

**Remarks of the Chair of Working Group III
at the 52nd Session of UNCITRAL (16 July 2019)¹**

Thank you to the Secretariat and to the Chair for giving me the opportunity to address this Commission session today.

As was just noted by our distinguished Secretariat and was up on the screen, the Commission will recall that Working Group III was given a three part mandate to engage in government-led, consensus-based and fully transparent deliberations:

- (i) Phase one of that phase was to identify and consider concerns regarding Investor State Dispute Settlement (ISDS);
- (ii) Phase two was to consider whether reform was desirable in light of any identified concerns; and
- (iii) Phase three is if the Working Group did conclude that reform was desirable, the Working Group was to develop any relevant solutions to be recommended to the Commission.

Last year, I was able to come to the Commission and report that the Working Group had completed Phase 1 of our mandate with respect to the three broad categories of concerns about ISDS that the Secretariat had identified after a review of existing literature and other relevant sources.

With regard to our work of this last year, as the Secretariat noted, the detailed and very excellent report of the Secretariat is before this Commission, so I will try to give only a brief summary here.

At the fall session in 2018 (36th session)

- The Working Group began its deliberations on the second phase of its mandate – namely, considering whether reform was desirable in light of the concerns that had been identified in Phase I.

The first broad category of concerns that the Working Group discussed related to the costs and duration of investor-State arbitration proceedings.

¹ This paper is made available upon for information only following requests from delegations and is not meant to be a full transcript of the presentation made by the Chair on the progress report of the 36th and 37th sessions of Working Group III. Audio recordings of the 52nd session of the Commission where the presentation was made are available on the website of UNCITRAL at <https://uncitral.un.org/en/commission>.

At its fall session, the Working Group agreed that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to three subjects related to this broad category of concerns:

- 1) Generally, the cost and duration of ISDS proceedings;
- 2) How the costs are allocated between the parties by arbitral tribunals; and
- 3) Security for costs.

The second broad category of concerns the Working Group discussed in its fall session related to consistency, coherence, predictability and correctness in arbitral decisions by investor-State tribunals.

At that Fall meeting, the Working Group agreed that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to three subjects related to this broad category of concerns:

- 1) Unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals;
- 2) The lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms; and
- 3) The fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness in decisions.

The third broad category of concerns that the Working Group discussed related to arbitrators and decision makers in ISDS proceedings.

At its Fall session, the Working Group agreed that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to four subjects related to this broad category of concerns:

- 1) the lack or apparent lack of independence and impartiality of decision makers in ISDS;
- 2) the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules;
- 3) the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules; and
- 4) the lack of appropriate diversity amongst decision makers in ISDS.

This concluded our fall session.

As was mentioned by the Secretariat, we have had a tradition in this Working Group of having **Intersessional Meetings**.

The Intersessional was held in this case in February of 2019 and was graciously hosted by the Dominican Republic.

The intersessional was well attended, and upon hearing the report provided by the distinguished representative of the Dominican Republic, I think the Working Group was clear and agreed that the meeting had been extremely useful and beneficial.

At our spring session in 2019 (37th session),

- The Working Group wrapped up its work in Phase II of its mandate concluding in two areas.

First, the Working Group discussed concerns about third party funding.

The Working Group, in the spring decided that it was desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third party funding in ISDS.

Then, the Working Group turned to discussing whether or not there were other concerns that had not already been discussed, and that could not be considered to be covered by the broad areas of reform that the Working Group had agreed to consider in Phase III.

In this regard, the Working Group noted that while the mandate is clearly demarcated into 3 phases, the Working Group understands that the phases are markers of progress, not hard barriers that cannot be re-crossed.

It also consistently acknowledged that it is and must be until the end of the work, open to the identification of new concerns.

Though in identifying additional concerns, the Working Group was clear that its mandate is to focus on concerns with respect to ISDS, rather than the more general topic of international investment agreement reform, which includes reforms to the substantive rules of behaviour in international investment agreements, not just to dispute resolution procedures.

In recalling this, the Working Group noted though that its focus on procedural issues is in no way intended to, and nor could it, diminish the importance of answering questions about reforming the substantive provisions in international investment agreements.

In this part of its work at its Spring session on any additional concerns, the Working Group discussed potential concerns that included the need for means other than arbitration to resolve disputes, the lack of a requirement to exhaust local remedies, the need to ensure the participation of third parties, the possibility of counterclaims, the alleged regulatory chill caused by ISDS, and how damages are calculated.

In the end, the Working Group decided that there was no additional concern that could be identified with regard to ISDS at the current stage of its deliberations, because the concerns raised related to concerns that had already been identified, to tools to be considered by the Working Group, or to guiding principles for the developing reforms.

In this context though, the Working Group agreed that it was important as the Working Group was developing tools, to ensure that it was considering how those tools would address potential additional or new concerns to ensure that the reforms would be considered legitimate by all relevant stakeholders.

With that decision, the Working Group completed its work with respect to Phase I and II of its mandate.

- At the spring session, the Working Group then turned to the task of how it would organize its work in Phase III.

This discussion had two separate parts to it.

First, there was a discussion of what would make up the substance of the work plan.

The Working Group agreed that it would discuss, elaborate, and develop multiple potential reform solutions simultaneously, and that for this purpose, a project schedule would be prepared that would allow for the development of proposed solutions to move forward in parallel, to the maximum extent of the Working Group's capacity in light of all of the tools available to it.

As for what would be on that project schedule, it was agreed by the Working Group that one of the potential solutions that would move forward in phase III at the start of the project schedule would be how to develop structural reforms.

The Working Group also agreed that other potential solutions that could be included in the project schedule would need to be identified.

In order to facilitate the work of the next session and to further develop the project schedule to include the discussions on potential solutions in addition to the potential solution of structural reform, the Working Group agreed to the following steps, recognizing that in Phase III, the allocation of time between discussions would follow the general principle of balanced time allocation, though with flexibility to ensure that the Working Group's time was effectively used.

Step 1 was identifying additional potential solutions to be on the schedule in addition to structural reform.

In this regard States were asked to indicate by July 15 what other potential solutions they might like to seek to develop and to indicate when they would prefer to have such solutions addressed in terms of a project schedule.

My understanding is that some such submissions have been received.

For those who do intend to still make submissions, we encourage you to get those submissions in soon to allow the Secretariat the time to translate them and make sure we have them for the next session.

Step 2, which will occur at the next meeting, will require the Working Group to discuss all of the proposals that have been received and to create a project work schedule.

Step 3, which will also begin next session, is that after that schedule is created, the Working Group will turn to the further elaboration and development of potential solutions to be recommended to the Commission pursuant to our mandate.

As the Commission will note, the Working Group has a very significant amount of work in front of it.

In that light, the Working Group also had a discussion of the tools that it wished to use as it implemented the work plan.

The Working Group, in its spring session, agreed that, with the sole purpose of enhancing the efficient and effective use of Working Group meeting time in the next phase of its work, it would consider, when appropriate, the use all tools and mechanisms available in accordance with practices at UNCITRAL.

It agreed that such tools and mechanisms could include, but would not be limited to, informal meetings on the margins of Commission and Working Group sessions, smaller drafting groups, colloquia, meetings convened jointly with other international organizations, intersessional meetings of the Working Group, and enhanced interactions with the academic or practitioner's groups.

The Working Group agreed that the use of these tools and mechanisms should only occur where practical and where they could be given a clear mandate that would allow them to be used to effectively to advance preparations for an upcoming session of the Working Group or Commission.

The Working Group of course recognized that no final decisions could be taken outside of a formal Working Group meeting, and that any work done using these tools and mechanisms would necessarily be without prejudice to the outcome of discussions in formal meetings of the Working Group.

The Working Group further agreed that in any case where the tools and mechanisms were used, the process should remain government-led in line with our mandate, with the appropriate involvement of the Secretariat to ensure the quality and neutrality of reports to the Working Group, and that it should also be open, inclusive and transparent and in this regard that the Working Group would consider technological means to facilitate the participation by all interested State and observer delegations.

The Working Group requested that the Secretariat, working with interested delegations, manage the use of tools and consider:

- *First*, establishing a separate link on the webpage for Working Group III, where information regarding the proposed or ongoing use of the tools and mechanisms could be publicly provided;
- *Second*, maintaining a list of relevant delegation contacts to ensure efficient and effective communication of information;
- *Third*, publishing proposed agendas in advance for comment and consideration by delegations;
- *Fourth*, assisting in the organization and facilitation of the use of these tools and mechanisms, whether in person meetings or by other means, with a view to ensuring inclusiveness and transparency;
- *Fifth*, preparing papers for Working Group or Commission sessions reflecting the discussions that occurred while using any such tools and mechanisms; and
- *Sixth*, developing any other working methods, in consultation with interested delegations, to ensure that any such additional work is fully transparent, inclusive, and effective.

This brings us to the final tool for facilitating the Working Group in completing the vast amount of work before it – the holding of additional formal Working Group sessions.

In this regard, the Working Group had considerable discussions about the work remaining for it, and the availability of an extra week of conference time this year due to the Commission session being scheduled for only 2 weeks.

As you will see from the Working Group's report, and from the other documents prepared for this session, the Working Group agreed to request that the

Commission allocate **to it** the additional week of conference time that is available this year.

The Working Group also agreed that it would make a standing request to the Commission that if and when additional conference time becomes available in the future, including during 2020 session in NY, the Commission also consider allocating it to Working Group III.

I understand that this will be a topic of discussion either this afternoon or tomorrow, so I will not address this request further, other than to note that it appears from the papers presented, that Working Group III is in fact the only Working Group to make the formal request as a Working Group for additional conference time to be made available to it.

As a final matter, I note that the next intersessional meeting is scheduled to be held at the end of September of this year, this time on the gracious invitation of Guinea, and we look forward to being able to engage with all representatives there, and hear in particular their regional experiences with ISDS.

I thank you for your attention