf (GCC), Commonwealth Secretariat, Eurasian Economic Union/Eurasian Economic Commission (EEU/EEC), European Bank for

[1] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh session are set out in documents A/CN.9/930/Rev.1; A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

[2] The deliberations and decisions of the Working Group at its thirty-eighth to forty-fourth session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; A/CN.9/1124 and A/CN.9/1130.

[3] *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17* (A/77/17), para. 186.

[4] Ibid., para. 194.

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Reconstruction and Development (EBRD), Organisation internationale de la Francophonie (OIF), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Association of International Law (AAIL), All India Bar Association (AIBA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), Centre for International Governance Innovation (CIGI), Centre for International Law, National University of Singapore (CIL), Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order (PluriCourts), Centre of Excellence for International Courts (iCourts), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Hong Kong International Arbitration Centre (HKIAC), Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Max Planck Institute for Comparative Public Law and International Law (MPIL), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute), Third World Network (TWN), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

8. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

9. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.225), (b) draft provisions on mediation (A/CN.9/WG.III/WP.226), (c) draft guidelines on investment mediation (A/CN.9/WG.III/WP.227), (d) draft legislative guide on investment dispute prevention and mitigation (A/CN.9/WG.III/WP.228), (e) report of Working Group III on the work of its forty-fourth session (A/CN.9/1130, containing the proposed articles 3, 4 and 11 of the code of conduct for arbitrators), and (f) report of Working Group II on the work of its seventy-seventh session (A/CN.9/1129, containing in its annex a draft of an additional note on early dismissal and preliminary determination for inclusion in the UNCITRAL Notes on Organizing Arbitral Proceedings).

10. In addition, a compilation of best practices on investment dispute prevention and mitigation and the current version of the draft codes of conduct for arbitrators and for judges and their respective commentary were made available to the Working Group for reference purposes.

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Possible reform of investor-State dispute settlement (ISDS).

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5. Other business.

6. Adoption of the report.

12. As to the scheduling of the session, it was agreed that the discussions during the first three days would begin with the draft provisions on mediation followed by the draft guidelines on investment mediation and the draft legislative guide on investment dispute prevention and mitigation. It was further agreed that upon completion of those discussions, the note on early dismissal and preliminary determination would be reviewed, to be followed by the discussion on the draft codes of conduct for arbitrators and for judges.

13. The Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the French Government, the German Federal Ministry for Economic Cooperation and Development (BMZ), and the Swiss Agency for Development and Cooperation (SDC), aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group as well as securing translations for informal sessions, so as to ensure that the process would remain inclusive and fully transparent.

III. Draft provisions on mediation (A/CN.9/WG.III/WP.226)

A. General remarks

14. The Working Group recalled that at its forty-third session in September 2022, it undertook a first reading of the draft provisions on mediation based on document A/CN.9/WG.III/WP.217. Considering that mediation was still being underutilized to resolve investment disputes, the Working Group reiterated the need to provide for exhortation to encourage parties to conduct mediation where appropriate without creating an obligation. The benefits of mediation as an alternative or complement to arbitration and other forms of dispute resolution were recalled, mainly that mediation could save cost and time to resolve a dispute, preserve the relationship between the parties, and thereby retain the investment or potentially foster further investment.

15. The Working Group continued its consideration of the draft provisions on mediation as contained in document A/CN.9/WG.III/WP.226.

B. Draft provisions on mediation

1. Draft provision 1

16. Among the two options in draft provision 1, it was generally felt that option A was preferable as it reflected the voluntary, consensual and flexible nature of mediation. It was mentioned that option B, which mandated the commencement of mediation, could possibly delay the resolution of the dispute adding to costs. On the other hand, it was said that option B would provide the impetus for parties to try mediation, and that the time limits could limit delays. It was suggested that both options could be retained with option B for possible use by States that wished to require parties' engagement in mediation.

17. After discussion, the Working Group agreed that the text in option A would be the basis for its deliberations, while incorporating certain elements of option B. A number of drafting suggestions were made, including:

- To reorder paragraphs 1 and 2 so as to begin the provision with a definition of "mediation";
- To replace the word "shall" in paragraph 1 with the words "may" or "should" to highlight the voluntary nature of mediation and at the same time to encourage its use;

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- To separate paragraph 1 into two paragraphs, one signalling the availability of mediation and the other indicating that parties can agree to engage in mediation at any time;
- To refer to "disputing parties" or "parties in dispute" to clarify that it was not the States parties to the treaty;
- To extend the 30-day time frame in paragraph 3 (for example to 45, 60 or 90 days) so as to give the parties sufficient time to consider the invitation, including to consult with other relevant entities and address the possible inconsistency with the applicable mediation rules by stating that the longer period would prevail;
- To take into account that a party might suggest a different time period in its invitation and that the parties might agree to extend the time frame in paragraph 3 as well;
- To differentiate the time frames in paragraphs 3 and 4, with paragraph 4 providing for a longer period after which a party could elect to treat the non-response as a rejection of the invitation;
- To clarify that "a party" in paragraph 4 referred to the "inviting" party;
- To address the question of when mediation would be deemed to have commenced;
- To address the appointment of a mediator, along the lines of paragraph 4 of Option B, but with a longer time period;
- To address the situation where the parties were not able to agree on an institution or a person to assist in appointing a mediator;
- To require the mediator to convene a meeting within a short period of time after his or her appointment, along the lines of paragraph 5 of option B;
- To incorporate paragraph 6 of option B in draft provision 3 (see paras. 23 and 24 below);
- To mention the possibility of co-mediation in view of the complexities of handling investment disputes;
- To include a rule addressing any conflict among the draft provisions, the applicable mediation rules, and the law applicable to the mediation from which parties cannot derogate (including that parties would be permitted to vary the provisions of the applicable mediation rules unless prohibited by those rules).
- To refer to the applicable mediation rules to the extent that parties could derogate from those rules and with regard to any conflict with the law applicable to the mediation;
- To refer to the "Provisions" when referring to the draft provisions so as to distinguish them from provisions of applicable mediation rules; and
- To refer also to the "commencement" of mediation in the heading of draft provision 1.

18. After discussion, the Working Group agreed that draft provision 1 would be formulated along the following lines:

"Draft provision 1 (Availability and commencement of mediation)

1. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the "mediator") lacking the authority to impose a solution upon the parties to the dispute.

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2. The parties should consider mediation to settle an international investment dispute amicably.

3. The parties may agree to engage in mediation at any time, including after the commencement of any other dispute resolution proceeding.

4. A party may invite the other party in writing to engage in mediation in accordance with draft provision 2 (the "invitation").

5. The other party should make all reasonable efforts to accept or reject the invitation in writing within 30 days of the receipt. If the inviting party does not receive an acceptance within 60 days of the receipt, that party may elect to treat it as a rejection of the invitation.

6. The mediation shall be deemed to have commenced on the day on which the other party accepts the invitation.

7. The parties shall agree to conduct the mediation in accordance with these Provisions and:

(a) The UNCITRAL Mediation Rules;

(b) The ICSID Mediation Rules;

(c) The IBA Rules for Investor-State Mediation; or

(d) Any other rules.

8. Unless provided otherwise in the rules agreed by the parties pursuant to paragraph 7:

(a) The parties shall appoint a mediator within 30 days after the commencement of the mediation. If a mediator is not appointed within that period of time, the parties shall agree on an institution or a person that shall assist them in appointing a mediator; and

(b) The mediator shall convene a meeting with the parties within 15 days after the appointment and the parties are required to attend that meeting.

9. The parties may at any time agree to exclude or vary any of these Provisions.

10. Where any of these Provisions is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, including any applicable instrument or court order, that provision of law shall prevail."

2. Draft provision 2

19. It was stated that draft provision 2, which addressed the content of the invitation to engage in mediation, should not be prescriptive or unduly burdensome. It was further stated that the invitation should provide the other party with sufficient information to assess the invitation, including whether mediation would provide an opportunity to amicably resolve the dispute.

20. A number of drafting suggestions were made with regard to draft provision 2, including:

- To use more neutral language highlighting that investors and States alike could invite the other party to engage in mediation and not imply that it would always be the claimant investor that would invite the respondent State to engage in mediation;
- To require not only the factual basis but also the legal basis of the dispute (for example, the treaty, contract or other legal instrument to which the dispute relates), while another suggestion was to simply refer to the "basis" of the dispute;

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- To require that the description of the issues in dispute to be sufficient to identify the matter giving rise to the invitation;
- To require an indication of the relief or outcome being sought, while views were also expressed that such indication should be left to the discretion of the parties;
- To combine subparagraphs (a) and (c);
- To note that draft provision 2 would indicate the minimum requirements of an invitation (possibly, by adding the words "at least") and to further note that the inviting party would be free to include any additional information not listed in the draft provision and that the invited party would also be able to request for additional information to consider the invitation;
- To include at the beginning of the chapeau "unless the applicable mediation rules already agreed provide otherwise" or "absent the designation of mediation rules in advance";
- To require the invitation to be in the official language of the State party or other agreed language, and to propose the language of the mediation.
- To not make any reference to the applicable mediation rules considering that the draft provision would indicate the minimum requirements of an invitation and the parties might not have agreed on the mediation rules at that stage; and
- To refer to the "inviting" party in subparagraph (a) and to replace the word "submitted" with the words "invitation is made by".

21. After discussion, it was agreed that draft provision 2 would be formulated along the following lines:

"Draft provision 2 (Information required in an invitation)

The invitation to engage in mediation referred to in provision 1(4) shall contain at least the following information:

(a) The name and contact details of the inviting party and its legal representative(s) and, if the invitation is made by a legal person, the place of its incorporation;

(b) Government agencies and entities that have been involved in the matters giving rise to the invitation;

(c) A description of the basis of the dispute sufficient to identify the matters giving rise to the invitation; and

(d) A description of any prior steps taken to resolve the dispute, including information on any pending claim."

3. Draft provision 3

22. It was agreed that draft provision 3 should address how the parties' agreement to engage in mediation would impact other dispute resolution proceedings and avoid parallel proceedings. Questions were raised on how an automatic stay of the other proceedings as provided for in paragraph 1 could be operationalized.

23. Several drafting suggestions were made with regard to draft provision 3, including:

- Rather than providing for the automatic stay of the other proceedings, to oblige the parties to not initiate nor continue any other proceeding;
- To clarify the scope of "any other dispute resolution proceedings" including whether they included domestic court proceedings;
- To refer to other "ongoing" dispute resolution proceedings in paragraph 1 and also address the situation where the other proceeding had not yet been initiated;

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- To require the parties to "request" the suspension of the other proceeding, pursuant to the rules applicable to that proceeding, rather than "informing" the other forums, and without prescribing whether the request needed to be in writing;
- To include safeguards to ensure that parties in bad faith would not be able to misuse the draft provision to further delay the resolution of the dispute;
- To indicate that the other proceedings should be suspended for a period of time (see draft provision 1, option B, paragraph 6) and/or until the mediation is terminated;
- To list the circumstances when the mediation would be terminated.
- To refer to commencement of "the" mediation to indicate that the draft provision aimed to address a specific mediation proceeding and its relationship with another proceeding to resolve "the dispute", which gave rise to "the" mediation;
- To note that the rules applicable to the other dispute resolution proceedings might not provide for suspension;
- To refer to the commencement of mediation in the draft provision rather than to the parties' agreement to mediate considering that draft provision 1 provided a rule on the commencement; and
- To note that the parties could agree to not request suspension of the other dispute resolution proceeding, in other words, vary paragraph 2.

24. After discussion, it was agreed that draft provision 3 would be formulated along the following lines:

> "Draft provision 3 (Relationship with arbitration and other dispute resolution proceedings)
>
> 1. Upon the commencement of the mediation, a party shall not initiate or continue any other proceeding to resolve the dispute until the mediation is terminated.
>
> 2. If the mediation commences while another proceeding to resolve the dispute is in progress, the parties shall request the suspension of that proceeding pursuant to the rules applicable to that proceeding."

4. Draft provision 4

25. It was widely felt that draft provision 4 should strike a balance between confidentiality and transparency, while bearing in mind the desire to encourage the use of mediation.

26. It was suggested that paragraph 1 should include the possibility for the parties to agree otherwise and refer to the information being independently and "publicly available" or "available in the public domain". It was further suggested that even when disclosure was required by law, it should be limited to the extent necessary.

27. Views diverged on whether paragraphs 2 and 3 struck the appropriate balance between confidentiality and transparency. Support was expressed for paragraphs 2 and 3 as drafted. It was suggested that paragraphs 2 and 3 should further state that any information that was confidential, sensitive or protected should not be the subject of disclosure. On the other hand, concerns were expressed that paragraphs 2 and 3, which allowed a party to disclose certain aspects of mediation without any limitation, might discourage the parties from engaging in mediation. It was suggested that paragraphs 2 and 3 should be revised so that the disclosure therein would be possible only with the prior agreement of all parties or if required by domestic law. It was also suggested that paragraphs 2 and 3 be deleted, in view of paragraph 1 providing the general rule on confidentiality, yet with a possibility for the parties to agree otherwise.

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28. It was recalled that the Working Group had previously decided that it would not prepare a set of rules for the conduct of mediation in light of the existing rules. It was further noted that the existing rules that were referred to in draft provision 1 contained rules on transparency and confidentiality, and in addition, that the parties were also free to vary those provisions in achieving the appropriate balance. Considering the divergence in views and that different disputes might require the balance between transparency and confidentiality to be struck differently, the Working Group agreed that draft provision 4 would be deleted and that efforts would be made to reflect in the draft guidelines the importance of the appropriate balance being struck in selecting the rules for the conduct of the mediation.

5. Draft provision 5

29. Support was expressed for the inclusion of a "without prejudice" provision, even though existing mediation rules contained provisions to that effect. It was agreed that including draft provision 5 would emphasize that principle, which could further promote the use of mediation.

30. On the other hand, concerns were expressed that the notion of "without prejudice" might be understood differently depending on the legal tradition. It was suggested that the provision should be drafted as a rule (for example, by replacing the word "is" with "shall be") addressed to the parties. It was mentioned that the meaning of "engaging in mediation" would need to be elaborated in the draft provision to also refer to information shared and views expressed. In that context, it was suggested that Rule 11 of the ICSID Mediation Rules provided a sound basis for the drafting of provision 5.

31. After discussion and considering that draft provision 1 allowed the parties to vary the draft provisions, it was agreed that draft provision 5 would be formulated as follows:

> "Draft provision 5 (Use of information in other proceedings)
>
> A party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation."

6. Draft provision 6

32. While support was expressed for including a reference to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"), doubts were raised about requiring the parties to meet the requirements set forth therein as the Convention might not be relevant or applicable depending on the circumstances.

33. After discussion, the Working Group agreed to replace the words "shall ensure" in draft provision 6 with "should consider whether".

7. Conclusions

34. The Working Group requested the Secretariat to revise the draft provisions on mediation based on the decisions and deliberations of the Working Group and to present them for consideration by the Commission at its fifty-sixth session in 2023.

35. It was further agreed that the draft provisions should be recommended for use by States in their treaties and the possible inclusion of those provisions in a multilateral instrument on ISDS reform, which the Working Group was in the process of developing, would be considered at a later stage.

IV. Draft guidelines on investment mediation (A/CN.9/WG.III/WP.227)

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A. General remarks

36. The Working Group recalled that at its forty-third session in September 2022, it undertook a first reading of the draft guidelines on investment mediation ("draft guidelines") based on document A/CN.9/WG.III/WP.218, which aimed to promote the use of mediation to resolve investment disputes.

37. The Working Group continued its consideration of the draft guidelines as contained in document A/CN.9/WG.III/WP.227. The following section provides a summary of the changes to the draft guidelines as agreed by the Working Group, without reproducing the entirety of the agreed text.

B. Draft guidelines – summary of the changes

1. Sections A to E (A/CN.9/WG.III/WP.227, paras. 1–10)

38. With regard to paragraphs 1 to 10, the Working Group agreed to:

- Refer to "international" investment disputes throughout the draft guidelines;
- Note that the draft guidelines aimed to assist "parties" to mediation and not only "States" or "Government officials" (paras. 1 and 2);
- Replace the last sentence of paragraph 1 with the last two sentences of paragraph 3 of the UNCITRAL Notes on Mediation (2021) with necessary adjustments;
- Delete the word "non-formal" (para. 2);
- Refer to "dispute" instead of "conflict" (paras. 3 and 8);
- Revise the chapeau of para. 3 to read "…, the following are among the aspects to be taken into account by the parties where relevant";
- Delete "and" before subparagraph (k), which would read "Any implication of complying with any settlement agreement, including any political, economic, social or financial implication";
- Replace "need to be taken into account" with "may be relevant" (para. 4);
- Add the words "or in any other manner" in the second sentence (para. 5);
- Incorporate elements required in an invitation to engage in mediation based on draft provision 2 (para. 6, see para. 21 above);
- End the first sentence after the words "any point in time" and to include at the end of the penultimate sentence "including possibly through mediation" (para. 8);
- Delete the first sentence and the word "creative" (para. 9); and
- Replace "fix" with "define" and delete the illustration of six months (para. 10).

2. Sections F to H (A/CN.9/WG.III/WP.227, paras. 11–23)

39. With regard to paragraphs 11 to 23, the Working Group agreed to:

- Replace "can" with "should" and to delete the phrase "consistent with international standards" in the third sentence (para. 11);
- Refer to institutions "which can support the parties to resolve international investment disputes through mediation" (para. 12);
- Include "including on best practices" after the words "general information" in the last sentence (para. 13);

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- Combine the first two sentences to read: "A mediator should refrain from taking decisions and should not make judgments over ..." and shorten the third sentence to end with the words "their arguments" (para. 15);
- Revise the chapeau as "When choosing a mediator, parties should consider whether a mediator possesses, among others […]" (para. 17);
- Split the two elements in subparagraph (a) and delete "and" after subparagraph (f) (para. 17);
- Amend the first sentence to read "A mediator should be impartial and independent." (para. 18);
- Revise the second and third sentences along the following lines: "For example, the parties may consider whether the appointment of a mediator of a nationality other than those of the parties would avoid any perception of bias. However, the parties may also consider whether there might be benefits in selecting a mediator with the same nationality as the parties, such as enhancing the acceptability of the resulting settlement agreement or as being familiar with their language, customs and culture." (para. 19);
- Place paragraph 20 after paragraph 17; and
- Refer also to "institutions" striving to take into account geographical diversity and gender and to replace the words "prevent or eliminate the perception of bias" with "increase the confidence in mediation" (para. 23); and
- Insert a new subsection H.4 as follows:

  "4. Resignation and replacement of a mediator

  **. There may be instances where a mediator wishes to, or needs to, resign from the mediation, at which point the mediator would inform the parties as soon as possible. In addition, if requested jointly by the parties or if the mediator is not in a position to perform the duties required, the mediator should resign from the process. Upon the resignation of a mediator, the parties would usually replace the mediator using the same procedure used to make the original appointment."

3. Sections I and J (A/CN.9/WG.III/WP.227, paras. 24–33)

40. With regard to paragraphs 24 to 33, the Working Group agreed to:

- Delete the second sentence and combine the first and third sentences to read "In determining the size and the composition of its team, parties should consider including a member vested with the authority to settle the dispute ..." (para. 25);
- Revise the last sentence to read "Information about the extent of the settlement authority of the participants in the mediation should be shared with the mediator and the other parties …" (para. 25);
- Add the words ", if any" after the words "legal representatives in mediation" in the first sentence (para. 26);
- Revise the third sentence to read: "In mediation, legal representatives take a collaborative approach in exploring and identifying future-oriented solutions that further the interest and goals of their respective clients." (para. 26);
- Combine the first and second sentences to read: "The parties may wish to consider whether experts and other parties could take part in the mediation process and whether their participation might be beneficial and assist the parties in achieving an amicable solution." (para. 27);
- Replace the words "will usually" with "would" in the last sentence (para. 28);
- Refer to "other parties" instead of "non-disputing parties" throughout the draft guidelines;

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- Revise the first sentence to read: "The flexibility of mediation allows for the participation of other parties in the process, and the parties to the mediation should consider whether their participation could be a way to take into account the public interest …" (para. 29);
- Insert an additional sentence: "The following chart is an example/an illustration of the different phases." (para. 30);
- Add at the end of the third sentence "as long as the parties are able to effectively access the online meetings" (para. 31); and
- Replace "align with their interests" with "provide sufficiently robust protection" in the third sentence (para. 32).

4. Section K (A/CN.9/WG.III/WP.227, paras. 34–39)

41. With regard to paragraph 34 and its heading, the Working Group agreed to not use the term "without prejudice" but instead to elaborate the rule along the lines of draft provision 5 (see para. 31 above). The Working Group further agreed to delete the second sentence, while retaining the footnote to that sentence. It was further agreed that the word "merely" would be inserted after "inadmissible" in the last sentence.

42. The Working Group agreed to replace paragraphs 35 to 39 with the following text while retaining the relevant footnotes:

> "35. Parties should consider whether keeping the mediation proceedings and documents shared therein confidential is necessary to enable an open and frank discussion. The confidentiality obligation usually begins with the commencement of mediation and applies to all those involved in the mediation. Parties should be assured that they can share confidential information and engage in substantive discussions without fearing any negative consequences. Therefore, confidentiality may be an important attraction and strength of mediation.
>
> 36. On the other hand, parties should also consider whether transparency may be relevant in light of public interests and the possible expenditure of public funds. Generally, in order to encourage public acceptance and to enhance the legitimacy of investment mediation, a balance should be struck between confidentiality and transparency.
>
> 37. Parties wishing to specifically address confidentiality and transparency in investment mediation may agree on such aspects. When choosing mediation rules, the parties should consider whether the provisions therein are appropriate for investment disputes and balance confidentiality and transparency. Aspects that parties may wish to consider include: (i) whether the fact that mediation took place should be confidential; (ii) whether information relating to or obtained during the mediation should be confidential; (iii) whether and to what extent agreed settlements should be confidential; (iv) the extent to which experts and other parties should have access to confidential information; (v) media or public disclosure protocols to provide updates to the public and/or relevant constituents during the mediation; and (vi) the extent of disclosure in the event of unsuccessful mediation.
>
> 38. Provisions or rules applicable to investment mediation may impose limitations on the level of confidentiality agreed to by the parties, including through affirmative disclosure requirements (for example, disclosure may be required in domestic legislation or international agreements or by domestic courts). Further examples may be found in the domestic legal framework applicable to the underlying transaction or dispute (such as domestic legislation governing public-private partnerships, public financial management regulations, budget transparency legislation, or freedom of information legislation) and/or to mediation participants. There are also instances in which

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domestic legislation on disclosure of information aimed at safeguarding the public interest require the publication of any agreed engagement and/or ongoing disclosure of performance, as well as any renegotiated terms."

5. Sections L and M (A/CN.9/WG.III/WP.227, paras. 40–50)

43. With regard to paragraphs 40–50, the Working Group agreed to:

- Replace "will generally" in the first sentence with "are expected to" and "make efforts to meet the" in the last sentence with "consider those" (para. 40);
- Revise the end of the sentence to read: "… all or parts of the dispute subject to mediation to the extent that the dispute had been resolved" (para. 41);
- Add the words "in good faith" at the end of the first sentence, delete the last sentence, place the first two sentences as the first paragraph of section L (para 42);
- Revise the second sentence to read: "In addition, States wishing to use mediation as a means to resolve disputes may consider ways to remove impediments to the use of mediation …" (para. 43);
- Add the words "to the extent possible" at the end of the last sentence (para. 43);
- Delete the word "clear" in the first sentence and revise the second sentence to read: "Such a legal basis may create an enabling environment for States and State entities …" (para. 44);
- Revise the first sentence to read: "…, the need to enforce a settlement agreement may not arise often as parties are expected to abide by the terms therein." (para. 46);
- Replace "makes it possible" in the penultimate sentence with "is one tool" and replace the last sentence with the second sentence in footnote 22 (para. 46);
- Add "including any enforcement proceeding" after "adversarial proceeding" in the first sentence (para. 47);
- Not include an annex to the draft guidelines containing a list of future training and capacity-building activities; and
- Delete paragraphs 49 and 50 and instead insert an additional sentence at the end of paragraph 43 to read as follows: "States may also consider mediation as a component of their approach to dispute prevention and mitigation."

6. Conclusions

44. The Working Group requested the Secretariat to revise the draft guidelines on investment mediation based on the decisions and deliberations of the Working Group and to present them for consideration by the Commission at its fifty-sixth session in 2023. As to the title of the text to be presented, the Working Group agreed that "UNCITRAL Guidelines on Investment Mediation" should be used.

45. It was further agreed that the draft guidelines should be recommended for use by parties to investment disputes, mediators, institutions as well as for other purposes to promote the use of mediation to resolve investment disputes.

V. Draft legislative guide on investment dispute prevention and mitigation (A/CN.9/WG.III/WP.228)

46. The Working Group had a preliminary discussion on a draft legislative guide on investment dispute prevention and mitigation (the "draft legislative guide") with the aim to provide inputs to the Secretariat on how to develop the reform element further. In that context, the importance of dispute prevention and mediation was reiterated. It

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was further emphasized that enhancing the capacity of States and investors alike to prevent disputes from escalating was a key element of ISDS reform.

47. Noting that the draft legislative guide was prepared based on a compilation of best practices by States as well as approaches suggested by intergovernmental organizations and non-governmental organizations, there was general support to continue the compilation of best practices which could assist States and possibly form a basis for future work.

48. However, it was widely felt that a legislative guide might not be the most appropriate format to address the issues relating to dispute prevention and mitigation. It was said that not all of the aspects dealt with in the draft legislative guide were addressed in domestic legislation and were generally matters of policy. It was also said that considering the divergence in government structures, legislative styles and approaches to dispute prevention, prescriptive recommendations would not be suitable as they suggested that there could be a uniform approach and might be understood as imposing obligations on States to establish a legal framework. It was reiterated that a one-size-fits-all approach should be avoided. Accordingly, it was suggested that the text should be revised as a guidance document providing useful advice to States on possible approaches and ensuring that they had the flexibility in choosing among them.

49. During the deliberations, views were expressed that the investor's role in dispute prevention and mitigation should also be highlighted. Another view was that the text to be prepared should be limited to disputes arising with foreign investors and should not impact the States' right to regulate and pursue legitimate public policy objectives.

50. Views were expressed that the advisory centre being developed by the Working Group could play a role with regard to dispute prevention and mitigation, possibly assisting States with certain aspects or as a forum to share best practices. In that context, support was expressed for considering the two topics jointly while being distinct reform elements.

51. It was also stated that work on dispute prevention and mitigation should take into account work undertaken by other organizations and be further coordinated to avoid overlaps. It was cautioned that the scope of work should be limited to dispute prevention and mitigation and not be expanded to address investment promotion or facilitation.

Way forward

52. After discussion, the Secretariat was requested to revise the draft legislative guide, based on the deliberations, as a non-prescriptive guidance document on means to prevent and mitigate disputes including examples of best practices, which would aim to assist mainly States. The Secretariat was further asked to continue to compile information on best practices.

VI. Early dismissal and preliminary determination (A/CN.9/1129, Annex)

53. It was noted that Working Group II (Dispute settlement), at its seventy-seventh session in February 2023, had finalized a note on early dismissal and preliminary determination (the "Note") to be included in the UNCITRAL Notes on Organizing Arbitral Proceedings. In light of the fact that Working Group III was preparing a procedural rule on early dismissal in the context of the ISDS reform (see Chapter II.A of document A/CN.9/WG.III/WP.219), the Working Group engaged in a brief review of the Note with the aim to provide inputs to the Commission as the Notes were expected to be adopted at the upcoming session in 2023.

54. It was generally felt that the Note, as a descriptive text, provided useful guidance on the discretionary power of the arbitral tribunal, whether provided for in the

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arbitration rules or not. While it was said that the Note should refer to the rule on early dismissal in the ICSID Arbitration Rules, it was widely felt that that was not necessary given that the Note did not aim to modify the relevant provisions in the applicable arbitration rules. It was further acknowledged that the Note did not aim to modify the relevant provisions in the applicable arbitration rules. In that context, the non-binding and generic nature of the UNCITRAL Notes on Organizing Arbitral Proceedings was highlighted. While it was mentioned that the work on early dismissal and preliminary determination by Working Group III would need to be tailored for investment disputes, it was confirmed that the Note would not have any impact on or preclude such work. Accordingly, the Working Group expressed its satisfaction with the Note prepared by Working Group II and conveyed its appreciation to the Working Group.

VII. Codes of conduct and commentary (A/CN.9/WG.III/WP.223 and A/CN.9/1130)

A. Introduction

55. The Working Group recalled that at its forty-fourth session in January 2023, it had undertaken a third reading of the codes of conduct for arbitrators (the "Code for Arbitrators") and judges (the "Code for Judges", jointly referred to as the "Codes"), based on document A/CN.9/WG.III/WP.223. At the end of that session, the Working Group had requested the Secretariat to prepare revised drafts of the Codes based on the deliberations with a view to presenting the Codes and accompanying commentaries to the Commission.

56. At the current session, a doubt was expressed regarding the feasibility of the work on the Code for Judges as a decision had yet to be made on the establishment and design of a standing mechanism to resolve investment disputes. The Working Group, however, decided to consider the proposed modifications to the Codes, which were identified by the Secretariat in implementing the decisions taken by the Working Group at its previous session. The Working Group also continued its deliberations on the articles in the Code for Arbitrators relating to the limit on multiple roles (articles 3, 4 and 11).

B. Code for Arbitrators

1. Articles 1 and 2

57. It was agreed that "investment contracts" covered by the definition of "instrument of consent" should be limited to those concluded with a foreign investor. It was further agreed that the definition of an "instrument of consent" should not refer to an "international investment dispute" to avoid circularity. Accordingly, it was agreed that "instrument of consent" should be defined as follows:

"(i) A treaty providing for the protection of investments or investors;

(ii) Legislation governing foreign investments; or

(iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO,

upon which the consent to arbitrate is based."

58. It was agreed that the first sentence of article 2(1) should include a reference to a "former Arbitrator".

2. Articles 3, 5 and 6

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59. It was agreed to replace the words "might have" in article 3(2)(d) with the word "has".

60. With regard to article 5(a), it was agreed to delete the phrase "throughout the IID proceeding" as the notion was already captured under the definition of "Arbitrator".

61. With regard to article 6(b), it was agreed to replace the word "best" with "all reasonable efforts" to align with articles 10(2) and 11(4) and to make the same change in article 6(b) of the Code for Judges.

3. Articles 8, 9 and 10

62. It was agreed to: (i) clarify that the limitation in article 8(4) was with regard to a decision rendered in the IID proceeding; (ii) insert the word "proceeding" after the term "IID" in article 8(5); and (iii) expand article 8(6) to also apply to a former Arbitrator. Accordingly, it was agreed that article 8(4) to (6) would read as follows:

"4. An Arbitrator may comment on a decision rendered in the IID proceeding only if it is publicly available.

5. Notwithstanding paragraph 4, an Arbitrator shall not comment on a decision while the IID proceeding is pending or the decision is subject to a post-award remedy or review.

6. The obligations in this article shall not apply to the extent that a Candidate, an Arbitrator or a former Arbitrator is legally compelled to disclose the information in a court or other competent body …."

63. The Working Group agreed to replace the word "should" in article 9(1) with "shall".

64. The Working Group agreed to simplify article 10(1) as follows: *"Prior to engaging an Assistant, an Arbitrator shall agree with the disputing parties on the role, scope of duties, and fees and expenses of his or her Assistant."*

4. Article 11

65. Diverging views were expressed on whether a Candidate or an Arbitrator should be required under subparagraph 2(b) to disclose any financial or personal interest in any other proceeding involving a person or an entity identified by a disputing party as being related, or as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder.

66. One view was that requiring such a disclosure would be burdensome and that relationships with "a person or entity identified by a disputing party as being related, or as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder" would in any case need to be disclosed under subparagraph 2(a). Another view was that disclosure of personal or financial interests should be as broad as possible and that as long as all reasonable efforts were made to become aware of such information, it would not necessarily be burdensome. In order to address both views, it was agreed that the commentary should clarify that any financial or personal interest that a Candidate or an Arbitrator had in a person or entity with a direct or indirect interest in the outcome, such as a third-party funder, would need to be disclosed and that subparagraph 2(b) would be revised as follows:

"(b) Any financial or personal interest in:

(i) The outcome of the IID proceeding;

(ii) Any other proceeding involving the same measure(s); and

(iii) Any other proceeding involving a disputing party or a person or an entity identified by a disputing party as being related;"

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5. **Limit on multiple roles (articles 3, 4, 11) (A/CN.9/1130, paras. 91–92)**

67. It was recalled that there had been divergence in views with regard to the limit on multiple roles and that the Working Group, at its previous session, had agreed to seek to reach a compromise based on revised articles 3, 4 and 11 as contained in paragraph 91 of A/CN.9/1130. It was recognized that the articles aimed to address a number of different concerns, including the integrity of the process and the ISDS system, independence and impartiality of arbitrators, as well as the need to avoid the appearance of bias. It was said that other legitimate interests, such as the parties' choice of arbitrators, legal representatives and expert witnesses as well as ensuring diversity among the pool thereof needed to be taken into account. It was also said that the practical enforceability of any cooling-off period should be considered.

68. Diverging views were reiterated and it was acknowledged that the extent of the concerns was not necessarily shared by all, which posed challenges in finding consensus. On the one hand, the need to signal the significance of the concerns about the practice of double-hatting and to enhance the credibility of the work being undertaken by the Working Group on ISDS reform more generally was underlined. On the other hand, it was emphasized that any new regulation in this area should not undermine party autonomy in the selection of their own legal representatives or expert witnesses.

69. Delegations expressed their flexibility to reach consensus on related issues. It was observed that the limit on multiple roles should not aim to merely confirm the status quo but rather respond to the increased calls for reform. In that context, it was said that the preparation of the Code, which introduced and codified a number of new obligations for arbitrators, was in itself an effort to respond to such calls. It was also stressed that the work on the Code should be completed as soon as possible in order for the Working Group to continue its work on the other elements of ISDS reform, including structural reforms.

70. With regard to articles 3 and 11, there was general support for including the word "prospective" in article 3(2)(c) and requiring disclosure in accordance with article 11(2)(e). However, with regard to the possibility of challenge mentioned in the last sentence of the commentary to article 11(2)(e) (A/CN.9/1130, para. 92), it was said that the same applied to other disclosure requirements under article 11. Accordingly, it was suggested that the sentence should be revised or placed elsewhere to not create the impression that its content only applied in the context of subparagraph 2(e).

71. There was general support for paragraph 1 of article 4, which provided a prohibition on concurrent double-hatting under the circumstances provided therein. It was highlighted that this could bring a significant change to the current practice, reflecting an effort by the Working Group to amend the status quo.

72. Discussions focused mainly on the duration of the cooling-off period(s) to be provided in paragraphs 2 to 4 of article 4. It was recalled that views had been expressed that there was no need for cooling-off periods. It was observed that any cooling-off period should be considered in conjunction with: (i) the concurrent ban provided for in paragraph 1 and the average duration of three to four years for investment arbitration proceedings (see A/CN.9/WG.III/WP.153, para. 54); and (ii) the obligation under article 3(2)(c) not to be influenced by any prospective financial, business, professional, or personal relationship.

73. One view was that there should be a single, uniform period for all three paragraphs, as there was no difference between the concerns to be addressed by those paragraphs. It was said that a uniform period would be more manageable in practice for both former arbitrators and parties wishing to appoint former arbitrators as legal representatives or expert witnesses. Another view was that different or cascading periods of time should be provided for, as each paragraph addressed different concerns and the likeliness of the circumstances arising therein also differed. It was

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stated that in a situation where more than one of the paragraphs applied, a former arbitrator would be bound by the longer or longest period.

74. A wide range of views were expressed as to the period of time to be specified in paragraphs 2 to 4, varying from none to 3 years. One view was that a lengthy period should be prescribed, while allowing the parties to either: (i) not impose any cooling-off period; or (ii) agree on a shorter period. It was said that indicating a longer period of time would signal the significance of the concerns. On the other hand, views were expressed in support of a shorter period of time with the parties being able to agree on a longer period if they so desired. In that regard, views were expressed that a too stringent approach should be avoided, as it could limit the pool and diversity of qualified individuals to appoint as arbitrators, legal representatives and expert witnesses, with particular negative impact on respondent States, as "repeat players".

75. It was generally felt that the period of time specified in paragraphs 2 to 4 should provide the default rule, which could be varied by the disputing parties. In that context, it was widely felt that the "disputing parties" that could waive the cooling-off period should be the parties in the proceeding that the former arbitrator had adjudicated and not the parties in the proceeding where the former arbitrator was expected to act or was acting as a legal representative or an expert witness. While questions were raised regarding the rationale for that approach and the consequences of the relevant parties no longer existing, it was explained that the Code did not aim to regulate the conduct of legal representatives or expert witnesses but rather that of a former arbitrator and that requiring the agreement of the parties in the new proceeding would allow one party to limit the other party's choice of legal representatives or expert witnesses.

76. With regard to the specific cooling-off periods, it was said that proceedings involving the same measure or measures were the most concerning (paragraph 2). On the other hand, it was said that a longer cooling-off period for proceedings involving the same provisions of the same instrument of consent could result in a reduced pool of legal representatives and experts, particularly in relation to multilateral investment treaties (paragraph 4). However, views diverged on: (i) whether proceedings involving the same or related parties posed the same level of concern as those involving the same measure and (ii) the impact that the introduction of a cooling-off period could have on the pool of legal representatives and experts.

77. After discussion and in the spirit of compromise, the Working Group agreed that articles 3(2)(c), 4 and 11(2)(e) would read as follows:

"Article 3 – Independence and Impartiality

2. Paragraph 1 includes the obligation not to:

(c) Be influenced by any past, present or prospective financial, business, professional, or personal relationship; …

Article 4 – Limit on multiple roles

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in 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 instrument of consent.

2. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same measure(s) unless the disputing parties agree otherwise.

3. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding

involving the same or related party(parties) unless the disputing parties agree otherwise.

4. For a period of one year, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same provision(s) of the same instrument of consent unless the disputing parties agree otherwise.

Article 11 – Disclosure obligations

2. Regardless of whether required under paragraph 1, the following information shall be disclosed:

(e) Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding."

C. Code for Judges

78. It was agreed that the full title of the Code for Judges should be: "Code of Conduct for Judges in International Investment Dispute Resolution".

1. Article 2

79. It was agreed to include a reference to a "former Judge" in article 2. It was further agreed that the commentary to article 2 would elaborate on the meaning of "in accordance with", mainly that any incompatibility between articles of the Code for Judges and any other provisions on the conduct of a Judge would be addressed by the rules of the standing mechanism. In that context, it was noted that certain articles of the Code already anticipated that the rules of the standing mechanism might vary the obligations by including the phrase "unless permitted by the rules of the standing mechanism".

2. Article 3

80. The Working Group confirmed that the obligations of a Judge under article 3 would be broader than that of an Arbitrator, as they related to the functions as a member of the standing mechanism and not to a specific proceeding. Accordingly, it was agreed that subparagraphs 2(b) and 2(d) should be revised as follows:

"2. Paragraph 1 includes the obligation not to:

(a) ...;

(b) Take instruction from any organization, government, or individual regarding any matter addressed in a proceeding before the standing mechanism;

(c) ...;

(d) Use his or her position to advance any financial or personal interest he or she might have in any disputing party or in the outcome of a proceeding before the standing mechanism; ..."

3. Article 5

81. The Working Group agreed to replace the word "consistent" with "in accordance" to align the text with other articles of the Code.

4. Article 8

82. It was observed that the rules of the standing mechanism might provide for exceptions to the obligations of a Judge or a former Judge to disclose the contents of the deliberations, or comment on a decision rendered, in a proceeding before the standing mechanism. It was therefore suggested that examples of such instances be provided in the commentary.

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83. With regard to the extent to which a former Judge would be restricted from commenting on a decision, one view was that a former Judge should not be allowed to comment on any decision rendered by the standing mechanism. Another view was that such a restriction might be excessive considering that under article 4(4), a former Judge would be limited from acting as a legal representative or an expert witness only for three years after his or her term. Accordingly, suggestions were made that a former Judge should only be restricted from commenting: (i) on any decision that the former Judge had adjudicated; (ii) on any decision rendered in a proceeding which was pending during the Judge's term; or (iii) for a period of three years following his or her term.

84. After discussion, it was agreed that article 8 should read as follows:

"1. Unless permitted by the rules of the standing mechanism, a Judge or a former Judge shall not:

(a) Disclose or use any information concerning, or acquired in connection with, a proceeding before the standing mechanism;

(b) Disclose any draft decision prepared in a proceeding before the standing mechanism; or

(c) Disclose the contents of the deliberations in a proceeding before the standing mechanism.

2. Unless permitted by the rules of the standing mechanism, a Judge shall not comment on a decision rendered in a proceeding before the standing mechanism and a former Judge shall not comment on a decision rendered in a proceeding before the standing mechanism for a period of three years following the end of his or her term of office.

3. The obligations in this article shall not apply to the extent that a Judge or a former Judge is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body."

5. Article 9

85. With regard to the disclosure obligation of a Candidate and a Judge, the Working Group agreed that article 9 would read as follows:

"*1. ….*

2. Regardless of whether required under paragraph 1, a Candidate shall disclose all proceedings in which the Candidate is currently or has been involved in the past five years including as an arbitrator, a legal representative or an expert witness.

3. Regardless of whether required under paragraph 1, the following information shall be disclosed by a Judge with regard to a proceeding which he or she is expected to adjudicate or is adjudicating:

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

(i) Any disputing party in the proceeding;

(ii) The legal representative(s) of a disputing party in the proceeding;

(iii) Expert witnesses in the proceeding; and

(iv) Any person or entity identified by a disputing party as being related, or as having a direct or indirect interest in the outcome of the proceeding, including a third-party funder;

(b) Any financial or personal interest in:

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(i) The outcome of the proceeding;

(ii) Any other proceeding involving the same measure(s); and

(iii) Any other proceeding involving a disputing party or a person or an entity identified by a disputing party as being related.

4. For the purposes of paragraphs 1 to 3, a Candidate and a Judge shall make all reasonable efforts to become aware of such circumstances and information.

5. A Candidate shall make the disclosure to the standing mechanism in accordance with the rules of the standing mechanism.

6. A Judge shall make the disclosure in accordance with the rules of the standing mechanism as soon as he or she becomes aware of the circumstances and information mentioned in paragraphs 1 and 3. A Judge shall have a continuing duty to make further disclosures based on new or newly discovered circumstances and information.

7. A Candidate and a Judge shall err in favour of disclosure if they have any doubt as to whether a disclosure shall be made.

8. The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality."

D. Conclusions

86. The Working Group requested the Secretariat to revise the draft Codes based on the decisions and deliberations of the Working Group and to present them with their accompanying commentaries for finalization and adoption by the Commission at its fifty-sixth session in 2023. In that context, it was recommended that the Code for Arbitrators should be made available for use by disputing parties, institutions, and States. The Working Group recommended that the Code for Judges be adopted in principle as the Working Group was in the process of discussing the possible establishment of a standing mechanism to resolve investment disputes and if such a mechanism were to be established, exactly how the Code was to be incorporated into instruments of a standing mechanism would be the subject of further consideration. It was also agreed that the possible inclusion of the Codes in a multilateral instrument on ISDS reform, which the Working Group was in the process of developing, would be considered at a later stage.

VIII. Other business

87. During the session, the Government of Uruguay deposited its instrument of ratification to the Singapore Convention.

88. The Working Group expressed it appreciation to the Government of Singapore and welcomed its proposal to host an intersessional meeting in September 2023 (possibly during the first week for a period of two to three days) on the topics related to a standing multilateral mechanism and an appellate mechanism.

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