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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fourth session (Vienna, 23–27 January 2023)

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I. Introduction

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

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

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fourth session from 23 to 27 January 2023 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, Canada, Chile, China, Colombia, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mauritius, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Somalia, South Africa, Spain, Switzerland, Thailand, Türkiye, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Bahrain, Benin, Bosnia and Herzegovina, Burkina Faso, Chad, Costa Rica, Egypt, El Salvador, Estonia, Guatemala, Iceland, Jordan, Lebanon, Lesotho, Libya, Lithuania, Madagascar, Malta, Netherlands, New Zealand, Oman, Pakistan, Paraguay, Philippines, Portugal, Qatar, Romania, Sierra Leone, Slovakia, Sri Lanka, Sweden, Tunisia, 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*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Asociación Latinoamericana de Integración (ALADI), Commonwealth Secretariat, Eurasian Economic Union/Eurasian Economic Commission (EEU/EEC), Gulf Cooperation Council (GCC), Organisation for Economic Co-operation and Development (OECD),

[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-third session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; and A/CN.9/1124.

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

[4] Ibid., para. 194.

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

(c) *Invited non-governmental organizations*: African Association of International Law (AAIL), All India Bar Association (AIBA), American Society of International Law (ASIL), Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), 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 Governance Innovation (CIGI), Centre for International Law, National University of Singapore (CIL), Centre for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIArb), Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order (PluriCourts), Centre of Excellence for International Courts (iCourts), 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), Forum for International Conciliation and Arbitration (FICA), Geneva Center for International Dispute Settlement (CIDS), Hong Kong International Arbitration Centre (HKIAC), Institute for Transnational Arbitration (CAIL/ITA), Instituto Ecuatoriano de Arbitraje (IEA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Institute (ILI), Inter-Pacific Bar Association (IPBA), Korean Commercial Arbitration Board (KCAB), Max Plank Institute for Comparative Public Law and International Law (MPIL), New York City Bar Association (NYCBAR), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute), Swiss Arbitration Association (ASA), Tehran Chamber of Commerce, Industries, Mines and Agriculture (TCCIMA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

8. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

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

9. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.222), (b) draft codes of conduct and commentary (A/CN.9/WG.III/WP.223) and (c) appellate mechanism (A/CN.9/WG.III/WP.224).

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 first three days would be devoted to the draft codes of conduct and commentary (A/CN.9/WG.III/WP.223) and the remaining two days to the topic of an appellate mechanism (A/CN.9/WG.III/WP.224).

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

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

A. General remarks

13. The Working Group recalled that at its forty-third session in September 2022, it undertook a second reading of articles 1 to 9 of the code of conduct for adjudicators based on document A/CN.9/WG.III/WP.216, which was facilitated by an informal draft of the commentary. The Working Group further recalled that it had decided to work towards presenting two separate texts to the Commission in 2023, one for arbitrators and one for judges (A/CN.9/1124, para. 204).

14. At the current session, the Working Group continued its consideration of the codes of conduct for arbitrators (the "Code for Arbitrators") and judges (the "Code for Judges") (jointly referred to as the "Codes") as well as the accompanying commentary, all contained in document A/CN.9/WG.III/WP.223. In addition, an informal draft of the commentary to the Code for Judges was made available to the Working Group for reference only.

B. Codes of conduct

1. Article 10 – Assistant (A/CN.9/WG.III/WP.223, paras. 105–112)

15. There was general support for compiling the relevant provisions on Assistants into one provision, as reflected in article A10.

16. With regard to paragraph 1, it was agreed that the tasks to be performed by an Assistant should be included and that such tasks, and the fees and expenses of, an Assistant should be the subject of approval by, or an agreement with, the disputing parties and not merely the subject of consultation. Accordingly, it was agreed that the paragraph should be revised as follows: "Prior to engaging an Assistant, an Arbitrator shall agree with the disputing parties on the role of the Assistant and the scope of his or her duties as well as the fees and expenses of the Assistant."

17. It was agreed that the commentary to paragraph 1 should be revised accordingly. Different views were expressed on whether an Assistant should be allowed to prepare only the procedural portions of any preliminary draft decision or award and not the substantive portions. It was agreed that the commentary would be amended to make reference to an Assistant preparing "portions of" preliminary drafts of decisions or awards to avoid such differentiation (para. 107). It was also agreed that the commentary would explain that the disputing parties need not agree on the exact or total amount of fees and expenses but might agree on the means to calculate them (para. 108). It was further agreed that the commentary should clarify that the discussions on fees and expenses should be concluded before or immediately after the constitution of the arbitral tribunal (para. 108).

18. With regard to paragraph 2, it was agreed that the phrase "who is in breach of that declaration" should be replaced with the phrase "who does not act in accordance with the Code".

19. It was agreed that the commentary to paragraph 2 should be revised accordingly. It was further agreed to make the following revisions to the commentary:

- "While the Code does not apply directly to an Assistant, an Arbitrator should ensure that the Assistant acts in accordance with the Code (articles 3, 5, 6, 7, 8, 9, and 11)." It was noted that there was no intention to create different standards, for example, on disclosure (para. 109); and

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• The words "one way" in the first sentence should be replaced with the words "in order" and the word "shall" with the word "should" in the second sentence (para. 110).

20. With respect to article J10, the Working Group agreed that the Code for Judges need not include provisions on assistants, since the rules of a standing mechanism would regulate their conduct.

21. Subject to the above-mentioned changes, the Working Group approved article A10 and the accompanying commentary.

2. Article 11 – Disclosure obligations (A/CN.9/WG.III/WP.223, paras. 113–139)

(a) *Article A11*

Paragraph 1

22. With regard to paragraph 1, it was agreed that the square bracketed language ("including in the eyes of the disputing parties") should be deleted. It was further agreed that the commentary (paras. 120–122) should be revised to emphasize the broad disclosure required under paragraph 1 and explain that doubts would be justifiable if any person, whether a disputing party or a third person, having knowledge of the relevant circumstances, would reasonably reach the conclusion that there is a likelihood that an Arbitrator may be influenced by factors other than the merits of the case. It was further agreed that the commentary should highlight that the obligation in paragraph 1 was not limited in time and make consistent use of the term "circumstance".

23. It was suggested that the commentary should include examples to provide guidance on the circumstances to be disclosed under paragraph 1, as done, for instance, in the International Bar Association Guidelines on the Conflicts of Interest in International Arbitration (the "IBA Guidelines").

Paragraph 2

24. A number of drafting suggestions were made with regard to the chapeau of paragraph 2, which aimed to clarify the relationship between paragraphs 1 and 2. After discussion, it was agreed that the chapeau of paragraph 2 should be revised as follows: "Regardless of whether required under paragraph 1, the following information shall be disclosed:".

25. It was explained that the phrase "regardless of whether required under paragraph 1" would highlight the fact that disclosure of the information required under paragraph 2 (though limited in time) was mandatory and provided a minimum disclosure requirement independent of that required under paragraph 1 (which was not limited in time). It was agreed that the commentary should further clarify the relationship between the two paragraphs noting that while there may be overlap between the disclosure required, paragraph 2 would be an independent obligation and not a mere extension of the scope of disclosure under paragraph 1 (para. 123).

26. It was agreed that reference to "an entity" in paragraph 2 should be revised to "a person or an entity" to possibly include individuals.

27. With regard to subparagraph (a), it was agreed to insert the word "close" before "personal relationship", with the commentary providing some examples.

28. With regard to subparagraph (a)(i), it was agreed that persons or entities to be identified by a disputing party should be limited to those "related" to that disputing party. It was further agreed that the text in subparagraph (a)(iv) should be retained. It was explained that the inclusion of subparagraph (a)(iv) would allow an Arbitrator to inquire about the existence of, for example, a third-party funder and make the necessary disclosure. After discussion, it was agreed that subparagraph (a)(i) and (a)(iv) should be revised as follows:

"(i) Any disputing party;

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…

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

29. Suggestions were made to delete the reference to “financial or personal” in the chapeau of subparagraph (b) or to instead use the phrase “financial, business, professional or personal” found in the chapeau of subparagraph (a). In this regard, it was explained that the phrases in the chapeaux reflected the text in article 3(2), respectively subparagraphs (c) and (d). After discussion, it was agreed to retain the current text.

30. With regard to subparagraph (b), it was agreed that the word “IID” in subparagraph (b)(ii) should be deleted, and that subparagraph (b)(iii) should be split into two subparagraphs as follows:

“…

(iii) Any other proceeding involving a disputing party; and

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

31. Regarding subparagraph (c), it was agreed that the commentary would need to further elaborate on the meaning of “related proceedings” as any international or domestic proceeding directly related to the IID proceeding, such as set-aside, annulment, and enforcement proceedings (para. 131). It was clarified that a proceeding would not be “related” merely because it addressed the same measure or was based on the same instrument of consent.

32. With regard to subparagraph (d), a question was raised whether it only covered “appointments” within the past five years and if so, whether it would be necessary to require disclosure in instances where the appointment was made before that time but the Candidate or the Arbitrator continued to serve as an arbitrator, legal representative or an expert witness. In response, it was said that the subparagraph aimed to address repeated appointments by the same disputing party or its legal representatives – as such, it would not be necessary to cover appointments beyond the recent five years. It was observed, however, that such instances might still need to be disclosed under subparagraph (c) or paragraph 1 if the conditions therein were met. A suggestion to delete the temporal scope of five years did not receive support.

33. While it was suggested that publications or presentations by a Candidate or an Arbitrator should also be the subject of disclosure under paragraph 2, doubts were expressed about how this could be implemented. After discussion, it was agreed that the commentary to paragraph 1 should include text along the following lines: “A Candidate or an Arbitrator should inform the disputing parties of his or her publications or presentations, which might raise justifiable doubts as to his or her independence and impartiality” (see also para. 103 below).

Paragraph 3

34. It was agreed that the phrase “for the purposes of paragraphs 1 and 2” in paragraph 3 should be retained, as it would inform which “circumstances” a Candidate or an Arbitrator should become aware of. Further, it was agreed that reference should also be made to paragraph 6, which imposed a continuing duty of disclosure. In that context, it was also agreed that paragraph 6 should be placed after paragraph 2.

35. With regard to retaining either the word “best” or “reasonable” in paragraph 3, different views were expressed, including suggestions to delete the entire paragraph or to replace them with the words “all reasonable”. It was said that the inclusion of the word “best” would emphasize a higher standard of disclosure, while the inclusion of the word “reasonable” would provide a more objective standard. Considering that

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the commentary already provided useful guidance (para. 133), it was agreed to use the phrase "make all reasonable efforts" in paragraph 3 and to make the same change in article 10(2) to align the language.

36. It was agreed that the word "information" could replace the phrase "interests and relationships" in paragraph 3 as it was sufficiently broad to encompass those notions and since the chapeau of paragraph 2 and paragraph 6 also referred to "information". It was agreed that the commentary would need to elaborate on the meaning of "information" and what it encompassed in the context of article 11.

37. After discussion, it was agreed that paragraph 3 (to be renumbered paragraph 4) should be revised as follows: "For the purposes of paragraphs 1, 2 and 3, a Candidate or an Arbitrator shall make all reasonable efforts to become aware of such circumstances and information."

Paragraph 4

38. The Working Group approved paragraph 4, unchanged.

Paragraph 5

39. It was agreed to delete the phrase "using the form in Annex A1" as the form in the Annex was provided as an example of a form for disclosure.

Paragraph 6

40. It was agreed that the words "circumstances and" should be added before the word "information" to align the language with that in paragraph 1.

Paragraph 7

41. It was widely felt that paragraph 7 should not be interpreted as discharging a Candidate or an Arbitrator from the disclosure obligation in article 11, as, depending on the situation, the fact of non-disclosure might be a ground to establish the lack of independence and impartiality. Suggestions to delete the paragraph did not find support. Instead, it was agreed to insert the word "necessarily" after the words "in itself" to clarify the meaning. With regard to the set of square bracketed texts at the end of the paragraph, it was agreed to retain only the phrase "a lack of impartiality or independence". Accordingly, it was agreed that paragraph 7 should read as follows: "The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality".

42. It was agreed that the commentary should be revised accordingly, emphasizing that the paragraph should not be understood as inviting or permitting non-disclosure. It was further agreed that the commentary should be revised to note that a failure to disclose, whether repeated or not, might be factually relevant to establishing a lack of independence and impartiality taking into account the information that was not disclosed and all other relevant circumstances.

Paragraph 8

43. It was agreed that paragraph 8 should be deleted as whether and how a disputing party could waive their rights to raise an objection was usually addressed in the applicable rules and was not suitable to be addressed in the Code for Arbitrators. However, it was agreed that there was merit in retaining the commentary to the paragraph (para. 139), as it provided useful guidance.

Other issues

44. A suggestion was made to include an additional paragraph in article 11 providing that a Candidate or an Arbitrator who was bound by confidentiality obligations and was not in a position to disclose the required circumstance or information, would need to disclose as much information as possible. As this was already addressed in the commentary (para. 125), that suggestion did not receive support.

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(b) Article J11

45. It was agreed that article J11 would be revised in accordance with the revisions to article A11 agreed by the Working Group, where relevant (see paras. 24, 26-28, 37 and 39-41 above).

46. In addition, it was agreed that:

- Paragraph 2 should be revised to apply only to Judges (and not to Candidates), as the information to be disclosed related to a specific proceeding;
- The phrase "regardless of whether required under paragraph 1" should be included in paragraph 3;
- The words "or upon" in paragraph 6 should be deleted; and
- Paragraph 7 should include a reference to paragraph 2 in addition to paragraph 1.

47. With regard to the disclosure process outlined in paragraph 7, differing views were expressed regarding whether a Judge would make the disclosure directly to the disputing parties or whether a standing mechanism would inform the disputing parties based on the information obtained from a Judge. Considering that the structure and operation of a standing mechanism was yet to be determined, it was agreed that paragraph 7 should indicate that a Judge should make a disclosure in accordance with the rules of a standing mechanism.

48. It was agreed that paragraph 3 in the Annex J1 should be deleted. It was also agreed that sample forms for Candidates should be prepared.

49. Subject to the above-mentioned changes, the Working Group approved article A11 and the accompanying commentary, as well as article J11.

3. Article 12 – Compliance with the Code (A/CN.9/WG.III/WP.223, paras. 140–143)

(a) Article A12

50. The Working Group considered article 12, which addressed the compliance with the Code for Arbitrators. Considering the mandatory nature of the Code for a Candidate and an Arbitrator and the fact that it aimed to provide a minimum standard of conduct, it was agreed that the commentary should not refer to "voluntary" compliance.

51. The Working Group had a discussion on means to ensure compliance with the Code including possible sanctions (other than challenges and disqualification) that could be imposed for any non-compliance with the Code.

52. Noting that a number of the provisions of the Code might not be enforceable by means of challenges and disqualification, it was suggested that the following sanctions could be envisaged: admonishment, reputational sanctions with the publication of and information on the breach, report to the relevant employer and bar associations, and reduction or delay in the payment of the fees or salary. However, questions were raised on whether and how allegations of non-compliance would be made and processed, which entity would handle such allegations, and how to ensure due process. It was generally observed that it was premature to list such possibilities in the commentary to article 12, when the article itself did not address them. It was widely felt that such possibilities could be further examined in the context of other reform elements.

53. Other proposals were made, for example, to refer a dispute regarding non-compliance to administrative tribunals established by international organizations, to mandate an international organization to function as the secretariat of the Code, and to require disclosure of any breach of the Code under article 11. Those proposals did not obtain support.

54. It was observed that, at the current stage of the ISDS reform, existing instruments of consent or applicable rules or institutions that administered procedures

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pertaining to sanctions under those instruments would need to be relied upon to ensure compliance, to determine whether there was a breach, and to impose sanctions in the case of non-compliance. However, it was also observed that that would depend on whether and how the mandate of institutions permitted sanctions on Arbitrators based on external standards.

55. While noting that efforts would need to be made by the Working Group to further develop means to implement the Code for Arbitrators, it was said that the existence of the Code in itself could have a positive impact on the behaviour of the Candidates, the Arbitrators as well as the disputing parties, which should not be disregarded.

Paragraph 1

56. Considering that it was clear to whom the respective provisions of the Code applied, and that the entirety of the Code should be complied with, it was agreed that the words "the provisions of" should be deleted from paragraphs 1 and 2.

57. A suggestion that the application of the Code should be expanded to other actors in the IID proceeding did not receive support.

Paragraph 2

58. A suggestion to add in paragraph 2 the phrase "in order to preserve the integrity of the proceedings" and a reference to "deliberate" failure to comply did not find support, as it was said that the inclusion of such words would limit the scope of the paragraph. It was suggested that the commentary could explain that an Arbitrator would not need to resign or recuse him/herself due to an inadvertent non-disclosure as long as all reasonable efforts were made.

Paragraph 3

59. It was suggested that the word "process" or "procedure" could be added to paragraph 3 so that it would read: "Any process/procedure for challenge or disqualification ….". In response, it was said that the instrument of consent or the applicable rules would not only govern the procedure but would also provide for substantive standards to be applied in the procedure. It was agreed that the current text would remain unchanged.

60. It was agreed that the commentary to paragraph 3 should explain that:

- While the process and the standard of challenge, disqualification, sanctions, and remedies would be governed by the instrument of consent or the applicable rules, the institution administering the procedure should take into account any breach of the Code during that process;
- The term "applicable rules" also included those found in domestic legislation applicable to the arbitration; and
- Future instruments might be developed which could include means to implement the Code and to ensure compliance through modification of the instrument of consent or the applicable rules, and bodies or institutions might be established to monitor any breach and impose sanctions.

61. It was mentioned that a decision by the Commission adopting the Code for Arbitrators (and possibly the resolution by the General Assembly acknowledging and recommending its use) could include language recommending that States take the Code into account in their negotiation of investment treaties, and that arbitral institutions and other institutions administering sanctions apply, and consider any breach of, the Code.

(b) Article J12

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62. Considering that the mechanism for compliance in a standing mechanism was yet to be determined, it was agreed that article J12 should read as follows: "Compliance with the Code shall be governed by the rules of a standing mechanism."

63. Subject to the above-mentioned changes (see para. 56 above), the Working Group approved article A12 and the accompanying commentary as well as article J12. It was agreed that possible mechanisms to ensure compliance and to impose sanctions could be discussed by the Working Group once progress had been made on the other relevant reform elements.

4. Article 1 – Definitions (A/CN.9/WG.III/WP.223, paras. 5–26)

(a) Article A1

64. Although doubts were expressed about the need to include the following phrase in the article itself, it was agreed that the phrase "or any constituent subdivision of a State or agency of a State or an REIO" should be retained in the chapeau of subparagraph (a), and the square bracketed text in the commentary should be deleted (para. 15).

65. It was agreed to introduce the term "instrument of consent" and its definition (para. 6), while making it clear that the phrase "upon which the consent to resolve an international investment dispute is based" applied to all the types of instruments therein. It was further agreed that the definition of "IID" would be simplified making reference to the term "instrument of consent".

66. With regard to the suggestion to include the word "international" before "investment contract" in subparagraph (a)(iii), doubts were expressed about the meaning and scope of an "international investment contract". It was agreed to not include the word, and to expand the commentary to clarify the meaning of an "investment contract", by including examples of contracts that would fall within and outside the scope (para. 17).

67. With regard to subparagraph (d), it was agreed to move the phrase "concerning the IID" before the words "by a Candidate" and to include the phrase "or knowledge" after the word "presence" as without that phrase, an Arbitrator's ability to communicate with the disputing parties might be unduly restricted. It was agreed that the commentary would need to clarify that "knowledge" did not mean being merely aware of, but rather that the other party was provided adequate notice and given a practical opportunity to take part in the communication. It was also agreed that the commentary would clarify that presence was not limited to physical presence.

(b) Article J1

68. Considering that the jurisdiction of a standing mechanism was yet to be determined, it was agreed not to define the terms "IID" and "instrument of consent" in the Code for Judges. Consequently, it was agreed that reference to both terms in the current draft would be adjusted throughout – for example, the phrase "for the resolution of an IID" would be deleted from subparagraph (b) and the term "IID" would be replaced with the word "proceeding". It was mentioned that the phrases "proceeding before the standing mechanism" or "proceeding which the Judge is adjudicating" could be used in lieu of "IID proceeding" depending on the context.

69. It was agreed to delete the phrase "a Candidate or" in subparagraph (d) as a Candidate would not fall within the intended scope of article J7.

70. The Working Group approved articles A1 and J1 and the accompanying commentary subject to the above-mentioned changes.

5. Article 2 – Application of the Code (A/CN.9/WG.III/WP.223, paras. 27–32)

(a) Article A2

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71. With respect to paragraph 2, it was agreed to use the term "instrument of consent" and to delete the phrase "in an IID proceeding". It was also agreed that the use of the term "incompatibility" was appropriate.

72. With respect to the commentary to paragraph 2, it was agreed that:

- The term "involved in" should be replaced by another phrase in view of the application to a Candidate (para. 29);
- The phrase "(for example, conciliators and fact finders), possibly" should be deleted (para. 30); and
- Examples of incompatibility, including when the instrument of consent did not contain provisions on conduct, should be provided (para. 32).

(b) Article J2

73. It was agreed to add the phrase "in accordance with the rules of the standing mechanism" at the end of paragraph 1, and to delete paragraph 2 as any incompatibility between the Code for Judges and other provisions on conduct would be addressed by the rules of a standing mechanism.

74. The Working Group approved article A2 and the accompanying commentary as well as article J2, subject to the above-mentioned changes.

6. Article 3 – Independence and impartiality (A/CN.9/WG.III/WP.223, paras. 33–45)

(a) Article A3

75. It was agreed that the commentary should make a general reference to the IBA Guidelines rather than referring to certain examples found therein and further mention that the Guidelines provided useful guidance on what might be problematic or considered a breach of the Code (para. 35).

Paragraph 2

76. It was agreed that the commentary to subparagraph (a) should explain that the obligation not to be influenced by loyalty was a broad one, not necessarily limited to loyalty to "related" persons or entities. It was also agreed that the commentary should clarify that the mere fact of having the same nationality did not indicate in itself an influence by loyalty (para. 38).

(b) Article J3

77. While the Working Group deferred its decision on whether to include the word "prospective" in article A3 in light of the discussions on article A4, it agreed that the word should be included in article J3.

78. The Working Group approved article A3 and the accompanying commentary subject to the above-mentioned changes as well as its decision on whether to include the word "prospective". The Working Group approved article J3.

7. Article 4 – Limit on multiple roles (A/CN.9/WG.III/WP.223, paras. 46–69)

(a) Article A4

79. Considering the divergence in views expressed so far on article 4, a revised text was presented as a possible way forward:

"**Article A3 – Independence and Impartiality**

1. …

2. Paragraph 1 includes the obligation not to:

…

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

…

Article A4 – Limit on multiple roles

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:

(a) The same measure(s);

(b) The same or related party(parties); or

(c) The same provision(s) of the same instrument of consent.

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

3. For a period of one year, a former Arbitrator shall not act as a legal representative or an expert witness in any other proceeding involving the same provisions of the same instrument of consent unless the disputing parties agree otherwise.

4. Prior to acting concurrently as a legal representative or an expert witness in another IID proceeding involving similar legal issues, an Arbitrator shall disclose this potential new role and shall consider, after consulting with the disputing parties, whether such a role would breach his or her obligations under Article 3."

80. A wide spectrum of ways to address issues arising from Arbitrators undertaking multiple roles (referred to below as "double-hatting") were reiterated (from full prohibition to disclosure only), along with the underlying objectives, such as eliminating the appearance of bias and promoting diversity. Nonetheless, it was considered that the proposed text above provided a good basis for discussion and deliberations took place based on the above text.

Article 3(2)(c)

81. Support was expressed for the inclusion of the word "prospective" in the subparagraph, and it was said that the inclusion might make paragraphs 2 and 3 of article 4 unnecessary. It was said that similar to a cooling-off period, the inclusion of that word would prevent an Arbitrator from being influenced and from changing his or her decisions due to a possible future appointment as a legal representative or expert witness.

Article 4, paragraph 1

82. It was questioned whether involvement in non-IID proceedings should be limited, as this might have a negative impact on retaining suitable legal representatives or expert witnesses. Support was expressed for limiting the proceedings to "any other IID or related" proceedings, also in paragraphs 2 and 3. However, concerns were also expressed that limiting the application to only IID or related proceedings would limit the scope of the Code compared to the IBA Guidelines. Consequently, support was also expressed for retaining the language "any other proceeding".

83. It was said that subparagraph (b) might create an asymmetry between the disputing parties, as it could limit States' choice of arbitrators, legal representatives or expert witnesses.

84. Concerns were reiterated about subparagraph (c) in view of the fundamentally different types of cases that arise under the same provisions in multilateral investment treaties, for example, the Energy Charter Treaty.

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Article 4, paragraphs 2 and 3

85. It was suggested that paragraphs 2 and 3 should be deleted as it would be difficult to implement a cooling-off period in practice. The utility of the paragraphs was questioned including the possible limitations on disputing parties' choice of legal representatives and expert witnesses.

86. On the other hand, support was expressed for the cooling-off period as stipulated in paragraphs 2 and 3, and it was suggested that the same should apply to proceedings involving the same or related parties. However, it was also mentioned that such a situation did not raise the same level of conflict. A number of suggestions were made with regard to possible time periods.

Article 4, paragraph 4

87. It was suggested that an Arbitrator should not merely consult the parties but obtain their agreement prior to acting concurrently as a legal representative or an expert witness in a proceeding involving similar legal issues. In that context, it was suggested that consultation should aim to ensure that neither party had an objection to the assumption of both roles.

88. On the other hand, concerns were expressed that consultations might be difficult to conduct due to confidentiality obligations and be lengthy, which might result in a ban on double-hatting as a number of proceedings addressed similar legal issues. A suggestion was made to include a fixed time period for conducting the consultation. It was also said that the phrase "similar legal issues" might be too broad and ambiguous, which would make it difficult for an Arbitrator to determine whether disclosure was required.

89. A suggestion was made that paragraph 4 should be formulated as a disclosure obligation under Article 11, with the commentary highlighting that an Arbitrator would need to consider whether undertaking such a role might result in a breach of article 3.

Party autonomy

90. While support was expressed for the possibility for the disputing parties to agree otherwise, a number of suggestions were made on that aspect. With regard to paragraph 1, it was suggested that allowing the disputing parties to agree otherwise might defeat the purpose of the limitation on double-hatting. In response, it was stated that this was to provide flexibility for exceptional cases and that the general rule should be a ban on double-hatting during the cooling-off period. With regard to paragraphs 2 and 3, it was said that the commentary would need to clarify that the disputing parties in that context were those to the arbitral proceeding in which the former Arbitrator participated.

Summary

91. It was recalled that there had been support for a ban on double-hatting and at least a cooling-off period of 10 years, on the one hand, as well as support for no limitation, on the other hand. In a spirit of flexibility, willingness to explore various time periods for cooling-off was generally expressed. Specifically, time periods of 6 months, 1 year, 3 years, and 5 years were proposed. After discussion, it was agreed that this should be taken into further consideration as the Working Group sought to reach agreement on a compromise on limitation on multiple roles based on the following proposal regarding articles 3, 4 and 11:

"Article 3 – Independence and Impartiality

…

2. Paragraph 1 includes the obligation not to:

…

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

Article 4 – Limit on multiple roles

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:

(a) The same measure(s);

(b) The same or related party(parties); or

(c) The same provision(s) of the same instrument of consent.

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

3. For a period of […], a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same or related party(parties) unless the disputing parties agree otherwise.

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

Article 11 – Disclosure obligations

…

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

…

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

92. It was further proposed that the commentary to article 11(2)(e) should read along the following lines: "The purpose of the disclosure prior to an Arbitrator accepting an appointment as a legal representative or an expert witness in any other IID or related proceeding is to allow the disputing parties to know in advance, to ask questions, and to raise any concerns that they may have in terms of whether they believe that acting in the other capacity would violate article 3 of the Code of Conduct. If an Arbitrator accepts the appointment as a legal representative or an expert witness, a disputing party may challenge the Arbitrator under the applicable rules."

(b) Article J4

93. With respect to article J4, it was agreed that paragraph 2 should state that a Judge would make the declaration "in accordance with the rules of the standing mechanism". It was noted that the commentary to J4 might need to be adjusted depending on the terms of office of a Judge.

94. Subject to that change, the Working Group approved article J4 and the accompanying commentary.

8. Article 5 – Duty of diligence (A/CN.9/WG.III/WP.223, paras. 70–75)

(a) Article A5

95. It was clarified that "duties" in subparagraph (a) related primarily to the duties of the Arbitrator in the conduct of the proceeding, but they also included other duties

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under the Code. It was further clarified that the phrase "throughout the proceedings" would not exonerate the duties required of a former Arbitrator in specific articles. It was agreed that the commentary to subparagraph (a) should mention that an Arbitrator should make all reasonable efforts to adopt effective measures to perform his or her duties, while not being prescriptive on the meaning of "diligence".

96. Questions were raised with regard to articles 5(c) and 12(2) as well as whether the commentary should indicate a time frame for rendering decisions. After discussion, it was agreed that the commentary to subparagraph (c) should clarify that while it was the tribunal that rendered decisions as a general matter, each Arbitrator had the duty to ensure that the tribunal as a whole would be able to do so in a timely manner. It was also agreed not to provide an indication of specific time frames for the rendering of decisions because each case was unique in its circumstances.

(b) *Article J5*

97. With regard to article J5 and the commentary, it was suggested that the phrases "terms of office" and "terms of appointment" should be used consistently.

98. The Working Group approved articles A5 and J5 and the accompanying commentary, subject to the above-mentioned changes.

9. Article 6 – Integrity and competence (A/CN.9/WG.III/WP.223, paras. 76–80)

(a) *Article A6*

99. It was agreed that the commentary to subparagraph (c) should be revised to reflect the deliberations on article A10 (see paras. 16-19 above) and that the phrase "or procedural orders issued during an IID proceeding" should be deleted (paras. 78–79).

(b) *Article J6*

100. It was agreed that the commentary to article J6 could be simplified to note that the appointing authority would assess the skills and competence in accordance with the rules of a standing mechanism (para. 80).

101. The Working Group approved articles A6 and J6 and the accompanying commentary, subject to the above-mentioned changes.

10. Article 7 – Ex parte communication (A/CN.9/WG.III/WP.223, paras. 81–90)

(a) *Article A7*

102. It was agreed to include a reference in paragraph 1 to paragraph 2, as providing another circumstance where ex parte communication would be permitted. It was further agreed that the word "will" in paragraph 3 should be replaced with the word "would".

103. As to the commentary to article A7, it was agreed that:

- Examples of where ex parte communication would be permitted and under which conditions should be provided (for instance, with regard to the appointment of the presiding Arbitrator by the party-appointed Arbitrators) (paras. 86 and 88);
- Situations not covered by paragraph 2 and thus requiring the agreement of the parties should be more clearly set forth (para. 88);
- The last sentence in paragraph 90 should be placed in the commentary to article 11 with necessary adjustments (see para. 33 above).

(b) *Article J7*

104. The Working Group agreed insert the following phrase in article J7: "Unless permitted by the rules of the standing mechanism, ….".

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105. The Working Group approved article A7 and the accompanying commentary, as well as article J7, subject to the above-mentioned changes.

11. Article 8 – Confidentiality (A/CN.9/WG.III/WP.223, paras. 91–97)

(a) *Article A8*

106. With respect to paragraph 1, it was agreed to replace the word "and" between the subparagraphs with "or" (as well as in article J8). It was also agreed that the commentary should provide examples where the obligation of confidentiality would not apply, for instance, where the applicable rules provided for the disputing parties to review draft awards (para. 94). It was further agreed that the commentary to article 2(2) would address the circumstances where the instrument of consent or the applicable rules did not contain confidentiality obligations.

107. With regard to the commentary to paragraph 2, it was agreed to delete the phrase "material generated" as it was unclear and reference to the "views expressed by other Arbitrators during the deliberations" would cover any documents related to the deliberations (para. 94).

108. It was further agreed that paragraph 4 should be split into two paragraphs:

> "4. An Arbitrator may comment on a decision only if it is publicly available.
>
> 5. Notwithstanding paragraph 4, an Arbitrator shall not comment on a decision while the IID is pending or the decision is subject to a post-award remedy or review."

109. It was agreed that the commentary to paragraph 4 should elaborate on the meaning of "comment" with some examples. It was suggested that examples could include making a reference to the IID as a case where an issue was considered or decided or publishing of an academic article making a general reference to the legal issues dealt with in the IID (para. 95). However, it was agreed that such activities could not disclose deliberations, and thus could not contain a discussion or further explication of the reasoning behind the decision if that reasoning was not in the award. It was further agreed that any comment should not be of the nature that would lead to questioning of the integrity of the proceeding or the decision.

110. It was agreed that the last part of paragraph 5 should read as follows: "… or needs to disclose such information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body." It was said that this would cover situations of subpoena issued by an arbitral tribunal.

(b) *Article J8*

111. It was agreed that the chapeau of paragraph 1 should be revised as follows: "Unless permitted by the rules of the standing mechanism". It was further agreed that paragraphs 1 and 5 shall refer only to a Judge and not a Candidate.

112. It was additionally agreed to replace the phrase "IID proceeding" in paragraph 3 with the phrase "the term of office of a Judge".

113. The Working Group approved articles A8 and the accompanying commentary as well as article J8, subject to the above-mentioned changes.

12. Article 9 – Fees and expenses (A/CN.9/WG.III/WP.223, paras. 98–104)

(a) *Article A9*

114. Based on a suggestion that article 9 should include a rule on the timing of the discussions on fees and expenses, it was agreed that a new paragraph would be inserted as follows: "Any discussion concerning fees and expenses shall be concluded with the disputing parties as soon as possible."

115. It was further agreed that the commentary to the article should:

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- Explain that it was best practice to conclude such discussions prior to or as soon as possible after the constitution of the arbitral tribunal and in accordance with the applicable rules (para. 101);
- Replace the phrase "once the proceedings have commenced" with "at a later stage" (para. 101); and
- Mention that paragraph 3 reflected best practice which "intended to avoid or minimize" any dispute on fees and expenses (para. 104).

116. The Working Group approved article A9 and the accompanying commentary subject to the above-mentioned changes and confirmed that there would be no provision on fees and expenses in the Code for Judges.

C. Way forward

117. At the end of the session, the Working Group requested the Secretariat to present the draft Code for Arbitrators and Code for Judges with respective commentary based on its deliberations and decisions to the Commission for its consideration at the fifty-sixth session scheduled to take place in Vienna in July 2023. In preparing the revised drafts, the Secretariat was requested to make any consequential editorial changes to the Codes and commentary as necessary and to provide updates to the Working Group as it made progress through informal meetings.

118. The Working Group further agreed to continue its deliberations on the articles in the Code for Arbitrators relating to limits on multiple roles (see paras. 91 and 92 above) at its next session in March 2023. The Secretariat was also requested to hold informal consultations prior to the session to facilitate the discussions on that issue.

IV. Appellate mechanism

119. The Working Group recalled that it undertook preliminary considerations of an appellate mechanism based on document A/CN.9/WG.III/WP.185 at its resumed thirty-eighth session in January 2020 with the goal of defining and elaborating the contours of such appellate mechanism (A/CN.9/1004/Add.1, paras. 16–51). At its fortieth session in February 2021, the Working Group continued its deliberations on the basis of document A/CN.9/WG.III/WP.202, which contained draft provisions on an appellate mechanism and addressed issues regarding the enforcement of decisions rendered through a standing mechanism (A/CN.9/1050, paras. 63–114).

120. At the current session, the Working Group continued its consideration of an appellate mechanism on the basis of document A/CN.9/WG.III/WP.224. The deliberations took place on the basis that the views expressed during the session were not to be understood as indicating the need for an appellate mechanism and without prejudice to the final position of States on the various aspects of this reform element.

121. General interest was expressed in having an appeal mechanism and its importance in the overall ISDS reform was highlighted. In particular, it was noted that an appellate mechanism would provide access to justice, particularly in cases engaging public interest, and could enhance the coherence, consistency and the predictability of decisions in ISDS proceedings.

122. While it was suggested that discussions on the draft provisions should be preceded by more general discussions on the desirability, the purpose, and the possible structure of an appellate mechanism, including its relationship with the existing ISDS system, it was stated that the draft provisions and the notes thereto provided issues for the Working Group to consider broadly. It was also mentioned that the discussion on an appellate mechanism should not be limited to a standing two-tier mechanism but should also address an independent standing appellate mechanism as well as an *ad hoc* mechanism.

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123. Concerns about balancing the benefits to be achieved by an appellate mechanism against the additional costs and time that disputing parties might incur when resorting to such a mechanism were mentioned. Further, it was mentioned that the experience at the WTO Appellate Body should be considered. It was said that precedential effect of appellate decisions and its implication on similar provisions in other treaties and on the control of States over the interpretation of investment treaties should be considered, particularly for those that did not take part in the appellate mechanism. Also, questions with regard to the financing of an appellate mechanism and the risk of further fragmentation were raised.

124. It was underlined that any appellate mechanism should follow due process, be accessible and further the objectives identified by the States.

A. Draft provisions on the functioning of an appellate mechanism

1. Draft provision 1 – "Scope of Appeal"

125. The Working Group considered draft provision 1 which provided for the right of appeal by the disputing parties as well as the scope of appeal.

126. Views diverged on whether disputing parties should be provided a right to appeal or a right to request leave for appeal. It was stated that even when a disputing party had a right to appeal, there should be a filter or a screening mechanism particularly to avoid appeals that were dilatory, unmeritorious, or otherwise unjustified, so that not every decision would necessarily be reviewed by an appellate mechanism. In this regard, references were made to mechanisms providing for early dismissal, security for costs and time limitations, as well as the exploration of other types of mechanisms.

127. Those in support of a right to request leave for appeal highlighted that this would shift the burden of substantiating the appeal to the appellant. The need to ensure efficiency of an appellate mechanism and the need to limit the number of appeals, particularly frivolous appeals, was underscored. It was, however, questioned how such requests would be handled and by whom. It was suggested that for certain decisions (for example, interlocutory decisions), disputing parties would be required to request leave, while other decisions might be appealed without such a requirement.

Decisions subject to appeal

128. As to the decisions that would be subject to appeal, it was widely felt that the scope should not be too broad to ensure an efficient appellate mechanism. It was said that this could be achieved by providing for a limited overall scope or by providing for a broad scope with a list of exclusions. Preference was expressed for the latter approach.

129. As to the types of investment disputes, it was said that "international investment disputes" as defined in the Codes of Conduct provided a good basis for discussion, which might need to be adjusted, for example, to include State-to-State disputes and in light of the different nature of an appellate mechanism.

130. At the current stage, there was general support for including decisions rendered by arbitral tribunals and first-tier tribunals in a standing mechanism within the scope of appeal. It was clarified that decisions by domestic courts would not be the subject of appeal.

131. It was generally felt that decisions on jurisdiction as well as on the merits should both be the subject of appeal. However, views diverged on whether only final awards which had been notified to the parties should be the subject of appeal. In support, it was said that limiting appeals to a final award would bring more certainty, allow the appellate tribunal to have an overview of the entire case and would not interfere with and possibly delay the first-tier proceedings.

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132. On the other hand, the advantages of allowing appeal of non-final awards as well as partial awards, particularly those that could have a significant impact on the first-tier proceedings, were also highlighted. In this context, divergent views were expressed on whether certain decisions such as procedural orders, decisions on bifurcation and challenges, should be subject to appeal.

133. With regard to subparagraph (a), views diverged on whether decisions on interim measures should be excluded from the scope. It was said that they should not be excluded as such decisions could have a substantial impact on the conduct of States, while it was also said that it would depend on the type of temporary measure that was ordered. It was suggested that the meaning of the term should be clarified before any determination could be made.

134. With respect to subparagraph (b), it was generally felt that positive and negative decisions on jurisdiction should equally be the subject of appeal. In support, it was said that there was no reason to differentiate between the two, which might create an imbalance between the rights of the disputing parties. It was further mentioned that in case of remand or reversal, it was possible to either reconstitute the first-tier tribunal or to constitute a new tribunal. The need for clarity on which decisions would and would not be subject to appeal was underscored.

135. With regard to the scope of appeal, the Secretariat was requested to explore further any screening or filter mechanisms to limit the scope of appeal, whether partial or non-final decisions should be subject to appeal and if so at which point, and further develop the types of decisions that could be excluded from the scope of appeal.

2. Draft provision 2 – "Grounds for Appeal"

136. The Working Group considered the grounds for appeal provided in draft provision 2.

137. It was generally felt that the draft provision should aim to limit appeals, ensuring a balance between the underlying objectives of an appellate mechanism (for example, achieving consistency and correction of awards) and the efficiency of the dispute resolution process (avoiding undue delays and costs).

Paragraph 1

138. In order to limit the grounds for appeal, it was suggested that only "unreasonable", "ungrounded" or "fundamental" errors should be grounds for appeal. It was suggested that the same standard could be applied to both subparagraphs. It was generally felt that a de novo review of the case should be avoided.

Subparagraph (a)

139. Some doubts were expressed about the use of the term "application", and it was suggested that subparagraph (a) should refer only to "interpretation" of the law.

Subparagraph (b)

140. It was stated that if errors in the appreciation of the facts were to be grounds for appeal, it should be restricted, for example, requiring the error to be manifest as stipulated in subparagraph (b). However, questions were raised on the meaning of "manifest". It was questioned who would determine whether an error was "manifest". It was also stated that deference should be given to first-tier tribunals with regard to facts and that if errors of fact were found, the case should be remanded to the first-tier tribunal.

141. Differing views were expressed on whether "appreciation of domestic legislation" and "assessment of damages" should be expressly mentioned as a matter of fact under subparagraph (b).

142. It was said that their inclusion might unduly broaden the grounds for appeal. It was also said that they might also fall under subparagraph (a), for example, errors in

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the assessment of damages could arise from an error in the interpretation of the law. On the other hand, it was said that if “errors in assessment of damages” were not included as an express ground, errors in the choice or application of the valuation method might not fall under any ground for appeal.

143. It was said that the dichotomy between law and domestic legislation might be clearer in treaty-based investment disputes as the underlying law would be an international instrument. It was also said that the dichotomy might be blurred if disputes arising from treaties, domestic legislation governing foreign investment and investment contracts were to fall under the scope of an appellate mechanism, as the interpretation of domestic laws could be a matter of law. However, it was said that the assessment of domestic law other than the legislation applicable to the dispute (for example, the underlying laws or regulation of a measure that negatively impacted the investor’s rights) should be considered a matter of fact. It was also said that contradictions in the interpretation of domestic law by domestic courts and by the appellate mechanism should be avoided.

Paragraph 2

144. It was explained that paragraph 2 was drafted to reflect the grounds provided for in existing annulment and set-aside procedures on the basis that a comprehensive set of grounds in an appellate mechanism could avoid duplication of review. It was said that this could prevent a three-tier review system.

145. However, it was also said that the inclusion of the grounds in paragraph 2 might actually lead to additional overlaps and therefore, a lack of clarity.

146. Some questions were raised with regard to the application and relevance of subparagraph (a) in the context of investment disputes as well as the law that would determine the validity of the arbitration agreement. Questions were raised about the utility of subparagraph (c), in view of paragraph 1, and about subparagraph (d), which was seldomly used, and the costs arising from such cases.

147. It was noted that subparagraph (g) aimed to replicate the grounds found in article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, which provided for the setting aside of an award which was in conflict with the public policy of the forum State. In this regard, doubts were expressed about whether a similar concept based on domestic law could be contemplated in an international appellate mechanism. Doubts were expressed about the meaning of “international public policy”, and it was generally felt that the subparagraph could cause confusion.

148. Suggestions were made that “new or newly discovered facts” or “unsubstantiated award, absence or lack of reasoning” should be grounds for appeal. It was also suggested that grounds for correction and interpretation should also be grounds for appeal.

B. Issues relating to the implementation of an appellate mechanism

149. The Working Group engaged in a discussion on issues relating to the implementation of an appellate mechanism, among others, how it would interact with the existing annulment and set aside mechanisms (referred to as “existing review mechanisms” below), advantages and disadvantages of a three-tier system, and different models of implementation.

1. Interaction with existing review mechanisms

150. Although views were expressed with regard to the need for existing review mechanisms following an appellate review, it was generally felt that the creation of an appellate mechanism should not result in an additional layer of review or a three-tier system, which might result in additional costs and delays in resolving ISDS cases. It was further observed that an appellate mechanism would operate differently depending on whether the decision subject to appeal was one rendered by a first-tier

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tribunal in a standing mechanism, by an ICSID tribunal (thus not subject to appeal under the ICSID Convention) or a non-ICSID tribunal.

151. It was suggested that an appellate mechanism should aim to replace existing review mechanisms. It was said that for that purpose, grounds for review under existing review mechanisms should, in principle, be included as grounds for appeal and that the decisions of the appellate mechanism should not be subject of review under existing review mechanisms (see para. 159 below). It was highlighted that the grounds for appeal should be broader than the existing review mechanisms to not only address procedural irregularities but also incorrectness or inconsistency of substance.

152. On the other hand, it was observed that an appellate mechanism would need to inevitably operate with existing review mechanisms and should not aim to replace them. This was in light of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the ICSID Convention (which had different States Parties) as well as domestic laws that provided for set-aside procedures, which might not be easy to amend. This was also based on the ground that disputing parties should have the freedom to choose from the different mechanisms. It was said that the safeguards provided for in the New York Convention should be retained, with additional guarantees against possible delays. It was also said that some arbitral proceedings, such as those at the Court of Arbitration for Sport, allowed for appeal but were incorporated into existing review mechanisms, such as those under the New York Convention.

153. It was said that an appellate mechanism should consequently entail the development of means to avoid parallel as well as subsequent proceedings. It was suggested that the instrument providing for an appellate mechanism (including a multilateral instrument on ISDS reform) should contain clear rules addressing the relationship with existing review mechanisms.

154. Additional means to avoid an appellate mechanism creating a three-tier system or leading to multiple proceedings were discussed.

155. One possibility was through a waiver by the disputing parties, whereby they would agree to not resort to any review mechanism in case of an appeal. As to the timing of such a waiver, it was said that the waiver could be a condition for initiating arbitration or for submitting an appeal. It was, however, questioned whether domestic courts would recognize such a waiver.

156. Another possibility was that while disputing parties would be allowed to choose from the appellate or existing review mechanisms, once that choice was made, it would be final (similar to a fork-in-the-road clause). However, it was pointed out that disputing parties might not necessarily agree on the choice, which might lead to multiple proceedings in different forums.

157. Yet another possibility was to eliminate the finality of the first-tier decisions when an appeal was raised, making them no longer subject to existing review mechanisms. It was said that in such instance, a decision would only become final and binding when rendered through an appellate mechanism.

158. It was also mentioned that another possibility would be to ensure that decisions that were the subject of existing review mechanisms and the outcomes thereof did not fall under the scope of an appellate mechanism.

159. While different views were expressed on whether decisions of an appellate process should be subject to existing review mechanisms, it was generally felt that at least the substance of the decision should be final and not subject to further review. This was in light of the fact that there would be other ways to ensure control by States (for example, binding interpretations by States parties to the underlying investment treaty, or decisions by the member States of an appellate mechanism with regard to the decisions rendered and the operation of the mechanism more broadly). It was

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suggested that further consideration should be given to means to ensure due process and the procedural integrity of the appellate process, and to whether such tools could be made part of a self-contained appellate mechanism.

160. In the same vein, views were expressed that the enforcement of decisions rendered by an appellate mechanism should be addressed within the mechanism (draft provision 8) rather than relying on existing enforcement mechanisms under the ICSID Convention or the New York Convention. In support, it was said that this would avoid the creation of a possible fourth tier and lead to a more legally stable framework. However, views were also expressed that ways to make use of existing enforcement mechanisms should continue to be explored.

2. Models for implementation

161. It was said that the interaction with existing review mechanisms and the means to avoid multiple review proceedings would largely depend on how an appellate mechanism were to be implemented. It was recalled that the Working Group had considered an appellate mechanism being established ad hoc (possibly administered by existing institutions) or as a standing mechanism (either as a stand-alone body or a second tier of a body with both first and second-tier tribunals).

162. Preference was expressed for focusing on the development of a standing appellate mechanism, as it could provide for more predictability and ensure correctness of awards. On the other hand, it was stated that it was premature to rule out other models, as an ad hoc model could be more cost-effective, in line with the principle of party autonomy, and avoid political influence.

163. It was noted that a permanent registry or administering institution, full-time judges with an independent appointment process, a secure budget for operation, and a permanent venue, were characteristics that would distinguish a standing appellate mechanism from an ad hoc one. On the other hand, it was mentioned that there could be some commonalities, for example, if a roster were to be established or if an existing institution were to function as the administering institution or the secretariat. It was therefore suggested that work could be undertaken to assess how a roster could be established and operate both in an ad hoc and a standing setting, also taking into account the practice at ICSID. It was also suggested that the establishment of chambers could be envisaged to address certain types of disputes or disputes among States from the same regional groups or regarding the same investment treaty. In this context, the benefits of embedding an appellate mechanism within a standing body composed of both tiers were also underlined.

164. It was mentioned that in further considering the implementation models, due consideration should be given to how an appellate mechanism could impact on States which were not members of the appellate mechanism, as well as investors from those States. This included questions like whether and how they might be bound by or have access to an appellate mechanism as well as the possible impact that an appellate decision could have on the interpretation of their investment treaties.

165. It was generally felt that the advantages and disadvantages of the different models of implementation would need to be further examined in light of the main objectives of an appellate mechanism. It was also mentioned that discussions with regard to other reform elements (notably, the structure and financing of a standing multilateral body, the selection and appointment of adjudicators in a standing mechanism and the selection criteria of ad hoc arbitrators) could shed light on the discussions for an appellate mechanism, with necessary adjustments.

C. Way forward

166. Based on the above deliberations, the Secretariat was requested to continue to develop draft provisions on the functioning of an appellate mechanism, which could be employed regardless of the chosen model for implementation. The Secretariat was

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requested to explore, possibly with the Academic Forum, how each model could be implemented and interact with existing review mechanisms, while ensuring the efficiency of the overall system.

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