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Comments to the Draft Working Group III Workplan

Columbia Center on Sustainable Investment
Columbia Law School, ccsi@law.columbia.edu

International Institute for Environment and Development
inforequest@iied.org

International Institute for Sustainable Development
info@iisd.org

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Workplan Submission

1 March 2021

Submission to UNCITRAL Working Group III on ISDS Reform, contributed by the Columbia Center on Sustainable Investment (CCSI), the International Institute for Sustainable Development (IISD), and the International Institute for Environment and Development (IIED)

Pursuant to an invitation from the Chair of Working Group III in his letter dated 1 February 2021, CCSI, IISD, and IIED are pleased to submit the following comments on the draft work and resourcing plan (the Plan).

I. Importance of Facilitating Participation of Developing States, Observers, and the General Public

When giving Working Group III its mandate, delegations noted that they viewed UNCITRAL as an appropriate venue for ISDS reform negotiations given its nature as multilateral forum that enabled work in an “inclusive and transparent manner, where the interests not only of States but also of other stakeholders could be considered.” (Commission, 50th Session, para. 258) Accordingly, the Commission’s mandate directed WGIII to ensure the work would be based on input “from all Governments” and be “fully transparent.” (Commission, 50th Session, para. 258)

Many delegations, particularly developing States, face capacity constraints that limit their effective participation in the process. The proposed Plan envisions a significant increase in work and shifts in modes of working that seem likely to exacerbate those challenges. This raises questions about whether and how the Working Group can comply with the Commission’s mandate and how the work can be conducted consistently with the United Nations Sustainable Development Goals’ call for “responsive, inclusive, participatory and representative decision-making at all levels” (SDG target 16.7). We therefore suggest some steps that could help facilitate openness and engagement.

A. Opt-in vs. opt-out participation

The Working Group may wish to consider conducting all intersessional work, including meetings, drafting groups, and other initiatives, on an opt-out rather than opt-in basis. Only a limited number of States were involved in developing the Plan, and we understand that almost all States involved were developed States. An opt-out rather than opt-in basis would help ensure broader access to the process without requiring further steps from delegations, ensuring all stay informed and can engage at any time, unless they explicitly express their wish not to participate in a given discussion.

B. Translation for intersessional work

The Plan envisions that intersessional work will significantly increase over the coming three years. Many States will be unable to engage in this process without translation services for meetings and documents. We are

concerned about the impact that the lack of translation will have on delegations' abilities to effectively participate in the intersessional work. We suggest that the perspectives of non-English speaking delegations on this issue be given particular consideration and weight before the Plan is agreed and funding requests based upon it are submitted or decided.

C. Transparency of the WGIII process

Intersessional drafting and other work should be transparent. It could be automatically provided to all delegations, both States and Observers, via online communications, and/or to the general public on the UNCITRAL website. Policies regarding what is or will be shared, with whom, and when, should also be published. Transparency should also be provided with respect to which experts are being called upon to conduct research or develop or review drafts of documents. This should involve the publication of the names of such experts and their respective roles in the process.

II. Importance of Incorporating All Issues and Concerns Identified by the WGIII

The WGIII has identified critical “cross-cutting” issues and has agreed that these issues should be incorporated into ISDS reform solutions ([WGIII 37th Session Report](#)).¹ These cross-cutting issues include: means other than arbitration to resolve investor-State disputes, exhaustion of local remedies, calculation of damages, third-party participation, and regulatory chill. CCSI, IIED, and IISD made a [2019 submission to WGIII](#) setting forth how these issues might be considered.

Despite the WGIII’s agreement that these issues should be incorporated systematically into its work, these issues have been notably absent from Session agendas, deliberations, and intersessional work; are largely absent in working papers drafted by the Secretariat; and, most notably, are not expressly included in the Plan.

The Plan should incorporate or earmark specific, dedicated time to:

- Ensure the “cross-cutting” issues are meaningfully considered during the course of each reform solution, and/or
- Devote specific and allocated time to consideration of all cross-cutting issues and how they will be addressed in the WGIII’s reform solutions.

We believe that, as the Commission emphasized, this project must be broad and inclusive – both in terms of the process and the issues addressed. We thank you for the opportunity to give input.

¹ In addition to the oral interventions by delegations on these issues, see written submissions by, e.g., Indonesia (WP.156 (referring to exhaustion, regulatory chill, and damages)), the EU and its Member States (WP.159 & Add. 1) (referring to participation by third-parties)), Morocco (WP.161 (referring to exhaustion and damages)), Brazil (WP.171 (referring to regulatory chill)), Colombia (WP.173 (referring to exhaustion and damages)), Ecuador (WP. 175 (referring to participation by third-parties)), South Africa (WP. 176 (referring to exhaustion, impacts on third-parties, regulatory chill)), China (WP.177 (referring to impacts on the right to regulate)) Mali (WP.181 (referring to exhaustion, damages, and the right to regulate)), and Burkina Faso (WP.199 (referring to damages)).