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**United Nations Commission on  
International Trade Law  
Working Group III (Investor-State  
Dispute Settlement Reform)  
Forty-first session  
Vienna, 15–19 November 2021****Report of Working Group III (Investor-State Dispute  
Settlement Reform) on the work of its forty-first session  
(Vienna, 15–19 November 2021)****Contents**

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## I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). 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 wishes 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 fortieth session, the Working Group considered concrete reform options 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 resumed fortieth session in May 2021, the Working Group considered a workplan to implement ISDS reform and resource requirements.<sup>4</sup>

5. At its fifty-fourth session in 2021, the Commission commended the Working Group for its progress on the development of concrete reform elements. The Commission also decided to recommend to the General Assembly that additional conference and supporting resources be allocated to the Secretariat, which would allow Working Group III to hold one additional one-week session per year during the period of 2022–2025. In that regard, the Commission requested the Working Group to report annually on the use of its resources.<sup>5</sup>

## II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its forty-first session in Vienna from 15 to 19 November 2021. The session was organized in accordance with the decision by the Commission to extend

<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 fortieth sessions are set out in documents [A/CN.9/1004\\*](#), [A/CN.9/1004/Add.1](#), [A/CN.9/1044](#) and [A/CN.9/1050](#).

<sup>4</sup> The workplan considered by the Working Group has been included in an annex to document [A/CN.9/1054](#).

<sup>5</sup> *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, para. 263.

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>6</sup> Arrangements were made to allow delegations to participate remotely as well as in person at the Vienna International Centre. The session was organized jointly with the International Centre for Settlement of Investment Disputes (ICSID).

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

8. The session was attended by observers from the following States: Armenia, Bahrain, Bolivia (Plurinational State of), Bosnia and Herzegovina, Bulgaria, Burkina Faso, Costa Rica, Cyprus, Egypt, El Salvador, Greece, Jamaica, Kuwait, Lithuania, Madagascar, Maldives, Morocco, Panama, Paraguay, Portugal, Qatar, Republic of Moldova, Sierra Leone, Sweden, Uruguay, and Yemen.

9. The session was also attended by observers from the European Union and the Holy See.

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

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and the World Bank Group;

(b) *Intergovernmental organizations*: African Union (AU), Council of Arab Economic Unity (CAEU), Cooperation Council for the Arab States of the Gulf (GCC), International Organization of La Francophonie (OIF), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Barreau de Paris (BP), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Law (CIL), Centre of Excellence for International Courts (iCourts), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Columbia Centre on Sustainable Investment (CCSI), Corporate Counsels' International Arbitration Group (CCIAG), École Nationale de la Magistrature (ENM), 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), Institute for Transnational Arbitration (ITA), Institutio Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International and Comparative Law Research Center (ICLRC),

<sup>6</sup> Ibid., para. 248.

International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Mediation Institute (IMI), Inter-Pacific Bar Association (IPBA), Japan Association of Arbitrators (JAA), Korean Commercial Arbitration Board (KCAB), Kozolchyk National Law Center (NATLAW), Law Association for Asia and the Pacific (LAWASIA), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Organisation For African Caribbean And Pacific Countries, Legal Association (ACP LEGAL), Pluricourts, Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), Swiss Arbitration Association (ASA), Third World Network, Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

11. According to the decision made by the States members of the Commission (see para. 6 above), the following persons continued their offices:

*Chairperson:* Mr. Shane Spelliscy (Canada)

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

12. The Working Group had before it the following documents: (a) annotated provisional agenda ([A/CN.9/WG.III/WP.207](#)); (b) notes by the Secretariat prepared jointly with the ICSID Secretariat on means of implementation of the code of conduct for adjudicators in international investment disputes ([A/CN.9/WG.III/WP.208](#)); and on the draft code of conduct for adjudicators in international investment disputes ([A/CN.9/WG.III/WP.209](#)).

13. 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).

### III. Draft code of conduct

#### *Inter-sessional Meetings on ISDS Reform*

14. Before engaging in substantive deliberations, the Working Group heard an oral report of the fourth and fifth inter-sessional meetings on ISDS Reform. The fourth meeting, addressing the topic of procedural rules reform and cross-cutting issues, took place on 2–3 September 2021 and was hosted by the Ministry of Justice of the Republic of Korea. The fifth meeting, addressing the use of mediation in ISDS, took place on 28–29 October 2021 and was organized by the Department of Justice of the Hong Kong Special Administrative Region and the Asian Academy of International Law, with support of the Central People's Government of the People's Republic of China.

15. It was reported that the two meetings were well-attended and provided an opportunity to informally consider the topics of procedural rules reform, cross cutting issues, and mediation, on the basis of draft notes prepared by the Secretariat. They also provided an opportunity to share experiences and views on the topics. The Working Group expressed its appreciation to the Governments of the Republic of Korea and the People's Republic of China as well as the Secretariat for having organized the meetings.

#### *Travel support*

16. The Working Group was informed that travel support to allow representatives of developing States to participate in the Working Group sessions had been

reactivated, with support from the contributions to the UNCITRAL trust fund from the European Union, the Government of France, the German Federal Ministry for Economic Cooperation and Development (BMZ), and the Swiss Agency for Development and Cooperation (SDC). The Working Group expressed its appreciation for these contributions which enhanced the inclusiveness of the reform process.

## A. General remarks

17. The Working Group considered the draft code of conduct as contained in document [A/CN.9/WG.III/WP.209](#) (“the Code”). The Working Group expressed its appreciation to the Secretariats of ICSID and UNCITRAL for having jointly prepared the Code, which provided a useful basis for the deliberation.

18. The Working Group was informed that: (i) the Code had been prepared based on a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts; and (ii) it was based on prior analyses by the Secretariats of ICSID and UNCITRAL, as contained in document [A/CN.9/WG.III/WP.167](#) (see also document [A/CN.9/WG.III/WP.151](#)).

19. The Working Group further noted that the Code was prepared based on the understanding of the Working Group that the Code should: (i) be binding and contain concrete rules rather than guidelines ([A/CN.9/1004\\*](#), paras. 52 and 68); (ii) provide a uniform approach to requirements applicable to adjudicators handling international investment disputes ([A/CN.9/1004\\*](#), para. 51); and (iii) give more concrete content to broad ethical notions and standards found in the applicable instruments.

20. The Working Group agreed that the Code should be accompanied by a commentary to be prepared jointly by the two Secretariats, which would clarify the content of each provision, including the relationship between the obligations of adjudicators and the disclosures required, discuss practical implications, and provide examples (“the Commentary”).

## B. Consideration of the draft provisions

21. In response to a suggestion that the Code should include a preamble stating its purpose, it was said that the decision by the Commission adopting the Code and the resolution of the General Assembly recommending its use could include such language.

### 1. Article 1 – Definitions

22. The Working Group considered article 1 which defined certain terms used throughout the text.

#### *Paragraph 1*

23. With respect to article 1(1), a question was raised whether two separate Codes should be prepared, one applying to arbitrators and another applying to members of a standing multilateral mechanism (referred to below as “judges”).

24. Views were expressed in favour of retaining one Code applying to both judges and arbitrators, on the basis that such an approach would better reflect the call for universal standards applicable to ISDS adjudicators generally, making it easier to achieve harmonized application and interpretation. It was said that there was much commonality in the core responsibilities of arbitrators and judges. Furthermore, it was suggested that additional obligations specific to judges could be addressed in the statute or rules of procedure of the multilateral standing mechanism. As a possible way forward, it was suggested that each article of the Code could contain an indication of how the standards therein applied differently to arbitrators and judges, or that a final provision could be inserted in the Code to outline the specificities of the

application of the Code to judges. It was also said that these solutions could possibly make the Code more cumbersome.

25. Views were also expressed in favour of preparing two separate Codes, while maintaining consistency between the two versions as much as possible, given that the obligations of judges ought to take into account the specific context of their employment, selection and appointment. In addition, it was said that addressing the responsibilities of arbitrators and judges in a single Code could be problematic and raise drafting challenges, including in the preparation of the Commentary. It was also pointed out that the obligations of judges would likely be determined by the member States of the multilateral standing mechanism and be addressed in the statute or rules of procedure of the multilateral standing mechanism. Therefore, consideration of a Code applying to judges should be deferred to a later stage. In response, the decision of the Working Group to progress on the establishment of a standing mechanism in parallel to other reforms was reiterated.

26. It was stated that the crucial point was that the fundamental obligations remained the same for both arbitrators and judges, regardless of whether there would be one or separate Codes. It was cautioned to not overcomplicate the matter and the presentation of the Code. It was said that efforts ought to be made to differentiate obligations between arbitrators and judges only to the extent strictly necessary.

27. After discussion, the Working Group agreed that the core principles reflected in the Code should apply to both arbitrators and judges. The need to ensure uniformity and harmonization and to not create discrepancy in the interpretation of the standards was also underlined. In light of its discussions, the Working Group agreed to place article 1(1) in square brackets. The Working Group further agreed to consider the provisions applicable to arbitrators and judges in parallel and to identify during its deliberations the standards that would apply differently to arbitrators and judges. The issues of the implementation of the Code, its format and how it will be presented was reserved for further consideration.

#### *Paragraph 2*

28. With respect to article 1(2) which defined the term “arbitrators”, it was suggested that the Commentary would clarify that the definition aimed to encompass ad hoc or institutional non-ICSID arbitrations as well as ICSID arbitrations.

#### *Paragraph 3*

29. With respect to article 1(3), it was said that the staff of arbitral institutions or of standing multilateral mechanisms, and tribunal-appointed experts were not included in the definition of “assistant”, and that this should be mentioned in the Commentary.

30. In addition, it was suggested that the Commentary should expand on the tasks that assistants could or could not carry out and should include examples of elements that could or could not be part of the assistant's terms of reference. In relation, it was further noted that article 5(2) clarified that adjudicators should not delegate decision-making functions to assistants. It was further suggested that article 1(3) should expressly clarify that the assistants would perform only organizational and administrative tasks.

31. Regarding the application of article 1(3) in the context of a multilateral standing mechanism, it was suggested to delete the words “as agreed with the disputing parties”, as they were not necessary. It was agreed that those words would be deleted, and that the Commentary would refer to the agreement of the disputing parties regarding the tasks to be performed by the assistants in the context of arbitration.

#### *Paragraph 5*

32. With respect to article 1(5) which refers to “International Investment Dispute” (“IID”), the following questions were raised: (i) whether investment disputes based

on investment contracts and foreign investment law should be covered by the definition; and (ii) whether the definition aimed to cover State-to-State disputes.

33. With respect to the first question, it was widely felt that, for the sake of consistency and coherence, investment disputes based on investment contracts and foreign investment law ought to be covered in the definition. It was underlined that that would allow for uniform application, regardless of the basis of the dispute. It was suggested that the Commentary should make it clear that the Code applied to non-treaty-based investment disputes and that other disputes of a pure commercial nature would not be covered.

34. Drafting suggestions were made, including to refer in general terms to the “instrument of consent” or “the agreement of the disputing parties”, or to list the sources of consent (investment treaty, contract, investment law, the disputing parties’ agreement). Reference was made to the definition of “investor-State dispute settlement” in the first version of the draft Code, which referred to “a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute”, with a suggestion to reinstate that language.

35. With regards to the reference to treaty-based disputes, it was suggested to clarify whether the intention was to refer to the breach of a substantive obligation under a treaty or to the use of the ISDS procedure available under a treaty. A suggestion was made to delete the word “promotion” on the basis that promotion provisions in an international treaty were excluded from the scope of ISDS clauses, and to refer only to “investment protection provisions in an international treaty”.

36. With respect to the second question, it was agreed that the mandate of the Working Group was to address ISDS reform and, on this basis, it was stated that the Code should not apply to State-to-State disputes. It was said however that this merited further discussion, as some delegations were of the view that a move to State-to-State dispute settlement mechanisms to resolve investment disputes was the most effective way to reform ISDS. Reference was made to approaches by some States relying entirely on the State-to-State mechanism for settlement of investment disputes.

37. After discussion, the Working Group agreed to consider further the following proposal with respect to article 1(5): “International Investment Dispute (IID) means a dispute between an investor and a [host] State or a Regional Economic Integration Organization (REIO), pursuant to a treaty or legislation providing for the protection of investments or investors or a contract between an investor and a State or a REIO, or any constituent subdivision or agency of a State or a REIO.”

38. It was explained that that definition could be complemented with a paragraph to be inserted in article 2 dealing with scope of application, along the following lines: “This Code shall apply in an IID and to any other dispute by agreement of the disputing parties.” It was clarified that the agreement to apply the Code could be made by the disputing parties in their treaty or at the stage of the dispute. Furthermore, it was suggested that that paragraph could be split to indicate that the Code applied to IID and that it could also apply with the agreement of the relevant parties.

39. While a number of suggestions were made to improve the drafting, it was also suggested to expand the scope of the definition of “IID” beyond treaty-based disputes and to make it possible to apply the Code in the context of State-to-State dispute settlement mechanisms, as such mechanisms were used by certain States to solve investment disputes. Other delegations said that the Code should apply to investor-State disputes only, in order to maintain consistency with the mandate of the Working Group, also taking in account the different interests arising in the different disputes. It was further said that for the application of the Code to disputes other than investment disputes, in particular, to State-to-State disputes, the consent of the

disputing parties would be sufficient. On that basis, it was proposed not to address the application of the Code to other disputes.

40. It was reiterated that the definition of IID should be distinguished from the means of implementation of the Code. The definition of IID would indicate what types of disputes and which arbitrators would be subject to the Code. In contrast, the methods of implementation would determine when the Code would apply and how consent would be expressed.

41. Suggestions were made to clearly indicate that the reference to contracts in the definition of IID were to investment contracts and not purely commercial ones.

42. After discussion, the Working Group agreed to consider drafting improvements to the proposals under paras. 37 and 38 above, reflecting the points in paras. 39 to 41 above.

43. The Working Group took note of draft article 1(5) that was considered informally during the session, aimed at reflecting the deliberations of the Working Group. It was said that such a provision could serve as a basis for further work: Article 1 (5): “‘International Investment Dispute’ (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (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 [between an investor and a State or a REIO, or any constituent subdivision or agency of a State or a REIO].”

#### *Paragraph 6*

44. A suggestion was made that the words “appointed as” should be replaced by the words “who is” as it was unclear how a person would be selected to become a member of the multilateral standing mechanism.

#### *Paragraph 7*

45. With respect to article 1(7) which defined the term “Treaty Party”, it was noted that such definition was inserted in order to distinguish between the disputing parties, on the one hand, and the State or regional economic integration organization (“REIO”) that were parties to a treaty and might be a non-disputing party in the proceedings, on the other hand. After discussion, it was felt that that definition was not needed as long as article 3(2)(b) was clearly drafted. The Working Group agreed to delete article 1(7), and to consider any drafting adjustment that might be required to clarify that a REIO could be a party to a treaty.

## **2. Article 2 – Application of the Code**

46. The Working Group considered article 2, which was a general provision on the application of the Code.

#### *Paragraphs 1 and 3*

47. With regard to articles 2(1) and (3), it was agreed that they could be deleted as the articles referred to therein already specified whether they applied to adjudicators or candidates. It was said that the Commentary should clearly indicate which articles of the Code applied to whom and at which point in time for ease of reference.

#### *Paragraph 2*

48. With regard to article 2(2), some support was expressed for a direct application of the Code to assistants and for including a separate article on the duties of an assistant. However, it was generally felt that an assistant should not have direct obligations under the Code and that the adjudicator assigning the tasks to the assistant should bear the obligation to ensure that the assistant was aware of, and complied with, the relevant provisions of the Code.



49. As to which provisions of the Code would apply to assistants, it was mentioned that clear guidance should be provided as they would likely differ depending on the role of the assistants in each case. In that context, the need to highlight the obligation of confidentiality was echoed. It was suggested that it would be sufficient if the relevant provisions were mentioned in the Commentary rather than in the Code itself.

50. It was explained that the role of the assistants varied to some extent particularly depending on the case at hand as well as tasks required by the adjudicator. It was stated that the functions to be performed by an assistant should be listed and explained in the Commentary, emphasizing that they worked under the direction and control of the adjudicator (see article 1(3)) and that they should not have any decision-making function (see article 5(2)).

51. With regard to the steps to be taken by an adjudicator, support was expressed for the adjudicator to be required to take “necessary” rather than “reasonable” steps, which would emphasize that such steps were required, and that the adjudicator was accountable for the actions of the assistant. However, doubts were also expressed as such wording would impose a higher level of responsibility on the adjudicator, without specifying the consequence of non-compliance with the standard (for example, a challenge of the arbitrator).

52. As to the concrete steps to be taken, it was stated that the assistants might sign a declaration stating that they were aware of the Code and agreed to comply with the relevant provisions therein. It was also stated that this could be part of the terms of reference for the assistants.

53. As to sanctions to be imposed upon non-compliance of the Code by the assistant, a few examples were provided, including the removal of the assistant from the case, publicizing the names of those assistants, and deducting from their remuneration. It was stated that it would be the adjudicator who would have the power to impose such sanctions and that the sanctions should be reasonable. As to which article should address the sanctions on assistants, a suggestion was made that they should be included in article 11. It was also suggested that the consequences of non-compliance should be further elaborated on in the Commentary.

54. After discussion, it was suggested that paragraph 2 could be revised to provide that adjudicators should take appropriate and reasonable steps to ensure that their assistants were aware of, and would comply with, relevant provisions of the Code, including by requiring assistants to sign a declaration that they have reviewed the Code and would comply with the relevant provisions. An adjudicator should remove its assistant who did not comply with the relevant provisions of the Code. In addition, it was widely felt that the Commentary should: (i) list some examples of tasks to be performed by assistants; (ii) indicate the provisions of the Code that applied to assistants depending on such duties; and (iii) list the possible sanctions that could be imposed on assistants by adjudicators.

#### *Scope of coverage of the Code to other participants*

55. On whether the Code should apply to other participants in ISDS (for example, mediators, conciliators, counsel, party- and tribunal-appointed experts), it was generally felt that it would be more effective to focus the deliberations on adjudicators. It was suggested that the Commentary could mention that the treaty parties and the disputing parties might agree that the Code would apply to mediators or conciliators, *mutatis mutandis*. A further suggestion was made that separate codes for mediators, conciliators, experts, and staff of administering institutions should be prepared to supplement the Code.

#### *Paragraph 4*

56. With respect to paragraph 4, differing views were expressed on whether and how the Code would apply when there was a treaty-specific code of conduct – mainly whether the treaty-specific code would supersede the Code or vice versa. It was

mentioned that both options in paragraph 4 had advantages and disadvantages, while also providing flexibility to opt-in or opt-out.

57. In support of option 1, which would require the treaty-based code of conduct to prevail over the Code unless otherwise agreed, it was said that the option would provide more clarity on which code (and provisions therein) would apply and thus, be simpler to implement. It was also stated that option 1 provided flexibility to the treaty parties and the disputing parties to agree that the Code would apply instead of the treaty-based code. To simplify the wording, it was suggested that the paragraph should state that the Code superseded any existing code. It was mentioned that if option 1 were to be chosen, the Commentary should indicate that disputing parties would still be able to agree on the application of the Code rather than the treaty-based code and consent to such application could also be recorded among parties to a multilateral treaty. It was further mentioned that it should be possible for States to agree to unilaterally apply the Code.

58. It was stated that disputing parties should have flexibility to choose which code should apply on a case-by-case basis as well as which provisions should apply to the dispute.

59. In support of option 2, it was highlighted the option 2 could fill any gap by providing for the application of the Code as a default standard, particularly should the treaty-specific code not regulate certain aspects dealt with in the Code. It was also stated that option 2 could lead to harmonization of standards and universal application, particularly as existing treaties did not address all aspects and did not contain standards, or up-to-date standards, on the matter. In that context, the need to avoid fragmentation and to have a binding Code was highlighted.

60. It was noted that if more stringent standards were provided for in the treaty-specific code of conduct, it would still be possible to apply such standards.

61. It was also suggested that the complementary or supplementary nature of the Code and the treaty-specific code should be fully taken into account in drafting paragraph 4. In that light, a suggestion was made that option 2 should foresee the cumulative or concurrent application of both codes and address the situation where it would be impossible for the adjudicator to comply with both, upon which the respective treaty-specific provisions should prevail over similar Code provisions. It was also suggested that the wording “or other ethical standards” should be retained in option 2.

62. However, doubts were expressed on how paragraph 4 would apply in practice if option 2 were adopted, including who would determine whether the provisions in the Code and the treaty-specific code were incompatible or modified. In that light, it was stated that the Commentary could address the instances where there was discrepancy in the standards or where the provisions in the two codes were incompatible.

63. A number of drafting suggestions were made to improve the wording in paragraph 4, listed below:

- “In the event of an [incompatibility] [inconsistency] between a provision of this Code and a provision of the treaty upon which consent is based, the treaty provision shall prevail.”;
- “This Code shall apply subject to the provisions in a code of conduct for IID for Adjudicators included in the treaty upon which consent to adjudicate is based.”;
- “This Code shall apply unless certain provision in a code of conduct contained in the treaty upon which consent to adjudicate is based stipulates different provisions. In that case, the code stipulating such a provision shall apply only in that respect.”;
- “This Code shall apply unless the treaty upon which consent to adjudicate is based contains a code of conduct of IID pursuant to that treaty or agreed otherwise by dispute parties or treaty parties.”;

- “A provision in this Code shall apply unless it is impossible for the subject to comply with the provision while also complying with a proviso in a code of conduct for IID in the treaty upon which consent to adjudicate is based. In such circumstances, the latter provision shall prevail.”;
- “A provision in this Code shall apply unless compliance is not possible while also complying with a provision in a code of conduct for IID in the treaty upon which consent to adjudicate is based. In such circumstances, the latter provision shall prevail.”;
- “This Code shall apply as complementary to different provision in a code of conduct for IID for adjudicators included in the Treaty upon which consent to adjudicate is based.”;
- “Where this Code applies, its rules shall supplement any applicable rules on code of conduct contained in the treaty upon which consent to adjudicate is based. Where there is a conflict between this Code and such applicable rules, the latter shall prevail.”;
- “This Code will apply unless another code of conduct is provided for in a treaty, investment agreement or chosen by the parties during the arbitration proceedings. The parties can agree to apply this Code to complement or supplement their applicable code.”; and
- “This Code shall apply unless otherwise modified by provisions in a code of conduct or other ethical obligations contained in the applicable instrument of consent.”

64. The Working Group took note of draft article 2 that was considered informally during the session, aimed at reflecting the deliberations of the Working Group. It was said that such a provision could serve as a basis for further work: “1. This Code applies to an IID and may be applied to 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 codes of conduct for IIDs, this Code shall be construed as complementing such provisions. 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 [the relevant provisions of] the Code, including by requiring that the Assistant sign the declaration in Annex X.”

65. It was further considered that an additional paragraph on breach by an assistant should be placed in article 11, and that such provision could serve as a basis for further work: “3. An Adjudicator shall remove an Assistant who is in breach of [the relevant provisions of] this Code.”

### **3. Article 3 – Independence and Impartiality**

66. With respect to article 3, it was reiterated that independence and impartiality were key elements of any system of justice and that they ensured a fair proceeding and compliance with due process requirements.

67. As to the meaning of these terms, it was suggested that a more detailed explanation should be added in article 3(1) (or in the definitions of article 1) and also in the Commentary. It was explained that while independence usually related to the lack of a business, financial, or personal relationship between an adjudicator and a party to the dispute, impartiality usually meant the absence of bias or predisposition of the adjudicator towards a party, its positions, or the issues in the proceedings. It was also said that these concepts had been developed in case law with sufficient clarity and that seeking to define independence and impartiality in an abstract way rather than on a case-by-case basis would be difficult. Therefore, it was agreed that no definition of these terms should be included in the Code, and that the Commentary should provide illustration on their meaning.

*Appearance of independence and impartiality*

68. The Working Group noted that article 3(1) provided that adjudicators should be independent and impartial, and omitted the reference to the avoidance of “any direct or indirect conflicts of interest, impropriety, bias and appearance of bias”, contained in the first version of the Code (see [A/CN.9/WG.III/WP.201](#)). Suggestions were made to reintroduce the original wording.

69. The suggestion to refer to “any direct or indirect conflicts of interest” did not receive support, as the phrase was considered to lack clarity and was therefore withdrawn from prior versions. Support was expressed to explore whether to include a reference to “direct or indirect conflicts of interest” in the Commentary.

70. The deliberations then focussed on whether to refer to the “appearance” of lack of independence and impartiality in paragraph 1, in light of the Working Group’s previous considerations that emphasized the need to address that matter (see [A/CN.9/964](#), para. 68). It was reiterated that in order to be considered effective and legitimate, the ISDS framework should not only ensure actual impartiality and independence of adjudicators, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality.

71. While it was mentioned that “appearance” may introduce a subjective element as it reflected a viewpoint of persons, it was also argued that it was a well-known standard, also required of judges, and that an objective interpretation of the notion had been developed in jurisprudence.

72. Furthermore, it was pointed out that article 10(1) required disclosure by an adjudicator of matters that “in the eyes of the disputing parties, would give rise to doubts as to their independence or impartiality”. The IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”) also required such disclosure. The IBA Guidelines, and all major institutional rules, required that disqualification be judged from the point of view of a “reasonable third person”. Any provision referring to “appearance”, it was further said, ought to determine appearance to whom.

73. It was however pointed out that such a standard might give rise to potential abuse by a disputing party and open the door to frivolous claims and challenges. It was further said that this might consequently also impact the duration and costs of the proceedings.

74. It was cautioned that the inclusion of the element of appearance in article 3 could create inconsistencies in relation to the ICISD Convention and Arbitration Rules or domestic laws. It was said that a distinction had to be made between the ethical standard of independence and impartiality and the standard for disqualification, with the element of appearance relating only to the latter. It was stated that article 3 did not intend to provide a standard for disqualification which was usually provided in the institutional rules.

75. In that context, it was said that the Working Group should be cautious not to create standards different from the existing practices, so as to avoid ambiguity in the application of the standard and further fragmentation. In response, it was said that innovative solutions might be required to address the concerns identified.

76. It was reiterated that the appearance of independence and impartiality was a core obligation, to be reflected in article 3(1), along the lines of: “Adjudicators shall be and appear to be independent and impartial”. It was recalled that the appearance of independence and impartiality was part of the concerns identified by the Working Group as requiring redress and an important element to contribute to the legitimacy of the ISDS regime. Mention was also made of article 12 of the UNCITRAL Arbitration Rules which referred to “justifiable doubts as to the arbitrator’s impartiality or independence”.

77. After discussion, support was expressed for retaining article 3(1) as drafted as it provided for a simple and clear rule, and to refer to the appearance of a lack of independence and impartiality as an example in article 3(2), along the following lines: “(g) take any action that creates the appearance of a lack of independence or impartiality”. It was also suggested that the Commentary should clarify that the standard of appearance should be interpreted as an objective one, based on reasonableness, building to the extent relevant on the IBA Guidelines.

*Non-exhaustive list in article 3(2)*

78. The suggestion to clarify that the list in article 3(2) was non-exhaustive received support. It was suggested to replace the term “encompasses” in the chapeau of article 3(2) by “includes”, with additional words, such as “in particular,” “but not limited to” or “for example”.

*Subparagraph (2)(a)*

79. With respect to subparagraph (2)(a), concerns were raised about its subjective nature and the vagueness of the terms used. It was said that the elements contained therein were too broad and could create confusion. It was also pointed out that the “fear of criticism” was not necessarily a negative attribute for adjudicators as it could be a motivating factor to act in a diligent manner and make firm decisions. It was suggested that elements in subparagraph (2)(a) were already covered by other subparagraphs. Accordingly, it was agreed to delete subparagraph (2)(a), and to elaborate on the elements therein in other subparagraphs and the Commentary.

*Subparagraph (2)(b)*

80. The Working Group agreed to remove the phrase “by loyalty to a Treaty Party, or” as it was already covered in the following phrases (see also para. 45 above).

81. Support was expressed to add in subparagraph (2)(b) a reference to “counsel to a disputing or non-disputing party”.

*Subparagraph (2)(c)*

82. A suggestion was made to clarify in the Commentary that compliance by the adjudicators with binding interpretations of a joint committee would not be considered as “taking instruction from an organization or a government”, and would therefore not fall under subparagraph 2(c).

*Subparagraph (2)(e)*

83. It was said that the limbs in paragraph 2 concerned mainly independence. In that light, it was suggested to strengthen the focus on impartiality by adding language to subparagraph (2)(e), which could be inspired by the IBA Guidelines.

*Proposal for a new article 3(3) on obligation to decline appointments*

84. A proposal was made to include a new paragraph in article 3, which could be inspired by the IBA Guidelines, to provide that adjudicators should decline appointment or, if the proceedings had already been commenced, should decline to continue to act as an adjudicator if they had any doubt as to their ability to be impartial or independent. A further suggestion was made to provide explanation as found in the IBA Guidelines that the same principle would apply if facts or circumstances existed, or had arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

85. After discussion it was suggested to not include that provision in article 3 but instead to discuss the matter in the context of article 11 on compliance with the Code.

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

86. The Working Group considered article 4, which aimed to address adjudicators undertaking multiple roles (also referred to as “double hatting”).

87. As a general point, it was said that judges would likely be prevented from undertaking multiple roles in accordance with their terms of appointment and so the standard applicable to them was not reflected in the options under article 4 (see para. 106 below). The deliberations therefore focused on the limitation of multiple roles by arbitrators.

88. A wide range of views was expressed on the three options provided in article 4. Noting the difference of views already expressed on the matter at previous sessions, the Working Group worked towards identifying common ground.

##### *Option 1*

89. Views were expressed in support of option 1, which provided for a full and comprehensive prohibition of double hatting. In support, it was stated that option 1 provided a clear and strict rule which could be easily applied and would strengthen the legitimacy of ISDS. It was also mentioned that other international adjudicatory bodies had introduced a ban on double hatting and that empirical data showed that not all adjudicators acted as legal representatives in an IID prior to their appointment. It was said that such data illustrated that option 1 would not necessarily result in a potential shortage of qualified arbitrators or undermine diversity. It was further said that, nevertheless, such data could not prove that the potential shortage of arbitrators could be avoided with option 1 either.

90. It was said that option 1 was not an absolute ban, as the prohibition was limited to IID cases and as disputing parties would be able to waive the restriction. It was suggested that the scope of the prohibition should be expanded to other types of proceedings not necessarily limited to IID as long as they concerned the same parties or the same measure. It was said that that would ensure a uniform application of the prohibition standard to all such disputes. On the other hand, there was support to limit the prohibition to those circumstances provided in square brackets in option 1 (“in another IID case or in a proceeding relating to the application or interpretation of [an] [the same] investment treaty”). In that context, the need to expand the definition of IIDs in article 1 to include disputes submitted pursuant to foreign investment laws and investment contracts was reiterated, as that would ensure that option 1 achieved the intended result of full prohibition of double hatting for all types of relevant disputes.

91. A suggestion was made that the approach in option 1 could be applied to certain types of arbitrators, i.e., the presiding arbitrator and a sole arbitrator, whereas a more lenient approach such as that in option 2 could be taken for others, mainly the party-appointed arbitrators. The rationale for the proposal was that the presiding and the sole arbitrators were particularly influential on the outcome of the case and also played the main role in ensuring the impartiality of the proceedings. It was said that such an approach could address some of the concerns expressed with regard to option 1 (see para. 92 below), particularly as parties would be less limited in appointing their respective arbitrator. It was further suggested, as an alternative, that the approach in option 2 could be applied to all types of arbitrators but with less limitations being applicable to the party-appointed arbitrators. Nonetheless, it was emphasized that, in the case of party-appointed arbitrators, they should still be subject to prohibitions in clear situations of conflict of interest. However, it was said that such an approach would go against the principle that all arbitrators should be impartial and independent.

92. Views were also expressed against a full prohibition as provided in option 1, mainly as it could: (i) limit parties’ autonomy to appoint arbitrators of their choice, which ability to choose arbitrators was said to be one of the most important advantages of the current ISDS system; (ii) limit the pool of arbitrators and undermine

diversity therein; and (iii) function as a barrier to entry of new arbitrators. It was said that, in practice, there would be very few individuals who could carry out a career only as an arbitrator, which would undermine their availability and lead to increases in arbitrators' fees. It was also said that, without such practice, there would be limited means for individuals to gain experience in IID to function either as counsel or arbitrator. It was said that there was no empirical data that double hatting was indeed harmful or that it was not harmful.

### *Option 2*

93. In light of the concerns expressed about full prohibition (see para. 92 above), support was expressed for a modified prohibition as provided for in option 2. It was said that option 2 provided more balanced regulation with fewer negative consequences, particularly with regard to the parties' selection of arbitrators.

94. Views diverged on which specific instances of double hatting to include in option 2 in order to illustrate the different instances where conflicts might arise. It was generally felt that option 2 should address the most problematic circumstances, those giving rise to serious conflicts of interest and/or resulting in the lack of independence and impartiality.

95. While one view was that all four elements in option 2 should be included, it was generally considered that two or more elements would be sufficient for the effective regulation of double hatting. In general, it was widely felt that the criteria to be developed should be drafted in clear language and further elaborated either in article 4 or in the Commentary, so that arbitrators and disputing parties would be aware of the different situations envisaged therein.

96. Doubts were expressed about including subparagraph (b) ("the same legal issue"), which was considered to be too broad, particularly in light of the fact that a number of investment treaties contained the same or similar substantive standards. It was said that the inclusion of subparagraph (b) could result in a full ban of double hatting. Furthermore, it was stated that it might not be possible for disputing parties or candidates to identify the legal issues of the dispute at the earlier stages of the proceedings. It was also said that subparagraph (d) ("the same treaty") was too broad, and that involvement in an IID case with the same legal issue (found in subparagraph (b)) or involving the same treaty (found in subparagraph (d)) did not necessarily raise the same level of conflicts of interest (or concerns about independence and impartiality) as the other instances did. Nonetheless, there was support to retain subparagraph (b), with the word "substantially" and also subparagraph (d). Another suggestion was to include a catch-all phrase in option 2, which would capture circumstances where the multiple roles contravened the obligations in the Code, for example, those in article 3.

97. With regard to subparagraph (c), a suggestion was made that reference to "State-owned enterprises" in articles 4 and 10 should be avoided as State-owned enterprises were often a separate legal entity conducting its business operation without any interference of the State and as State ownership per se was not sufficient to determine the affiliation of the State-owned enterprise to the State.

98. It was generally felt that the instances in option 2 should be applied alternatively (with the words "or", although it was said that it should be applied cumulatively (with the words "and").

99. It was felt that a proper implementation of option 2 would rely on the availability of information and thus, the need to ensure full disclosure as provided in option 3 was emphasized. It was generally felt that the two options would be complementary to each other and that a combination of the two could form a possible basis for compromise.

*Option 3*

100. In light of the concerns expressed about full prohibition (see para. 92 above), views were also expressed in support of option 3. By requiring full or extensive disclosure, it was considered that option 3 would allow disputing parties to obtain relevant information and hold the arbitrators accountable for any possible conflicts of interest through recusal and challenges. In support, it was said that option 3 would preserve party autonomy in relation to the selection of arbitrators, not introduce a barrier to new entrants, and further promote diversity within the pool of arbitrators. It was also said that option 3 provided a flexible approach to the concerns raised about double hatting and took into account the circumstances of each appointment. It was further said that options 1 and 2 were not the only means to avoid repeat appointments and to promote diversity of arbitrators, and reference was made to various measures in institutional appointments.

101. A suggestion was made that if option 3 were to be chosen, it would need to be considered closely with the disclosure obligations in article 10, which applied also to candidates. A suggestion was made that option 3 should also apply to candidates.

102. As to drafting, suggestions were made to delete the words “or in any other role” and to retain the word “substantially”.

103. However, it was also suggested that option 3 would not fulfil the objective of reforming the current ISDS regime, and might be at odds with the provisions found in recently concluded treaties. It was suggested that option 3 would need to be combined with either options 1 or 2 to address the concerns raised about double hatting. Views were expressed that article 4 should contain all elements of options 1 to 3 and support was also expressed for merging options 1 or 2 with option 3. It was also said that option 3 contributed to maintaining the core benefits of the current ISDS system.

*Temporal scope*

104. It was noted that all of the options addressed only the concurrent multiple roles without making any reference to the period prior to or after acting as an arbitrator. Some doubts were expressed about taking such an approach and views were expressed that article 4 should introduce a time frame during which individuals would be prevented from undertaking multiple roles (referred to as a “cooling-off” or “transition” period). For example, one suggestion was that an arbitrator should not have served as counsel against one of the disputing parties, or as a legal representative or expert witness of one of the disputing parties, in another IID case, within the past one or three years.

105. Also in relation to the scope, a question was raised whether article 4 should address not only conflicts of interest arising from appointment of the individual arbitrator but also with respect to the law firm to which the adjudicator belonged.

*Rule for judges*

106. With regard to judges, it was suggested that article 4 could read as follow: “1. Judges shall not act as counsel or expert witness in another IID case or exercise any political or administrative function. Judges shall not engage in any other occupation of a professional nature which is incompatible with their independence, impartiality or with the demands of a full-time office. Judges shall declare any other occupation of a provisional nature to the [President] of the standing mechanism and any question on the application of this paragraph shall be settled by the decision of the standing mechanism. 2. Former Judges shall not become involved in any manner whatsoever in proceedings before the standing mechanism relating to an IID which was pending, or which they have dealt with, before the end of their term of office. As regards IID initiated subsequently, former judges shall not represent a party or third party in any capacity in proceedings before the standing mechanism until a period of [three] years after the end of their term of office.”



*Preparation of a revised version of article 4*

107. After discussion, the Working Group requested the Secretariat to prepare a revised version of article 4, based largely on option 2 but also taking into account the views expressed in support of options 1 and 3. In preparing the revised article, it was suggested that: (i) the criteria therein should be presented in a disjunctive manner, unless two or more criteria need to be met; (ii) the temporal scope of the prohibition should be addressed, including whether there should be a cooling off or transition period; (iii) different rules to govern arbitrators playing different roles (wing or presiding) could be developed; (iv) the potential role of disputing parties should be considered and clarified, for example, in waiving any prohibition; (v) consideration should be given to ensuring robust disclosure also in connection with the disclosures obligation in article 10; and (vi) a specific provision be developed for judges. The Secretariat was also requested to consider the relationship of article 4 with the other obligations provided in the Code.

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

108. The Working Group considered article 5, which addressed the adjudicator's duty of diligence. It was mentioned that article 5 would complement requirements in arbitral rules and terms of appointment providing for obligations to act diligently and expeditiously.

109. It was noted that article 5 did not address the obligations of candidates, which were covered under article 6(2). In that light, a suggestion was made that all obligations might be grouped in a more coherent manner in the Code, and that that matter could be considered at a later stage of the deliberations.

### *Paragraph 1*

#### *- Competing obligations*

110. It was suggested that article 5(1) should include a duty to refuse competing or concurrent obligations, and that the following phrase should be added at the end of the first sentence: "and shall refuse concurrent obligations that may preclude or interfere with their devoting the necessary time to adjudicating the IID". A further suggestion was made to replace the words "preclude or interfere" by "impede" and to refer to the ability to perform duties diligently. It was said that it might be difficult to objectively determine "competing" obligations and that the proposed additional wording might not be necessary in light of the obligations provided for in the second sentence of article 5(1).

#### *- Reasonably available*

111. With regard to the notion of "reasonably available" in the second sentence of article 5(1), it was said that it was too abstract. Different suggestions were made to address this. For instance, it was suggested to refer instead to the "ability to devote enough time". It was suggested that more concrete rules should be provided for. A different view was that the word "reasonably" was appropriate and introduced the necessary level of flexibility.

112. It was said that the second sentence of article 5(1) was applicable to arbitrators, but that a different standard should be provided for judges, along the lines of: "Judges shall be fully available to perform the duties of their office, consistent with the terms of their appointment." It was, however, questioned whether the reference to the terms of appointment was appropriate. In response, it was said that such provision would provide flexibility as the mechanism for appointing judges in a standing investment mechanism was not yet known, including whether they would be employed full-time or part-time, and whether certain functions, as academia, could be authorized.

113. Regarding the reference to "administering institution", it was suggested that to also cover ad hoc arbitration, the words "if any" should be added after the word "institution".

- *Dedicate necessary time and effort and render decisions in a timely manner*

114. A suggestion was made to replace the words “the necessary time and efforts” with the words “adequate time and resources”. It was also suggested that a timeline be illustrated, in the Commentary, to concretise what “timely” referred to.

- *Limitation of number of cases*

115. Noting that a previous version of the Code included a provision stating that adjudicators should “refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions”, it was suggested that the Commentary should provide guidance on the number of cases that arbitrators could reasonably handle. It was agreed that such indication on the number of cases need not be included in the text of the provision.

*Paragraph 2*

116. A suggestion was made to formulate paragraph 2 as a positive obligation, as follows: “The decision-making function is the exclusive responsibility of the Adjudicator and shall not be delegated”.

117. The suggestion to delete the words “to an Assistant or to any other person” to cater for any instances of delegation received support.

118. It was noted that the notion of “decision-making” would need to be elaborated in the Commentary.

## **6. Article 6 – Other duties**

119. The Working Group considered article 6 which addressed other duties of adjudicators.

*Paragraph 1*

120. It was said that the word “display” in subparagraph 1(a) did not convey properly the intending meaning of that provision and should be replaced by alternative drafting such as “conduct the proceedings with” or “demonstrate”.

121. Regarding subparagraph 1(b), it was said that the term “civility” was too vague and that its meaning differed across jurisdictions and cultures. It was further said that such an obligation could lead to unfounded challenges. However, it was said that “civility” was an accepted standard reflected in a number of codes, implying the obligation to be polite and respectful, and that it was a basic requirement in social interactions that adjudicators should respect. Furthermore, it was said that the remedy for non-compliance need not be the removal of the adjudicator.

122. After discussion, it was agreed to retain a reference to “civility”, together with an explanation of its meaning in the Commentary, which could provide more context by referring to general conduct and professionalism. Reference was also made to the ICCA Standards of Practice which addressed that topic in the context of international arbitration. It was also agreed to consider further the question of the consequences of non-compliance with that obligation in the context of article 11.

123. A suggestion was made to include for judges a continuing duty of maintaining and enhancing competence by adding in paragraph 1 the following subparagraph: “Judges shall make their best efforts to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties”.

*Paragraph 2*

124. A suggestion was made to redraft the paragraph so that an alternative to the term “believed”, which was potentially problematic, could be used. It was questioned whether paragraph 2 would be applicable to judges as it referred to appointment in respect to a particular dispute, but not to a permanent mechanism.

125. Furthermore, it was said that the placement of paragraph 2 might need to be considered at a later stage of the deliberations, when a decision would be made on the placement of the obligations in the Code.

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

126. The Working Group considered article 7 which addressed ex parte contacts and was based substantially on the IBA Guidelines on Party Representation in International Arbitration (“IBA Guidelines on Party Representation”).

### *Restructuring the paragraph 1*

127. At the outset, it was suggested that paragraph 1 could be restructured so as to prohibit ex parte communications, with a limited number of exceptions stipulated in a new paragraph 2. It was said that such drafting approach would align article 7 with the approach adopted in the IBA Guidelines on Party Representation and bring more clarity to the provision. It was also said that such structure would make it easier to apply article 7 to judges, as the new paragraph 2 (limited exceptions) would not be applicable to judges.

128. Regarding the prohibition on ex parte communications, it was said that such prohibition should be broad, to encompass communications between a candidate or adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person. It was said that the term “other related person” aimed at making the list of persons concerned an open one, and that that would need to be clarified in the Commentary. As an illustration, it was said that third party funders and experts would be covered under the phrase, as well as any third party who would function as an intermediary between a party and an adjudicator.

### *Paragraph 1 of the current draft*

129. Regarding the bracketed text in paragraph 1, “[during the proceedings]”, it was queried how “proceedings” should be understood. It was explained that its purpose was to permit ex parte communications after the case had concluded as the concerns motivating the provision would no longer apply at that point. A suggestion was made that paragraph 1 should apply not only to “during the proceedings” but also “prior to its initiation”. That suggestion received support. It was also suggested that the phrase “during the proceedings” could be replaced by “until the conclusion of the proceedings” for the sake of clarity. In that context, it was further mentioned that there could be instances where ex parte communications should continue to be prohibited even after the termination of the proceedings, for instance, where an arbitral tribunal or a court would be called to review an award, or if an appellate mechanism were to be set up, and remand be provided for.

130. It was further said that, in contrast to paragraph 1, a new paragraph 2 on exceptions thereto should be construed narrowly. It was suggested that the chapeau of a new paragraph 2 would refer to communications between a candidate or adjudicator and a disputing party or its legal representative only, thereby making the list of persons concerned a closed one.

131. Regarding the exceptions, various comments were made in relation to subparagraphs (a), (b) and (c) of paragraph 1 of the current draft. It was suggested that subparagraphs (a) and (b) could be merged. The deliberations focussed on subparagraph (b), and whether ex parte communications could be permitted with a candidate for presiding arbitrator. It was suggested that the notion of presiding arbitrator, and whether it also covered sole arbitrator, should be defined, possibly in the Commentary. It was suggested that, as also provided for in the IBA Guidelines on Party Representation (8(b)), subparagraph (b) should provide that a prospective or appointed party-nominated arbitrator might communicate with the disputing parties or their representatives for the purpose of the selection of the presiding arbitrator. By contrast, it was argued that any communication with a candidate for presiding arbitrator should not be permitted ex parte, unless the parties agreed otherwise. It was

further clarified that where all parties agreed, such communications would no longer necessarily be ex parte, as they would be held with the knowledge of the other party.

*Paragraph 2 of the current draft*

132. It was generally agreed that paragraph 2 should be drafted as an open list. Various drafting suggestions were made in relation to paragraph 2, including: “Communications permitted by Article 7(1) shall not include substantive discussion of issues related to the IID”; and “Communications permitted by Article 7(1) shall not address any procedural or substantive issues that the Candidate or Adjudicator reasonably anticipates could arise in the IID”. A further suggestion was made to merge the two proposals so that paragraph 2 would be redrafted along the following lines: “Communications permitted by Article 7(1) shall not include procedural or substantive discussion of issues related to the IID”. It was also suggested that the paragraph could remain unchanged, with the retention of the bracketed text and a clarification of the meaning of the phrase “merits of the case”.

## **8. Article 8 – Confidentiality**

133. The Working Group considered article 8 which outlined the duty of confidentiality of candidates and adjudicators. It was noted that article 8 needed to be considered in conjunction with the disclosure obligations contained in article 10.

*Paragraph 1*

134. Regarding subparagraph 1(a), the Working Group agreed that the confidentiality obligation should be limited to non-public information (see [A/CN.9/WG.III/WP.201](#), article 9).

135. A drafting suggestion was made in order to avoid a double negative phrase coupled with exceptions, along the following lines: “Candidates and Adjudicators shall not: (a) disclose or use any non-public information concerning, or acquired in connection with, an IID except for the purposes of that proceeding or in accordance with the applicable rules or treaty or with consent of the disputing parties.” A further suggestion was made to replace the words “in accordance with” by “as permitted under” in subparagraph 1(a).

136. Views were expressed that subparagraph 1(b) appeared to be covered by the provisions of subparagraph 1(a) and should therefore be deleted. It was however noted that if subparagraph 1(a) were to be modified as suggested in para. 135 above, then subparagraph 1(b) might need to be retained as the scope of subparagraph 1(a) would be more limited. It was agreed to retain subparagraph 1(b) for further consideration, also in light of its relation to article 3.

137. It was highlighted that candidate for the position of a judge would not have access to information regarding specific cases, and so should not be covered by paragraph (1).

*Paragraph 2*

138. Regarding subparagraph 2(a), it was suggested that the language should be clarified so that the disclosure of views expressed in the deliberations by any adjudicator would be covered. It was further suggested to include the words “or Adjudicators” after the word “Adjudicator” in order to extend the application of the provision to possible discussions between two or more adjudicators.

139. Regarding subparagraph 2(b), it was said that the disclosure obligations should apply generally, and therefore the words “to the disputing [and non-disputing] parties” should be deleted. It was also suggested to not only refer to awards but also to parts thereof. A further suggestion was made to add the words “or part of it” after the words “any drafts” to refer to the disclosure of part of a decision, such as its reasoning or operative part.

140. Regarding subparagraph 2(d), it was said that the text should include a prohibition from comment made “prior to the conclusion of the proceedings”, so as to prevent adjudicators from commenting on an order, or decision in an ongoing proceeding. It was said that the bracketed text in subparagraph 2(d) should be retained for arbitrators so that comments on public awards would be possible, also in light of possible academic activities. With respect to judges, it was said that subparagraph 2(d) should not apply to judges as they would usually be expected to refrain from commenting on the court activities and its decision. It was generally stated that further clarification on subparagraph (d) should be provided for in the Commentary, in particular to provide clarification on the word “comment” and to make sure that it would still be possible for parties to introduce non-public decisions in support of a position in an ongoing proceeding and the arbitrators being allowed to consider and “comment” upon such decisions.

## C. Next steps

141. At the close of its deliberations, the Working Group considered how it would advance its work on the Code so as to present a new version of the Code to the Commission for its approval in 2022, as envisaged in the work plan ([A/CN.9/1054](#), Annex).

142. It was noted that the drafting proposals on articles 1, 2 and 11, that were discussed informally during the session, had been included in this report to form the basis for future discussions and assist the Secretariat in its preparation of the next version of the Code (see paras. 43, 64 and 65 above).

143. A suggestion was made that the issues relating to enforcement and implementation of the Code could be put on the agenda of the informal meeting scheduled to take place in December 2021 so as to obtain inputs from delegations on the next version of the Code. Similarly, as a wide range of views had been expressed with regard to article 4, it was suggested that an informal meeting should be held prior to the next session of the Working Group, scheduled to be held in February 2022, to discuss a revised draft of article 4. Due to lack of time at the close of the session, there was no further discussion on that suggestion.