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Other business

**Submission by Australia, Bahrain, Chile, Israel, Japan, Mexico, Peru, Thailand
and the United States of America**

Note by the Secretariat

The Governments of Australia, Bahrain, Chile, Israel, Japan, Mexico, Peru, Thailand and the United States of America have submitted a proposal with regard to the resources to implement the work programme with respect to investor-State dispute settlement (ISDS) reform for consideration by the Commission at its resumed fifty-third session. The submission was received by the Secretariat on 3 September 2020. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.



Annex

Submission by Australia, Bahrain, Chile, Israel, Japan, Mexico, Peru, Thailand and the United States of America

Factors for Considering the Need for Additional Conference Resources for Working Group III

Introduction

The Secretariat's note to the Commission¹ on additional resources for Working Group III provides useful background and context on possible ways to view the management of Working Group III and the demands that its reform agenda places on the Working Group and the Secretariat. In particular, it highlights the need for Working Group III to strive to complete its mandate by a date certain for the reform work to be relevant.

Working Group III continues to make progress on its mandate through a government-led process, in a collaborative and transparent manner, ensuring full participation of government officials with relevant experience in investor-State dispute settlement (ISDS). The Working Group has also shown great flexibility and creativity in continuing its work in light of the postponement of its 39th session, scheduled for last spring in New York. The use of webinars to explore in more depth the topics that were to be discussed at the postponed 39th session and invitations for written submissions on the draft Code of Conduct are two examples of the Secretariat's resourcefulness and the delegations' flexibility and adaptability to continue to lay the groundwork for progress when in-person deliberations can resume.

The request to the Commission to consider recommending that the General Assembly provide Working Group III with additional resources predates the full emergence of the very real impacts of the COVID-19 pandemic on travel and budgets for participating delegations. As such, the Secretariat's note would benefit from revision to reflect the level of uncertainty as to when in-person sessions may resume and the ability of delegations to accommodate additional travel and human resources in light of the significant economic impact on budgets and uncertainty in overall planning that the pandemic has generated. A discussion of the recent UNCITRAL experience with using alternatives to in-person meetings to make progress would also be a useful addition to the paper. As originally envisioned, the consideration of the request for additional resources would have followed the spring 2020 meeting of Working Group III. At that meeting, the Working Group would have completed its review of reform initiatives and had the opportunity to carefully consider and begin to develop an agenda of the issues that it would like to pursue going forward and the general sequencing of the issues. That meeting, however, was postponed and this task, which is closely connected to the question of additional resources, was not completed.

A decision on additional resources for Working Group III is proposed for consideration during the Commission's resumed 53rd session, from 14–18 September 2020. In light of these general observations, and for the following reasons, adopting a decision on additional resources at this Commission session would be premature. Given the present challenging circumstances, it would be prudent for the Commission to defer this decision until it meets for its 54th session in July 2021 to allow the development and analysis of a broader set of options for completing the mandate of Working Group III efficiently and effectively.

¹ [A/CN.9/1011](#).

Uncertainty Created by the COVID-19 Pandemic Regarding Travel and In-Person Meetings

The COVID-19 pandemic has introduced an unprecedented level of uncertainty about the ability to schedule in-person meetings and availability of delegate resources, both in terms of travel funds and time. Travel restrictions, including bans from certain regions of the world to Vienna and New York, as well as quarantine requirements, make participation impractical for many delegations for at least the foreseeable future. Additionally, time zone differences limit the amount of time that can be used realistically for remote participation. Thus, at this time, it is difficult for many states to make advance commitments in terms of their time and resources in the face of this uncertainty. The pandemic has also generated unforeseen tasks and responsibilities that further limit the time and resources delegates can dedicate to Working Group meetings. Any decision to request additional conference time and resources to Working Group III should be one that has wide-spread support and can ensure consistent equal participation of all delegations of government officials who have expertise with investment disputes, as was the case prior to the pandemic. Making a decision to seek additional resources before this uncertainty is resolved ignores the reality that participating delegations simply do not know when they will be able to participate fully again.

Full Assessment of Possible Options to Promote Efficient Use of UNCITRAL's Existing Available Resources

A decision on whether additional meeting time is necessary should consider the availability of additional conference time that UNCITRAL already has. In 2018, the Commission took the decision itself to operate more efficiently and strive to conduct its business during a two-week session rather than a three-week session each year. It did so in part to make available additional conference time for use by Working Groups when necessary. The Secretariat's note highlights that this additional week of Commission time may not always be available due to the work of the Commission and there may be scheduling difficulties if a decision to make the week available to Working Group III is not made until the time of the Commission meeting itself.² The Commission, however, has the discretion to decide the length of its future sessions in advance. Thus, for example, any additional conference time that might be dedicated to Working Group III could be scheduled to coincide with the Commission session itself, assuming that delegations would have the necessary resources that would allow their Working Group III experts to attend the session. Were this approach feasible, it could also facilitate the submission of any reform options that the Working Group has completed for consideration by the Commission, especially if Working Group III experts were required at the Commission session to address any questions or resolve any issues for the Commission so that it could consider fully a proposed reform option.

In addition, the Commission's decision on the amount of additional conference time should take into account the lessons that have been learned from the COVID-19 pandemic. While the pandemic has revealed strengths and challenges to alternatives to in-person meetings, it has also shown that different modes of work may be better suited to different tasks. There are thus a variety of formats now available and the individual tasks related to a working group's mandate can be approached differently and may actually be better suited to different formats for accomplishing that particular task. This better understanding and differentiation of tasks is particularly important for Working Group III, where there are many delegations actively involved in the shaping of the Group's work and different types of solutions are being considered simultaneously. For example:

- The use of webinars to provide foundational information regarding existing solutions to some of the concerns about ISDS that the working group has identified can be a more efficient way for delegations to share their experience

² Ibid., para. 28.

with certain potential reform tools. Finding a way to facilitate translation for these webinars would help further the understanding of delegations.

- The use of written comments, whether formally or informally, on draft provisions can also allow delegations to share their expertise in a more accessible format and with more precision than an oral intervention in an in-person meeting.
- The use of virtual platforms to allow delegations to hold informal discussions, such as the “Interprefy” platform now used by UNCITRAL for the formal sessions, can facilitate advancement of issues for later consideration by the Working Group.

Exploring how to use these different tools and tasks will ensure that the Commission is making its decision with the benefit of the additional lessons learned from the pandemic. It could very well be that the Working Group concludes that these methodologies present at least some alternatives to the proposed extra time for full meetings of the Working Group.

Need for a Working Group III Work Plan to Perform Its Mandate Efficiently

The Secretariat’s note correctly observes that, for this project to have a beneficial impact, it should concentrate its efforts on identified reform initiatives and have a finite end point in the near future. The Commission’s guidance should be framed with these objectives in mind. To do so prudently, the Commission should be informed by a number of other factors that need to be considered in making a decision to request additional resources.

Working Group III needs to complete its review of reform options to consider its agenda going forward before the Commission will be in a position to adequately assess whether there is a need for additional resources to be allocated to Working Group III to complete its mandate. Thus, it may be difficult to assess the need for additional resources at this time because that assessment is influenced by a review by the Working Group that has not yet been completed but would typically occur before the Commission made such an assessment. In this regard, the Commission’s decision should be informed by the views and recommendations of the Working Group itself on the scope of its future work and how it seeks to approach that work. Working Group III has six remaining topics to consider: (i) the role of States in treaty interpretation; (ii) the role of mediation in investor-State dispute settlement; (iii) potential reforms to address frivolous claims and multiple proceedings; (iv) the use of security for costs; (v) shareholder reflective loss; and (vi) the consideration of a multilateral instrument. These topics were to be considered last spring, and presumably now will be on the agenda for the Fall 2020 session in 5–9 October 2020. While it is very likely that the Working Group will seek to pursue reforms in this area, how these reforms fit into the broader set of reforms needs to be considered, as they are ones that are suitable for ad hoc ISDS, as well as for any possible structural reforms. Having this information from the Working Group is important to inform the Commission’s decision about the need for additional conference time and when it may be needed.

Moreover, sufficient time between meetings is also essential to allow participating delegations to develop positions and respond to other delegation views. Additional meeting time, even if remote, will not necessarily result in progress if delegations have not had time to develop and refine their views through consultation internally and with other delegations. As the Secretariat’s note correctly points out, informal sessions can help delegations understand their positions and foster the development of consensus.³ Time for these types of informal exchanges between formal meetings needs to be factored into the discussion regarding any additional in-person or other conference time resources.

³ Ibid., paras. 29–36.

There are certainly times, though, when in-person meetings cannot be replaced by other forms of exchanging views. Assessing when those additional sessions may be needed and will constructively advance the work will help Working Group III organize itself toward the completion of its task.

The Secretariat's note highlights some challenges to the sequencing and timing of the development of the multiple reform options.⁴ These challenges, however, need to be further assessed in light of the reform options that the Working Group is exploring. Moreover, based on recent experience, more tailored tools could provide effective opportunities for participating delegations to develop specific elements of the reform options, which may not require as much in-person conference meeting time as suggested by the Secretariat's note.

Conclusion

The pandemic and its consequences have introduced an unprecedented level of uncertainty about the timing for the resumption of in-person meetings at UNCITRAL and the availability of resources for member state participants to travel as originally scheduled in light of the COVID-19 pandemic's travel restrictions and budgetary uncertainty. More generally, the request for additional resources should be balanced by an overall consideration of the ability of the participating delegations that are working on this issue to absorb any additional resources, given their own budgetary and time constraints, as well as managing competing policy objectives.

The issue of whether Working Group III requires additional resources is a challenging one. It is not simply a mathematical question of how much additional conference time the Commission should request from the General Assembly, but for what and how the resources should be allocated. A discussion within Working Group III regarding its agenda going forward and workplan will also help to better inform the Commission's consideration of this issue, including with respect to the various tools available for advancing work. In short, when the Commission meets next summer in 2021, it will have important information before it that is not available now, including the outlook on travel and health conditions and a more refined assessment of when extra conference time might be necessary. Accordingly, the decision on additional resources for Working Group III should be postponed to the next Commission meeting in 2021.

⁴ [A/CN.9/1011](#), para. 38.