UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

COMMISSION DES NATIONS UNIES POUR
LE DROIT COMMERCIAL INTERNATIONAL

Vienna International Centre
P.O. Box 500, A-1400 Vienna, Austria
Telephone: (43-1) 26060-4060 Fax: (43-1) 26060-5813
E-Mail: uncitral@un.org Internet: uncitral.un.org

1 April 2022

Re: UNCITRAL Working Group III (ISDS Reform) – Informal online meetings on the Draft Code of Conduct held on 23-24 March 2022

Dear Delegates to Working Group III,

It is my pleasure to share with you a summary, prepared by the Rapporteur and myself with the assistance of the Secretariat, of the main points discussed during the informal meetings held on 23 to 24 March 2022 on the following points related to the draft code of conduct for adjudicators (the "Code"):

- Consideration of Articles 1 to 8 of the draft Code (CRP.2 version), and
- Consideration of questions to assist the Secretariat in a redraft of articles 9 to 11 in line with the deliberations of the Working Group at its 42nd session.

The purpose of the meetings was to explore current draft articles of the Code and consider a number of questions raised by the Secretariat in detail in order to support delegations in their preparation for the next Working Group session at which this topic will be considered and make such discussions more efficient. These informal meetings were generally helpful in providing technical support to the Secretariat tasked with the preparation of a revised version of the draft Code and a draft commentary to be formally presented to the Working Group. No decisions were taken at these meetings.

The meetings were held in English and French, with the interpretation being sponsored by the Government of France.

General drafting suggestions were made by the Secretariat:

- To ensure a consistent use of the terms IIDs, IID proceedings and proceedings, as well as of the terms "disputing parties", "a disputing party", "one of the disputing parties" throughout the draft provisions; and
- To use the singular form for certain defined terms throughout the draft provisions, for the sake of consistency.

Articles 1 to 8:

Participants referred to **draft articles 1 to 8 of the draft Code** on the basis of revised draft A/CN.9/WG.III/XLII/CRP.2 available here. Comments included the following.

Article 1

As a drafting matter, it was suggested to place the definition of the terms "Arbitrator" and "Judge" before the term "Adjudicator".

Regarding the definition of "IID" in article 1(1) which, in conjunction with article 2(1) defines the scope of application of the draft Code, it was questioned whether it was broad enough to encompass domestic investors, in case they would be able to raise claims under the underlying instrument. Additionally, it was suggested to remove the brackets and retain the text "or any constituent subdivision", especially in light of article 25(3) of the ICSID Convention.

Regarding the definition of "Assistant" in article 1(6), it was suggested that the definition should be limited to the arbitration context as, in a permanent mechanism, an assistant would be part of the staff of the institution. It was said that, for the same reason, the provision in article 2(3) should only refer to arbitrators.

Generally, it was said that the commentary should clarify that the terms used in the definitions (for example "investor") do not have a self-standing meaning but must be read in light of the underlying instrument.

Article 2

Regarding article 2(1), it was said that:

- The Code would apply only to individuals and this would be explained in the commentary;
- In case the text in brackets would be retained, the reference to IIDs would be redundant as already part of the definition in article 1; however, removing the term "IID" might be problematic vis a vis the reference to "and may be applied to any other dispute".

Regarding the complementary nature of the Code in article 2(2), a suggestion was made to replace the existing language "this Code shall be construed as complementing such provisions or code" with "this Code shall supplement such provisions or code". It was further said that:

- The Vienna Convention could apply in interpreting the Code if implemented through a multilateral instrument or if made part of a treaty, and further difficulties could arise;
- The interaction between the Code and other underlying instruments was clearly expressed and should be kept so as to ensure that the higher ethical standards would apply;
- The notion of "inconsistency" should be further explained in the commentary as referring to a clear conflict between two sets of applicable ethical provisions

where compliance with the two instruments would no longer be possible, as opposed to the first sentence of paragraph 2 where mere differences might arise, e.g. different time periods for disclosure.

Regarding article 2(3), it was said that the obligation would still be on the adjudicator and that this should be explained in the commentary.

Article 3

Regarding article 3(2), it was said that subparagraphs (a) and (c) were potentially overlapping while the term “allow” in subparagraph (c) might imply a subjective element; therefore, more guidance on these points would be needed in the commentary.

Regarding subparagraph (2)(d) it was said that the use of the adjective "significant" may imply that a minor interest would not be covered by the prohibition and that the term should be deleted: what mattered was the use of the financial or personal interest by the adjudicator, regardless whether that interest was significant or not.

Article 4

Regarding article 4(1), it was said that:

- The text, by using the term “conclusion of the proceedings”, may not cover situations where an arbitrator would decide to resign from a proceeding, and move to the role of legal representative involving the same parties;
- The current draft did not address the possibility for an arbitrator to later act as a judge;
- Subparagraphs (a), (b) and (c) should use the singular form as an IID or other proceeding involving at least one same measure, related party or provision of the same treaty would limit an arbitrator from acting on multiple roles.

Regarding subparagraph 1(c), it was said that:

- The phrase “The same provisions of the same treaty” could result in a total ban in the case of a multilateral treaty;
- The term “treaty” could be replaced by “same instrument on which consent is based” so as to better capture other underlying instruments and align with the definition of IID under article 1.

Regarding article 4(2), a suggestion was to make it an explanatory note in the commentary, instead of leaving it in the Code. On the other hand, it was said that this provision was the result of deliberations in the Working Group, and that it could be left in the Code, with useful examples included in the commentary for clarification. It was also questioned whether the language “Unless the disputing parties agree otherwise” should appear in this paragraph or be instead referred to in the commentary. It was

said that it would be difficult for disputing parties to waive a right related to a potential conflict arising out of an appearance of lack of independence or impartiality.

Regarding article 4(5) and article 4(6), it was questioned whether similar prohibitions would apply to an arbitrator subsequently appointed as a judge. A suggestion was further raised that the terms “in any capacity” and “in any manner” in the draft be better aligned as they seemed to bear the same meaning in the Code.

Regarding article 4(6), it was questioned whether the term “third party” was the proper term to use as as it did not appear in any other provisions.

Article 5

Regarding subparagraph 1(b), a clarification was sought on the meaning of “sufficient time”. It was said that this could be addressed more concretely in the commentary, possibly by referring to the need for adjudicators to comply with potential time targets set in the applicable procedural rules.

Article 6

It was said that:

- The terms “perform their duties” and “fulfil their duties” in paragraphs 1 and 2 needed consistency;
- Some confusion existed as to the extent of the obligation in paragraph 3, and the commentary could explain that such qualities usually were required by the court itself.

Article 7

It was said that:

- The definition of “ex parte communication” could be moved to article 1 of the Code;
- Paragraph 2 could also include a reference to paragraph 4;
- Paragraphs 3 and 4 would not apply to judges of a permanent mechanism and clarification would be needed regarding the persons with whom such communication would be permitted.

Article 8

As general drafting points, it was said that for consistency the term “consent” could be aligned with the term “agreement” throughout the article, and that clarification was needed regarding the meaning of the terms “decision” and “publicly available”.

Regarding paragraph 3, it was said that what constituted “comment” would benefit from clarification, and that:

- A distinction could be made that, if a decision is not made publicly available, adjudicators should not comment on it, but once publicly available, adjudicators could comment on it only if the IID proceeding is concluded;

- A judge in a permanent mechanism should refrain from commenting on a decision at all time, even after the conclusion of the proceeding;
- An arbitrator should generally refrain from commenting a decision during the IID proceeding;
- A complete prohibition to comment would be detrimental and have a "chilling effect"; it would be useful to clarify that there are exceptions or at least flexibility, for instance for academic purposes.

Articles 9 to 11:

Participants considered a number of questions that were raised by the UNCITRAL Secretariat in order to assist it with refining a revised version of draft articles 9 to 11 reflecting the deliberations of the Working Group at the 42nd session on 14-18 February 2022.

Article 9

A number of drafting questions were raised, in particular:

- In paragraph 1, whether the terms "unless otherwise regulated by the applicable rules or treaty" should be removed in view of article 2(2) already indicating the complementary nature of the Code; and whether the terms "concluded" should be replaced by "conducted";
- Whether the notion of reasonable fees and expenses should appear in the text or in the commentary;
- What could be the consequences of non-compliance with the obligations in article 9, whether they applied to the tribunal as a whole, and how these could be addressed in the commentary.

It was further said that:

- The term "concluded" was correct, and there was no objections to using a different term if needed;
- The repeated use of the phrase "unless otherwise regulated by the applicable rules or treaty" in both paragraphs 1 and 2 was useful;
- In paragraph 1, second sentence, the terms "if any" should be removed as they created confusion.

Article 10

On paragraphs 1 and 2, it was questioned whether the words "and Adjudicators" should be retained, as the current drafting could suggest that the same disclosures would need to be made twice, first as a candidate and then as an adjudicator. It was said that these words could be retained since, in practice, many disclosures were made throughout the proceeding, although it was pointed out that paragraph 5 already contained a continuous disclosure obligation.

Article 11

Participants were presented with suggested additional language that candidates shall not accept an appointment and adjudicators shall resign or recuse themselves if no longer in a position to comply with the Code, as well as a redraft proposal of paragraph 2 that would more clearly express the interaction of applicable rules or treaties with the Code.

At the end of the informal discussion, participants were invited to provide comments and/or drafting suggestions on articles 1-11 to both the UNCITRAL and ICSID Secretariats, preferably before mid-May 2022 to provide sufficient time for the Secretariats to refine a revised version of the Code and prepare a draft commentary in time ahead of the forthcoming session of the Working Group, scheduled to take place in September 2022.