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Submission from the Governments of Chile, Israel and Japan

This note reproduces a submission received on 14 March 2019 from the Governments of Chile, Japan and Israel in preparation for the thirty-seventh session of Working Group III. The submission is reproduced as an annex to this Note in the form in which it was received.

Annex

Proposal for Work Plan of Working Group III
Submitted by the Delegations of Chile, Israel and Japan

A. Introduction

At the Working Group's 36th session, Member States were encouraged to consult and submit by the next session written proposals for the development of a work plan for stage three of the mandate of the Working Group. This proposal for a work plan reflects the view of the delegations of Chile, Israel and Japan.[1]

This proposed work plan desires to bring about a meaningful and achievable reform, by addressing:

(i) How some or all of the concerns that the Working Group identified as desirable for reform during the second phase of its mandate should be addressed in phase three of the mandate; and

(ii) Questions such as sequencing, priority, coordination with other organizations, multiple tracks, ways to continue the work between sessions of the Working Group, and any other matter that these delegations considered necessary.

As a general note, we wish to emphasize that the Working Group should provide for flexibility and take into account the views and opinions of a wide variety of stakeholders[2] regarding the reform of ISDS.

B. Background

For the past two decades, many Member States have been grappling with different kinds of concerns that have arisen in their experience with ISDS cases.

In the first stage of the Working Group's mandate, the Group identified a list of concerns as set forth in the table below.

[1] We would like to thank the Secretariat for documents A/CN.9/964, A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.158. These documents assisted us in drafting this proposal for a work plan.

[2] For the purpose of this paper these stakeholders are: Member States of the Working Group, Observers, Academics and Practitioners, and other representatives of relevant, expertized and/or experienced organizations who attend the Working Group's meetings.

Broad Categories of Concerns	Issues of Concern
Lack of consistency, coherence, predictability and correctness of arbitral Decisions by ISDS tribunals	Unjustified divergent interpretations of substantive standards, unjustified divergent interpretations relating to jurisdiction and admissibility, and unjustifiable procedural inconsistency.
	Lack of a framework to address multiple proceedings
	Limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions
Arbitrators and decision makers	Lack or apparent lack of independence and impartiality
	Adequacy, effectiveness and transparency of the disclosure and challenge mechanisms
	Lack of appropriate diversity of decision makers
	Qualifications of decision makers
Cost and duration of ISDS cases	Lengthy and costly ISDS proceedings
	The lack of a mechanism to address frivolous or unmeritorious cases
	Allocation of costs in ISDS
	Availability of security for cost in ISDS
	Concerns regarding third-party funding (to be discussed)
Other categories that may be raised in the future	

C. Stage three of the Working Group's mandate – Development of Solutions

Many older, or "first generation" investment treaties, currently lack solutions to the concerns identified by the Working Group to date[3]. Yet it is these "first generation" agreements under which many ISDS cases are pursued and which give rise to many of these concerns. [4]

[3] Many modern agreements also include revisions to substantive obligations to address concerns about coherence, consistency, and correctness. Although substantive reform is beyond the scope of the Working Group's mandate, we note that the differences in substantive obligations also give rise to the concerns identified in phase two.

[4] *See, e.g.,* UNCTAD Database: Of 931 IIA-based ISDS cases, 783 have been initiated under IIAs that were signed before 2000 (84%); UNCTAD IIA Issues Note, "Improving Investment Dispute Settlement: UNCTAD Policy Tools" (November 2017) at 13 ("Old treaties abound: more than 2,500 IIAs in force today (95 percent of all treaties in force) were concluded before 2010…. [V] irtually all known ISDS cases have been based on those treaties."); UNCTAD World Investment Report 2018 at 93 ("The majority of the IIAs invoked in 2017 date back to the 1980s and 1990s.").

At this stage of the mandate the Working Group is entrusted with the task of suggesting solutions to the identified concerns. An indicative list of possible solutions that exist in modern agreements is included in Annex I.

1. Principles in addressing the main concerns in stage three of the mandate

i. Modalities of reform measures

The Working Group should have maximum flexibility to develop a menu of relevant solutions, which may vary in form,[5] and that Member States can choose to adopt, based on their specific needs and interests, including those of developing countries. The form of the solutions could be determined by the nature of the concern the reform seeks to address and allow for flexible adoption[6]. These solutions can form a "suite" of options, which Member States could adopt either individually, in combination or in their entirety as a package.

A likely way in which these options from the "suite" could be incorporated into Member States "first generation" agreements, or any existing agreements, in which such solutions are lacking, may be through a treaty amendment process to these agreements[7]. The "suite" approach would provide states with maximum flexibility to adjust their practice to remedy gaps in their agreements to adhere to current needs.

A key feature of this "suite" approach would be to have suggested solutions available in stages to initially address the most pressing concerns identified. Some solutions can have an immediate material impact regarding some of the concerns identified. This "suite" approach would avoid a situation in which all solutions must be completed by the Working Group before any reforms can be adopted by Member States.

[5] As outlined below, forms that solutions may take include (i) free-standing codes; (ii) ISDS-specific amendments to the existing UNCITRAL Arbitration Rules; (iii) soft law instruments, such as "best practices" and related tool kits; and (iv) treaty amendments.

[6] Despite the fact that the Working Group has identified a broad list of concerns, this does not mean that all States necessarily face all of these concerns. Therefore, maximum flexibility to develop a menu of relevant solutions should be a premise in order to allow States to choose and adopt the best solution based on their specific needs and interests. This approach would also allow States to internalize, adopt and ensure the effectiveness at its national level for any kind of solution through different ways rather than through a rigid approach that could hinder or impede the States to adopt the solutions into its national level.

[7] A possible option for doing so would be to use a similar structure to the UN Convention on Transparency in Treaty-based Investor-State Arbitration, which allows States to express consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to multiple treaties through the adoption of the Convention.

ii. Prioritizing the identified concerns

It is in our view that in order to allow effective progress in its discussions on the matter, the Group should prioritize the concerns identified in the second stage of its mandate. This could be done *inter alia* in light of the views of Member States regarding the severity and mal-effect of the concern, its prevalence, its significance to ISDS procedures and in the overview of the desired reform.

iii. Prioritizing the proposed solutions

In order to ensure the most immediate impacts for reform and the widest application to ISDS cases, Member States should firstly pursue reforms to address specific concerns for which there is a high degree of consensus. This, while continuing to explore possible ranges of solutions for those concerns for which there is lack of consensus about the type of reform appropriate. These solutions should be developed without regard to whether they would apply to the current system of *ad hoc* arbitration, a permanent institution to resolve investment disputes, or other dispute settlement models. Doing so would allow for more rapid adoption of reforms to future agreements and may also facilitate its adoption to existing agreements under which disputes may continue to be initiated.

Therefore, it is the view of these delegations that the Working Group should, for efficiency reasons, prioritize its work according to several variables, such as: the degree of consensus of the Group regarding a proposed solution, the relevance of the solution to several issues of concern, the solution's feasibility and the extent of its effect.

iv. Cooperating with other organizations

We believe that in order to properly address the concerns identified and to avoid duplication, the Working Group should take benefit from the profound work of other organizations. The important recent work of other organizations, such as ICSID, UNCTAD and the OECD should be taken into account, where possible and appropriate, in the discussions of the Working Group. We would therefore suggest to cooperate with other organizations and to encourage their contribution to the discussions of the Working Group.

v. Work method of the Working Group

Working Group III should remain responsible for the consideration and development of all reform measures. Given the importance of ensuring that the reform process is government-led, moving some reform measures to a sub-group or another working group could make it difficult for many delegations to follow all of the reform efforts if multiple tracks are established. In that regard, we wish to emphasize that any efforts made by the Working Group to address reform measures must take into account the resource constraints of both the Secretariat and Member States (including developing states), which may vary greatly, and should seek to work efficiently and expeditiously within these constraints.

That said, it may be useful for the Working Group to consider whether there may be opportunities to designate experts from participating delegations, along with representatives from relevant institutions, the Academic Forum, Practitioners' group, and other stakeholders, to work intersessionally to develop further proposals to be presented to the Working Group.

The use of additional UNCITRAL resources can be considered at an appropriate time once the Working Group has developed a schedule of reforms and begun its discussion of these reforms.[8]

2. Action plan for the discussion and development of solutions

It is the view of these delegations, that for the sake of efficiency, the Working Group should tackle the work at hand in two stages:

i. Action plan for the first stage

- Prioritize the concerns identified up until now by the Working Group according to the principles outlined in part C.1 of this paper.
- Discuss and compile a list of possible solutions for the concerns identified, based on the prioritization exercise.
- Compile an inventory of solutions discussed or adopted under reforms in modern treaties or in other organizations, which relate to the concerns identified by the Working Group to date.

[8] Document A/CN.9/WG.III/WP.158.

- Assess the degree of consensus for each possible solution and focus on areas of consensus that could result in meaningful and achievable reform.
- Based on the degree of consensus, relevance of the solution to several concerns, its feasibility and effect, as well as time and resource implications, develop a **Schedule** for addressing the list of solutions, beginning with solutions that can have the most immediate material impact. The Working Group may agree on **working methods** for the implementation of the work plan.

ii. Action plan for the second stage

- According to the **Schedule** and **working method** that will be agreed upon, work should commence to further develop the solutions raised in the first stage.
- The Working Group will decide on appropriate approaches for adopting the solutions, such as:
  - Introduce them as "model" provisions for Member States to implement in their practice for future agreements.
  - Establish free-standing codes that could be adopted by the parties to a particular dispute.
  - Amend or supplement the current UNCITRAL Arbitration Rules, with respect to their application to ISDS.
  - Develop "soft law" practice notes or "best practices" toolkits for areas such as case management and other related topics that can build on the experience of Working Group participants to share as guidance.
  - Develop a framework that would allow for some or all of the model measures to be adopted to amend their existing international investment agreements that lack these provisions (similar to the approach used in the UN Convention on Transparency in Treaty-based Investor-State Arbitration).

An illustration of how the action plan could be implemented, using the concern about arbitrator impartiality and independence as an example, is included at Annex II.

ANNEX I

INDICATIVE LIST OF EXISTING SOLUTIONS BY CATEGORY OF CONCERN[9]

Concerns pertaining to arbitrators and decision-makers

- code of conduct or incorporation of existing ethics rules (e.g., IBA Guidelines)
- rules limiting/prohibiting double-hatting
- special expertise requirements for arbitrators for certain claims (e.g., financial services)
- independent appointing authority (i.e., to appoint tribunal chair)
- roster for appointment of co- arbitrators and tribunal chair
- disclosure of third-party funding
- treaty-specific rules for arbitrator challenges
- treaty-specific appellate review mechanism

Concerns pertaining to cost and duration

- encouragement of mediation, conciliation, etc. to avoid formal disputes
- dismissal of frivolous claims
- expedited consideration of preliminary objections
- requirement that claimants name arbitrator when submitting a claim
- deadlines for the appointment of other arbitrators, including the chair
- provisions encouraging parties to appoint chair
- statute of limitations for bringing claims
- waiver of claims by parent/subsidiary once claims are submitted under a different treaty
- voluntary consolidation of similar claims brought under same treaty by different parties
- guidelines for production of documents in order to avoid so-called "*fishing expeditions*" (e.g., IBA Rules on the Taking of Evidence in International Arbitration)
- requirement to hold arbitration in a NY Convention state unless parties agree otherwise

[9] This list reflects some of the solutions raised in document A/CN.9/WG.III/WP.149 (Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS)).

- requirement for tribunals and parties to act in a cost-effective and expeditious manner
- limitations on tribunal authority to order interim measures
- express permission for tribunal to award costs and attorneys' fees
- automatic discontinuance of abandoned claims

Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

- waiver of ability to pursue pending claims or initiate new claims in other dispute settlement forums once claims are submitted to arbitration (i.e., "no U-turn")
- waiver of claims by parent/subsidiary once claims are submitted under a different treaty
- voluntary consolidation of similar claims brought under same treaty by different parties
- special expertise requirements for arbitrators for certain claims (e.g., financial services)
- non-disputing Party submissions on treaty interpretation
- other third-party submissions (not limited to issues of treaty interpretation)
- binding joint interpretations by Parties of treaty provisions
- tribunal-appointed experts
- review of draft awards by disputing parties and notice to other treaty Party
- publication of pleadings, awards, and other case documents related to treaty interpretation
- treaty-specific appellate review mechanism

ANNEX II

ILLUSTRATION OF IMPLEMENTATION OF THE ACTION PLAN – ARBITRATOR IMPARTIALITY AND INDEPENDENCE

An example of how the proposed action plan would operate with respect to concerns expressed about arbitrator impartiality and independence may be useful. During stage one, the degree of consensus and possible reforms would be identified for this topic. Based on the Working Group discussions to date, the ethical conduct and motivations of arbitrators has garnered widespread expressions of concern.[10] Discussion in the Working Group has also yielded general consensus that reform on this issue is a priority and that common guidelines to regulate the ethical conduct of arbitrator conduct would be a desirable reform.[11]

In stage two, specific reforms would be pursued, building on existing reforms but allowing for innovation as appropriate. At present, there are several models for reforming arbitrator ethics, but no widely agreed ethical guidelines or rules created by government to address the specific ethics issues that arise in ISDS. Pursuing ethics reform through an arbitrator code of conduct would potentially allow for harmonization of these models. Ethics reform could have an immediate impact on ISDS cases, as these reforms could be structured to allow for their adoption into existing arbitral rules. At the same time, ethics reform does not prejudge whether ISDS cases should continue to be resolved through ad hoc arbitration or a permanent institution, reserving the broader question of institutional or structural reform for further consideration.

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[10] Document A/CN.9/964, paras. 66-72.
[11] *Id.,* paras. 73-81.