



**United Nations Commission  
on International Trade Law  
Working Group III (Investor-State  
Dispute Settlement Reform)  
Forty-second session  
New York, 14-18 February 2022**

## **Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14-18 February 2022)**

### Contents

	<i>Page</i>
I. Introduction .....	2
II. Organization of the session .....	2
III. Standing multilateral mechanism: Selection and appointment of ISDS Tribunal members.....	4
A. General remarks .....	5
B. Framework: establishment, jurisdiction and governance .....	5
1. Draft provision 1 – Establishment of the Tribunal .....	5
2. Draft provision 2 – Jurisdiction .....	5
3. Draft provision 3 – Governance structure .....	6
C. Selective representation and Tribunal members .....	7
1. Draft provision 4 - Tribunal members .....	7
2. Draft provision 5 – Ad hoc Tribunal members .....	10
D. Nomination, selection and appointment of candidates .....	11
1. Draft provision 6 – Nomination of candidates .....	11
2. Draft provision 7 – Selection panel .....	12
E. Concluding remarks .....	13
IV. Draft code of conduct .....	13
A. Articles 9 to 11	
1. Article 9 – Fees and expenses	13
2. Article 10 – Disclosure obligations	14
3. Article 11 – Compliance with the Code of Conduct	19
B. Way forward	20
V. Other business	20
Annex Revised version of the draft Code of Conduct - Articles 1 to 8	21

## 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). It also agreed that, in line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to, first, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).<sup>1</sup>

2. 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.<sup>2</sup> At its thirty-eighth session, the Working Group agreed on a project schedule to discuss, elaborate and develop multiple potential reform solutions simultaneously in accordance with the third phase of its mandate.

3. From its thirty-eighth to forty-first sessions, the Working Group considered concrete reform elements related to: (i) the establishment of an advisory centre; (ii) a code of conduct for adjudicators; (iii) the regulation of third party funding; (iv) dispute prevention and mitigation and means of alternative dispute resolution; (v) treaty interpretation by States parties; (vi) security for costs; (vii) means to address frivolous claims; (viii) multiple proceedings and counterclaims; (ix) reflective loss and shareholder claims; (x) appellate and multilateral court mechanisms; and (xi) the selection and appointment of ISDS tribunal members.<sup>3</sup>

4. At its fifty-fourth session in 2021, the Commission commended the Working Group for its progress on the development of concrete reform elements.

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its forty-second session in New York from 14 to 18 February 2022. The session was organized in accordance with the decision by the Commission to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents [A/CN.9/1078](#) and [A/CN.9/1038](#) (annex I) until its fifty-fifth session.<sup>4</sup> Arrangements were made to allow delegations to participate remotely as well as in person at the United Nations Headquarters.

6. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

<sup>2</sup> The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh sessions 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.

<sup>3</sup> The deliberations and decisions of the Working Group at its thirty-eighth to forty-first sessions are set out in documents [A/CN.9/1004\\*](#), [A/CN.9/1004/Add.1](#), [A/CN.9/1044](#), [A/CN.9/1050](#) and [A/CN.9/1086](#).

<sup>4</sup> *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 248.

Republic, Ecuador, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Lebanon, Mali, Mauritius, Mexico, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Afghanistan, Angola, Armenia, Bahrain, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cambodia, Costa Rica, Cyprus, El Salvador, Gabon, Jamaica, Jordan, Kuwait, Latvia, Lithuania, Madagascar, Maldives, Mauritania, Mongolia, Morocco, Nepal, Netherlands, Oman, Panama, Paraguay, Portugal, Saudi Arabia, Senegal, Sierra Leone, Slovakia, Sweden, Turkmenistan and Uruguay.

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

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

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID), United Nations Environment Programme (UNEP) and the United Nations Industrial Development Organization (UNIDO);

(b) *Intergovernmental organizations*: African Union (AU), Asian-African Legal Consultative Organization (AALCO), Asociacion Latinoamericana de Integracion (ALADI), Gulf Cooperation Council (GCC), Organisation for Economic Co-operation and Development (OECD), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Association of International Law (AAIL-AADI), African Center of International Law Practice (ACILP), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitral Women (AW), Asian Academy of International Law (AAIL), Asian-African Legal Consultative Organization (AALCO), Asociación Americana de Derecho Internacional Privado (ASADIP), Association pour la Promotion de l'Arbitrage en Afrique (APAA), Barreau de Paris (BP), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Dispute Settlement (CIDS), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), 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 (CI Arb), China Council for the Promotion of International Trade (CCPIT), Columbia Centre on Sustainable Investment (CCSI), Corporate Counsels' International Arbitration Group (CCIAG), Die Deutsche Gesellschaft für internationale Zusammenarbeit, European Federation for Investment Law and Arbitration (EFILA), European Law Institute (ELI), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), Hong Kong International Arbitration Centre (HKIAC), Institut de Droit International (IDI), Institute for Transnational Arbitration (ITA), Institutio Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International and Comparative Law Research Center (ICLRC), International Council for Commercial Arbitration (ICCA), International Institute for Sustainable Development (IISD), International Institute for Environment and Development (IIED), International Law Association (ILA), International Law Institute (ILI), Japan Association of Arbitrators (JAA), Korean Commercial Arbitration Board (KCAB), Kozolchyk National Law Center (NATLAW), New York City Bar Association (NYCBA), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Singapore International Mediation Centre (SIMC), Stichting

Onderzoek Multinationale Ondernemingen (SOMO), Swiss Arbitration Association (ASA), Teheran Chamber of Commerce, Industries, Mines and Agriculture (TCCIMA), Third World Network (TWN), Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ), United States Council for International Business (USCIB), Vienna International Arbitration Centre (VIAC), World Economic Forum (WEF).

10. According to the decision made by the State members of the Commission (see para. 2 above), the following persons continued their offices:

*Chairperson:* Mr. Shane Spelliscy (Canada)

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

11. The Working Group had before it the following documents: (a) annotated provisional agenda ([A/CN.9/WG.III/WP.211](#)); (b) notes by the Secretariat prepared jointly with the ICSID Secretariat on the draft code of conduct for adjudicators in international investment disputes ([A/CN.9/WG.III/WP.209](#)), and on means of implementation of the code of conduct for adjudicators in international investment disputes ([A/CN.9/WG.III/WP.208](#)); (c) note by the Secretariat on the Advisory Centre ([A/CN.9/WG.III/WP.212](#) and [A/CN.9/WG.III/WP.212/Add.1](#)); (d) note by the Secretariat on standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters ([A/CN.9/WG.III/WP.213](#)); and (e) summary of the intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea ([A/CN.9/WG.III/WP.214](#)).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Possible reform of investor-State dispute settlement (ISDS).
4. Other business.

13. It was noted that the provisional agenda ([A/CN.9/WG.III/WP.211](#)) as adopted by the Working Group included reference to the following topics: draft code of conduct for adjudicators in international investment disputes and means of implementation, the selection and appointment of ISDS tribunal members and related matters, and the multilateral advisory centre. Regarding the topics to be considered with priority at the session, the Chair had circulated a letter suggesting to first consider the selection and appointment of ISDS tribunal members and related matters and then the draft code of conduct. While an alternative proposal for the purpose of time efficiency was made to consider first the draft code of conduct and then the multilateral advisory centre, that proposal did not receive support. As part of this alternative proposal, it was reiterated that the workplan should be flexible and notional, so that the details could be adapted as progress of the Working Group would be made.

14. After discussion, the Working Group decided to proceed its deliberation in the manner as suggested by the Chair which would ensure that equal time is allocated to both topics.

### **III. Standing multilateral mechanism: Selection and appointment of ISDS tribunal members**

15. At its resumed thirty-eighth session in January 2020 and at its fortieth session in February 2021, the Working Group had undertaken a preliminary consideration of the selection and appointment of ISDS tribunal members focusing exclusively in the context of a standing multilateral mechanism (referred to below also as the “Multilateral Investment Tribunal” or the “Tribunal”) ([A/CN.9/1004/Add.1](#), paras. 95–133; [A/CN.9/1050](#), paras. 17–56).

16. At the current session, the Working Group continued its consideration of the topic on the basis of document [A/CN.9/WG.III/WP.213](#). It was stressed that views expressed in relation to the above-mentioned topic were without prejudice to the position of the delegations on that reform option.

## **A. General remarks**

17. It was noted that the establishment of a Multilateral Investment Tribunal would likely require the preparation of a statute, which would be open for adoption by States and regional economic integration organizations. It was said that such a statute should have a preamble setting forth the objectives of the Tribunal and a section on key definitions. It was observed that the statute would need to be supplemented by rules or regulations addressing detailed procedural matters and that the draft provisions in document [A/CN.9/WG.III/WP.213](#) would also need to be adjusted accordingly. Differing views were expressed as to whether these supplemental procedures should be drafted by the Working Group or by the Committee of the Parties at a later date.

## **B. Framework: establishment, jurisdiction and governance**

18. The Working Group considered draft provisions 1 to 3, which provided the general framework for the selection and appointment of Tribunal members.

### **1. Draft provision 1 – Establishment of the Tribunal**

19. It was said that draft provision 1 would need to be further elaborated to address aspects such as the setting up of the Tribunal, whether it would include an appellate mechanism, where its seat would be, how it would be funded, and its interaction with the current ISDS regime. It was mentioned that some of those aspects would be addressed in the statute establishing the Tribunal.

20. As a matter of drafting, it was suggested that the “standing” nature of the Tribunal should be highlighted in the provision.

### **2. Draft provision 2 – Jurisdiction**

21. A wide range of views were expressed regarding draft provision 2 addressing the jurisdiction of the Tribunal. Various views were expressed with regard to the two options in paragraph 1.

22. With regard to option 1 (which provided that the jurisdiction of the Tribunal was limited to disputes “arising out of an investment”), it was said that the option might result in requiring a double test of not only meeting the notion of “investment” under the applicable underlying investment instrument but also under draft provision 2. Therefore, support was expressed for deleting the reference to “investment” or, as an alternative, for clarifying that the notion of “investment” should be determined in accordance with the underlying investment instrument. While suggestions were made that the jurisdiction of the Tribunal should not cover disputes between States, another view was that such disputes should fall under the jurisdiction of the Tribunal as long as they arose out of, or related to, an investment. A suggestion was made that the words in square brackets (“under an international investment agreement”) could be deleted in option 1 to include disputes based on investment contracts and national investment laws. Another suggestion was that the words “nationals of another Contracting State” should be replaced with the words “investors of another Contracting State”.

23. Views were expressed in support of option 2, which provided that the Tribunal would have jurisdiction over any dispute which the parties had consented to submit to it. One of the reasons mentioned was that it would avoid the double test requirement as it did not include any reference to “investment”. However, concerns were also expressed that option 2 would endow the Tribunal with a too broad jurisdiction, possibly resulting in other types of disputes falling under its jurisdiction (trade or

commercial disputes) and disputes ending up in multiple fora. To clarify the nature of the disputes to be covered, it was suggested that option 2 should refer to “international investment”, or “investment” disputes to also include claims based on domestic investment laws. Another proposal was to simply refer to “disputes” as the consent qualification would provide the necessary flexibility to States. It was suggested that further clarification and explanation could be included in a commentary accompanying the draft provision. It was further noted that the underlying investment instrument would in any case have the effect of limiting the jurisdiction of the Tribunal.

24. More generally, it was stated that the resources available to the Tribunal should be taken into account when determining its scope of jurisdiction in order to ensure its proper functioning.

25. It was suggested that draft provision 2 should require consent to be in writing and further elaborate on how such consent could be given, whether by treaty parties or disputing parties. It was further suggested that mechanisms should be developed to allow States to consent to the jurisdiction of the Tribunal, including for disputes arising out of existing treaties (akin to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration or the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting). It was further pointed out that States should be able to specify and list investment agreements with regard to which they would opt-in to the jurisdiction of the Tribunal and that the framework should provide for a coordination mechanism between States to do so.

26. With regard to paragraph 2 of draft provision 2, it was suggested that it should be made clear that it was merely a deeming provision and that consent to submit a dispute to a tribunal established under an international investment agreement was not to be considered as automatically recording consent to submit the dispute to the Tribunal. It was stated that the paragraph might have the effect of automatically transferring the jurisdiction of a tribunal established under an international investment agreement to the Tribunal and, if so, the scope of the jurisdictions would need to be further clarified. A suggestion was made that the words “international investment agreements” might need to be revised to include instances where the consent was not necessarily based on a treaty but other instruments.

### **3. Draft provision 3 – Governance structure**

27. The Working Group considered draft provision 3 which addressed the governance structure of a standing multilateral mechanism. It was generally suggested that the draft provision should be further elaborated to provide clarity on the functions and the role of the different bodies to be established in the governance structure.

#### *Committee of the Parties*

28. To ensure more efficiency in the exercise of the missions of the Committee of the Parties, which would be a forum where decisions would be taken, it was proposed that the governance structure should include a Committee of the Parties (the Committee), composed of representatives of all the parties and a Sub-Committee whose members would be elected by the Committee from among the members of the Committee of the Parties which would be responsible for exercising the functions of the Committee under its supervision. It was suggested that the Committee should be able to make determination on aspects pertaining to the operation of the standing multilateral mechanism. It was also suggested that the number of the Committee meetings as well as their interval would need to be specified.

29. It was mentioned that the statute providing for the establishment of a standing multilateral mechanism would generally set forth the role of the Committee and the Tribunal which should be balanced to ensure the proper functioning of the Tribunal with a certain oversight by the Committee of the activities of the Tribunal. Similarly,

the power to establish rules of procedure and relevant regulations would need to be carefully distributed between the Committee and the Tribunal. In that context, it was suggested that flexibility should be given to the Tribunal to update its rules and adapt its procedure when necessary.

30. It was said that the Advisory Centre should be a separate and independent institution and not be part of the Tribunal. It was stressed that doing otherwise and merging two institutions in one could lead to conflicts of interest and raise questions regarding the autonomous operation of the Advisory Centre.

31. With regard to the decision-making process in the Committee, it was suggested that paragraph 5 would need to be elaborated to specify a quorum, whether majority were to be determined based on those present, those who cast the votes or the number of parties to the Committee. It was further suggested that while a simple majority rule could apply to most procedural decisions, a qualified majority of two thirds or more might be required for most substantive decisions. In that context, it was mentioned that the Committee should also be able to amend the statute through such a majority. It was suggested that mechanisms to balance the views of the different regional groups could be elaborated.

#### *Presidency of the Tribunal*

32. Regarding draft provision 3 (b), it was suggested that the scope of procedural rules to be determined by the Tribunal needed to be specified against the background of the work of the Working Group on procedural reform solutions and it was said that further clarifications on what would be the routine functioning was needed.

33. Regarding paragraph 2, it was suggested to foresee several vice-presidents to allow for diversity within the presidency of the Tribunal, reflecting the diversity of its member States.

34. The Working Group considered whether, in a standing body having both a first-instance and an appellate level, the president of the Tribunal would be the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level. In that context, the establishment of a secretariat was suggested to serve both instances. More generally, it was suggested that the selection of the secretariat members and the role of the secretariat should be clarified.

### **C. Selective representation and Tribunal members**

#### **1. Draft provision 4 - Tribunal members**

35. It was said that draft provision 4 reflected the preference expressed in the Working Group for selective rather than full representation on the basis that the latter might be costly and complex to manage if the number of Tribunal members were to be high.

#### *Paragraph 1*

##### *- Number of tribunal members*

36. It was generally felt that it would be premature to determine the number of Tribunal members at the current stage. Nevertheless, it was also stated that the number of Tribunal members was a fundamental question that should be resolved at the current stage of discussing “the architecture” of the permanent mechanism. It was suggested that there could be a transitional provision which would provide flexibility whereby the number of the Tribunal members could evolve over time, following any variation in the number of participating States as well as the evolution of the caseload (see below, para. 48).

37. While a suggestion was made that the number of Tribunal members should be sufficiently high, similar, for instance, to that of the International Tribunal on the Law

of the Sea (ITLOS), concerns were expressed about the financial resources that would be required. It was also said that it would be wrong to use such international courts like International Court of Justice (ICJ) or ITLOS as a reference, since many more cases would need to be expected, considering the current number of ISDS cases.

- *Employment on a full-time – part-time basis*

38. Regarding whether the Tribunal members should be employed on a full-time or part-time basis, support was expressed for full-time employment to ensure the independence and impartiality of Tribunal members and to avoid the risk of any outside influence. It was further said that full-time employment would reduce the required number of members and would limit the risk of conflicts of interest. It was suggested that if part-time employment were to be provided for, a rule would need to be adopted regarding external activities that would be prohibited or permitted.

39. It was said that a transitional provision could be explored to allow for part-time employment for a limited period at the earlier stages of the Tribunal's operation, also taking into account the financial resources. Concerns were expressed about the prolongation of any such part-time appointments.

- *Qualifications*

40. It was noted that paragraph 1 provided the requirements that the Tribunal members should be cognizant of international law and have an understanding of the different policy considerations relating to foreign investment. In that context, doubts were expressed about retaining the phrase "experience in or consulting governments including as part of the judiciary" as such requirements might create an appearance of bias. It was suggested that experience advising investors was similarly relevant. In response, it was said that the purpose of that requirement was to underline the need for Tribunal members to be cognizant of, and to have experience in, dealing with policies of governments as that constituted an important aspect of investment disputes.

41. It was suggested that, considering the potential scope of jurisdiction of the Tribunal, qualifications should be broad, and include competence in public law, international trade/economic law and administrative law. It was further said that diversity of qualifications should be considered when composing the Tribunal, possibly taking into account the existing legal systems. Views were expressed that expertise in domestic law might also be required.

42. Reference was made to the requirements found in the statute of international courts that judges should be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices or [be] jurisconsults of recognized competence". Some doubts were expressed about including the reference to the "appointment to the highest judicial offices" as the competence required of the Tribunal members would be more specialized than that required of judges in a domestic context. As a drafting suggestion, preference was expressed for referring to "jurists of recognized competence," which would be more inclusive and also cover individuals qualified for "highest judicial offices".

43. It was cautioned that the qualifications required of the Tribunal members should not unduly limit the pool of candidates that could be appointed as members of the Tribunal. Concerns were expressed that there would be a very shallow pool of candidates who could meet all the requirements in paragraph 1, particularly if the requirements were understood to be cumulative.

44. Regarding linguistic requirements, it was said that the working languages of the Tribunal should first be determined and that Tribunal members should be fluent in at least two working languages of the Tribunal to ensure language diversity. It was also said that that could limit the pool of candidates. It was questioned whether such



requirements ought to be provided for in the rules of procedure of the Tribunal instead of in the statute.

- *Diversity*

45. Regarding the reference to “diversity and gender balance” in paragraph 1, it was underlined that there were many different aspects of diversity that ought to be reflected in the statute (including geographical representation, a balanced representation of gender, levels of development and legal systems). It was also said that while such principles should be stressed, both notions were abstract, could be understood differently, could cause complications in implementation. If included, their meaning should be expressed more clearly. It was underlined that geographical/regional distribution among contracting Parties should also be considered.

- *Nationality*

46. The Working Group considered whether nationality should play a role in the composition of the Tribunal. Views were expressed that the criterion of nationality remained crucial when assessing the impartiality of a decision maker and that it could not be neglected as it was a decisive factor. Another view was that Tribunal members should be elected irrespective of their nationality, therefore focusing mainly on their competence and other qualifications, following the approach in the statute of the ICJ.

47. The Working Group considered whether nationals of a State that was not a Party to the statute of the Tribunal should be eligible to become a Tribunal member. While concerns were expressed, it was also said that inclusion of such nationals could enhance diversity and geographical representation.

*Paragraph 2*

48. It was observed that there should be a mechanism to adjust the number of Tribunal members (see para. 36 above). While it was noted that existing international courts and tribunals provided examples of such a mechanism, it was also cautioned that adjustments in the number of Tribunal members could have procedural, administrative as well as budgetary consequences on the operation of the Tribunal, including potential increases in contributions to be made by contracting Parties. While it was suggested that the evolution of the caseload or the number of contracting Parties could justify the adjustment, it was mentioned that there might be other reasons, which should be clearly set forth.

49. It was suggested that the authority to request the adjustment should not be limited to the Presidency of the Committee of the Parties but that any member of the Committee or the Committee as a whole should be able to make the request, upon which the number would be amended on the basis of a qualified majority of the representatives of the Committee of the Parties. Some preference was expressed for requiring a two-thirds majority.

*Paragraph 3*

50. The Working Group considered whether no two Tribunal members should be of the nationality of the same State as proposed under paragraph 3. Views diverged on the question whether nationality should play a role in the selection, and on whether, in order to achieve geographical diversity, no two members of the Tribunal should be of the same nationality, in particular if only a small number of judges were to be appointed. It was also suggested that nationals of a contracting State should not be assigned a case involving that State or one of its nationals. In that context, views diverged on whether the square-bracketed text at the end of paragraph 3 should be retained, and it was stated that paragraph 3 could only be considered in full after the issue of the number of Tribunal members had been decided.

51. A question was raised with regard to the meaning of the word a “national”, particularly in relation to persons who had a permanent residence in a State yet with a different nationality. In response, it was suggested that whether to treat such a person as a national of the State where he or she had permanent residence might be a question of domestic law and that it need not be dealt in the draft provision. With regard to dual nationality, it was generally felt that the reference to the habitual residence and/or main centre of interest provided a solution.

## **2. Draft provision 5 – Ad hoc Tribunal members**

52. It was noted that the issue of whether a person could be appointed as an ad hoc member of the Tribunal should be distinguished from the issue of the formation of a chamber within the Tribunal which would address specific cases. It was stated that the latter required a more detailed analysis of how the Tribunal would handle its cases.

53. With regard to the appointment of ad hoc Tribunal members by parties, it was explained that draft provision 5 would allow disputing parties to appoint a person external to the Tribunal to sit as a member of the Tribunal on a temporary basis to handle that specific dispute. Reference was made to similar mechanisms in the ICJ. It was suggested that whether to allow for ad hoc Tribunal members could only be discussed in detail once the mechanism for appointing the permanent members of the Tribunal was fixed.

54. Views diverged on the desirability of parties appointing ad hoc Tribunal members.

55. Concerns were expressed that allowing party-appointed “ad hoc” members would run contrary to the establishment of a “standing” mechanism, one of its aims being to ensure the independence and impartiality of the Tribunal members. It was stated that concerns raised about the current ISDS system would persist even in the standing mechanism should party-appointed arbitrators be allowed. It was said that party-appointed arbitrators as well as ad hoc judges were found to favour the parties that had appointed them, and the potential bias of such members would be particularly problematic.

56. It was stated that, pursuant to the current formulation of draft provision 5, it was not clear who could appoint an ad hoc judge – each party or only a State party or whether each party would have to agree to such appointment. It was also noted that if only the respondent State as a contracting Party were to be able to appoint an ad hoc member, it would lead to inequality as investors would not have the same right. In response, it was stated that one possible solution would be to require that Tribunal members could not hear cases involving their State of nationality as the respondent State, and that nationals of the respondent State could not be appointed as ad hoc members of the Tribunal.

57. Some practical issues that could arise with regard to ad hoc Tribunal members were raised, for example, the procedural rules applicable to their nomination and appointment (including whether the agreement of the disputing parties would be required) as well as the applicable standards (including whether they would be different from those applicable to permanent members). As an example, a question was raised on how the limitation on multiple roles as provided for in the draft code of conduct would apply to ad hoc Tribunal members. Suggestions were made that the same standard should apply regardless of whether they were appointed on an ad hoc or permanent basis. Questions were also raised on how the standing mechanism would deal with instances where a case would be remanded to a first-instance tribunal that was composed of ad hoc members. The potential increase in cost and possible delays to the proceedings deriving from appointment of ad hoc members were also cautioned.

58. On the other hand, views were expressed in favour of providing for ad hoc Tribunal members mainly on the basis that it would preserve the party autonomy and the related legitimacy existing in the current ISDS system. It was said that ad hoc

Tribunal members could be particularly beneficial where specific expertise not possessed by full-time Tribunal members would be necessary to resolve a dispute, even though it was stated that experts appointed by the Tribunal would be able to assist in such circumstances. It was said that members appointed ad hoc would not necessarily favour the parties that appointed them. It was also said that ad hoc members could improve the overall functioning of the standing mechanism, also improving diversity and contributing to capacity building of potential candidates.

59. To address some of the concerns expressed about ad hoc Tribunal members, proposals were made that their appointment should only be allowed under limited circumstances. Furthermore, it was suggested that they could be chosen from a roster of qualified candidates and that there could be a two-stage appointment, similar to existing mechanisms in ICSID and the European Court of Human Rights, whereby the appointment would be made by a third-party and not the disputing parties themselves.

60. Some support was expressed for allowing “junior” persons to participate or observe the case handled by the Tribunal as a way of enhancing inclusiveness and of building the capacity of potential candidates. At the same time, reservations were expressed on the role that they could play in the dispute resolution process, particularly with regard to decision-making.

## **D. Nomination, selection and appointment of candidates**

61. With regard to draft provisions 6 to 8 on the nomination, selection and appointment of candidates, it was recalled that the objective was to ensure the appointment of the most qualified and independent candidates, diversity in terms of legal systems, geographical representation and backgrounds as well as gender balance.

### **1. Draft provision 6 – Nomination of candidates**

62. While support was expressed for including a nomination stage, doubts were also expressed. It was said that in certain courts and tribunals, tribunal members were appointed directly by the treaty Parties, without any prior formal nomination stage.

63. Regarding the options in draft provision 6, differing views were expressed in favour of option 1, option 2 and a combination thereof. It was observed that the two options were not exclusive and could complement each other.

#### *Option 1*

64. With regard to option 1, it was said that the nomination process should be in the hands of States, which could have the effect of achieving a balance between respondent State- and investor-oriented candidates. Furthermore, it was said that there should be a mechanism to allow representatives of investors to also be involved in the nomination stage, while concerns were expressed about such a mechanism.

65. While it was suggested that each State should nominate one candidate, it was said that that could be revisited depending on the structure of the standing mechanism, including the number of States Parties to the statute. It was also suggested that States should nominate two candidates of different gender to foster gender balance. Another suggestion was that there should be no limitation on the number of candidates nominated. However, a concern was raised that nomination of two or more candidates by a State could lead to a large pool of candidates, which might complicate the selection and appointment process.

66. Differing views were expressed on whether a candidate would need to be a national of the nominating State. Some views underlined the importance of nationality, and how such a requirement would ensure geographical diversity, whereas others suggested that the candidate need not necessarily be a national of the

nominating State. It was suggested that candidates should be nationals of a contracting Party. It was also suggested that co-nomination should be possible, where a State expressed support for a candidate nominated by another State.

67. Views diverged on whether States should be obliged to follow the process in paragraph 2. In favour, it was said that States should be encouraged to adopt an open, inclusive, and transparent nomination process and that various stakeholders, including civil society and business communities ought to be consulted. It was suggested that an express reference to business association should be included in subparagraph (b). Another view was that more flexibility should be provided to reflect the different circumstances of States and a suggestion was that paragraph 2 could be deleted. Questions were raised on the possible consequences of non-compliance with paragraph 2 and the meaning of the phrase “civil society” therein. A suggestion was made to provide that States should give evidence that consultations had been carried out in accordance with paragraph 2.

#### *Option 2*

68. With regard to option 2, it was said that a self-nomination process would ensure openness and transparency, which could also enhance the independence and diversity of the Tribunal members and avoid undue politicization. While the benefits of self-nomination or application by individuals were noted, certain drawbacks were mentioned, including the need for additional screening or filtering prior to the selection process, which might result in additional costs. It was suggested that, to prevent self-nomination by individuals that did not possess the minimal qualifications, option 2 could be revised to clearly set forth the eligibility criteria and require individuals to provide a detailed statement specifying how they fulfilled the requirements. It was suggested that the open call for candidates should take place at the level of a contracting State. In that context, it was said that the criteria for nomination should not be unified so as to account for specificities of different regional groups.

69. While the benefits of an inclusive process were highlighted, some caution was expressed for subparagraph (b) as the process could easily become politicized. It was suggested that the reference to “the investment community” should be deleted in subparagraph (b), which should refer more broadly to “relevant organisations” like paragraph 2 of option 1.

#### *Merging options 1 and 2*

70. Overall, it was generally felt that a combination of options 1 and 2 could bring the benefits of both options and significantly contribute to increase the legitimacy of the nomination process. In addition, it was suggested that in case a hybrid option would be introduced, the nomination by States and the self-nomination process should be balanced to avoid the situation where certain candidates would be subject to more stringent selection and nomination requirements than others. The secretariat was asked to prepare a new draft of that provision combining options 1 and 2 for further review by the Working Group.

## **2. Draft provision 7 – Selection panel**

71. It was noted that draft provision 7 provided for the operation of selection panels or committees, including their role in the appointment process, how they would be constituted and how to ensure the independence of panel members.

72. It was said that an independent selection panel could guarantee the nomination of suitable candidates and promote inclusiveness and representation of all stakeholders. It was noted that such selection panels already existed in a number of international courts and tribunals.

73. On the other hand, a number of concerns were raised, and views diverged as to the practical operation of such a screening mechanism. One concern was over the

accountability and legitimacy of such a panel. It was pointed out that it might be difficult for a selection panel to maintain independence and avoid potential conflicts of interest among its members. It was also pointed out that the selection of the members of such a panel would potentially be politicized. Another concern was that the selection process could lie entirely in the hands of States to the detriment of other stakeholders and might therefore not reflect proper representation. Furthermore, it was said that a selection panel could lead to multiple assessments of candidates, which could increase the overall costs for the entire appointment process.

74. In that light, suggestions were made that there could be less complex and expedited procedures to screen candidates. It was suggested that prior screening by a registrar, or a similar administrative body tasked with a review of candidates could be sought. It was also suggested that a selection panel should be established on an ad hoc rather than a permanent basis to reduce costs. It was suggested that an external body could confirm the independence of a candidate.

75. Regarding the mandate of the selection panel, it was said that the panel should be able to open a call for further nominations if needed as provided for in draft provision 7(f).

76. With regard to the composition of the selection panel, it was generally felt that, regardless of the definitive number of members, it should reflect gender balance, geographical representation and representation of the different legal systems, as well as diversity of professional and educational backgrounds. In that respect, it was suggested to retain the language in brackets in the last sentence of draft provision 7(b)(1). A suggestion was made that a maximum of five panel members could strike a right balance between efficiency, costs and resources, while another view was expressed that geographical representation would only be fulfilled with at least five panel members. Another view was that the number of panel members should not be less than ten, in order to reflect broad representation.

77. With regard to the individuals to be appointed as selection panel members, it was suggested that they could be former judges of international courts or of the Tribunal itself or be appointed *ex officio*. A view was expressed that members of the selection panel should also comprise persons who represented the views of other non-State stakeholders, such as the investors or associations or other organizations representing them.

## **E. Concluding remarks**

78. At the close of its consideration of the standing multilateral mechanism, the Working Group requested the Secretariat to prepare a revised version of draft provisions 1 to 7 and agreed to continue its consideration of the remaining provisions at a future session.

## **IV. Draft code of conduct**

79. The Working Group continued its first reading of the draft code of conduct (“Code”) at the current session.

80. It was recalled that the Working Group had considered articles 1 to 8 of the Code at its forty-first session in November 2021 based on document [A/CN.9/WG.III/WP.209](#). It was noted that, based on the deliberations of the Working Group at that session, a revised draft of articles 1 to 8 had been prepared as provided for in the Annex. References to articles 1 to 8 in this chapter are to the respective articles in the Annex.

### **A. Article 9 to 11**

## 1. Article 9 – Fees and expenses

81. It was agreed that article 9 would apply only in the context of arbitration because the fees and expenses of judges in a standing mechanism would be regulated in the framework establishing the standing mechanism and judges would not need to discuss such aspects with the disputing parties. In that context, the words “adjudicatory body” in paragraph 1 should be replaced with the words “arbitral tribunal”.

82. It was suggested that the phrase “unless otherwise regulated by the applicable rules or treaty” in paragraph 1 should be aligned with similar phrases in other parts of the Code also in light of article 2(2).

83. It was generally felt that the fees and expenses of any assistant should be an aspect that an arbitrator should discuss with the disputing parties, along with the responsibilities and duties of such an assistant. It was mentioned that there were increased calls for transparency on assistant’s fees, which could be elaborated in the commentary to the Code as such transparency could assist in avoiding situations where assistants would conduct decision-making functions.

84. On the other hand, it was stated that arbitrators would not necessarily be in a position to determine whether they would engage an assistant upon their appointment as the scope and the complexity of the case would likely not be fully known. It was also noted that whether to engage an assistant would depend on whether the procedure was to be administered by an institution or not. In that light, it was agreed that an additional sentence could be included in paragraph 1 to read along the following lines: “Any discussion concerning the fees and expenses of an Assistant, if any, shall be concluded with the disputing parties prior to engaging [hiring] the Assistant.”

85. In relation to paragraph 1, it was questioned whether *ex parte* communication between a disputing party and a candidate with regard to the potential fees was something to be permitted under article 7.

86. It was noted that paragraph 2 intended to address how proposals on fees and expenses would be channelled to the disputing parties. A suggestion was made that article 9 should mention that fees and expenses of arbitrators should be reasonable in amount. Another suggestion was that the Code could provide for objective criteria to determine the appropriate or reasonable fees and expenses of the arbitrators and assistants, possibly in the form of a tariff schedule. However, it was questioned whether the Code was the appropriate instrument to regulate such aspects, which were usually dealt with in the applicable procedural rules. After discussion, it was agreed that the drafting of paragraph 2 could be improved along the following lines: “Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding or by the sole or presiding Arbitrator if there is no administering institution.”

87. With respect to paragraph 3, while a question was raised whether it was practically feasible for arbitrators to comply with the obligations therein, it was noted that such a report was common practice in investment arbitration. It was suggested that an arbitrator should be further required to make available the record of time and expenses on a regular basis and/or upon the request of a disputing party. Accordingly, it was agreed that an additional sentence should be included in paragraph 3 along the following lines: “Arbitrators shall make such records available when requesting the disbursement of funds or upon the request of a disputing party”. In relation, it was mentioned that the consequences of non-compliance with such obligation would need further consideration.

## 2. Article 10 – Disclosure obligations

88. It was noted that article 10 aimed to provide a standard of disclosure that was broad enough to assess potential situations of conflict of interest, while being reasonable. In particular, it was noted that article 10 would allow participants in international investment disputes proceedings to know in advance which circumstances would need to be disclosed by candidates or adjudicators, and that the

Commentary could include concrete examples. It was observed that article 10 would play a central role in the Code as disclosure obligations therein would ensure compliance with the Code and enhance transparency.

#### *Paragraph 1*

89. While it was agreed that the standard of disclosure set in paragraph 1 should be broader and different from that for disqualification, views diverged on the standard to be provided. For instance, concerns were expressed that the phrase “in the eyes of the disputing parties”, which had been developed mainly in the context of commercial arbitration, was subjective in nature, whereas an objective standard should be provided for in the Code in particular if the Code applied to a standing mechanism. It was also questioned whether the phrase referred to doubts in the eyes of one or all of the disputing parties. In response to a suggestion that the phrase could be deleted entirely, concerns were expressed that that could unduly lower the standard of disclosure.

90. To provide a more objective standard, it was suggested that reference could be made to “a reasonable third person” instead of the “disputing parties”. Another suggestion was that a “realistic possibility” of circumstances giving rise to justifiable doubts could be the standard.

91. In light of support to draft a standard based on existing instruments, another suggestion was to align the wording with the language in article 11 of the UNCITRAL Arbitration Rules, which was considered to provide an objective standard. It was stated that this would also ensure consistency in the application of the Code when the UNCITRAL Arbitration Rules were applicable to the IID.

92. With regard to the second sentence of paragraph 1, it was said that the wording “reasonable efforts” could entail confusion and would require further explanation in the Commentary. Suggestions were made that the wording could be replaced with the words “best efforts” or that the sentence could be deleted. Considering that the sentence aimed to encourage diligence on the part of the candidates and adjudicators to become aware of circumstances that required disclosure and as the sentence should apply also to paragraph 2, it was agreed that the sentence should be formulated as a separate paragraph in article 10.

93. It was noted that candidates and adjudicators might be obliged to maintain confidentiality of the information required to be disclosed under article 10. It was further noted that such obligations might arise not only from article 8 of the Code itself but from other applicable procedural rules, domestic laws or bar association regulations. Therefore, it was suggested that the Code should clarify that candidates and adjudicators in such a situation would be required to disclose the fact that they were subject to a confidentiality obligation and therefore were not in a position to disclose the information in accordance with article 10.

94. A question was raised whether and how article 10 would apply to judges. In response, it was said that a person who was under consideration for appointment as a judge would be subject to a similar disclosure obligation. However, it was generally felt that the obligations in article 10 might not necessarily apply to judges who were assigned to a specific case, while some elements in paragraphs 1 and 2 might be pertinent when a judge decided to recuse herself or himself from the case. It was suggested that the application of article 10 to judges would need further consideration.

#### *Paragraph 2*

95. Views diverged on whether publications by candidates and adjudicators should be the subject of disclosure under paragraph 2, and if so the time period to be applied. It was suggested that providing the list of publications could be a mandatory requirement while providing the list of speeches could be a recommendation due to the lack of technical means to search for and store such speeches.

- *Subparagraph (a)*

96. While differing views were expressed with regard to the time period in subparagraph (a), it was considered that “past five years” was generally acceptable, and that five years was an appropriate time period as a “floor” but not a “ceiling”. It was mentioned that that time period should not be understood to mean that relationships prior to the five years need not be disclosed, as candidates and adjudicators would need to make disclosures if such circumstances gave rise to justifiable doubts under paragraph 1. It was said that the same rule should apply in case the other subparagraphs included any time periods.

97. Suggestions were made that the Commentary should clarify the meaning of “business” and “professional” relationship in subparagraph (a) and illustrate some concrete examples. It was further suggested that subparagraph (a) should not be interpreted too broadly to result in requiring disclosure of situations which fell under the green list in the IBA Guidelines on Conflict of Interest in International Arbitration.

98. With regard to subparagraph (a)(i), a suggestion was made that the words “and any subsidiary, affiliate, parent entity, State agency or State-owned enterprise” should be replaced with the words “or related parties” and that the term should be defined elsewhere. Another suggestion was to delete reference to “State-owned enterprises” as their status differed depending on the jurisdictions. In response, it was said that while the status might differ, relationship with such State-owned enterprises merited disclosure.

99. Another suggestion was to delete the words “identified by the disputing parties” in subparagraph (a)(i) and the word “identified by a disputing party” in subparagraph (a)(iv). It was further suggested that the information identified by the disputing parties be supplemented with the disclosure of any information not identified by the disputing parties, but about which candidates and adjudicators knew or reasonably should have known. However, it was said that it would be quite difficult for candidates and adjudicators to be aware of such information without being alerted by the disputing parties and, therefore, those words should be retained. It was suggested that similar phrases should be used consistently in the different parts of the Code.

100. With regard to subparagraph (a)(iv), suggestions were made to delete the term “funder” to broaden the scope of disclosure generally to third parties. Along the same lines, a suggestion was to delete the word “financial” or replace it with the phrase “any direct or indirect”. Yet another proposal was that if a third-party funder were to be defined elsewhere, the words “with a financial interest in the outcome of the IID” might not be necessary.

- *Subparagraph (b)*

101. It was agreed that subparagraph (b) was generally acceptable.

- *Subparagraph (c)*

102. A suggestion was made to delete the subparagraph (c) entirely or the words “or Adjudicator” at the end, as the obligation therein was too burdensome and such information was publicly accessible. In support, it was mentioned that issue conflicts or repeat appointments were addressed through other articles of the Code. On the other hand, it was mentioned that disclosure in accordance with subparagraph 2(c) could assist in limiting multiple roles and was broader than that provided for in subparagraph (a) and (b) and thus should be retained.

103. With regard to the words “all related proceedings”, it was agreed that the phrase should be retained with the commentary elaborating on its meaning, possibly providing examples of such proceedings, such as contract-based proceedings, domestic proceedings to set aside or enforce an IID award, and challenge proceedings.

- *Subparagraph (d)*



104. With regard to subparagraph (d), support was expressed that candidates and adjudicators should be required to disclose their engagements in a non-international investment dispute. As to the drafting, it was agreed that reference should be made to “IID or other proceedings” to avoid confusions arising from use of the term “non-IID”.

*Revised version of paragraphs 1 and 2*

105. After discussion, the following revised version of article 10(1) and (2) was presented to the Working Group: “1. Candidates and Adjudicators shall disclose any circumstances likely to give rise to justifiable doubts [, including in the eyes of the disputing parties,] as to their independence or impartiality. 2. Candidates and Adjudicators shall include the following information in their disclosures: (a) Any financial, business, professional, or personal relationship within the past five years with: (i) The disputing parties or related entities identified by a disputing party; (ii) The legal representatives of a disputing party in the IID; (iii) The other Adjudicators and expert witnesses in the IID; and (iv) [Any third-party identified by a disputing party as having a direct or indirect interest in the outcome of the IID, including third-party funders]; (b) Any financial or personal interest in: (i) The IID or its outcome; (ii) Any other IID proceeding involving the same measures; and (iii) Any other proceeding involving at least one of the same disputing parties or entities identified by a disputing party; (c) All IID and related proceedings in which the Candidate or Adjudicator has been involved in the past five years or is currently involved in as a legal representative, expert witness, or Adjudicator; and (d) Their appointments as legal representative, expert witness, or Adjudicator made by either disputing party or its legal representative in an IID or any other proceeding in the past five years. 2 bis. For the purposes of paragraphs 1 and 2, candidates and adjudicators shall make [reasonable][best] efforts to become aware of such circumstances, interests, and relationships.”

106. It was explained that proposed paragraph 1 used the long established and widely accepted UNCITRAL standard for disclosure. The language in square brackets was to clarify that, under this standard, the adjudicator would still have to consider disclosure obligations through the lens of the disputing parties. However, this was not meant to introduce a new requirement. It was further noted that the proposed wording in paragraph 2 reflected the suggestions made by the Working Group, while proposed paragraph 3 reflected the suggestion that the obligation to make best or reasonable efforts should apply with respect to all types of disclosures in both paragraphs 1 and 2. The Working Group agreed to undertake further consideration of article 10(1) and (2) on the basis of the revised version set out above.

*Paragraph 3*

107. Paragraph 3 was found generally acceptable as it applied to arbitrators.

108. As a general comment, it was said that paragraphs 3, 4 and 6 would usually not apply as such to judges in a standing mechanism and would need to be adjusted (see para. 94 above), possibly requiring disclosure to be made to the President of the Tribunal or a similar administrative body and requiring a different form of disclosure as applicable. It was also said that setting a specific disclosure regime for judges was advisable as it would remedy existing flaws in current international practice. The Secretariat was instructed to prepare draft provisions that would reflect that proposal.

*Paragraph 4*

109. With regard to paragraph 4, it was agreed that imposing a continuing duty of disclosure was an important aspect that should be retained. Concerns were expressed that the current language of “newly discovered information” might lead to confusion and suggestions were made to replace it with “new information”. On the other hand, it was pointed out that the current language meant that the situation might have

already existed but was not known to the adjudicator. It was generally felt that the phrase could be revised to “new or newly discovered information”.

110. It was suggested that the procedure or the format of how to make further disclosures in accordance with paragraph 4 should be set out either in the Code or in the Commentary to provide guidance to the adjudicators. A drafting suggestion was made, along the following lines: “If, in the course of the proceeding, the arbitrator becomes aware of a circumstance that he or she is required to disclose under this Code, he or she in due course has to inform of this circumstance the parties, the arbitrators and other persons specified in Article 10(3) of the Code and prescribed by the applicable arbitral rules or the treaty by sending an electronic letter or in other suitable means used for communication in the course of arbitration pursuant to Article 10(3) of the Code.”

#### *Paragraph 5*

111. It was noted that the second sentence of paragraph 5 would need to be revised to clarify that a failure to disclose, while not necessarily constituting a basis for challenge, could indeed constitute a breach of the obligations in article 10. A number of drafting suggestions were made in that respect.

112. For instance, proposals were made that the fact of disclosure or failure to disclose did not “necessarily by itself establish a breach of this Code”; “prejudge the lack of independence or impartiality, any bias or a conflict of interest”; “by itself form a basis for challenge”; “constitute the existence of a conflict of interest”; or “constitute a breach of the duty of independence and impartiality”.

113. On the other hand, it was noted that none of the above proposals fully captured the distinction between the basis for challenge of adjudicators and the fact of the disclosure or failure to disclose. In that light, another suggestion was made to remove the second sentence from paragraph 5 and insert it in article 11, while other views suggested that issues of repeated non-disclosures could be further addressed in the context of article 11.

114. Against that backdrop, it was agreed that the second sentence should remain in article 10 as a separate paragraph that would read along the following lines: “The fact of non-disclosure does not in itself establish a [lack of] [breach of the duty of] impartiality or independence”. It was further agreed to explain in the Commentary that the very fact that a candidate failed to disclose an information should not necessarily be understood as a possible lack of independence or impartiality, and that such finding could only be informed by the content of the disclosed or omitted information.

#### *Paragraph 6*

115. With regard to paragraph 6, it was stated that it should be limited to waivers by the disputing parties following a disclosure and not provide for a general waiver by those parties. In support, it was noted that the Code provided for a system of specific exceptions in the respective provisions, which should be retained.

116. However, the view was expressed that paragraph 6 should not be included in the Code as it gave the impression that any potential non-compliance with the Code could be waived. Doubts were expressed whether a provision on a waiver was needed. It was also said that it would be possible for disputing parties to waive any conflict of interest even without paragraph 6. In response, it was noted that an express provision similar to paragraph 6 could prevent unnecessary complications in the proceedings.

117. Another view was that paragraph 6 could be moved to article 11 without the text in square brackets as it related more to the implementation of the Code.

118. It was said that, if retained in article 10, the paragraph should be revised along the following lines to narrow the scope of possible waiver: “Following disclosure or otherwise, the disputing parties may agree to waive any potential conflict of interest

with respect to a particular disclosed or known interest, relationship or matter with the effect that no disputing party may at a later stage raise an objection based on the mere existence of that particular interest, relationship or matter.”

119. After discussion, it was agreed that paragraph 6 should be revised and retained in article 10 for further consideration. It was further mentioned that the commentary should provide concrete examples, which would aid in the understanding of the possible operation of this paragraph.

### **3. Article 11 – Compliance with the Code of Conduct**

120. It was generally observed that the Code would be implemented through voluntary compliance by the candidates and adjudicators. Therefore, paragraph 1 was found to be generally acceptable.

121. In order to ensure proper application and use of the Code, a suggestion was made that arbitral institutions administering proceedings under the UNCITRAL Arbitration Rules and appointing authorities in exercising their functions under those Rules should be recommended to apply the Code in ascertaining the independence and impartiality of arbitrators. It was observed that UNCITRAL had previously adopted in 1982 and 2012, “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”. Under these two guidance documents, arbitral institutions/appointing authorities were recommended to identify any code of ethics or other written principles which they would apply in ascertaining the independence and impartiality of arbitrators in the context of a decision on challenge of an arbitrator. This meant that the current texts of all versions of the UNCITRAL Arbitration Rules could already accommodate direct application of the Code for decisions on challenge. A suggestion was made that that fact could also be made clear in the Commentary. It was also suggested that, in proceedings under non-UNCITRAL rules, arbitral institutions and appointing authorities should also be recommended to apply the Code, or else consider the Code to the maximum extent possible, for deciding any challenges brought under such rules in reliance on the Code.

122. Another suggestion was that the Code should provide for an obligation that candidates would decline appointment and adjudicators would resign if they were not able to comply with the obligations in the Code. Yet another proposal was that such an obligation could be included in the declaration to be signed by candidates and adjudicators. It was said that that could ensure the Code being applied in any disqualification or removal procedure. On the other hand, a view was expressed that as the Code provided for a wide range of obligations, it might not be necessary to provide for a stringent rule linking the Code to a disqualification procedure.

123. With regard to paragraph 2, the Working Group considered how the Code would be implemented if non-compliance did not necessarily result in disqualification or removal under the applicable rules or underlying instruments. In that context, questions were raised regarding whether and how disputing parties would make allegations of such non-compliance, who would handle such allegations and how to ensure that allegations did not result in unnecessary harm to the reputation of the adjudicators. A number of suggestions were made.

124. As to whom allegations of a breach should be brought to, it was mentioned that in an ad hoc arbitration context, the appointing authority should have the power to consider such allegations, based on evidence submitted by the disputing parties, and hearing the views of the arbitrators. In that context, it was pointed out that an appointing authority might not necessarily have been agreed upon by the parties or involved in the appointment process, which would require the designation of an appointing authority to hear such allegations. It was also suggested that an allegation of a breach of the Code by a judge should be brought to the President of the standing mechanism.

125. With regard to possible sanctions, differing views were expressed. One was that reference to disqualification and removal was sufficient and that mentioning other types of sanctions could lead to fragmentation in implementing the Code. Yet another view was that disqualification and removal might not be the most appropriate type of sanctions to address non-compliance with the Code. Accordingly, it was suggested that the words “or any other sanctions or remedy provided for in” be added after the words “removal procedures” in paragraph 2.

126. While a suggestion was made that other types of sanctions available in the institutional rules or underlying instruments could be listed in the commentary (for example, admonishment, publications of misconduct, communication of findings to bar associations or other relevant entities, and reduction of fees), it was questioned whether such sanctions could be imposed, for example, by the appointing authority, if not so provided for in the applicable rule or treaty.

### **B. Way forward**

127. At the end of its deliberations, the Working Group considered how to proceed with the preparation and finalization of the Code. According to the work plan considered at the resumed thirty-ninth session of the Working Group (in May 2021), it was expected that a draft of the Code would be presented to the fifty-fifth session of the Commission in 2022. While the Working Group was able to conduct a first reading of the Code, it was considered that the Working Group was not in a position to submit a ready draft to the Commission this year, which was mainly due to the limited conference time (reduced from 30 to 20 hours) in the current format of meetings. Although a request was made for the Secretariat to identify additional days for the Working Group to meet in a resumed session before the fifty-fifth session of the Commission, so that the Code could be further developed for submission to the Commission, it was explained that such a resumed session was not possible due to constraints on available UN meeting space.

128. Accordingly, it was generally felt that further deliberations on the Code would be necessary to submit a well-prepared draft for consideration by the Commission. It was also felt that the deliberations on the Code would be facilitated by an article-by-article commentary, which would incorporate the comments and suggestions made by the delegations during this and previous sessions.

129. Accordingly, the Working Group requested that the Secretariat, in cooperation with the ICSID Secretariat, prepare a revised version of the Code and the accompanying commentary for the next session scheduled to take place from 5 to 16 September 2022 in Vienna, subject to confirmation by the Commission of those dates. It was agreed that the Working Group would aim to submit the Code and the commentary to the Commission for its consideration at the fifty-sixth session in 2023.

130. During the deliberation, it was stated that measures should be taken to enable in-person participation of delegates at the meetings of the Working Group and the Commission held at United Nation Headquarters in New York, including the timely issuance of visas for those participating from abroad.

## **V. Other business**

131. Appreciation was expressed for the contributions to the UNCITRAL trust fund made by 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.

## Annex

### Revised version of the draft Code of Conduct (Articles 1 to 8)

The following provides a revised version of articles 1 to 8 of the draft Code of Conduct based on the discussions of the Working Group at its forty-first session. The previous version of the draft is contained in document [A/CN.9/WG.III/WP.209](#).

#### Article 1 – Definitions

For the purposes of this Code:

1. “International Investment Dispute” (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;
2. “Adjudicator” means an Arbitrator or a Judge;
3. “Arbitrator” means a person who is a member of an arbitral tribunal, or a member of an ICSID ad hoc Committee, who is appointed to resolve an IID;
4. “Judge” means a person who is a member of a standing mechanism for IID settlement;
5. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet been appointed, or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
6. “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties.

#### Article 2 – Application of the Code

1. This Code applies to [Adjudicators or Candidates in] an IID and may be applied [to/in] any other dispute by agreement of the disputing parties.
2. If the instrument upon which the consent to adjudicate is based contains provisions on ethics or a code of conduct for Adjudicators or Candidates in an IID, this Code shall be construed as complementing such provisions or code. In the event of an inconsistency between an obligation of this Code and an obligation in the instrument upon which consent to adjudicate is based, the latter shall prevail to the extent of the inconsistency.
3. An Adjudicator shall take all reasonable steps to ensure that her or his Assistant is aware of and complies with this Code, including by requiring the Assistant to sign a declaration that they have read and will comply with the Code.

#### Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceedings or until the end of their term of office.
2. Paragraph 1 includes, in particular, the obligation not to:
  - (a) Be influenced by loyalty to a disputing party, a non-disputing party (including a non-disputing Treaty Party), or a legal representative of a disputing or non-disputing party;
  - (b) Take instruction from any organization, government, or individual regarding the matters addressed in the IID;

- (c) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgment;
- (d) Use their position to advance any significant financial or personal interest they might have in one of the disputing parties, or the outcome of the case;
- (e) Assume a duty or accept a benefit that could interfere with the performance of their duties; or
- (f) Take any action that creates the appearance of a lack of independence or impartiality.

#### **Article 4 – Limit on multiple roles**

*[Paragraphs applicable to Arbitrators only]*

1. Unless the disputing parties agree otherwise, an Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:
  - (a) The same measures;
  - (b) The same or related parties; or
  - (c) The same provisions of the same treaty.
2. An Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would create the appearance of a lack of independence or impartiality.

*[Paragraphs applicable to Judges only]*

3. Judges shall not exercise any political or administrative function. They shall not engage in any other occupation of a professional nature which is incompatible with their obligation of independence or impartiality or with the demands of a full-time office. In particular, they shall not act as a legal representative or expert witness in another IID proceeding.
4. Judges shall declare any other function or occupation to the [President] of the standing mechanism and any question on the application of paragraph 1 shall be settled by the decision of the standing mechanism.
5. Former Judges shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which they had dealt with, before the end of their term of office.
6. As regards an IID proceeding initiated after their term of office, former judges shall not act as a legal representative of a disputing party or third party in any capacity in proceedings before the standing mechanism within a period of three years following the end of their term of office.

#### **Article 5 – Duty of diligence**

*[Paragraph applicable to Arbitrators only]*

1. Arbitrators shall:
  - (a) Perform their duties diligently throughout the proceeding;
  - (b) Devote sufficient time to the IID;
  - (c) Render all decisions in a timely manner;
  - (d) Refuse concurrent obligations that may impede their ability to perform their duties under the IID in a diligent manner; and

- (e) Not delegate their decision-making function.

*[Paragraph applicable to Judges only]*

2. Judges shall be available to perform the duties of their office diligently, consistent with their terms of office.

#### **Article 6 – Other duties**

1. Adjudicators shall:

(a) Conduct the proceedings in accordance with high standards of integrity, fairness and competence;

(b) Treat all participants in the proceeding with civility; and

(c) Make their best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform their duties.

*[Paragraph applicable to Arbitrator candidates only]*

2. Candidates shall accept an appointment only if they have the necessary competence and skills, and are available to fulfil their duties.

*[Paragraph applicable to Judge candidates only]*

3. Candidates shall possess the necessary competence and skills to fulfil their duties in order to be appointed or confirmed as a Judge.

#### **Article 7 – Ex parte communication of a Candidate or an Adjudicator**

1. “Ex parte communication” means any oral or written communication between a Candidate or Adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the opposing disputing party.

2. Other than as provided in paragraph 3, Candidates or Adjudicators shall not have any ex parte communication concerning the IID prior to the initiation of the IID proceeding and until the conclusion thereof.

3. It is not improper for Candidates or Adjudicators to have ex parte communications in the following circumstances:

(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;

(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Adjudicator, if the disputing parties so agree;

(c) As otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.

4. Ex parte communications provided in paragraph 3 shall not address any procedural or substantive issues related to the IID proceeding or those that the Candidate or Adjudicator could reasonably anticipate to arise in the IID proceeding.

#### **Article 8 – Confidentiality**

1. Candidates and Adjudicators shall not disclose or use any information [which is not publicly available,] concerning, or acquired in connection with, an IID proceeding, except for the purposes of that proceeding, as permitted under the applicable rules or treaty, or with the consent of the disputing parties.

2. Adjudicators shall not disclose the contents of deliberations or any view expressed during the deliberations.

[3. Unless a decision is publicly available, Adjudicators shall not comment on that decision in which they participated, prior to the conclusion of the IID proceeding.]

4. Adjudicators shall not disclose any draft of a decision prior to rendering it and any decision they have rendered, except as permitted under the applicable rules or treaty or with the consent of the disputing parties.
5. The obligations in Article 8 shall survive the conclusion of the IID proceeding and shall continue to apply indefinitely.
- [6. The obligations in Article 8 shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose non-public information in a court or other competent body or must disclose such information to protect his or her rights in a court or other competent body.]

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