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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Government of Costa Rica

Note by the Secretariat

This note reproduces a submission received on 30 July 2019 from the Government of Costa Rica 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.



Annex¹

1. During the thirty-seventh session of Working Group III (Investor-State Dispute Settlement Reform), Member States were encouraged to submit to the Secretariat their comments “on what other solutions to develop and when such solutions might be addressed in terms of the project schedule”.²
2. Costa Rica trusts that the discussions in Working Group III can positively impact the ISDS system. Moreover, we believe that this process can deliver results to improve the proceedings, in the short, medium and long term, and could become a basis for other more profound reforms.
3. Costa Rica hereby submits its comments to contribute to the development of a project schedule to continue the discussion of possible solutions and achieve concrete progress during the third phase of the mandate of Working Group III. Costa Rica proposes a method that includes a definition of objectives and thematic priorities for discussion.
4. In our view, and as has been also expressed by other Members in previous meetings, any discussion in Working Group III shall address ways to achieve balance among the parties to the dispute, as well as means to foster accountability, legal certainty and good governance of the arbitration process. To do so, it is important that Members define elements such as objectives, expected outcomes, indicative time frames and indicators of progress for the discussions. This will help to obtain concrete results and to organise the work. In Annex I of this document, we provide, for Working Group III’s consideration, an example to illustrate this.
5. In addition, Costa Rica considers that an order for discussion of topics needs to be determined to guarantee an efficient process. In our view, this is also necessary for the project schedule.
6. When considering this sequencing, we suggest taking into account: (i) the degree of support expressed by Members for specific solutions; (ii) whether solutions have been included in existing treaties; or (iii) whether the concerns have already been addressed through procedural rules or in the ICSID Amendment process. This can serve as an indicator of an ongoing trend with regards to improvements in the ISDS system, and of agreement among a number of countries.
7. In line with our previous submission,³ we share with the Members in Annex II to this document our preference for the order of the topics.
8. From our perspective, there is no one size fits all solution and, thus, flexibility should be at the core of any Working Group III discussion. Likewise, while we are submitting an approach, we are open to explore and adopt other methods proposed by other Members.
9. Another point on the definition of a schedule relates to the discussion on what form the potential solutions will take. Costa Rica considers that the solutions should be discussed together with the possible forms that they could adopt (for example, guidelines, convention, toolbox, treaty clause, among others). We suggest including time slots for this discussion in the project schedule. Having some idea of the type of instrument that Members are willing to adopt can facilitate domestic consultations and contribute to focus the discussions.
10. The elements mentioned above are those that we believe should guide the construction of a project schedule. We expect that our thoughts in this regard can add value to the upcoming meeting and help in moving forward the process. From Costa Rica’s point of view, the “early harvests” that can be reached from Working Group III

¹ The comments included in this document are without prejudice of future proposals, observations or modifications in Costa Rica’s position resulting from the Working Group III process.

² [A/CN.9/970](#) – Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session.

³ [A/CN.9/WG.III/WP.164](#) – Submission from the Government of Costa Rica.

are not isolated outcomes. On the contrary, each of them serves to a greater purpose and the sum of all of them is, in itself, a holistic reform.

11. Costa Rica's proposed approach pursues positive results in the ISDS system. We estimate that applying a method to define the project schedule can provide for: (i) a greater legitimacy of the work of Working Group III; (ii) improvements to the system, such as, in the short term, tool kit options to implement in ongoing proceedings and, in the long term, more transparent, more efficient and less expensive proceedings; (iii) finding consensus on building blocks for more complex solutions; and (iv) more information to facilitate the adoption of public policies.

Annex I: Example chart of a project schedule

<i>Type of concern</i>	<i>Concern</i>	<i>Objectives</i>	<i>Desired outcomes</i>	<i>Time frames</i>	<i>Indicators of progress</i>
I. Arbitrators and decision makers	Code of conduct	To agree on a guideline that contains best practices.	Early harvest: Guidelines for the conduct of arbitrators and decision makers.	II quarter 2020.	<ul style="list-style-type: none"> - Preparatory meetings for drafting. - Submit the draft to the Commission. - Final publication.
		To issue a code of conduct to be used in proceedings.	Final outcome: Code of conduct.	I quarter 2021.	<ul style="list-style-type: none"> - Preparatory meetings for drafting. - Submit the draft to Commission. - Final publication.
II. Lack of consistency, coherence, predictability and correctness of arbitral decisions					
III. Cost and duration of ISDS					
IV. Other concerns					

Annex II: Costa Rica's priorities

(a) Lack of consistency, coherence, predictability and correctness of arbitral decisions

1. Non-disputing Treaty Party submissions.
 2. Strengthening involvement of State authorities to respond to consultations, as a means of dispute prevention and dispute resolution other than arbitration.
 3. Joint interpretations, as well as the mechanisms to implement them with regards to treaties.
 4. Consultation of State authorities by arbitral tribunals (for instance, with regards to non-conforming measures, financial services or taxation measures).
 5. Mechanisms to address concurrent proceedings when the same measure has impact on several investors.
 6. Legal standards to limit claims by different entities within the same corporate structure.
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(b) Arbitrators and decision makers

1. Development of a Code of Conduct for arbitrators and decision makers.
 2. Requirements for arbitrators.
 3. Improvements to current system of appointment and challenge of arbitrators, including pledge for diversity.
 4. Control system for challenges of arbitrators.
 5. Consequences for not complying with codes of conduct.
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(c) Cost and duration of ISDS

1. Good practices for dispute prevention.
 2. Tools to reduce costs.
 3. Guidelines on allocating costs and for establishing security for costs.
 4. Mechanisms for dismissal of frivolous claims at an early stage.
 5. Rules for third-party funding.
 6. Counterclaims by Respondent States.
 7. Advisory centres.
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