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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022)

Contents

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-second 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.

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-third session in Vienna from 5 to 16 September 2022 at the Vienna International Centre.

4. The session was attended by the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mali, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Thailand, Türkiye, Uganda, Ukraine, 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: Bahrain, Bangladesh, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Burkina Faso, Burundi, Chad, Congo, Costa Rica, Egypt, El Salvador, Estonia, Gabon, Guatemala, Iceland, Jamaica, Jordan, Lebanon, Lesotho, Libya, Lithuania, Madagascar, Malta, Myanmar, Netherlands, Oman, Pakistan, Philippines, Portugal, Qatar, Sierra Leone, Slovakia, Sri Lanka, Sudan, Sweden, Tunisia, Tanzania (United Republic of), Uruguay and Uzbekistan.

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 the World Health Organization (WHO);

(b) *Intergovernmental organizations*: Asian Clearing Union, Banque Ouest Africaine de Développement (BOAD), Caribbean Court of Justice (CCJ),

[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-second 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; and A/CN.9/1092.

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

Commonwealth Secretariat, Cooperation Council for the Arab States of the Gulf (GCC), Interparliamentary Assembly of CIS Member Nations (IPA CIS), Organisation for Economic Co-operation and Development (OECD), Organization of the Petroleum Exporting Countries (OPEC), 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 (AAA)/International Centre for Dispute Resolution (ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitral Women, Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), Association pour la Promotion de l'Arbitrage en Afrique (APAA), British Institute of International and Comparative Law (BIICL), 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 Law, National University of Singapore (CIL), Centre for Research on Multinational Corporations (SOMO), 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 Federation for Investment Law and Arbitration (EFILA), European Law Institute (ELI), European Society of International Law (ESIL), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), Hong Kong International Arbitration Centre (HKIAC), Institut de Droit International (IIL), Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Dispute Resolution Institute (IDRI), International Institute for Sustainable Development (IISD), International Institute for Environment and Development (IIED), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), Regional Centre for International Commercial Arbitration Lagos-Nigeria (RCICAL), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), Swiss Arbitration Association (ASA), Tehran Chamber of Commerce, Industries, Mines and Agriculture (TCCIMA), The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Third World Network (TWN), Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ), United States Council for International Business (USCIB), Venezuelan Arbitration Association (AVA), Vienna International Arbitration Centre (VIAC) and World Economic Forum (WEF).

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.215); (b) notes by the Secretariat on the advisory centre (A/CN.9/WG.III/WP.212 and A/CN.9/WG.III/WP.212/Add.1); (c) note by the Secretariat on a standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters (A/CN.9/WG.III/WP.213); (d) note by the Secretariat prepared jointly with the ICSID Secretariat on the draft code of conduct (A/CN.9/WG.III/WP.216); (e) notes by the Secretariat on mediation – draft provisions on mediation and draft guidelines on mediation (A/CN.9/WG.III/WP.217 and A/CN.9/WG.III/WP.218); (f) notes by the Secretariat on procedural rules and cross-cutting issues – draft provisions on early dismissal, security for costs, allocation

of costs, counterclaims, and third-party funding (A/CN.9/WG.III/WP.219) and the assessment of damages and compensation (A/CN.9/WG.III/WP.220); and (g) note by the Secretariat on a multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.221).

10. 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).
5. Adoption of the report.

11. As to the scheduling of the session, it was agreed that the following topics would be discussed during the first week of the session: selection and appointment of ISDS tribunal members in a standing mechanism, the advisory centre, the multilateral instrument on ISDS reform, procedural rules and cross-cutting issues. It was further agreed that the second week would be devoted to the code of conduct and the texts on mediation. It was also agreed that flexibility should be provided during the first week to allow delegations, whose travel to Vienna was delayed, to make an intervention on topics that the Working Group had already discussed.

12. 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. Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters (A/CN.9/WG.III/WP.213)

13. At its forty-second session in February 2022, the Working Group considered the selection and appointment of ISDS tribunal members particularly in the context of a standing multilateral mechanism (referred to below also as the “Tribunal”) on the basis of a note by the Secretariat, which contained draft provisions addressing the topic (A/CN.9/WG.III/WP.213, for the deliberations of the Working Group, see A/CN.9/1092, paras. 15–78).

14. Recalling that it had considered draft provisions 1 to 7 at the forty-second session, the Working Group continued its consideration of draft provisions 8 to 11, which addressed the appointment process of Tribunal members, their terms of office, conditions of service, and the assignment of cases. It was stressed that views expressed in relation to the draft provisions were without prejudice to the position of the delegations on the establishment of the Tribunal.

A. Draft provisions 8 to 11 (A/CN.9/WG.III/WP.213, paras. 44–65)

1. Draft provision 8 – “Appointment (election)”

15. With regard to paragraph 1, it was generally felt that the classification of candidates into regional groups should be based on their nationality rather than on the State or States nominating them. It was stated that this would be in line with the suggestion made at the previous session that nominated individuals need not be nationals of the nominating State and that co-nomination should be possible (see A/CN.9/1092, para. 66).

16. As to the regional groups, it was suggested that the grouping in the United Nations could be a starting point for discussion, while another suggestion was that the grouping could be determined on the basis of contracting States to the Tribunal. Yet another suggestion was that it should be a combination of the two.

17. With regard to instances where a candidate had more than one nationality, it was suggested that the predominant one be used. The Working Group requested the Secretariat to develop some options including the test to be applied in, and the body responsible for, the determination.

18. Views were expressed that the criterion for recommending members to serve on the appellate level of the Tribunal in paragraph 2 ("extensive adjudicatory experience") was too limited and should be expanded to reflect other types of qualifications or experience. In support, it was explained that the current wording might unduly restrict the number of recommended candidates, possibly frustrating the goal of achieving diversity and gender equality. In that respect, a suggestion was made to align paragraph 2 with draft provision 4(1), which outlined a number of characteristics that Tribunal members should possess. A question was raised whether it would be appropriate for the Selection Panel to make such a recommendation and the effect that the recommendation would have on the eventual appointment by the Committee of the Parties. After discussion, the Secretariat was requested to include alternative criteria to be assessed when recommending or appointing members to the appellate level to ensure that qualified candidates would be appointed also in light of paragraph 5.

19. With respect to paragraph 3, it was generally felt that the members of the Committee of the Parties should be entitled to vote on all identified candidates and not limited to those that fall within their regional group. It was said that such an approach could ensure diversity and flexibility.

20. However, it was felt that it was premature to determine the number of initial members and their allocation among the regional groups as the composition of the Committee of the Parties was yet to be known. Consequently, it was suggested that paragraph 3 should be drafted to empower the Committee to subsequently determine how the votes would be cast and how the candidates would be elected. It was said that such an approach would make it possible to adjust to any increase in membership.

21. With respect to paragraph 4, different views were expressed on the method for appointing Tribunal members at the first instance and the appellate level and the specificity to be provided (see A/CN.9/WG.III/WP.213, para. 47). However, it was generally considered that the detailed process would largely depend on the structure of the Tribunal, including whether or not the appellate level was to be part of the Tribunal.

22. There was broad support for enhancing the principles outlined in paragraph 5 in the appointment process. It was said that reference could be further made to diversity in backgrounds, expertise and language. It was said that the practice in other international courts and tribunals might provide guidance. However, it was also expressed that such guidance should take into account the current context of ISDS, in the sense that not all international courts and tribunals could act as an example for the Tribunal. A question was raised on how the principles laid down in paragraph 5 would be fulfilled and who would make the assessment. Questions were also raised whether equitable geographical representation should be determined on the basis of the members of the Committee of the Parties (which may differ for the first instance and the appellate level) or be broader.

2. Draft provision 9 – "Terms of office, renewal and removal"

23. With regard to draft provision 9(a), diverging views were expressed as to the term of office and whether that term should be renewable.

24. Preference was expressed for long (for example, 9 years) non-renewable terms to ensure independence and impartiality of the members and protect them from undue

external influence, were they to seek re-election. It was also stated that longer terms could contribute to collegiality among members and promote consistency in case law.

25. Another view was that a shorter term of, for example, 6 or 7 years with the possibility of renewal might better guarantee diversity and rotation within the regional groups and promote dynamism. It was said that foreclosing re-election could lead to a shortage of qualified members, who might have attained valuable experience.

26. Support was expressed for a staggered term of members as provided in draft provision 9(a)(2) to ensure continuity of the Tribunal members. In that context, it was generally felt that Tribunal members that were given shorter terms should be able to be re-elected as with members that were appointed to replace a member for the remainder of their term (see draft provision 9(b)(2)).

27. The Working Group considered that it was premature to determine whether the terms of the members of the first instance and those of the appellate level should be the same, as that would largely depend on the structure of the Tribunal, including whether or not the appellate level was to be part of the Tribunal.

28. While support was expressed for Tribunal members to continue in office beyond their term to complete any case under their consideration, doubts were expressed as this could unduly burden the Tribunal and result in undue prolongation of their terms.

29. With respect to removal of a Tribunal member addressed in draft provision 9(b), support was expressed that non-compliance with the Code of Conduct should form a ground for removal. However, it was suggested that removal should be limited to instances of a serious breach or repeated failures to comply with the Code. It was further suggested that a clear threshold for removal would need to be developed.

30. A further suggestion was that the process of removing a member from the Tribunal should be clearly spelled out, including who could request removal, how the views of the members in scrutiny would be heard, who would make the decision and whether that decision could be challenged. Doubts were expressed about other members of the Tribunal making the decision as members might be hesitant to remove a colleague, which could also lead to tensions. If the members of the Tribunal were to decide on the removal, preference was expressed for a decision by a qualified majority. On the other hand, it was said that a unanimous decision would increase the legitimacy of the removal.

3. Draft provision 10 – “Conditions of services”

31. With regard to draft provision 10(1), there was general support for including a reference to the Code of Conduct currently being prepared by the Working Group. A suggestion was made that the paragraph should envisage the possibility of subsequent amendments to the Code.

32. A suggestion was made that draft provision 10 or a separate provision should address sanctions to be imposed on former members of the Tribunal, including when they were in breach of any applicable articles of the Code of Conduct.

33. With regard to draft provision 10(2), it was suggested that remuneration should be dealt with in a separate provision, also taking into account that the Tribunal might have ad hoc judges. Views were expressed that salaries, allowances, and other benefits would need to be considered in light of the practice in other international adjudicatory bodies and the financing structure of the Tribunal.

4. Draft provision 11 – “Assignment of cases”

34. With regard to the assignment of cases addressed in draft provision 11, diverging views were expressed in support of option 1 (including the two variants therein) as well as option 2. General support was expressed that the assignment process should: (i) ensure neutrality, impartiality and independence as well as the diversity of the members assigned to a case; (ii) be flexible to adjust to the circumstances of the case; and (iii) be transparent. It was also mentioned that the assignment process would

largely depend on the total number of Tribunal members as well as other aspects of the Tribunal that the Working Group had yet to reach consensus on.

35. Support was expressed for developing clear criteria, which would guide the President of the Tribunal in assigning the cases. However, doubts were also expressed about the President, or any other body composed of the members of the Tribunal, performing such function, which might lead to bureaucracy within the Tribunal and incur additional costs. Thus, support was also expressed for a random assignment process. It was stated that a randomized process would ensure that assignments were not predictable avoiding any influence by the disputing parties. On the other hand, it was mentioned that safeguards should be in place to ensure that the capacity (including specialized knowledge and languages skills) and diversity of the members were taken into account when composing a chamber. In that regard, the role of the President in overseeing the assignment process as well as consulting the Tribunal members in that process was highlighted.

36. After discussion, it was generally felt that the positive aspects of options 1 and 2 as well as the two variants in option 1 should be captured so that, for example, disputes would be initially assigned to Tribunal members on a random basis with the President or the Presidency of the Tribunal being able to adjust or vary that assignment based on pre-established and publicly available criteria. It was generally felt that the elements mentioned in variant 2 of option 1 could be a starting point when developing the criteria.

37. With regard to whether Tribunal members who are nationals of a respondent State should be restricted from being assigned a case involving that State, some support was expressed for that limitation, while others stated that nationality should not be a proxy for bias and should not be a criterion.

38. With regard to whether chambers of the Tribunal should be pre-determined with certain members assigned for a fixed term, some support was expressed for setting up chambers with special expertise, while the composition of chambers generally should be done ad hoc. The Secretariat was asked to conduct research on the practice of other international adjudicatory bodies, particularly those that have incorporated a mixture of ad hoc and specialized chambers.

39. Interest was expressed for the formulation of grand chambers (see A/CN.9/WG.III/WP.213, para.65), while calls were also made for more clarity on when the grand chamber would be called upon (for example, issues of significant relevance, divergent interpretations by different chambers, or departure from a precedent) and upon request by whom.

40. With regard to a possible change in composition after assignment of a case, it was suggested that a mechanism akin to a challenge of arbitrators should be developed, which would allow a member to be replaced by another member under certain circumstances, for example, in case of a conflict of interest. It was suggested that such a mechanism (which should be distinct from the removal from the Tribunal addressed in draft provision 9) should not be too prescriptive and could be included in the rules of procedure of the Tribunal.

B. Way forward

41. Recalling that the Working Group had requested the Secretariat to prepare a revised version of draft provisions 1 to 7 (see A/CN.9/1092, para. 78), the Working Group requested that draft provisions 8 to 11 be also revised in light of the discussions. The Working Group decided to consider other matters related to the Tribunal (A/CN.9/WG.III/WP.213, paras. 66–78) at a future session in conjunction with the revised draft provisions.

IV. Advisory Centre

42. At its thirty-eighth session in October 2019, there was general support in the Working Group for further consideration of the establishment of an Advisory Centre on International Investment Law (referred below as the "Centre") as usefully complementing other reform options to be developed. At that session, preliminary views had been expressed as to its beneficiaries, scope of services to be provided and financing structure (A/CN.9/1004*, paras. 26–49).

43. At the current session, the Working Group discussed the establishment of the Centre based on document A/CN.9/WG.III/WP.212 and A/CN.9/WG.III/WP.212/Add.1. The discussions were focused on draft provisions 5 to 9, as services to be provided by the Centre and the beneficiaries were critical elements, which would have an impact on the structure and the financing of the Centre.

A. Services to be provided by the Centre (A/CN.9/WG.III/WP.212, paras. 19–50)

Draft provision 5

44. General support was expressed for the establishment of the Centre and the two pillars of services as outlined in draft provision 5. Differing views were expressed about a phased approach, which could prioritize the Assistance Mechanism or the Forum. It was suggested that the Working Group should be ambitious for the mandate of the Centre while being mindful of the practical and financial implications.

45. One view was that there could be merit in pursuing the Forum first as an informal, multilateral mechanism to share information, exchange best practices, and provide capacity-building. It was said that the Forum could, for example, focus on enhancing the capacity of States to prevent disputes and defend against claims. Noting the budget and other formalities required for establishing the Centre, it was stated that it would be simpler to establish the Forum, which would allow it to reach a broader range of beneficiaries at the initial stage. It was clarified that this approach was not an alternative to the establishment of the Centre but would allow for a phased establishment.

46. Another view was that the Centre should focus on the Assistance Mechanism, which would provide assistance and representation to States with limited resources. It was stated that while the Forum would be an important pillar of the Centre, the core function should be to assist States, for example, in evaluating the appropriateness of the dispute resolution mechanism to be chosen and to assess the strengths and weaknesses of their legal case. It was also noted that, while there were capacity-building opportunities available to Government officials, there was currently no mechanism to provide legal representation services and focusing on the Assistance Mechanism would avoid duplication. In this regard, reference was made to the scoping study outlined in document A/CN.9/WG.III/WP.196.

47. It was said that the services to be provided by the Assistance Mechanism should remain flexible and could be expanded over time to cover additional services, as foreseen in draft provision 8. If a Centre was developed in that fashion, priority would be given to least developed States (LDCs) first, followed by developing countries. It was stated that those priorities should be clearly set out when establishing the Centre.

48. In relation to the possible establishment of a standing mechanism to resolve investment disputes, a view was expressed that the Centre should be an essential component of the reform option proposing the establishment of such mechanism. Another view was expressed that the Centre should be neutral and independent from a standing mechanism to secure the impartiality of the Centre and to negate possible conflicts of interests and that the Centre should provide assistance regardless of whether a dispute was being resolved through the standing mechanism or not. It was also said that the standing mechanism should in any case provide technical assistance

even if the Centre was established separately from a standing mechanism. A view was expressed that the Centre should be established within existing organizations.

49. Considering the emphasis put on the exchange of information and sharing of best practices with regard to ISDS (a function anticipated to be carried out by the Forum), the Working Group requested the Secretariat to consider organizing an informal meeting during the Commission session in 2023 with that purpose. It was suggested that a draft programme for the event could be presented to the Working Group at its next session.

Draft provision 6

50. With regard to subparagraph (a), it was said that reference could be made also to providing advice with regard to negotiations and non-contentious amicable means of dispute resolution.

51. While support was expressed for the Centre providing legal representation (in full or in part) mentioned in subparagraph (b), doubts were also expressed about the Centre representing States in specific cases. It was highlighted that providing legal representation services could be costly and that such services should only be provided depending on the availability of funds. Suggestions were made that focus should be on providing legal advice or in assisting States for example, in the preliminary assessment of the case. It was noted that, even when providing legal representation, the role of the Centre should be to build States' capacity so that they would be in a position to prevent, handle and manage the disputes, rather than to inadvertently create dependency.

52. It was also suggested that the services to be provided by the Centre could be listed in a chronological order and that reference should be made expressly to dispute prevention-related services. A view was expressed that subparagraph (c)(iv) and (v) should be deleted.

53. It was said that the services should be provided regardless of the procedural position of the States, i.e., whether respondent or claimant, and that this should also be reflected in draft provisions 5 and 6.

54. A question was raised whether the services to be provided by the Centre would be limited to treaty-based disputes or would encompass claims based on contract or investment law. Another question related to whether the Centre could be tasked to assist States in disputes involving domestic investors. It was said that the scope of services would need to take into account the jurisdiction of the standing mechanism and the scope of the multilateral instrument on ISDS reform (MIIR), both of which were to be discussed at a later stage.

55. More generally, the Working Group considered that reference could be made to the Advisory Centre on WTO Law (ACWL) when designing the services to be provided by the Centre.

Draft provision 7

56. It was widely felt that the services to be provided by the Centre should not overlap with functions of other international organizations such as UNCTAD, the World Bank and OECD, and that draft provision 7 should be revised to avoid any duplication.

57. There was also a concern expressed that draft provision 7 was prescriptive and that the word "direct" in draft provision 7(1)(a) could be misleading.

58. With respect to draft provision 7(1)(c), it was widely felt that the Centre providing legal and policy advice could be problematic and that the boundaries of such a mandate, if retained, would need to be clarified. For instance, it was said that the Centre should not be advising States on whether any measure they have taken or would take was compliant with the obligations in their investment treaties as this might also lead to questions about liability.

59. It was suggested that some of the services listed in draft provision 7 might not require the establishment of an Advisory Centre. It was also suggested that the services contemplated under draft provision 7 would overlap with the services mentioned in draft provision 6 and that it might be useful to merge the draft provisions.

Draft provision 8

60. It was said that while draft provision 8 allowed for the adjustment of functions to be carried out by the Centre based on a periodic review by the Governing Board, additional flexibility could be provided so that the adjustments could be made at any time, depending on the resources available to the Centre.

B. Beneficiaries (A/CN.9/WG.III/WP.212, paras. 56–67)

61. Regarding the beneficiaries, it was widely felt that the services of the Centre should foremost address the needs of States, particularly LDCs and developing States. However, doubts were expressed about such a categorization, which may not be reflective of the needs of different States for assistance. A suggestion was made that draft provision 9 should state that services be provided to State members of the Centre with a separate paragraph on priority to be given to certain States (see para. 47 above). On the other hand, it was noted that there might be merit in providing services to States not members of the Centre when it would also be beneficial to the member States and could be done in a cost-effective manner (for example, exchange of information and knowledge-sharing).

62. It was suggested that different types of membership could be developed, with different services being provided by the Centre. In response, it was stated that the structure of the Centre should not be overly complicated and that full membership for all States would be preferable.

63. It was widely felt that clear rules on prioritization should guide the Centre as it provided services to States, that could also take into the account the needs of those States and avoid any perception of politicization regarding the Centre's decision. With regard to the rule in option 1 which might limit States from receiving legal representation services if they had or were receiving such services, a question was raised whether the same rule would apply to other services provided by the Centre. It was said that option 2 would provide flexibility to react to unforeseen developments. It was suggested that both options 1 and 2 could be combined. It was said that the priority rule in draft provision 9, option 1 could be a starting point, while the Governing Board should be given discretion to make adjustments depending on the circumstances.

64. While views were expressed in support of including claimant investors (in particular micro, small and medium-sized enterprises, referred to as MSMEs) as beneficiaries of services provided by the Centre, it was felt that MSMEs should not be covered, particularly as beneficiaries of representation services. It was said that the definition of MSMEs differed across jurisdictions. It was also said that subsidizing the claims of investors would run contrary to the objectives of the Centre. It was further noted that conflict of interests could arise, if the Centre were to provide services to both investors and States, particularly with regards to legal representation. It was however suggested that whether the Centre could provide services to MSMEs should be assessed at a later stage once the services to be provided by the Centre were clearer. It was said that certain services could be available to MSMEs and natural persons, such as access to databases, research tools and workshop resources, with limited budget implications.

C. Way forward

65. The Working Group requested the Secretariat to prepare a revised set of provisions on the Centre based on the deliberations of the session.

V. Multilateral instrument on ISDS reform

66. At the thirty-ninth session in October 2020, it was said that a multilateral instrument on ISDS reform (MIIR) should provide a framework for implementing multiple reform elements, and that a coherent and flexible approach to the different reform elements was needed, which would allow State Parties to choose whether and to what extent they would adopt the relevant reform elements (A/CN.9/1044, para. 105). At the current session, the Working Group continued its consideration of the MIIR on the basis of document A/CN.9/WG.III/WP.221.

A. Possible structure of a multilateral instrument (A/CN.9/WG.III/WP.221, paras. 7–13)

67. The Working Group explored the possible structure of the MIIR. At the outset, views were expressed that it was premature to engage in such a discussion considering that a number of the reform elements were still being developed and that it would be prudent to engage in a more detailed discussion once progress had been made on the reform elements. On the other hand, it was stated that the discussion would be useful as it could guide the work in developing the reform elements and that the structure would in any case need to be adjusted as progress was made. In general, the need for the MIIR to balance coherence and flexibility was highlighted.

68. The discussions evolved around two potential structures: a framework convention with protocols and a single convention with annexes. It was noted that there was no need to make a clear distinction between the two structures, as they were similar in nature and protocols and annexes could both provide the flexibility to States to opt in to or opt out of the reform element contained therein. Therefore, it was felt that the MIIR could generally be structured as a single legal instrument that could include core provisions along with optional protocols and/or annexes. It was also suggested that the MIIR should be structured to allow for implementation of any future reforms.

69. The need for providing a mechanism for a State to become a party to a protocol without becoming a party to the single instrument was mentioned. However, concerns were raised as that could run contrary to having the core provisions embodied in the single instrument. It was also highlighted that that could impact the domestic ratification of the protocols.

70. It was also widely felt that whether and how a reform element would be attached to that single instrument could only be determined once that reform element had been developed. It was also observed that not all of the reform elements would necessarily be contained in the MIIR as they might be implemented through different means (for example, as part of the arbitration rules, guidance texts or model clauses).

71. Noting that the Secretariat was preparing draft provisions on a number of the reform elements, it was requested that they be prepared for inclusion in the MIIR, when appropriate. However, it was emphasized that this should be without prejudice to the Working Group's decision on whether those provisions would fit in the MIIR or in one of the protocols or annexes or be implemented in a different way. It was stressed that issues such as whether each of the reform elements would entail amendments to existing investment agreements would ultimately need to be taken into account.

B. Coherence and flexibility (A/CN.9/WG.III/WP.221, paras. 14–30)

1. Coherence and MIIR Operation

72. The Working Group engaged in a discussion about possible core provisions of the MIIR, which would aim to achieve coherence in the application of the reform elements.

Objectives

73. It was generally felt that the objectives of the MIIR should constitute one of the core provisions. While it was observed that addressing the concerns that had been identified by the Working Group during its first phase of its mandate and undertaking reform of the ISDS mechanism could be overarching objectives of the MIIR, it was generally felt that it was difficult at the current stage of the deliberations to set out other concrete objectives, which could only follow after the reform elements had been fully developed and agreed upon. The Secretariat was requested to elaborate on the principles listed in paragraph 16 (for example, transparency, efficiency and the Sustainable Development Goals), so that the Working Group would be in a position to consider them as possible objectives of the MIIR at a later stage.

Modes of ISDS

74. The Working Group discussed whether a provision in which State Parties determined the modes of ISDS that they would consent to under the MIIR, as found in existing investment agreements, should form part of the core provisions. While it was explained that such a provision could map out the different modes of ISDS under the MIIR and their relationship with the modes available in existing investment agreements and thus be useful for investor claimants in identifying their options, doubts were expressed on the need for such a text. It was also said that it was too early in the reform process to articulate how the different modes of ISDS would interact. After discussion, the Secretariat was requested to consider the underlying issues (including the relationship with the consent already provided by States under existing treaties and mechanisms) and examine whether such a provision would need to be developed.

Governance/institution

75. It was widely felt that provisions on the governance of the MIIR should form part of the core provisions as its proper functioning would require institutional support.

76. Diverging views were expressed on the form of the governance structure, which could take the form of a Conference of the Parties and/or a secretariat. In light of the likely budget constraints, a preference was expressed for an existing institution to support the governance structure. As to the functions to be carried out, doubts were expressed about overseeing compliance with, and providing interpretation of, the MIIR, while support was expressed for more technical functions (monitoring treaty actions, supporting negotiations of protocols and annexes, consolidation of reform implementation). It was also mentioned that some of the functions mentioned could be performed by an independent group of experts. It was widely felt that the exact functions could only be determined at a later stage and that reform elements included in protocols or annexes might require distinct governance structures. It was stated that the governance structure of the MIIR would depend on what tasks would be required and how those tasks might be allocated between the governance structure of the MIIR itself and the governance structure for specific reform elements. After discussion, the Secretariat was requested to prepare draft provisions on the possible governance of the MIIR (including options for institutional support) with different options for consideration by the Working Group.

Amendments

77. Differing views were expressed on whether rules on the amendment of the MIIR (including any protocol or annex) should form part of the core provisions. The view was expressed that while a provision on the amendment of the MIIR should be

included as a core provision, amendments to a protocol or an annex should be dealt with in the respective instrument.

Other

78. A suggestion was made that a clause on the interaction between the single instrument and the protocols or the annexes should form one of the core provisions. It was also suggested that provisions on the scope of application of the single instrument and the protocols or annexes, definition of terms used therein, entry into force and termination should form part of the core provisions.

2. Flexibility

79. It was generally felt that the MIIR should be sufficiently flexible to accommodate future developments and endure the passage of time. A view was expressed that it would be necessary to accommodate specific interests or concerns of States by allowing for reservations. At the same time, it was said that caution should be taken in utilizing reservations as the primary vehicle for achieving flexibility, as that could lead to legal uncertainties.

C. Scope of application and relationship with existing treaties (A/CN.9/WG.III/WP.221, paras. 31–48)

1. Application to future investment agreements

80. In general, doubts were expressed about seeking to prohibit States from choosing to derogate from the provisions of the MIIR in future investment agreements as well as to with respect to the MIIR providing an entire set of provisions governing disputes between investors and States for incorporation in future treaties. However, views were also expressed that such an application could ensure coherent application of the reform elements in the future and that there would be some utility in providing a set of provisions, which States could refer to in their investment agreements or guide them in future negotiations. Nonetheless, it was generally observed that the MIIR could not circumscribe what States desired to negotiate and agree to in their future investment agreements.

81. With regard to the scope of the MIIR, a question was raised whether its provisions could apply in the context of State-to-State dispute settlement mechanisms to resolve investment disputes.

2. Relationship with existing investment agreements

82. It was generally felt that one of the objectives of the MIIR should be to apply the reform elements to existing investment agreements. Views were expressed that the MIIR should lay out enhanced reform elements for States to choose from that could supplement existing investment agreements without having an effect on, or an intent to modify them. It was also said that whether the reform elements would apply to existing investment agreements should be left to the State Parties of the MIIR to decide. It was said that if the intention of the States Parties to the MIIR was indeed to have the reform element apply to existing investment agreements, that should be clearly set out in the MIIR.

83. It was generally observed that States could design the relationship between an existing treaty and a new treaty and that the Vienna Convention on the Law of Treaties (VCLT) should be a starting point for reflection on these issues. However, it was noted that not all States were parties to the VCLT and that it might be prudent for the MIIR to clearly set out the relationship with existing investment agreements (including how it would amend certain provisions therein) rather than to rely on the VCLT or a treaty interpretation clause. It was stated that providing such certainty would make the MIIR more user-friendly. It was also said that the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration and the OECD Multilateral

Convention to Implement Tax Treaty Related Measures to Prevent Base Eros and Profit Sharing provided examples of such a clause.

84. As to how the MIIR could interact with existing investment agreements, it was suggested that an amendment, *inter se* modification and suspension (whole or in part) of those agreements could be options. Reference was also made to utilizing the treaty interpretation tools either in the context of the MIIR or within the existing investment agreements.

85. It was mentioned that reform elements which had not been addressed in existing investment agreements would be easier to introduce as was the case for the Transparency Rules, whereas those that were already addressed in existing investment agreements might require more careful consideration. In that context, it was widely felt that the relationship with, and possible amendment of, existing agreements would vary depending on the respective reform element. It was suggested that the Secretariat could prepare standard language that could be considered by the Working Group, should it wish to apply a reform element to existing agreements by amending the provisions therein.

86. With regard to the preparation of a compatibility or conflict clause in the MIIR, it was generally felt that such a clause should be developed in the context of and tailored to each reform element for which it was appropriate, as was the case with article 2(2) of the draft Code of Conduct. It was stated that it was premature to prepare a general clause that would apply to all of the protocols or annexes, which might be optional in character. A suggestion was made that a possible formulation could be to state that the provisions of the MIIR would not affect the rights and obligations of the State Parties established in other treaties.

87. After discussion, the Working Group requested the Secretariat to outline the relevant issues that could arise with regard to existing investment agreements, as the respective reform elements were developed and to develop a standardized language that could apply in different situations.

D. Way forward

88. After discussion, the Working Group requested the Secretariat to prepare an updated version of the note (A/CN.9/WG.III/WP.221) in light of the deliberations, including draft provisions as identified above.

VI. Assessment of damages and compensation and other cross-cutting issues (A/CN.9/WG.III/WP.220)

89. It was recalled that concerns had been expressed in the Working Group in view of inconsistent decisions regarding the application of legal principles to the assessment of damages and compensation (A/CN.9/930/Add.1/Rev.1, para. 30), the high amount of compensation awarded by arbitral tribunals and its potential to undermine States' ability to regulate (A/CN.9/970, paras. 36–38).

90. At the current session, the Working Group discussed the issue of assessment of damages and compensation based on document A/CN.9/WG.III/WP.220.

91. There was a shared understanding within the Working Group that the assessment of compensation could be complex, which contributed to concerns about the cost and duration of ISDS proceedings. It was also generally felt that that complexity also posed significant challenges for the correctness, consistency and predictability of awards relating to compensation. It was further emphasized that awards involving a high amount of compensation often had a detrimental effect on the respondent States' budget with implications on the public interest.

Scope of work

92. As to the possible scope of work, views were expressed that the issues outlined in paragraphs 65, 69, 73, 76 and 77 provided a sound basis for the Working Group to identify work that could be carried out.

93. Yet, concerns were expressed that the issues listed in paragraph 65 were substantive in nature and that it would not be realistic for the Working Group to handle all such aspects in light of the wide range of reform elements already being developed. Views were expressed that the mandate of the Working Group was to focus on procedural aspects of ISDS and doubts were expressed about whether questions relating to the standards of compensation were within that mandate. Doubts were also expressed about the feasibility of completing work on damages and the other reform elements in parallel within a reasonable amount of time. Questions were raised with regard to paragraph 65 on which reform elements could appropriately involve the potential role of national bodies and domestic law in the calculation of damages and what type of work could be envisaged.

94. In response, it was said that some of the issues on that list were procedural in nature or could be addressed through procedural reforms. It was further said that it would be artificial or difficult to classify issues as being procedural or substantive and that the Working Group had been given a broad mandate to work on the possible reform of investor-State "dispute settlement." It was emphasized that it would be important to develop reforms to address the concerns that had particularly severe consequences for developing countries. At the same time, it was stated that caution should be taken not to embark on work on underlying substantive standards. It was also observed that the work should not undermine the investor's right to remedy for a breach of treaty obligation, but rather focus on how damages were assessed as well as unjustifiable inconsistency and lack of correctness of decisions regarding calculation of damages. It was said that efforts should be made to incentivize investors to make more reasonable claims with regard to damages and ensure that the tribunal's determinations on damages were reasonable and justifiable.

95. In that context, support was expressed for the Working Group to address issues of compensation standards, valuation methodology, causation, criteria for assessing inflated claims and possible sanctions (allocation of costs, penalizing the difference between the damages claimed and awarded), burden of proof, valuation date, speculative evidence, role of experts (including divergence of party-appointed experts' damage calculation), impact of investor's conduct on the damages awarded and interests. It was further mentioned that reforms with regard to damages should aim to ensure that claims by investors (as well as awards rendered by the arbitral tribunal) were realistic and proportional to the damages incurred. In light of the limited resources of the Working Group and the Secretariat, it was felt that there was a need to prioritize among the identified issues rather than addressing all of them simultaneously.

96. With regard to the role of experts, it was said that disputing parties should have the right to appoint their own experts. It was also said that under most arbitration rules, tribunals had the power to appoint their own experts to ensure efficiency of the proceedings and to possibly address the divergence in calculations. In that context, it was said that the relationship between the experts' calculation (including the methodology used) and the burden of proof should be examined. Reference was made to work already undertaken by other organizations on the topic. In addition to the points outlined in paragraph 77, it was suggested that bifurcation between liability and quantum should be explored.

97. With regard to a possible cap on compensation as a way to address the concerns raised, it was stated that such awards were a reflection of the impact that a government measure had on investment, which could involve a significant amount of capital. It was said that the possibility of monetary compensation ensured that States would abide by their obligations and provided necessary confidence to investors. However, a view was expressed that the amount of damages should be limited to the amount invested especially in cases where the operations had yet to commence.

98. While a view was expressed that the establishment of a standing mechanism could address some of the concerns raised with regard to the calculation of damages, another view was that a standing mechanism would not necessarily address all of the concerns expressed.

99. As to the form of possible work, divergent views were expressed about whether treaty provisions, guidelines or model clauses should be developed to address the respective issues. It was said that the instrument to be prepared in this regard should generally aim to provide guidance.

Way forward

100. Considering the support expressed to continue work on the assessment of damages and compensation, the Working Group requested the Secretariat to draft text comprised of draft provisions and guidelines that could address concerns about correctness and consistency, as well as cost and duration, that damages and compensation presented. It was said that such provisions and guidelines could draw on existing provisions in treaties that sought to address those concerns through the conduct of dispute settlement proceedings. It was noted that the draft text could address issues relating to, among others, the avoidance of relying on speculative evidence, clarification of causation requirements, allocation of the burden of proof and other evidentiary matters, allocation of costs based on the conduct of the parties, and the role of experts. Further, the Secretariat was requested to prepare explanatory texts to provide guidance on how a tribunal should apply any such provision. For instance, the draft provision on speculative evidence could be accompanied by guidance on valuation methodologies, valuation date, and interest rates. It was affirmed that the form and content of the draft text to be prepared by the Secretariat would be without prejudice to the Working Group's decision which shall be made at a later stage.

Other cross-cutting issues

101. After concluding its deliberation on assessment of damages and compensation, the Working Group engaged in a discussion to identify the so-called cross-cutting issues that could be addressed under the auspices of procedural reform. This was to provide guidance to the Secretariat on provisions to be prepared in addition to those provided for in document A/CN.9/WG.III/WP.219 (see para. 8 therein). It was mentioned that reforms to address shareholder claims and reflective loss as well as other multiple proceeding were already being developed. In that context, it was said that the current reform project already stretched the capacities of the Working Group and that it might be difficult to complete work on all of the issues within a reasonable time period. Accordingly, it was said that new issues should not be added to those that had already been identified.

102. It was noted that during the Fourth Intersessional Meeting of the Working Group, one of the sessions was devoted to identifying and discussing some of the cross-cutting issues (see A/CN.9/WG.III/WP.214). It was further recalled that the annex in an earlier submission by governments (A/CN.9/WG.III/WP.182) contained a list of procedural reforms to be addressed by the Working Group.

103. During the discussion, the following issues were identified as requiring further work:

- Binding joint interpretation by the Treaty Parties and submissions on interpretation by non-disputing Treaty Parties;
- Waiver of claims in other fora with regard to the same claim as well as within the company chain;
- "Fork in the road" clause and other means to address the relationship between domestic and international remedies;
- Exhaustion of local remedies;

- Limitation periods for raising claims;
- Limiting the scope of claims that can be brought by certain investors and in certain circumstances;
- Domestic courts' decisions not being the subject of ISDS;
- Discontinuance of abandoned claims;
- Limitations on treaty shopping;
- Taking of evidence (including fabrication thereof) and burden of proof;
- Consolidation of proceedings;
- Transparency of the proceedings;
- Non-disputing party submission as well as third-party participation, including of affected parties;
- Exclusive jurisdiction of domestic courts with regard to domestic law interpretation and precedence of decisions rendered by domestic courts;
- Regulatory chill; and
- Possible use of State-to-State dispute settlement to resolve investment disputes.

104. The Secretariat was requested to prepare draft provisions on the above-mentioned issues taking into account recent treaty practice, the recently amended ICSID Arbitration Rules as well as studies conducted by other organizations with a view to identifying best practices. The Secretariat was also requested to take into account the fact that some of the provisions mentioned above had not been interpreted in accordance with the intent of the Treaty Parties.

VII. Draft provisions on procedural reform (A/CN.9/WG.II/WP.219)

105. The Working Group recalled that it had undertaken preliminary considerations of procedural rules reform at previous sessions (A/CN.9/1044, paras. 41–89; A/CN.9/964, paras. 124–134).

106. At the current session, the Working Group continued its consideration of the procedural reforms based on document A/CN.9/WG.III/WP.219, which provided draft provisions on: (i) early dismissal of claims (draft provision A); (ii) security for costs (draft provision B); (iii) allocation of costs (draft provision C); (iv) counterclaims (draft provision D); and (v) third-party funding (draft provision E).

A. Early dismissal of claims manifestly without legal merit (A/CN.9/WG.III/WP.219, paras. 11–18)

107. General support was expressed for the inclusion of a rule on early dismissal to address unmeritorious or frivolous claims in an expeditious fashion. It was noted that a similar rule would need to be prepared in the context of an appellate mechanism and a standing mechanism with necessary adjustments. The Working Group considered draft provision A, as provided in paragraph 12 of document A/CN.9/WG.III/WP.219.

108. With regard to paragraph 1, diverging views were expressed on whether the arbitral tribunal should be allowed to rule "on its own initiative". Some viewed that a ruling on early dismissal should be based upon the request of a disputing party and that ruling on the initiative of the arbitral tribunal could raise questions about its independence and impartiality. Another view was that the arbitral tribunal should have the discretion as a means to effectively manage the proceedings, which could also benefit the disputing parties.

109. Doubts were expressed about counterclaims and claims for the purpose of set-off ("set-off claims") being the subject of early dismissal. It was stated that a key objective of the mechanism was to reduce cost and time and that a procedure to dismiss counterclaims or set-off claims would not achieve the same result, given that those counterclaims were usually raised along with a defence. Reference was made to Rule 41 of the 2022 ICSID Arbitration Rules (the "ICSID Rules"), which only mentioned "claims", while references were also made to other existing arbitration rules providing for early dismissal of both claims and counterclaims.

110. It was clarified that draft provision A should allow for early dismissal of a claim or "parts thereof." While it was suggested that "defences" should also be the subject of early dismissal, it was generally felt that the scope should be limited to claims. It was stated that the procedure for dismissing a defence and the consequences thereof would be quite different.

111. While it was generally understood that the phrase "manifestly without legal merit" would provide the basis for a prima facie assessment by the arbitral tribunal, it was suggested that the meaning would need to be clarified by making reference to jurisprudence. However, a concern was expressed that tribunals had imposed a high threshold which was difficult to meet and a question was raised whether the phrase would sufficiently cover frivolous claims and instances of abuse of process.

112. It was widely felt that draft provision A should cover a plea that a claim that the arbitral tribunal had jurisdiction was "manifestly" without legal merit. It was observed that a contrary ruling by the tribunal should not deprive the disputing parties of the right to raise a subsequent jurisdictional plea, which should be reflected in paragraph 7. It was said that the arbitral tribunal should have the discretion to rule on its jurisdiction without any request by the disputing party (see para. 108 above).

113. With regard to paragraph 2, it was suggested that the time frame for making the request should be between 30 and 60 days, while preference was expressed for aligning it with Rule 41(2)(a) of the ICSID Rules (45 days). Views were expressed on when the time frame should commence, such as with the constitution of the arbitral tribunal or the submission of the statement of claim (cf. notice or request for arbitration), whichever might be later. It was explained that this would cater for different circumstances, for example, where the statement of claim was submitted prior to the constitution of the tribunal or sometime thereafter.

114. With regard to paragraph 3, it was suggested that the words "as precisely as possible" should be deleted. It was generally felt that there was no need for draft provision A to provide a two-stage process as currently found in paragraphs 4 and 5. Noting that the second sentence of paragraph 3 was intended to assist the determination of the arbitral tribunal on whether to rule on the request, it was suggested that the sentence could be deleted along with paragraph 4.

115. It was mentioned that draft provision A should set out the overall procedure for early dismissal, including how the disputing parties would express their views, whether it would be a document-only procedure, whether the proceeding would be suspended while the arbitral tribunal made the ruling, and when the arbitral tribunal was exercising the discretion on its own initiative. It was also suggested that paragraph 5 should provide a fixed time frame within which the arbitral tribunal would need to make a decision and reference was made to 60 days in Rule 41(2)(e) of the ICSID Rules. It was generally felt that the time frame should commence on the date of the last submission on the request unless the arbitral tribunal was constituted after that submission. It was also mentioned that the tribunal should be able to extend the time frame under certain circumstances.

116. With regard to paragraph 6, it was explained that the form of the ruling would largely depend on its content – for example, if the arbitral tribunal were to deny the early dismissal request, it could issue an order instead of an award. Questions were raised whether rulings by the arbitral tribunal under draft provision A should be the subject to review and how the mechanism would operate when the ruling was in the

form of an order. A suggestion was made to delete paragraph 6 and leave it to the arbitral tribunal to choose the appropriate form. Another suggestion was to clarify when the arbitral tribunal should issue an order and when to make an award.

117. It was generally felt that the mere existence of third-party funding should not be an element to take into account when the arbitral tribunal made a ruling in accordance with draft provision A. It was, however, noted that if certain types of third-party funding were to be prohibited, a way to implement that regulation was through the early dismissal of the claim.

118. It was also suggested that draft provision A should clarify that the arbitral tribunal should not engage in a fact-finding exercise in making a ruling by including language that the arbitral tribunal were to assume that the alleged facts were true.

119. There was general support to include a rule along the lines of Rule 52(2) of the ICSID Rules.

B. Allocation of costs (A/CN.9/WG.III/WP.219, paras. 32–43)

120. The Working Group then discussed draft provision C on allocation of costs as provided in paragraph 33 of document A/CN.9/WG.III/WP.219. Delegations were invited to provide written comments to the Secretariat on draft provisions B (security for costs) and D (counterclaims). It was widely felt that a clear rule on allocation of costs would have a positive impact in reducing the costs of the proceeding and prevent inconsistencies among decisions on costs.

121. Regarding paragraph 1, there was general support for including a default rule that the unsuccessful party would bear the costs of the proceedings with the arbitral tribunal having the discretion to decide otherwise. It was said that this corresponded to current arbitral practice and would deter claims that were unlikely to succeed. However, it was said that it was often difficult to determine which party was unsuccessful in an ISDS proceeding and that the arbitral tribunal should be required to take into account all relevant circumstances of the case in allocating costs. In support, it was also said that the allocation of costs between the disputing parties should not be limited to exceptional instances.

122. Regarding paragraph 2, views diverged on whether the meaning and the scope of “costs of the proceeding” should be clarified in the draft provision or left to the applicable treaty or arbitration rules. It was also suggested that further guidance could be provided to the arbitral tribunal in determining whether the costs were reasonable, as it provided too much discretion to the tribunal.

123. It was widely felt that paragraph 3 should provide an indicative list of elements to be considered by the arbitral tribunal and there was general support for subparagraphs 3(a) to 3(c). With regard to subparagraph 3(b), it was suggested that the arbitral tribunal should take into account whether parties acted in an expeditious and efficient manner and in compliance with the tribunal’s orders, the excessiveness of the claims as well as the proportionality of the damage awarded with that claimed. Views diverged on whether the existence of third-party funding should have an impact on cost allocation. As to other elements that could be listed, it was suggested that the complexity and novelty of the issues as well as the economic level of development of the respondent States should be factors to be considered by the arbitral tribunal.

124. Regarding paragraph 4, it was widely felt that expenses related to or arising from third-party funding should not fall under the costs of the proceeding and the phrase “unless determined otherwise by the arbitral tribunal” should be deleted accordingly. There was general support for paragraphs 5 and 6 (see para. 119 above).

C. Third-party funding (A/CN.9/WG.III/WP.219, paras. 52–101)

125. It was said that third-party funding in the context of ISDS posed a significant concern and could lead to an increase of frivolous claims. It was emphasized that regulation of third-party funding could benefit States with limited resources and address the concerns expressed about the mechanism being misused as a business opportunity. It was stated that ISDS claims should generally not be motivated by third-party funding and that its regulation should aim to ensure that only substantiated claims were raised by claimants.

126. In response, it was said that third-party funders would only fund substantiated claims with high prospects of success and that it would be incorrect to assume that claims with such funding were necessarily frivolous. The value of third-party funding as providing access to justice, in particular for micro-, small- and medium-sized enterprises (MSMEs) as well as for States, was also highlighted.

1. Definitions (Draft Provision E-1)

127. Noting that the effectiveness of any regulation on third-party funding would need to be based on clear definitions of key terminology, the Working Group considered draft provision E-1 with the understanding that the definitions therein would need to be adjusted depending on the eventually agreed regulation model.

128. It was suggested that the scope of the definition should be broadened, so that all types of third-party funding, including non-profit funding, would be subject to disclosure. Accordingly, a suggestion was made to delete the phrase "in return for remuneration dependent on the outcome of the proceeding". On the other hand, it was mentioned that a clear distinction should be made between commercial and non-profit funding and support was expressed for retaining that phrase in the definition.

129. A number of suggestions were made, which included the following:

- Funding provided by the disputing parties' legal or other representative should be covered in the definition, while services provided by legal or other representatives as non-financial support should not be covered;
- Clarity should be provided on the meaning of "indirect" funding;
- "IID proceeding" should be understood to mean all types of procedures to resolve an investment dispute;
- Funding by affiliates of a company should be excluded;
- The phrase "to finance part or all of the cost of the proceeding" should be included in the definition of third-party funding; and
- "Funded party" should be understood to include both investor claimants and respondent States.

2. Regulation models (A/CN.9/WG.III/WP.219, paras. 62–74)

130. The Working Group considered the various modes of regulating third-party funding (referred to as "regulation models") and diverging views were expressed on the level of regulation to be pursued. While the advantages and disadvantages of each regulation model were mentioned, it was also noted that the regulation models shared some commonalities.

131. Support was expressed for the prohibition model in light of the negative impact that third-party funding had on the dynamics of ISDS proceedings, including the introduction of a commercial element into a mechanism established for protecting investors. It was suggested that even under the prohibition model, certain exclusions could be provided, for example, for MSMEs and legal aid mechanisms. Differing views were expressed with regard to the drafting options in paragraph 64.

132. With regard to the restrictive model, questions were raised about its implementation. It was stated that the funded party might have difficulties to demonstrate that the funding meets the rather high threshold, particularly that

provided for in the access to justice exception model. Questions were also raised with regard to the meaning of the phrase "sustainable development provisions", which would differ depending on the jurisdiction. Doubts were raised as to whether restrictions on third-party funding was an appropriate tool for advancing sustainable development goals.

133. There was support expressed for the permissive model, which would allow third-party funding in principle, except in limited circumstances. However, it was stated that caution should be taken when drafting the exceptions, as a provision like subparagraph (a) could result in prohibiting most types of third-party funding. It was suggested that third-party funding amounting to an abuse of process could be listed as an example of prohibited types of funding.

134. Yet another view was that none of the regulation models were appropriate, as third-party funding did not necessarily result in a conflict of interest. It was highlighted that third-party funding could enable access to justice and its regulation required a careful balancing of the different interests. Recognizing the urgent need to address the current lack of transparency in third-party funding practice and conflicts of interest that might arise from it, support was expressed for imposing a strong disclosure requirement without implementing any of the regulation models. It was stated that disclosure requirements could sufficiently and adequately address the concerns identified particularly if combined with other procedural rules such as those on security for costs and allocation of costs and avoid over-regulation. It was also stated that the regulation models would likely increase the procedural burden of the disputing parties and the arbitral tribunal, particularly with regard to whether the third-party funding was the subject of regulation or not. It was further stated that discussions on disclosure obligations should precede those on the regulation models.

3. Disclosure (Draft Provision E-2)

135. There was broad support for requiring disclosure as a way to enhance transparency and avoid conflict of interests. There was also wide support that the disclosure requirement should be robust and comprehensive, possibly exceeding the scope required in Rule 14 of the ICSID Rules. In that context, there was general support for subparagraphs 1(a) and 1(b). However, it was stated that disclosure should be limited to that necessary to identify and resolve a potential conflict of interest.

136. With regard to subparagraph 1(c), diverging views were expressed on whether the funding agreement or the terms thereof should be subject to mandatory disclosure. One view was that the disclosure of such information was crucial, as it would allow the arbitral tribunal and the other disputing party to be aware of any conflict of interests, how the funding was channelled, and the extent to which the third-party funder might cover the costs of the proceeding. It was stated that without the disclosure of such information, the arbitral tribunal would not be in a position to request additional information in accordance with paragraph 2.

137. Another view was that the funding agreement and its terms should only be disclosed when required by the arbitral tribunal insofar as it would be necessary to identify the nature of the funding arrangement. It was further mentioned that the funding agreement might be subject to confidentiality, which might deter compliance. However, it was mentioned that the disclosure requirement could be met by taking certain measures, for example, by redacting confidential information.

138. It was noted that the information that could be requested by the arbitral tribunal in paragraph 2 would need to be adjusted depending on the regulation model – for example, subparagraphs (b) and (d) might be applicable in the permissive model but could be deleted if that model was not chosen. It was said that subparagraph (f) would give broad discretion to the arbitral tribunal and the tribunal should be mindful that the disputing parties might not be able to access all such information.

139. A suggestion was made that there should be no or limited exception to the disclosure requirement to ensure scrutiny. Another suggestion was that disclosures

should be made as soon as the funding agreement was concluded even before the constitution of the arbitral tribunal, which would allow the other disputing party or potential arbitrator candidates to assess whether there was any conflict of interests and take the necessary measures.

4. Legal consequences and sanctions in case of non-compliance (Draft Provision E-3)

140. With regard to the sanctions that could be imposed in case of non-compliance, it was noted that such measures should be readily available to ensure compliance and that they would likely differ depending on the regulation model. Questioning whether the measures needed to be expressly listed in a separate provision, it was stated that discretion should be provided to the arbitral tribunal to take the most appropriate measure. Views were also expressed in favour of listing the possible sanctions. In that context, it was noted that draft provisions E-3 intended to address not only non-compliance but also delays in compliance.

141. Doubts were expressed about subparagraph (a) as the arbitral tribunal would likely lack the competence to issue such an order. Doubts were also expressed about subparagraph (b), particularly when third-party funding was to be regulated only via disclosure requirements. However, it was noted that the possibility of suspension could incentivize disputing parties to abide by the disclosure obligations, particularly when so requested by the arbitral tribunal. It was generally felt that termination should not be listed as a possible sanction, as the outcome would be too severe. While support was expressed for subparagraph (c), it was also said that the subparagraph might be redundant in light of draft provision B(4)(d). Lastly, there was general support for subparagraph (d) as providing an effective measure.

5. Third-party funding and investment (A/CN.9/WG.III/WP.219, para. 100)

142. Diverging views were expressed on the need for a provision clarifying that third-party funding does not constitute an investment protected under investment treaties. The Secretariat was requested to examine the issues further and report back on the need for and utility of such a provision.

6. Way Forward

143. It was proposed that draft provision E should be revised as follows:

- Provide a broad definition of third-party funding to ensure adequate disclosure, which would allow for the identification of any conflict of interests;
- Include a permissive rule whereby third-party funding would generally be allowed, including third-party funding provided in return for remuneration dependent on the outcome of the proceeding, but would impose conditions on the specific terms of that funding, which might include the following:

(a) Where security for costs had not been provided, the third-party funder would be required to have agreed to cover any costs awarded against the funded party;

(b) The third-party funder or its representative must not (i) have control or influence over the management of the claim or the proceedings; (ii) be able to terminate the funding arrangement without prior notice to the arbitral tribunal and other disputing parties; (iii) have control or influence over the decision of the funded party to terminate, settle or otherwise resolve the dispute; and

(c) The funded party must retain the right to choose and be represented by its own legal representative;

- Identify other specific terms, if any, which would be necessary to address what were seen as the most problematic consequences of third-party funding;
- Provide rules mandating disclosure of the terms of the funding agreement necessary to establish that the above-mentioned conditions were met, while

providing for the arbitral tribunal to have the discretion to order the disclosure of additional terms of the funding agreement; and

- Include rules on sanctions to address the situation where the funded party deliberately falsified the terms of the funding arrangement or intentionally concealed the fact that the above-mentioned conditions were not met.

144. The Working Group did not have time to discuss the proposed way forward, and hence requested the Secretariat to prepare a revised draft provision E as described in the proposal for future consideration by the Working Group.

VIII. Draft texts on mediation

145. The Working Group reiterated its support for promoting mediation as a means to resolve investment disputes. It was observed that the use of mediation could reduce costs of ISDS and at the same time preserve the relationship between the investor and the State.

146. The Working Group considered draft provisions on the use of mediation as contained in document A/CN.9/WG.III/WP.217 and the draft guidelines found in document A/CN.9/WG.III/WP.218.

A. Draft provisions on mediation (A/CN.9/WG.III/WP.217 – paras. 16–33)

147. It was generally felt that the work on the draft provisions should aim to prepare treaty language rather than a complete set of mediation rules. Calls were made to avoid duplication of work, in light of existing mediation rules (including the 2021 UNCITRAL Mediation Rules, the 2022 ICSID Mediation Rules and the 2012 International Bar Association (IBA) Rules on Investment for Investor-State Mediation). It was also said that a standing mechanism could administer mediations according to the draft provisions.

1. Draft provision 1

148. The Working Group considered draft provision 1 which included three options to make mediation available and conducive. It was widely felt that mediation should be encouraged as a means to resolve disputes in an amicable fashion, which could be done prior to or during an arbitration proceeding. It was stated that explicit language on the use of mediation should be included in investment treaties which would make it easier for States to engage in mediation.

149. Among the three options, there was wide support for option A, which provided that the disputing parties would determine whether to engage in mediation. It was stated that this option would preserve the flexibility and consent-based nature of the mediation process. Furthermore, it was said that imposing mediation on the parties could lead to delays in the overall resolution of the dispute.

150. On the other hand, support was expressed for a provision that would combine the elements found in options B and C, which would mandate the commencement of mediation to promote early constructive dialogue. It was suggested that the combined provision could be developed as an option for those States that wished to require mandatory engagement in mediation, while option A would provide the default rule when there was no agreement between the States Parties.

151. Generally, it was stated that the choice of the applicable set of mediation rules could be left to the parties. It was therefore suggested that draft provision 1 should be limited to the offer of mediation, which would include a proposal on possible mediation rules to choose from. In support, it was suggested that the list of available mediation rules in draft provision 4 could be placed in draft provision 1.

152. As a way to encourage the use of mediation, it was generally felt that paragraph 1 should include more explicit wording along the following lines: “The disputing parties shall give favourable consideration to mediation as a means to resolve disputes amicably.” It was stated that such language would give mediation sufficient visibility without imposing an obligation on the disputing parties.

153. It was suggested that the requirement to give favourable consideration to the request for mediation in paragraph 2 could be redundant if the above-mentioned language was incorporated in paragraph 1. However, it was said that there might be merit in emphasizing that favourable consideration should be given also to a party’s request for mediation.

154. It was said that a definition of mediation along the lines of article 1, paragraph 3 of the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation and article 2, paragraph 3 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”) should be included for clarity.

155. It was suggested that the time frames for responding to a request for mediation and for agreeing on the mediator need not to be mentioned in draft provision 1 as they were addressed in the mediation rules. However, it was stated that the disputing parties might not have agreed on the mediation rules at that stage.

156. As to the 15-day time frame in paragraph 2, while some viewed it as reasonable, it was suggested that the period should be longer to allow disputing parties, in particular respondent States, to assess and coordinate among the relevant agencies on whether to accept or reject the request for mediation. Suggestions were made that the time period could be 30 or 60 days from the receipt of the request. Other suggestions were made that the time period could be different depending on whether the State accepted or rejected the request and that the minimum and the maximum period should be indicated.

157. It was stated that the 15-day time frame in paragraph 4 was also too short and needed to be adjusted. However, it was said that paragraph 4 would not be necessary as the appointment of the mediator, and associated timelines, was dealt with in the existing mediation rules.

158. Diverging views were expressed about the consequence of a disputing party not responding within the time frame provided for accepting an invitation to mediation. One view was that silence should be deemed as acceptance of the offer to mediate, considering that the parties were required to give favourable consideration to mediation. The prevailing view however was that consent to mediation needed to be expressed explicitly, emphasizing the voluntary nature of mediation, and thus it would not be appropriate to interpret silence as tacit acceptance.

159. It was suggested to include in draft provision 1 a time frame within which the disputing parties would need to reach a settlement once mediation commenced, similar to that found in option C, paragraph 3.

160. A question was raised whether the requirement for signature in paragraph 3 was necessary. With regard to a suggestion that the request for mediation shall be in writing, reference was made to draft provision 3(1).

2. Draft provisions 2 to 4

161. Draft provisions 2 to 4 were considered together as they addressed issues that were closely related. It was generally felt that the request for mediation should be in writing, including through electronic means.

162. Regarding the use of mediation in parallel to arbitration and litigation, it was widely felt that commencement of mediation should result in the suspension of other proceedings, without the need for an agreement by the disputing parties. This was based on the need to limit any risk of interference between the proceedings and to

ensure that disputing parties, particularly States with limited resources, could concentrate on mediation when they so agreed.

163. Questions were raised whether the automatic suspension of other proceedings would result in undue costs or injustice for the other party or parties that did not request mediation. In response, it was said that the disputing parties had to agree to commence mediation and were free to terminate the mediation process when they so wished. Questions were also raised about the impact that a suspension could have on limitation periods and more generally, how it would interact with provisions addressing the suspension of arbitral proceedings. In response, it was clarified that draft provision 2 could be drafted so as to override such provisions and to include a trigger for the suspension, for example, a notification by the disputing parties to the tribunal.

164. It was suggested that draft provisions 3 and 4 could be combined. This was on the basis that a request for mediation should include a set of governing rules, to which the other party could agree or counter, which would reduce the need for enumerating specific requirements in the draft provisions. While views diverged on the level of detail of information to be included in a request for mediation, it was generally felt that the information provided should allow parties to consider the request, including effective internal coordination. It was cautioned that requiring too much information in the request for mediation could be burdensome on the parties and counterproductive for mediation. It was also suggested that draft provisions 3 and 4 may be further combined with draft provision 1.

165. With respect to draft provision 4, some support was expressed in favour of including a conflict or compatibility clause to ensure the coherent interaction between the draft provisions and the applicable mediation rules or any other rule agreed by the disputing parties. It was also suggested that paragraph 4(d) should refer to other rules on “mediation”.

3. Draft provision 5

166. There was general support for draft provision 5, which provided a rule that engagement in mediation should not prejudice the legal position or rights of any disputing party in any other proceeding. In that context, it was widely felt that there was no need to qualify “proceedings” as international investment dispute resolution proceedings. It was further suggested that the draft guidelines could elaborate how draft provision 5 would operate in practice, making reference to Article 7 of the UNCITRAL Mediation Rules and Rule 11 of the ICSID Mediation Rules, both of which limited the conduct of the disputing parties in this regard.

4. Draft provision 6

167. With regard to sections F and G as well as draft provision 6 therein, it was highlighted that there was a need to strike a balance between transparency and confidentiality. For example, it was noted that too much emphasis on transparency could deter parties from being able to engage candidly in a mediation, and thus undermine the aim of the draft provisions to promote the use of mediation. However, it was also pointed out that the use of public resources to conduct mediation and to pay any settlement reached as well as the impact that a settlement could have on the public interest required a level of transparency.

168. It was stated that parties should be able to tailor the arrangements for transparency and confidentiality to meet their needs, such as by choosing the applicable rules that would apply to the mediation, and that the draft provision should not impose a default rule. In response, it was suggested that there could be merit in stating a default rule that would provide flexibility to the parties to agree otherwise, subject to certain exceptions (for example, when disclosure is required by domestic legislation or when information is confidential or protected under the applicable rules depending on the default rule).

169. It was stated that if a draft provision on transparency was to be prepared, it would be necessary to address the linkage with the confidentiality provision in the applicable mediation rule. Another suggestion was to follow the approach in Rule 10 of the ICSID Mediation Rules. As to what should be the subject of public disclosure, views diverged on whether the fact that mediation was taking or took place should be disclosed as well as the extent to which the settlement agreement should be made available to the public.

5. Draft provision 7

170. It was felt that paragraph 1 of draft provision 7 could be deleted and its content dealt with in the draft guidelines. This was because the issue whether any other proceeding could be commenced or continued would depend on the agreement of the parties, which could be recorded in the settlement agreement. It was also said that the limitation in paragraph 1 should be subject not only to the conclusion of the settlement agreement but also the compliance thereof. It was clarified that paragraph 1 should not prevent disputing parties from pursuing a proceeding with regard to parts of the dispute that were not resolved in the settlement agreement.

171. It was felt that paragraph 2 was acceptable as providing guidance to the disputing parties on the need to meet the requirements of the Singapore Convention on Mediation or any other similar requirements.

6. Way forward

172. The Secretariat was requested to revise the draft provisions based on the deliberations and to simplify their structure.

B. Draft guidelines on investment mediation (A/CN.9/WG.III/WP.218)

173. There was wide support for the preparation of the draft guidelines on investment mediation (the "Guidelines") as it was found to be a useful educational and awareness-raising tool. It was stated that the Guidelines would be prepared as a stand-alone document independent from the draft provisions on mediation.

1. Section A to G (A/CN.9/WG.III/WP.218, paras. 6–15)

174. It was suggested that paragraph 8 should list the nature of the dispute or the underlying grievance as aspects to be taken into account when considering whether mediation was suitable. It was also stated that the possibility of mediating parts of the claim should be expressly mentioned.

175. A suggestion was made that the chart in paragraph 10 could mention exhaustion of local remedies as well as other preconditions for the initiation of arbitration. However, it was noted that the chart was only an illustration for educational purposes and that not all investment treaties required exhaustion of local remedies.

176. Doubts were expressed about the need for the chart. It was observed that the chart did not represent the wide range of options provided in investment agreements as well as the different scenarios and life cycles of an investment. It was said that the text in paragraph 10 might be sufficient to highlight that mediation was available throughout the different stages of the dispute, including before its crystallization. The Secretariat was requested to revise the chart to emphasize that aspect for consideration by the Working Group at a future session.

177. With regard to paragraph 11, it was suggested that the last two sentences should indicate that there might be a minimum time period during which the mediation process would continue.

178. It was said that paragraph 12 should state the need for clarity regarding any time frame and the need to give disputing parties sufficient time to engage in mediation.

179. It was widely felt that paragraph 13 should note that the disputing parties could agree to any other mediation rules. It was stated that in making that reference, the Guidelines should emphasize that those rules should be in line with international standards and not conflict with provisions which the disputing parties cannot derogate from, including any applicable law or court order.

180. With regard to paragraphs 14 and 15, the possible benefits of the standing mechanism offering permanent mediation services to be provided by full-time mediators was mentioned, while another view was that a standing mechanism would not resolve all existing issues related to the use of mediation in ISDS. It was also suggested that the envisaged Advisory Centre should be mentioned as a platform for information sharing, capacity building as well as the provision of mediation services. However, there was general support for the current language, which was generic in nature and did not specify any institution. It was generally felt that the role of institutions in identifying a pool of qualified mediators as well as engaging in capacity-building and awareness-raising should be listed in paragraph 15.

2. Section H (A/CN.9/WG.III/WP.218, paras. 16–24)

181. It was suggested that the competencies listed in paragraph 20 should not be understood as mandatory requirements for mediators. In the same vein, it was said that the list should be neither cumulative nor exhaustive. Doubts were expressed about referring to accreditation by an internationally recognized organization in subparagraph (b). It was suggested that the term “conciliation” in subparagraph (c) should be deleted to avoid confusion.

182. It was widely felt that section H should highlight that disputing parties might wish to take into account the need for diversity and gender balance when appointing a mediator.

183. With regard to paragraph 22, it was suggested that the role of mediators in facilitating the resolution of a dispute be emphasized rather than the fact that they could not impose decisions. It was noted that expertise in the field of investment law, knowledge of language, and specific sector experience be included in paragraph 20 as mediator’s competencies.

184. It was agreed that section H did not need to further elaborate on the benefits of co-mediation or the factors to take into account when using co-mediation.

3. Section I to M (A/CN.9/WG.III/WP.218, paras. 25–41)

185. There was general support for paragraph 28 as it emphasized the collaborative approach required in mediation.

186. It was agreed that paragraph 29 should be deleted as the disputing parties had the ultimate choice on whether to engage in mediation and there was no need for the Guidelines to address the terms agreed between the disputing party and its legal representatives. It was said that such terms could however clarify the role and professional responsibilities of legal representatives in mediations.

187. A suggestion to include clear, fixed time frames for the different stages mentioned in paragraph 32 did not receive support.

188. It was suggested that paragraph 33 should mention safeguards to ensure the integrity of the online mediation process. It was further suggested that the advantages and disadvantages of online mediation should be presented in a balanced manner.

189. With regard to paragraphs 35 and 36, it was said that, while the disputing parties could generally agree between themselves on what may be disclosed, there might be instances where the domestic law required the settlement agreement to be made public in order to facilitate its execution and that such instances should be an exception to confidentiality. It was suggested that the Guidelines highlight that the without prejudice principle and the confidentiality obligation applied to all those involved in the mediation process, including any non-disputing parties.

190. It was suggested that section K could elaborate on the balance between transparency and confidentiality more broadly in the context of ISDS, especially with regards to issues surrounding the public interest as well as the conditions that would justify transparency and the information to be made public. It was suggested that paragraph 39, which addressed mandatory disclosure requirements, might be better placed in section K in the context of confidentiality and transparency.

191. It was said that paragraph 40 should note that the participation of non-disputing parties was one way to represent the public interest as there were other means to do so.

192. With respect to paragraph 41, it was suggested that the Guidelines should avoid making a comparison with arbitration and focus more on the benefits of mediation, particularly how the disputing parties had more control over the mediation process.

4. Section N (A/CN.9/WG.III/WP.218, paras. 42–54)

193. It was suggested that the elements to be covered in the domestic legal framework listed in paragraph 43 could be further developed in the Guidelines with reference to the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

194. While a suggestion was made for the Guidelines to encourage States to resort to mediation during the cooling-off period, it was noted that not all investment treaties provided for such a period.

195. With regard to paragraph 45, it was stated that while the Singapore Convention provided a sound enforcement mechanism for mediated settlement agreements, caution should be taken in presenting it as the sole mechanism for enforcing mediated settlement agreements in the area of ISDS. It was said that the reservations allowed in article 8 of the Singapore Convention would enable a Party to not apply the Convention to settlement agreements involving a government or a government agency.

196. It was suggested that paragraph 46 should be revised to reflect the different views expressed on the topic in the context of the draft provisions on mediation (see paras. 147-171 above). It was suggested that the different approaches should be set out in a neutral manner.

197. It was suggested that a list of awareness-raising, capacity-building and technical assistance activities be provided in the Guidelines and that paragraph 47 highlight the need to coordinate such activities, which was one of the envisaged roles of the Advisory Centre.

198. It was suggested that paragraph 52 should be revised to list the relevant responsibilities or functions that could be carried out by a dispute prevention and management agency, while avoiding the impression that a single agency should be vested with those functions. It was mentioned that technical assistance and capacity-building could be included in that list. It was said that the list should be illustrative and the Guidelines should clarify that States would be free to prescribe all or some of the functions listed, in one or more agencies, based on their own policy preferences and consistent with their individual government structures.

5. Way forward

199. It was agreed that there was no need to expand the Guidelines to include the investors' perspective and that focus should be on the necessities and constraints faced by States.

200. Making reference to previous informal consultations such as the Fifth Intersessional Meeting and the Forum for Further Preparatory Work on Investment Mediation held in Hong Kong, China, the Working Group agreed that the Secretariat could continue to make use of informal means to further develop the draft provisions

and the Guidelines so as to present them to the Commission next year. It was reiterated that no decisions would be made during such informal meetings

IX. Draft Code of Conduct for Adjudicators

A. General remarks

201. The Working Group commenced its second reading of the draft code of conduct for adjudicators (the "Code") based on document A/CN.9/WG.III/WP.216. An informal draft of the accompanying commentary (the "Commentary") was also made available to facilitate the discussions on the Code.

202. At the outset, the Working Group considered how to present the Code to the Commission, mainly whether it should be presented as a single text applicable to both arbitrators and judges of a standing mechanism or as two separate texts.

203. It was said that there were benefits in continuing to discuss the provisions applicable to arbitrators and judges in a single text as there were similarities between the standards. However, doubts were expressed about the extent to which the Code could address the conduct of judges, when it was not clear how the standing mechanism would operate, the functions and types of services to be provided by judges as well as their terms of service (full-time or part-time).

204. After discussion, the Working Group agreed to continue its deliberations based on document A/CN.9/WG.III/WP.216 and consider the articles of the Code as they would apply to both arbitrators and judges, but that it would work towards presenting two separate texts to the Commission for its consideration in 2023 – a code of conduct for arbitrators for adoption by the Commission, and a code of conduct for judges for adoption in principle, as adoption in principle would provide flexibility to revisit any pending issues and make any necessary adjustments once the deliberations on the standing mechanism had progressed.

B. Code of Conduct

1. Article 1 – Definitions

205. On whether to retain the phrase "or any constituent subdivision or agency of a State or a Regional Economic Integration Organization (REIO)" in subparagraph (a), it was said that the inclusion of that phrase would ensure that the Code also applied to disputes involving those entities, which might have entered into an investment contract not on behalf of the State or the REIO but in their own legal capacities. It was also said that the inclusion of that phrase would align subparagraph (a) with article 25(1) of the ICSID Convention, which provided that the jurisdiction of ICSID would extend to disputes involving a constituent subdivision or agency of a Contracting State designated by that State. It was said that the Code should apply equally for disputes to which a State or REIO was a disputing party, and for disputes to which a constituent subdivision or agency was a disputing party. Another view was that the inclusion of the phrase was not necessary as it would unduly complicate the definition, not be applicable to all States, and lead to confusion over the scope of the Code. Concerns were also expressed that the phrase could be understood as a statement on the applicable laws of attribution of responsibility to a State.

206. It was explained that that phrase did not address: (i) whether an act or a measure by a constituent subdivision or agency of a State would be attributable to a State or constitute a breach of the State's obligation under an investment treaty; (ii) issues involving the laws of agency or any legal relationship between the State and the constituent subdivision or agency; (iii) whether the State or the constituent subdivision or agency had consented to the proceeding or to the application of the Code. It was also observed that the definition in subparagraph (a) was for the purposes

of the Code only and was not intended to expand the scope of "investment" or "consent" found in any instrument of consent.

207. After discussion, the Working Group agreed to retain the phrase within square brackets and requested the Secretariat to prepare the Commentary to clarify the questions raised during the deliberations, including how the phrase would operate in the context of the ICSID Convention and to clarify that the phrase would not affect the operation of the applicable law on attribution of responsibility to a State.

208. A suggestion was made that the phrase "investment contract" in subparagraph (a) could be further elaborated on in the Commentary.

209. With respect to subparagraph (e), the Working Group agreed to retain the generic phrase "who has not yet been appointed" and explain in the Commentary that for example, in the ICSID context, a person only became a member of an arbitral tribunal when he or she accepted the appointment, and that acceptance was notified.

210. It was generally felt that the phrase "as agreed with the disputing parties" should be deleted from subparagraph (f), as it could unintentionally limit the scope of persons which the Code would cover. It was observed that the usual practice was that the disputing parties were consulted about engaging an assistant, his or her identity, the tasks to be performed, as well as the fees. Accordingly, it was agreed that a provision could be included in the Code requiring an adjudicator to consult the disputing parties before engaging an assistant, which could be further elaborated on in the Commentary. It was suggested that the possibility of an assistant being a legal person could be addressed in the Commentary.

211. Suggestions that the terms "investment", "investor", "investment contract", and "disputing party" be defined in the Code did not receive support.

212. A concern was expressed about the phrase "without the presence or knowledge of the other disputing party or parties" in subparagraph (g). This was because a disputing party merely being aware of a communication should not result in the obligations in article 7 being lifted. Accordingly, it was agreed that the phrase "or knowledge" should be deleted.

213. In addition, it was suggested that the phrase "or its (their) legal representatives" should be inserted at the end of subparagraph (g) to reflect a situation where the communication was with the legal representative and not the disputing party. It was said that such a situation should not be considered as "ex parte communication". In response, a view was expressed that the aim of article 7 should be to ensure that communications would take place with the presence of the disputing party and not only its legal representative. The Working Group agreed to revisit this issue after its consideration of article 7.

2. Article 2 – Application of the Code

214. It was explained that the instrument of consent referred to article 1(a) would provide the basis for submitting a dispute for resolution, to which the Code would apply. It was suggested that the Commentary should address the relationship between the instrument of consent and the Code and the possible means of incorporating the Code.

215. There was general support to include the words "an Adjudicator or a Candidate" without the square brackets in paragraph 1, as the Code would apply to individuals involved in the resolution of IIDs and not to the IID proceeding itself. It was, however, said that the inclusion of those words would make the words "in an IID proceeding" redundant in light of the definitions of "Arbitrator" or "Judge", which referred to an IID. It was also questioned whether a Candidate should be characterized as being "in" an IID proceeding.

216. After discussion, it was agreed that the first sentence of paragraph 1 should be revised as follows for Arbitrators: "The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding." It was agreed that the text would be adjusted for

Judges along the following lines: “The Code applies to a Judge or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role.”

217. It was expressed that the second sentence of paragraph 1 was not necessary as disputing parties would be free to agree to apply the Code. However, it was stated that the autonomy of the disputing parties to agree to apply the Code to a dispute, which might not fall under the definition of IID in the Code, should be highlighted and reference was made to State-to-State disputes or commercial disputes. It was agreed that the second sentence of paragraph 1 should be retained to highlight that possibility. It was also agreed that the possibility for the disputing parties to apply the Code to any person engaged to resolve a dispute, even if they did not fall under the definition of an Adjudicator in the Code, could be highlighted in the Commentary. For consistency with the first sentence of paragraph 1 (see para. 216 above), it was agreed that the word “dispute” in the second sentence should be replaced with the words “dispute resolution proceeding.”

218. It was agreed that the Code should not include a general provision on the possibility for the disputing parties to vary or exclude the application of the Code. Rather, such possibility should be dealt with in the respective articles of the Code.

219. With regard to paragraph 2, it was agreed that the first sentence should be retained in the Code with the word “complement”. It was said that the first sentence could be redrafted to make it clear that the Code was to be read and applied in conjunction with any other provision on the conduct of an adjudicator in the applicable instrument of consent, and that an adjudicator would generally be expected to comply with all such provisions as well as those in the Code.

220. It was also agreed that the second sentence in paragraph 2 should be retained, as it provided useful guidance to adjudicators where they would not be able to comply with the Code and other provisions on conduct in the applicable instrument of consent at the same time. In that context, it was suggested that the Commentary should clarify the meaning of the term “inconsistency”, namely whether it referred to the obligations being irreconcilable or incompatible. The Working Group agreed to revisit the use of the term “inconsistency” at a later stage, including whether it should be replaced with the word “incompatibility”.

221. A suggestion to delete the phrase “take all reasonable steps” in paragraph 3 did not receive support. It was widely felt that the current text reflected well that adjudicators should make best efforts to ensure that the assistant was aware of and respected the Code. Another suggestion was to replace the word “reasonable” with the word “necessary”.

222. It was stated that the phrase “comply with the Code” in paragraph 3 as well as the phrase “in breach of the Code” in article 11(4) gave the impression that the Code was directly applicable to Assistants and that the Code should be revised to that effect. In response, it was recalled that preference had been expressed at previous sessions that an assistant should not have direct obligations under the Code and the obligation would be on the adjudicator to take all reasonable steps to ensure that the assistant would respect and take account of the relevant provisions of the Code.

223. In that context, a number of drafting suggestions were made. One was that the Commentary should identify the articles of the Code which might be relevant for Assistants, for example, those addressing independence and impartiality, diligence, integrity of the process, and confidentiality. Another suggestion was to replace the word “comply” in paragraph 3 with “act in accordance”. Yet another suggestion was that the Commentary could explain that the declaration to be signed by an Assistant would indicate the willingness of the assistant to comply with the relevant articles of the Code and article 11(4) could be revised to read as follows: “An Adjudicator shall remove an Assistant who is in breach of the declaration made pursuant to article 2(3).” Another suggestion was that paragraph 3 or wording in the declaration to be signed could indicate that the provisions of the Code would apply *mutatis mutandis* to an

assistant. It was also suggested that the provisions addressing Assistants could be grouped together in the Code.

224. After discussion, the Secretariat was requested to draft the Commentary to indicate the articles of the Code that would be relevant for Assistants, elaborate on the contents of the declaration to be signed by an Assistant and revise article 11(4) to refer to the declaration rather than the Code itself.

3. Article 3 – Independence and impartiality

Paragraph 1

225. The Working Group agreed to delete the square bracketed language in paragraph 1, as the temporal scope was already covered in the definitions of Arbitrator and Judge.

226. A suggestion was made for the Commentary to address direct and indirect conflicts of interest. Another suggestion was to consider a possible oversight mechanism to monitor compliance with the Code.

Paragraph 2

227. With regard to paragraph 2, it was highlighted that it contained a non-exhaustive list of circumstances, where an adjudicator would be found to lack independence and impartiality. It was agreed that the word "includes" in the chapeau sufficiently reflected the non-exhaustive nature of the list. It was also agreed that the words "a" and "any" would be used in a consistent manner.

228. A suggestion was made that subparagraph (a) could be deleted as it was covered by the subsequent subparagraphs and an assessment of "being influenced by loyalty" was a subjective one and uncertain in some jurisdictions. However, it was generally felt that there was value in retaining subparagraph (a). It was agreed that the Commentary would elaborate on the meaning of "loyalty" and from whose perspective it should be assessed. It was said that the term "loyalty" should be understood as a sense or feeling of obligation or alignment, which might arise from external factors, including but not limited to past or present relationships. It was also noted that subparagraph (a) sought to avoid the situation of an adjudicator being influenced by loyalty and did not intend to discipline loyalty itself. It was also agreed that the Commentary would explain the distinction between the obligation in subparagraph (a) and obligations in subsequent subparagraphs in order to enable a better assessment of the obligations imposed by subparagraph (a). It was also agreed that the list of persons in subparagraph (a) was illustrative and that reference would also be made to third-party funders or expert witnesses.

229. Different views were expressed on whether to retain the words "or judgment" in subparagraph (c). One view was that it was redundant as the notion was covered by the word "conduct", while another view was that there was merit in highlighting the term "judgment" as it captured a sense of independence and impartiality in the decision-making process. In response to a suggestion that "personal" relationship should be explained in the Commentary, it was said that it referred to a wide range of relationships outside the professional setting.

230. After discussion, the Working Group agreed to modify subparagraph (c) as follows: "Be influenced by any past or present financial, business, professional or personal relationship" and to further consider including the words "prospective" to indicate that an Adjudicator should not be influenced by potential relationships that might arise in the future. It was further agreed that the Commentary would clarify that the conduct or the judgment of an Adjudicator should not be influenced by the above-mentioned relationships.

231. With regard to subparagraph (d), the Working Group agreed to replace the words "any significant" with the word "a". This was because the fact that a position was used to advance a financial or personal interest was itself problematic, regardless of

the extent of the interest sought. It was also said that the term "significant" was subjective, which would introduce uncertainty. It was stated that subparagraph (d) would not impact the legitimate expectation of an adjudicator to be remunerated following the IID proceeding.

4. Article 4 – Limitation on multiple roles

232. The Working Group recalled that it had discussed the issues arising from adjudicators undertaking multiple roles (referred to below as "double-hatting") at its forty-first session (see A/CN.9/1086, paras. 86–107). It was recalled that there had been a wide range of views both in support of a full and comprehensive prohibition of double hatting as well as in support of imposing robust and extensive disclosure requirements only. Nonetheless, the Working Group agreed to proceed with its consideration of article 4, which was drafted to reflect the compromise reached by the Working Group at that session.

A cooling-off period

233. While there was continued support for the compromise reached to limit double-hatting during the IID proceeding, views diverged on whether there should be a time period following the conclusion of the IID proceeding during which an arbitrator would be limited from undertaking roles as legal representative or party-appointed expert (referred to as the "cooling-off" period) in paragraphs 1 and 2.

234. Those in favour of a cooling-off period suggested that it could ensure independence and impartiality of an arbitrator and would not necessarily result in a shortage of qualified arbitrators. It was said that a cooling-off period would not undermine, but possibly promote, diversity among arbitrators. It was also said that the phrase "unless the disputing parties agree otherwise" would allow the disputing parties to lift the cooling-off period.

235. Those expressing doubts about a cooling-off period noted that the limitation could reduce the pool of available arbitrators and legal representatives in view of the rather long duration of IID proceedings. It was also said that it would be difficult to administer in practice as arbitrators would be functus officio during such period. It was further said that the concerns arising from double-hatting during a cooling-off period could be addressed in the context of article 3. It was said that treaty parties could provide for a cooling-off period in their respective treaties if they so desired. It was also said that if article 3(2)(c) was revised to mention "prospective" relationships (see para. 230 above), there would not be a need to include a cooling-off period.

236. Differing views were expressed about the duration of a cooling-off period. Suggestions were made to have a shorter or a longer period. Support was also expressed for the 3-year period as potentially reflecting a compromise.

"or any other proceeding"

237. As to the phrase "or any other proceeding" in paragraphs 1 and 2, different views were expressed. One view was that the inclusion of the phrase would ensure the effectiveness of the limitation by preventing any loopholes. It was suggested that examples of such other proceedings could be provided in the Commentary (proceedings at the ICJ, ECHR or other international or regional tribunals, domestic proceedings including for setting aside or enforcing an award, and commercial arbitration). A suggestion was made to qualify the proceedings as those relating to the application of investment treaties.

238. Another view was that the inclusion of the phrase would unduly broaden the scope of the limitation and include non-ISDS proceedings, which were unrelated to the concerns that were being addressed by paragraphs 1 and 2 with respect to the limitation on multiple roles for same or related parties. In support, it was said that such a broadening of the scope was not necessary in view of article 3, specifically subparagraph 2(d), and as the disclosure requirements in article 10 would allow the

disputing parties to be aware of any such proceedings and whether there was any conflict of interest.

Paragraph 1

239. A suggestion to replace the words "shall not act" with the words "shall refrain from acting" did not receive support. It was suggested that clarity should be provided on the term "conclusion" of the IID proceeding as it would differ depending on the circumstances of the case. One suggestion was to state that "conclusion" referred to when the arbitral tribunal rendered a final award or decision, regardless of whether it was on the merits or on jurisdiction. Another suggestion was that the proceeding would be deemed to have concluded after the lapse of a fixed period (for example, 30 days) following the receipt of the award and no request on the award had been made, which would also cater for any post-award remedies. A further suggestion was to replace the term "concurrently" with the phrase "until the conclusion of" or "during the duration of" the IID proceeding.

240. A number of suggestions were made with respect to subparagraph (c) ("the same provision(s) of the same treaty") and its coverage. It was suggested that the statistics on multilateral investment treaties (for example, the Energy Charter Treaty) should be examined to better understand the possible impact of the regulation under subparagraph (c), specifically, the number of cases where a person would not have been allowed to accept an appointment as an arbitrator, expert or legal representative if the regulation was in place. Another suggestion was to carve out multilateral treaties from the notion of "treaty", as article 4 could have a particularly negative impact on the number of qualified arbitrators available to handle disputes arising from those treaties. In response, questions were raised on the need for a different treatment for multiple treaties as well as on the meaning of a "multilateral" treaty.

241. In view of suggestions that the ICSID Convention should be carved out of subparagraph (c), it was proposed to qualify the term "treaty" as a treaty providing for the protection of investment or investors. It was also suggested that subparagraph (c) should be more closely aligned with the definition of "IID" contained in article 1(a) and that subparagraph (c) should also refer to legislation governing foreign investments and investment contracts.

242. Another suggestion was to carve out from the notion of "provision(s)" those providing the consent to the IID proceeding or addressing jurisdiction or procedure. In support, it was suggested that subparagraph (c) could be revised as "an allegation of a breach of the same provision(s) of the same treaty" to limit its application to proceedings involving the same substantive obligations. In response, it was said that double-hatting involving jurisdictional issues raised the same concerns and that the revision would unduly narrow the scope of the limitation.

Paragraph 2

243. The Working Group then discussed whether paragraph 2 should be retained in article 4.

244. One view was that paragraph 2 could be deleted, which received support. It was suggested that its contents could be addressed in the Commentary to article 3, as it dealt with accepting a role that would be in breach of article 3 without introducing a separate obligation. It was also said that if article 3(2)(c) was revised to mention "prospective" relationships (see para. 230 above), the issue that article 4(2) sought to address would be covered. Moreover, it was stated that the phrase "legal issues which are substantially so similar" was vague and would be difficult to assess, particularly at an early stage of the proceedings when many of the legal issues are not yet known. Concerns were raised that paragraph 2 could inadvertently result in a de facto ban on double-hatting and possibly lead to delays in the proceedings as a result of challenges raised on that basis. It was stated that the Commentary to article 4 could mention that the circumstances mentioned in

paragraph 1 were not an exhaustive list of conduct that would lead to a breach of article 3.

245. Another view was that paragraph 2 should be retained, which also received support. It was said that the paragraph was a compromise following extensive discussions. It was said that paragraph 2 reinforced the principle of independence and impartiality. In response to concerns expressed about the phrase "legal issues which are substantially so similar" resulting in a de facto ban on double-hatting, it was said that the commentary could clarify that this was not the intention and that paragraph 2 would only apply when it amounted to a breach of article 3. Different views were expressed about whether to retain the words "substantially so". It was generally felt that if paragraph 2 were to be retained, the phrase "unless the disputing parties agree otherwise" should not be included in that paragraph as it should not be possible for the disputing parties to waive a breach of article 3. Another suggestion was that the temporal scope of the limitation in paragraph 2 could be linked to when an arbitrator accepted the appointment.

246. Questions were raised regarding how article 4 would be implemented and who would determine whether there was non-compliance. In response, it was mentioned that article 4 would generally require a self-judgment by the arbitrator, while the disclosure requirements in article 10 should allow disputing parties to be aware of any double-hatting situation, in which case they might pursue to challenge the arbitrator. It was also mentioned that an allegation of a breach of article 4 could be presented by the disputing parties in a set-aside procedure.

5. Article 5 – Duty of diligence

247. With regard to article 5(1)(a), the Working Group agreed that the Commentary would explain that the duty of diligence included the duty to be "available to perform the duties" and that if a Candidate was not in a position to perform the expected duties, he or she should not accept the appointment. It was further suggested that the Commentary should provide an explanation of the meaning of "timely" in subparagraph (c) and factors to be taken into account when assessing timelines.

248. The Working Group also agreed to delete subparagraph (d), while the Commentary to subparagraph (a) would explain that an arbitrator should refuse concurrent obligations that may impede his or her ability to perform the duties under the IID proceeding in a diligent manner. The Working Group also agreed to place subparagraph (e) in article 6, as the obligation to not delegate decision-making functions had closer links to the obligation of integrity.

6. Article 6 – Integrity and competence

249. It was agreed that the heading "Integrity and competence" was appropriate and reflected the contents of article 6.

250. The Working Group agreed to delete subparagraph (b) and to include the word "civility" in paragraph (a) with the Commentary explaining that notion. It was also agreed that the subparagraph would highlight the need for an Adjudicator to conduct the proceedings in a competent manner. Accordingly, it was agreed that the subparagraph (a) would read as follows: "Conduct the IID proceeding competently and in accordance with high standards of integrity, fairness and civility."

251. It was further agreed that paragraphs 2 and 3 be deleted in light of article 11(2) and the Working Group's decision on article 5(1)(a) (see para. 247 above). However, in order to capture the need for an Adjudicator to possess the necessary competence, it was agreed that article 6(1)(c) would be revised as follows: "Possess the necessary competence and skills and make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties".

7. Article 7 – Ex parte communication

252. With regard to article 7, it was generally felt that ex parte communication should be prohibited unless permitted by the applicable rules or treaty or by agreement of the disputing parties. In that context, it was stated that there was a need to provide a clear rule in article 7 with regard to the following circumstances:

- First, when a disputing party engages in a communication with a candidate for its party-appointed arbitrator, so as to determine his or her expertise, experience, competence, skills, availability, and the existence of any potential conflict of interest (referred to below as "competence and any conflict of interest");
- Second, when a disputing party engages in a communication with its party-appointed arbitrator or a candidate for its party-appointed arbitrator to determine the competence and any conflict of interest of a candidate for presiding arbitrator; and
- Third, when a disputing party engages in a communication with a candidate for presiding arbitrator to determine the competence and any conflict of interest.

253. It was generally felt that ex parte communication should be allowed in the first circumstance. Therefore, it was agreed that subparagraph 1(a) would be revised to indicate that it applied only to candidates for party-appointed arbitrators.

254. It was observed that with regard to the second and third circumstances, the general practice was that all of the disputing parties would be present at the interview, or the other disputing party would be informed prior to the interview taking place. It was therefore suggested that an express agreement of the parties should be required for those circumstances. However, considering that subparagraph 1(c) allowed for ex parte communication if permitted by the agreement of the disputing parties, questions were raised whether it was necessary for paragraph 1 to provide separate rules to address the second and third circumstances. Accordingly, it was agreed that subparagraph 1(b) could be deleted and the Commentary would explain how article 7 would operate in the second and third circumstances.

255. While drafting suggestions were made to reflect this overall idea, it was recalled that the definition of "ex parte communication" in article 1(g) was construed as a communication "by" a candidate or an adjudicator "with" a disputing party, as the Code applied to a candidate or an adjudicator and not to the disputing parties directly. While a suggestion was made that paragraph 1 should provide language on its temporal scope, it was agreed that the addition was not necessary in light of the definitions of adjudicators and candidates.

256. After discussion, the Secretariat was requested to revise paragraph 1 to clearly carve out the circumstances where ex parte communication would not be prohibited (see paras. 253-254 above). The Secretariat was requested to do so on the basis of the definition agreed by the Working Group deleting the phrase "or knowledge" and adding the phrase "or its (their) legal representatives" at the end of article 1(g) (see paras. 212-213 above).

Paragraph 2

257. It was generally felt that even when so permitted under paragraph 1, ex parte communication should not address any procedural or substantive issues relating to the IID proceeding or those that can be reasonably anticipated. On the other hand, it was said that certain basic information would need to be shared in order to determine the candidate's competence and assess any conflict of interest. It was agreed that the Commentary would address those aspects.

258. While a suggestion was made that the words "under paragraph 1" should be inserted after the words "ex parte communication" in paragraph 2, it was said that paragraph 2 would apply regardless of whether it was permitted under paragraph 1 and this was currently captured by the words "in any case". However, it was said that such aspects could be adequately dealt with in the Commentary and therefore, it was

agreed to delete the words “in any case” in paragraph 2 and retain the remainder of the paragraph.

8. Article 8 – Confidentiality

259. The Working Group discussed article 8 which addressed the confidentiality obligations. It was observed that article 8 did not aim to regulate the disclosure or the use of information for the purposes of the IID proceeding, which was inherently allowed. It was also observed that article 8 should not address the evidentiary requirements, namely whether information provided by the disputing parties or otherwise obtained by the arbitral tribunal was admissible, which was an issue usually addressed in the applicable rules or treaty.

Paragraph 1

260. With regard to whether public information should fall outside the scope of the confidentiality obligation, different views were expressed. One view was that public information should not be the subject of confidentiality. While some viewed that the confidentiality obligation should be lifted only when the information was published in accordance with the applicable rules or treaty (in other words, leaked information would continue to be the subject of confidentiality), others viewed that it would be impractical and burdensome to require the adjudicator to make the verification in each instance. In the same vein, it was suggested that paragraph 1 could be revised to refer to non-disclosure or use of “confidential” information.

261. Yet another view was that the non-public nature of the information should not alter the obligation in paragraph 1 and that an adjudicator should be obliged to not disclose or use any information obtained during the proceeding. In support, it was said that subparagraph (b) would sufficiently address any issue arising from the non-public nature of the information. In support, it was suggested that the phrase “an IID proceeding” should be replaced with the phrase “the IID proceeding” to narrow the obligation in paragraph 1 to information obtained in the proceeding, which the candidate was approached about or which the adjudicator participated in.

262. Furthermore, it was suggested that the Commentary should clarify the meaning of the phrase “disclose or use”, particularly as paragraph 1 did not address the question of admissibility. A question was raised whether the obligation in paragraph 1 should apply equally to candidates and adjudicators.

263. After discussion, it was agreed that paragraph 1 should be revised along the following lines: “Unless permitted under the applicable rules or treaty or by the agreement of the parties, a Candidate or an Adjudicator shall not disclose or use any information concerning, or acquired in connection with, the IID proceeding.”

Paragraph 2

264. With regard to paragraph 2 it was agreed to delete the words “or any view expressed during the deliberation” as that was already covered by the word “contents” of the deliberations.

Paragraph 3

265. It was generally felt that an arbitrator should be prohibited from making comments on a decision made in an IID proceeding in which he or she participated, while the proceeding was ongoing and while any decision was the subject of a set-aside, annulment, appeal, enforcement proceedings (referred to below as “review/challenge”). This was due to the fact that such comments could have an undue effect on the review/challenge process. However, it was also widely felt that upon the completion of the review/challenge, an arbitrator should be permitted to comment on a decision, for example, for academic purposes, which could give the arbitrator an opportunity to contribute to the development and understanding of the jurisprudence.

In support, it was said that such practice could result in enhancing the transparency of ISDS.

266. Therefore, it was suggested that the obligation in paragraph 3 should be limited in time and that paragraph 5 should not apply in that context. It was also suggested that the exception in subparagraph 1(b) should also apply to paragraph 3, in particular to allow the parties to agree otherwise.

267. As to whether an arbitrator should be allowed to comment on a decision only when the decision was publicly available, views diverged. Nonetheless, it was generally felt that it would be inappropriate for an adjudicator to comment on a decision that was not available to the public, which might also be in breach of paragraph 1. It was observed that even when allowed to comment on a decision pursuant to paragraph 3, an adjudicator would continue to be bound by the obligations in paragraphs 1, 2 and 4, which were to apply indefinitely.

268. After discussion, it was agreed that paragraph 3 would be revised to indicate that an arbitrator should not comment on a decision that had been rendered in the IID proceeding, while the proceeding was ongoing and until the decision or award was no longer the subject of a review/challenge. Afterwards, an arbitrator should be allowed to comment on a decision only when it was publicly available, while continuing to be bound by the obligations in paragraph 1 and 2 (non-disclosure of confidential information and the deliberations). It was agreed that the Commentary should elaborate on the interaction among the different obligations in article 8 as well as the type of comments which would be allowed under paragraph 3.

269. It was also agreed that a Judge should not be allowed to comment on any decision of the standing mechanism, which would ensure the legitimacy and integrity of the mechanism.

270. While a suggestion was made that paragraph 3 might be better placed in article 3 or the commentary thereto, it was agreed to retain it in article 8 with a new heading to capture the obligation addressed in that paragraph.

Paragraph 4

271. In light of recent practice whereby a draft award or decision by the arbitral tribunal would be shared with the disputing parties before being rendered, it was agreed that the exception in subparagraph 1(b) should also apply to paragraph 4. It was suggested that paragraphs 1 and 4 could be combined, in light of that common exception. However, a question was raised whether the term “permitted” would be appropriate in both circumstances because while treaties commonly had express provisions permitting or requiring disclosure of draft awards or decisions, they rarely had provisions permitting or requiring disclosure of confidential information. It was thus suggested that paragraphs 1 and 4 should be revised to clarify that the obligations therein were subject to the applicable rules or treaty.

Paragraph 5

272. While a suggestion was made that the obligations in article 8 should apply for a limited time period after the IID proceeding (for example, 3 years), it was widely felt that the obligations in that article (apart from paragraph 3, see paras. 266 and 268 above) should continue to apply indefinitely, as currently reflected in paragraph 5. As to the drafting, it was agreed that reference could be made to a former Adjudicator or a former Candidate being bound by the obligations in article 8, possibly in the respective paragraphs.

273. After discussion, the Working Group requested the Secretariat to restructure the paragraphs in article 8 in light of the above-mentioned deliberations.

9. Article 9 – Fees and expenses

274. There was general support for the structure and content of article 9 and for its application to Arbitrators and Arbitrator candidates only.

275. It was suggested that article 9 should address the reasonableness of fees and expenses. However, it was questioned whether the Code should address such aspect, which was usually dealt with in the applicable rules. After discussion, it was agreed that an additional sentence would be inserted in article 9 as follows: “Fees and expenses should be reasonable in accordance with the applicable rules.” and that the Commentary would list elements that would determine the reasonableness of fees and expenses.

276. With regard to paragraph 2 which addressed when the discussion on fees and expenses should be concluded, diverging views were expressed. Support was expressed for stating that the discussion should be concluded prior to the constitution of the arbitral tribunal as it would reflect best practice. On the other hand, it was said that such a discussion typically took place after the constitution of the arbitral tribunal (for example, at the first procedural meeting), which might not necessarily be immediately upon the tribunal’s constitution. It was noted that applicable rules took different approaches and that the Code should not take a prescriptive approach, also in light of the practice in ad hoc arbitration.

277. In that context, it was suggested that disputing parties should be given flexibility to determine when the discussion concerning fees and expenses was to be concluded. Therefore, it was agreed that paragraph 2 would be revised along the following lines: “Unless the disputing parties agree or the applicable rules or treaty provide otherwise, a Candidate or an Arbitrator shall conclude any discussion concerning fees and expenses with the disputing parties before or as soon as possible after the constitution of the arbitral tribunal.”

278. It was agreed that the Commentary would explain how paragraph 1 would apply in ad hoc arbitration, particularly prior to the constitution of the arbitral tribunal, and that article 7 on ex parte communication would equally apply to any communication regarding fees and expenses.

10. Way forward

279. At the end of the session, the Secretariat was requested to prepare, based on the deliberations and decisions of the Working Group, two separate texts, a code of conduct for Arbitrators and a code of conduct for Judges, to be accompanied by Commentary (see para. 204 above). It was mentioned that any feedback on the initial draft of the Commentary was due on 14 October 2022. The Secretariat was requested to hold informal meetings to further a common understanding of the Working Group with regard to issues that were not resolved at the current session.