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Possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate

Report of the Secretary-General

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Introduction

1. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group exchanged views and information on a number of arbitration topics which were identified as likely items for future work. Some of those topics arose in the course of the Working Group's deliberations, others had already been considered by the Commission at its thirty-second session (reproduced in A/CN.9/468 at paras. 107 and 108), while yet others had been proposed by arbitration experts (reproduced at para. 109 of A/CN.9/468). The Working Group expressed support in favour of the Secretariat undertaking preparatory work on several of those topics and the purpose of this note is to provide the Working Group with a progress report on that preparatory work.

I. Court-ordered interim measures of protection in support of arbitration

2. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group considered, in the context of the discussion of interim measures that might be issued by an arbitral tribunal, a proposal for the preparation of uniform rules for situations in which a party to an arbitration agreement turned to a court with a request to obtain an interim measure of protection (A/CN.9/468, paras. 85-87). It was pointed out that it was particularly important for parties to have effective access to such court assistance before the arbitral tribunal was constituted, but that also after the constitution of the arbitral tribunal a party might have good reason for requesting court assistance. It was added that such requests might be made to courts in the State of the place of arbitration or in another State.

3. It was observed that in a number of States there were no provisions dealing with the power of courts to issue interim measures of protection in favour of parties to arbitration agreements; the result was that in some States, courts were not willing to issue such interim measures while in other States, it was uncertain whether and under what circumstances such court assistance was available. It was said that, if the Working Group decided to prepare uniform provisions on that topic, the ILA Principles on Provisional and Protective Measures in International Litigation (see para. 8 below), as well as the preparatory work that led to those Principles would be useful in considering the content of the proposed uniform rules.

4. The Working Group took note of the proposal and decided to consider it at a future session.

5. This note provides a preliminary examination of some of the issues related to the ordering by courts of interim measures of protection in support of arbitration. The Working Group may wish to consider the discussion set forth in this note with a view firstly, to deciding whether it is desirable or feasible to prepare uniform rules or provisions on these issues and secondly, if further work is desirable, to enable the Secretariat to prepare a draft text for consideration at a future session.

A. General Remarks

6. Interim measures of protection play an essential role in every legal system in facilitating the process of dispute resolution. The aims of such measures are broadly twofold: to preserve the position of the parties pending resolution of their dispute and to ensure the enforceability of the final judgment.

7. Different legal systems have characterized interim measures of protection in different ways and using different classifications. In addition, the scope and variety of interim measures of protection available differ from country to country. This can lead to situations in disputes with an international element where the applicant for an interim measure of protection may be forced to apply to the courts of a foreign country where the measures of protection that may be available and the conditions which need to be met in order for such measures to be ordered are unfamiliar. Yet, there is an ever growing number of requests for effective interim relief on an international level, firstly, because of the ease and speed with which assets can be

transferred in the modern world to avoid a court judgement or an arbitral award, and secondly, because contracting parties have higher expectations of their ability to enforce their rights. The fear is that an unscrupulous party might, for example, sell the goods or, even more obviously, transfer funds out of the jurisdiction prior to the judgement, given that modern methods of international bank transfers allow money to be transferred extremely fast.

8. The problems concerning the effectiveness and availability of interim relief on an international level have been the subject of many studies, including work done by the group of experts under the aegis of the International Law Association (ILA). At its 67th Conference in 1996 the ILA adopted the "Principles of Provisional and Protective Measures in International Litigation"[1] (the "ILA Principles", reproduced in paragraph 108 of document A.CN.9/WG.II/WP.108). The ILA Principles seek to establish rules of general application for the assistance of law reformers both at the national and international level on the exercise by courts of independent jurisdiction for granting provisional and protective measures with the objective of securing assets out of which an ultimate judgement may be satisfied.[2] The Principles were drafted bearing in mind "a paradigm case of measures to freeze the assets of the defendant held in the form of sums on deposit in a bank account with a third party bank".[3] The ILA recommended these Principles for possible use by UNCITRAL and the Hague Conference on Private International Law and in national statutory reforms.[4] It must be noted however that these Principles were drafted with the international litigation process in mind, as opposed to interim measures granted by a court in support of an international arbitration.

9. The process for obtaining interim measures of protection in arbitration is full of added difficulties. While not the case in all States, it is now widely recognized that parties may apply either to the arbitral tribunal or to the courts for interim measures of protection. However this freedom to choose is limited in a number of situations. First, the power of the arbitral tribunal to issue interim measures of protection is often limited to what the parties have agreed or by the institutional rules that they have chosen to govern their arbitration. Second, the tribunal may only grant interim measures of protection directed to the parties to the dispute.[5] Third, the tribunal can only act once it has been constituted. Therefore, before the tribunal is in existence, interim measures of protection have to be obtained from the court. Fourth, the power of the courts is also restricted. Where a valid arbitration agreement is in existence, this has been regarded by some courts as a decision by the parties to exclude the jurisdiction of the courts and would preclude the granting of interim relief. The courts in a number of countries have tried to establish the limits of this exclusion and the result is that a number of precedents are slowly building up, defining the situations in which the court may legitimately intervene to support the work of the arbitral tribunal without usurping its authority. Unfortunately, the conclusions being reached vary from country to country, making it difficult to predict the extent to which a national court may be prepared to intervene. Broadly however, a distinction is drawn between the time before the arbitral tribunal has been convened and afterwards. As noted above, before the tribunal has been convened, the court is generally the only body with the power to order interim measures of protection and the range of measures which the court

[1] The International Law Association, Report of the sixty-seventh Conference held at Helsinki from 12-17 August 1996 - Committee on International Civil and Commercial Litigation, Second interim report on provisional and protective measures in international litigation, published by the ILA, London 1996.

[2] The principle of independence of the jurisdiction to grant provisional and protective measures is in line with Article 24 of the 1968 Brussels Convention (and Lugano Convention) on Jurisdiction and Enforcement of Judgements.

[3] The International Law Association Report, page 186.

[4] The International Law Association Report, page 201.

[5] This follows from the consensual nature of the arbitration agreement: it is the parties who agreed to the resolution of their dispute by arbitration and no one else. If an order is required that would bind third parties, it will be necessary to have recourse to the courts.

can order at this stage is broader. Once the arbitral tribunal is in existence, it has been suggested that court intervention becomes limited to assisting the arbitral tribunal and providing what is termed "technical assistance" to enable the good administration of the arbitration.[6] In addition, the courts in some countries have held that at no time should the power of the court to issue interim measures of protection extend to a discussion of, or preliminary decision on, the substantive law of the dispute.[7] Finally, in an international dispute where interim relief is sought in a country other than the country where the arbitration takes place, the question of jurisdiction arises: do the national courts have jurisdiction to grant interim relief in support of foreign arbitration and on what grounds?

10. Countries have adopted different approaches to this issue. Some countries have legislation which contains adequate regulations, aimed in particular at the possibility of having recourse to the court not only in cases where the arbitration takes place in the country of the court, but also in cases where the arbitration takes place outside the country yet the debtor's assets, including a non-resident debtor's assets, are in its territory.[8] However, in many countries the law does not provide for this type of assistance by local courts. For example, in some countries, application to the courts for protective measures is only allowed where an application has already been made to that court for a decision on the merits. This is not possible where there is an arbitration agreement in existence. Equally in some jurisdictions, the court may order protective measures only in cases where the arbitration takes place within the jurisdiction of the court, but not abroad.

11. Therefore whilst some countries may already have adequate legislative regimes which address these issues, the Working Group may take the view that the lack of a uniform approach requires that the topic be considered further. A uniform regime may be considered desirable not only from the viewpoint of countries that wish to have a model facilitating the modernisation of law, but also from the perspective of users of arbitration in countries that do have an effective regime, but who may wish to have access to effective court assistance in other countries

12. Having outlined a number of the issues concerning court ordered interim relief in arbitration, the following discussion raises a number of the topics addressed by the ILA Principles and provides background information and explanation. Solutions to these topics may serve as an inspiration for any text that the Working Group might wish to prepare. References to principles in the headings of Part B are to the relevant ILA Principles. Where a Principle is not applicable in the context of international arbitration it has been omitted.

13. It should also be noted that there may be other additional ways to improve the effectiveness and availability of interim relief in international arbitration. It may be possible to clarify arbitrators' powers, in particular with respect to the scope of measures that may be issued, as discussed at paras 69-72 of document A/CN.9/WG.II/WP.108. In addition it has also been noted that improving the enforceability of arbitral tribunal ordered interim relief

[6] ICC, 1993, "Conservatory and Provisional Measures in International Arbitration", ICC Publishing S.A., at page 76.

[7] *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] 1 All ER 664, House of Lords.

[8] For example in one country legislation provides that the powers conferred on the court with regard to interim relief are exercisable even if the seat of the arbitration is outside the country or no seat has been designated or determined. Nevertheless the court may still refuse to grant interim relief if in the opinion of the court the fact that the seat of the arbitration is outside the country makes it inappropriate to do so. Due to the fact that the law has only recently been enacted it is not entirely clear how the courts will exercise this discretion, but it seems likely that if the courts at the place where the arbitration has its seat are themselves competent to order interim measures then the court may regard those courts as the natural forum for the grant of such measures and will itself decline to grant relief.

would help the situation.[9]

B. Possible issues that might be addressed by a uniform regime

a. Scope (Principles 1-2)

14. The Principles adopt a twofold classification of the purposes performed by provisional measures in civil and commercial litigation, (a) to maintain the status quo pending determination of the issues at trial; or (b) to secure assets out of which an ultimate judgment may be satisfied. The distinction is one which is commonly made in national legal systems and reflects the need for different types of relief (the classification of interim measures into different categories was discussed at para. 63, document A/CN.9/WG.II/WP.108). As noted above in para. 8, the Principles focus upon measures in category (b) simply because those measures represent measures commonly available and thus capable of comparative analysis. Should the Working Group decide that work on the development of a set of uniform rules on these issues is desirable, the question of the types of interim measure to which they should apply would need to be considered.

b. Availability of provisional and protective measures (Principle 3)

15. It is desirable that the measures be available to both foreigners and citizens alike and in respect of arbitrations held in both the country of the court issuing the measure and in a foreign country. In some countries, courts will only issue interim measures in support of arbitral proceedings held in that country.[10] In other countries, measures can be ordered in support of foreign arbitral proceedings, subject to certain conditions, for example, that the foreign arbitral award would be enforceable in that country,[11] that full disclosure of the existence of the arbitration agreement has been made,[12] that the request for the interim measure has been made by the arbitral tribunal or that the conditions of the legislation of the country in which the measure is sought are met.[13] In a third category of countries, the position

[9] A/CN.9/468, paras 60-79; At present Germany is the only country to expressly provide for the enforcement of a interim order granted by a foreign arbitral tribunal: German Arbitration Law 1998, Book 10 of the Civil Procedure Code, s.1041(2), 1062(1), (2).

[10] In India courts have interpreted the 1996 Arbitration and Conciliation Act to mean that an Indian court may only order interim relief in support of a domestic arbitration. Two decisions from the High Court of Delhi and the Calcutta High Court have held that because the provision dealing with interim measures by the courts is in Part I of the Act which applies where the arbitration is in India, this means that where the seat of the arbitration is outside India the Indian court has no power to order interim relief. This judgement has been criticized however and there is conflicting case law in existence although the matter is yet to be resolved by the Supreme Court. In addition, in China it would seem that it is not possible to apply for interim relief if the seat of arbitration is not in China.

[11] Austria, s387(2) Exekutionsordnung.

[12] Canada, *Ruhrkohle Handel Inter GmbH et al and Fednav Ltd. et al*, unreported judgement of the Federal Court of Canada, Trial Division T-212-91 supports the view that an arrest may be maintained in a foreign arbitration matter provided full disclosure of the arbitration agreement is made and that proceedings are subsequently stayed.

[13] The German courts do not differentiate between foreign and national arbitral proceedings as long as the Civil Procedure Code provides for a state court's jurisdiction to grant interim relief. Also in Greece, as long as the conditions of the Greek Code of Civil Procedure with regard to interim relief are satisfied, the Greek court will grant interim relief in support of a foreign arbitration.

is not clear either because the relevant legislation does not address the issue or because there have been no reports of cases in which such an order has been sought.[14]

16. In addition, where a measure is sought that affects the assets of a party to the arbitral proceedings, it may not be appropriate to draw a distinction between whether those assets are assets of a resident or non-resident of the country in which the measure is sought, since the purpose of the measure is simply the preservation of assets. In some countries, for example, the law requires that the court have jurisdiction over the respondent before an interim measure can be ordered or enforced, while in others certain measures can only be applied where the assets in respect of which the order is sought, belong to non-resident debtors.

c. Discretionary nature of the award of interim measures (Principle 4)

17. The granting of relief would generally be discretionary rather than mandatory and subject to certain specified considerations. Those might include, for example, consideration of the merits of the applicant's case and the relative consequences to the parties if the measure is either granted or refused. This may be problematic in the area of arbitration where case law in a number of countries shows that courts are not prepared to issue interim relief in any situation which would involve a preliminary discussion of the merits of the case. Nevertheless the willingness of the court to grant the interim measure usually depends to a greater extent on the urgency of the measure and the potential damage to the applicant should the measure be refused. If it is clear that the applicant is not merely trying to frustrate the arbitral proceedings it would seem that there is a greater chance that the measure will be ordered and the court will get around the problem of having to look at the substantive issues.

d. Hiding of assets (Principle 5)

18. The Principles recognize that the respondent should not be able to hide its assets by putting them into, for example, a corporation or a trust, while still remaining either de facto or beneficially the owner of the assets. While stating the general principle, the ILA Committee noted that this problem was a complex one and required further research and elaboration.

e. Due process and protection for the respondent (Principles 6-8)

19. While it might not always be possible to give the respondent prior notice that an order for interim measures is being sought, particularly where the element of surprise is important, as a general rule the respondent is entitled to be informed promptly of the measure ordered. Consistent with article 18 of the Model Law, the respondent should be given the opportunity to be heard within a reasonable time and to object to the provisional and protective measure.

20. As another measure of protection for the respondent, the court may need to have the authority to require security or other conditions (such as an undertaking by the applicant to indemnify the respondent if the measure proves to be unjustified) from the applicant for the potential injury to the respondent or to third parties which may result from the granting of the order, such as where the order is, for example, unjustified or too broad. If an undertaking as to damages might prove insufficient and the court considers ordering security, an additional consideration might relate to the ability of the applicant to respond to a claim for damages for such injury. In some countries, interim relief will only be ordered where the applicant gives at least an undertaking as to damages, the amount of the undertaking depending upon the type of measure requested, this being a common determinant of the conditions attaching to an interim order.[15]

[14] In the US for example there is no provision in US state statutes or the Federal Arbitration Act allowing interim remedies by the courts when the parties have agreed to arbitration. However the US courts have often derived their authority to provide interim relief from state law. See further: *David L. Threlkeld & Co. v. Metallgesellchaft Ltd,* 923 F.2d 245, 253 No. 2 (2d Cir.1991) *Borden Inc. v. Meiji Milk Products Co. Ltd.*, 919 F. 2d 822 (2d Cir. 1990)

[15] For e.g. in Sweden, section 6, chapter 15 of the Procedural Code prescribes that giving

f. Access to information concerning the respondent's assets (Principle 9)

21. In some countries little relief is available to an applicant in the area of access to information concerning the respondent's assets and the applicant may have no legal right, for example, to be informed by a third party as to the assets held at the bank by the respondent. Other legal systems make more expansive provision for ancillary disclosure. As the ILA Principles note, there are important competing policies underlying these two different positions; for example, the need for disclosure particularly in fraud cases to enable a applicant to trace and recover assets effectively, as against the importance of maintaining bank secrecy and the right to privacy as to personal financial affairs.

g. Jurisdiction (Principles 10-12, 16, 17)

22. A limitation on the granting of interim measures of relief in support of foreign proceedings may be the requirement that courts of the forum in which the measure is sought have jurisdiction over the substantive dispute. In some countries, for example, some interim measures of protection cannot be ordered unless the substantive proceedings are taking place, or would take place, in a court of that jurisdiction or in an arbitral tribunal within that jurisdiction. In other cases, the provision for the granting of interim relief in support of foreign court proceedings is limited to a group of convention countries (e.g. the 1968 Brussels's Convention) while in others it will apply to foreign court proceedings anywhere in the world without the need for the party seeking relief to establish any basis on which the court of the country in which relief is sought could assess jurisdiction in relation to the substantive issues in the claim. In such jurisdictions, the courts have indicated that the relief should not be limited to exceptional cases,[16] provided that it is not granted as a matter of routine or without very careful consideration. Such considerations might include, for example, whether the interim relief might hamper or obstruct the management of the case by the court seized of the substantive proceedings; or give rise to a risk of conflicting, overlapping or inconsistent orders in other courts; and whether the primary court was requested to give such relief and declined to do so.

23. The ILA Principles propose that jurisdiction could be derived from the mere presence of assets, subject to conditions which include that the presence of assets (or, in fact, the granting of an interim measure of protection in relation to those assets) should not be used in and of itself as a basis for founding more general substantive jurisdiction, a condition which reflects the common position in a number of different countries; the applicant would have an obligation to file a substantive action, within a reasonable time, either in the forum or abroad and there should be a reasonable possibility that any judgement rendered abroad would be recognized in the forum which granted the interim relief.

24. Where the court is properly exercising jurisdiction over the substance of the matter, the wide scope of orders that may be made over the respondent personally is a feature of the law of many countries. The court's power would cover issuing provisional and protective orders addressed to a respondent personally to freeze his assets, irrespective of their location and regardless of whether the respondent is or was physically present within the jurisdiction.

25. Where, however, the court is not exercising jurisdiction over the substance of the matter, and is exercising jurisdiction purely in relation to the grant of provisional and protective measures, there is a need for caution. The court's jurisdiction may need to be restricted to assets located within the jurisdiction, in particular to ensure that third parties are protected

security for an interim measure of protection is essential for the granting of the measure. The security can be in the form of a personal letter or guarantee or a pledge. Bank guarantees are also accepted. If the applicant cannot put up sufficient security he can be exonerated from this demand only by showing extra-ordinary grounds for his claim (The Execution Code Chapter 2 Section 25).

[16] See for e.g. the UK case of *Credit Suisse Fides Trust v. Cuoghi* [1998] Queen's Bench Division 818

from the conflicts of jurisdiction which might otherwise arise. Subject to international law, national rules (including rules of the conflict of laws) will determine the location of assets.

h. Duration of the validity of the interim measure (Principle 13)

26. The provisional and protective measure should be valid for a specified limited time. This principle is connected with the respondent's right to be heard. It may also be important where the measure sought may be controversial, such as an *ex parte* measure, or where it has the potential to be particularly onerous on the respondent if prolonged. In the case of *ex parte* measures, the requirement that the applicant return to the court for a renewal of the measure will allow the respondent to be heard at that time. The court can then consider renewal in the light of developments in the arbitral tribunal where the substantive action is being heard.

i. Duty to inform (Principle 15)

27. The applicant for provisional and protective measures should be required to promptly inform the arbitral tribunal of orders that have been made at the applicant's request. It is also important that the applicant be required to inform the court requested to make an interim order of the current status of arbitration proceedings on the merits and proceedings for provisional and protective measures in other jurisdictions (the duty to inform is discussed in the context of enforcement of interim measures in document A/CN.9/WG.II/WP.110 at para. 64).

j. Cross-border recognition and international judicial assistance (Principles 18-20)

28. While not seeking to impose an obligation to recognize orders made in other States or to cooperate with courts or arbitral tribunals in other jurisdictions, encouraging cooperation in the making of local complementary orders may lead to tangible results, both in recognition and judicial assistance. At the request of a party, a court may take into account orders granted in other jurisdictions. Further, it may be appropriate for courts to co-operate where necessary in order to achieve the efficacy of orders issued by other courts, and to consider the appropriate local remedy.

29. The fact that an order is provisional in nature, rather than final and conclusive, should not by itself be an obstacle to cooperation or even recognition or enforcement (enforcement of interim measures is addressed in document A/CN.9/WG.II/WP.110 paras. 52-80).

II. Scope of interim measures that may be issued by arbitral tribunals

30. Legislative solutions regarding the power of the arbitral tribunal to order interim measures of protection are not uniform. In some jurisdictions, the power is implied. In other jurisdictions there are express provisions empowering the arbitral tribunal to order interim measures. According to some arbitration laws, the power of the tribunal to order interim measures depends on the agreement of the parties, and the law limits itself to recognizing the effectiveness of the parties' agreement to grant such power to the arbitral tribunal. There are also jurisdictions where the arbitral tribunal is deemed not to have the power to order interim measures and it is considered that the parties cannot confer such power on the arbitral tribunal. Many sets of arbitration rules empower the arbitral tribunal to issue interim measures of protection (e.g., article 26 of the UNCITRAL Rules). The rules and laws that do empower the arbitral tribunal to issue interim measures typically leave a broad discretion to the arbitral tribunal as to how it should exercise that power.

31. The Working Group considered (at its thirty-second session in March 2000) the desirability and feasibility of preparing a harmonized non-legislative text on the scope of interim measures of protection that an arbitral tribunal might order and the accompanying procedural rules (A/CN.9/468, paras. 80-84). In that discussion wide support was expressed for the preparation of a non-legislative text, such as guidelines or practice notes, which would discuss issues such as the types of interim measures of protection that an arbitral tribunal might order; discretion for ordering such measures; and guidelines on how the discretion is to be exercised or the conditions under which, or circumstances in which, such measures might be

ordered. It was suggested that the clarification provided by such guidelines should be broad in scope and should cover all interim measures of protection mentioned in paragraph 63 of document A/CN.9/WG.II/WP.108 (i.e. (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award). However, it was added that the guidelines would be particularly useful for measures with respect to which court enforcement was more frequently needed.

32. It was agreed that the Secretariat should prepare a document that would analyse rules and practices regarding interim measures of protection issued by arbitral tribunals and set forth elements for a future harmonized non-legislative text. The Working Group was aware that the information needed for the preparation of the document was not readily available and therefore requested the States and international organization participating in the considerations of the Working Group as well as experts interested in its work to send to the Secretariat relevant information (e.g. arbitration rules, academic and practice writings, as well as examples of texts of interim measures of protection ordered omitting the names of parties and other confidential information). The Secretariat is currently collecting that information and preparing a study, which includes a draft outline of possible guidelines, for consideration by the Working Group at a future session. Preliminary work indicates that the following issues might be included in possible guidelines: the types of interim measures that might be ordered by an arbitral tribunal; the procedural steps preceding the issuance of an interim measure of protection; the exercise of the discretion to order an interim measures and matters relating to the order once it has been issued, such as the content of the order, the consequences of a failure to comply, and modification of the measure. The Working Group may wish to consider the study being prepared at a future session with a view to deciding whether any action by the Commission is warranted.

III. Validity of the agreement to arbitrate

33. At its thirty-second session, the Working Group considered possible topics for future work which included questions relating to the interpretation of legislative provisions such as those in article II(3) of the New York Convention (or article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration) (A/CN.9/468, paras. 107-114). In practice, those provisions have led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the respondent invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued (A/CN.9/468, para. 108). The Working Group expressed the view that those issues were of significant practical importance as they caused uncertainty and, potentially, delay in a number of States. The Secretariat is currently preparing a study which examines how those issues have been dealt with by the courts and the extent to which interpretations diverge. Preliminary research indicates that although article 8 of the Model Law and article II(3) of the New York Convention are broadly similar they have tended to be interpreted differently in some respects in national courts. In considering the validity of the arbitration agreement, courts examining the issue in respect of article 8 have tended to limit themselves to a *prime facie* examination of the case, whereas courts examining the same issue under article II(3) have adopted the approach that they have "full power" to examine the arguments, including taking evidence if necessary, in order to examine not only compliance with formal requirements but also substantial validity. The Working Group may wish to consider the study being prepared at a future session with a view to deciding whether any action by the Commission is warranted.