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**United Nations Commission on
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Submission from the Government of Costa Rica

This note reproduces a submission received on 22 March 2019 from the Government of Costa Rica 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

Options for implementing a workplan for Working Group III

1. Costa Rica participates since 2017 in Working Group III (WG III) to contribute to the global discussion on improvements to the Investor-State Dispute Settlement System (ISDS). Costa Rica has 21 international investment agreements in force with an ISDS mechanism (8 FTAs, 15 BITs). Furthermore, it has been respondent to 9 ISDS cases.
2. Given its practice and experience, the country has decided to engage in the discussions of WGIII and participate, as far as possible, in developing relevant solutions. In line with this objective and as required in the Working Group's 36th session, Costa Rica submits for the consideration of Member States a proposal for the development of a workplan for stage three of the mandate of WGIII.

How the concerns that the WGIII identified as desirable for reform should be addressed

3. Costa Rica supports a pragmatic and balanced approach to reform in order to achieve meaningful results within a reasonable time. It recognizes that the Working Group will require flexibility to develop and implement different solutions in the short, medium or long term.
4. This means that Costa Rica accepts, as a matter of general principle, the possibility of "early harvests", while not excluding future reform of a broader scope. In its view, such approach will not only allow immediate benefits in key areas; it will also endow greater legitimacy to the work of WGIII. "Early harvests" may also be building blocks for more complex reforms.
5. Costa Rica also encourages participants to discuss solutions together with the proposals on the form they might adopt (for example, guidelines, convention, code of conduct). From its point of view, this will help governments to assess the feasibility of proposals. Clearly, because not all Member States have the same concerns, the process should ensure enough flexibility so that they can choose to adopt the solutions and form that best suits their specific interests.

Sequencing, priority and multiple tracks

6. Costa Rica noted the views expressed by the WGIII in the 36th session regarding sequencing and prioritisation. In this area, it shares the view that some kind of priorities need to be set in order to enable an effective and efficient discussion. In this regard, Costa Rica suggests that the discussions should address the solutions in stages.
7. Thus, it proposes that the Working Group considers prioritising reform options where there seems to be consensus and considering the most pressing concerns. In Annex I, Costa Rica provides an indicative list of solutions by category of concern. These priorities should, preferably, be defined in the April 2019 meeting. In doing so, Member States could use as guidance the views expressed regarding the effects and frequency of a concern, the relative relevance to ISDS procedures, a solution's feasibility and whether a solution might be useful to address multiple concerns.
8. Informal consultations and drafting groups are considered a useful resource once there is common ground, in order to reserve meetings for deliberations on topics where there is no consensus. The Working Group could also engage in parallel tracks with regards to other issues of interest which have not been included in the prioritisation through side meetings.
9. Colloquia, conferences or expert presentations related to the topics under discussion could be considered for the first day of meetings, or after each day

meetings. In Costa Rica's view, organizing them outside of the meeting week would result in increased costs of participation.

10. Costa Rica participated in the intersessional regional meeting in Dominican Republic and considers that it was productive and useful in this stage of the process. Costa Rica also encourages use of electronic means for intersessional work. Future drafting sessions could be organized on the weekend before the meeting, in order to bring in the greatest number of participants.

Coordination with other organizations and working groups

11. Costa Rica believes that the discussions of WGIII could benefit from the outcomes of the ICSID Rule Amendment. While it is understood that not all countries represented in WGIII will be covered by such reform, the procedural tools included in the ICSID Rules could help to address matters of consistency, impartiality, independence, cost and duration.

12. Also, there is a significant amount of analysis on these topics occurring in other organizations, such as UNCTAD, the WTO and OECD. This work should be brought into the discussions. Cooperation among international organizations is fundamental for a successful outcome of WGIII discussions.

13. As to the possibility of another working group taking work related to that of WGIII, Costa Rica considers that it is inconvenient. As has been recognized in WGIII and other fora, ISDS procedures assess matters of public interest and arbitration cannot be applied without consideration of this feature. Costa Rica would prefer to address ISDS-related matters in a context of public policy makers and implementers.

14. Additionally, WGIII has spent a productive and significant amount of time and resources on debates about these difficulties that would be more efficiently undertaken through centring the discussion on WGIII. It is also important to consider the potential resource constraints that Member States could face if they have to participate in various working groups.

An open and inclusive process

15. Apart from the WGIII deliberations being government led, input from civil society, the Academic Forum and the Practitioner's Forum should form part of the process to develop solutions. This is important in order to benefit from the widest possible points of view and experience.

Annex I

Indicative list of solutions by category of concern

- (a) **Lack of consistency, coherence, predictability and correctness of arbitral decisions**
- Joint interpretations, as well as the mechanisms to implement them with regards to treaties.
 - Consultation of State authorities by arbitral tribunals (for instance, with regards to nonconforming measures, financial services or taxation measures).
 - Non-disputing Treaty Party submissions.
 - Strengthening involvement of State authorities to respond to consultations, as a means of dispute prevention and dispute resolution other than arbitration.
 - Legal standards to limit claims by different entities within the same corporate structure.
 - Mechanisms to address concurrent proceedings when the same measure has impact on several investors.
- (b) **Arbitrators and decision-makers**
- Development of a Code of Conduct for arbitrators and decision makers.
 - Requirements for arbitrators.
 - Improvements to current system of appointment and challenge of arbitrators, including pledge for diversity.
 - Sanctions for not complying codes of conduct.
 - Control system for challenges of arbitrators.
- (c) **Cost and duration of ISDS**
- Good practices for dispute prevention.
 - Rules for third-party funding.
 - Mechanisms for dismissal of frivolous claims at an early stage.
 - Tools to reduce costs.
 - Tools to streamline procedures.
 - Guidelines on allocating costs and for establishing security for costs.
 - Advisory centres.
 - Counterclaims by Respondent States.
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