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Submission from the Government of Turkey

This note reproduces a submission received on 8 July 2019 from the Government of Turkey in preparation for the thirty-eighth session of Working Group III. The submission is reproduced as an annex to this Note in the form in which it was received.

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Annex

Without prejudice to Turkey's final position, this document reflects Turkey's preliminary views on the policy options to reform the current ISDS system. During the preparation of this document, the opinions of government authorities as well as NGOs, academia, and the business have been asked in the light of their past experience with the current ISDS system.

Turkey, as a capital importer and exporter, is of the view that foreign direct investment (FDI) is beneficial for the development of countries that suffer from capital shortage. In this respect, the promotion and protection of FDI and the settlement of investment disputes through a reliable, cost-effective, and predictable system carry great importance, not only for investors but also for capital seeking host countries.

Turkey's past experience with the ISDS system illustrates the fact that even though the current system functions to a certain extent, it could be improved to become more reliable, cost-effective and efficient. To this end, in its own capacity, Turkey has been revising and renegotiating its bilateral investment treaties (BITs) by taking into consideration past arbitral decisions and developments in the international investment rule-making to provide a better legal base for the settlement of investment disputes. However, given the high number of BITs that should be revised, Turkey considers that simultaneous reforms must be done in the other parts (institutional and procedural rules, code of conduct for arbitrators, and financial regulations) of the ISDS system with the contributions and involvement of all stakeholders. In this context, Turkey considers UNCITRAL as a suitable multilateral platform to discuss and adopt the reforms that the current ISDS system needs.

In this framework, we wish to bring forward the following points:

I. Inconsistency

To avoid multiple proceedings, soft law instruments may be introduced to deter claimant from filing the same claim at different arbitral, judicial or administrative institutions. Soft law has a legally non-binding nature and may vary, such as institutional resolutions, principles and declarations.

II. Arbitrators and decision makers

- **Developing a binding code of conduct and other ethical requirements** for arbitrators, decision makers and other persons involved in the ISDS regime (counsels, experts etc.) is highly recommended to sustain transparency and avoid double-hatting as well as conflict of interest.
- **Appointment of arbitrators through transparent methods to avoid lack of diversity,** in order to prevent double-hatting and functioning of the same persons as arbitrators in various cases simultaneously, a comprehensive illustrative list of arbitrators and a database indicating the workload and timeframe of those arbitrators may be prepared by UNCITRAL for the use by both claimants and respondents. Such a comprehensive list would also increase the geographical diversity and the participation of women. During the preparation of such a list, governments, international organizations, NGOs, and academia would be asked to forward their nominees to be added to this list. World Trade Organization (WTO) Secretariat maintains such an indicative list of names for trade disputes, from which panellists may be drawn. In preparing and maintaining an indicative list, UNCITRAL may benefit from the WTO experience.

III. Cost and Duration

- **Establishment of an early or expeditious dismissal mechanism through** developing good practices and institutional information mechanism and introducing innovations in arbitration rules; such as rules for early dismissal of frivolous and unmeritorious claims.
- **Introduction of clear rules or mechanisms for security for estimated arbitration** cost to ensure recovery of costs borne by the respondent States carry utmost importance given the fact that many frivolous claims have been brought so far. Claimants should deposit a reasonable portion of the estimated arbitration cost after their application is accepted.
- **A non-profit, international advisory centre** may be established by UNCITRAL to provide low cost legal advice and advocacy support particularly for developing and less-developed host States and SMEs.
- **Third-party funding** should be transparent and subject to clear regulations. Contracts between the claimant and the funder should be open to the review of counsels and arbitrators, and the amount of the return that would be taken by the funder should be limited to a reasonable portion of compensation.
- **Challenges of arbitrators should be regulated** to avoid tactical challenges to be made to prolong the arbitral process.
- **A mandatory "declaration of workload" and/or "availability"** should be submitted by the nominated arbitrators during the appointment process to avoid prolonging the establishment of tribunals and conflict of interest.
- **Alternative dispute resolution procedures such as mediation, conciliation and expedited arbitration procedures may be supported** since these procedures are faster than the common arbitration procedure under the arbitration rules. In addition, expedited arbitration procedure is deemed more appropriate for disputes that are less complex and/or relate to smaller amounts.