# Investor-State Dispute Settlement (ISDS) Reform

Submission by the Corporate Counsel International Arbitration Group (CCIAG)
to UNCITRAL Working Group III

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## I. Introduction and Executive Summary

1. The Corporate Counsel International Arbitration Group (CCIAG) is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution. The CCIAG offers this submission as an observer in UNCITRAL Working Group III. In this submission, we articulate the views of a wide range of investors that have experience using investor-state dispute settlement (ISDS) and that consider the availability of ISDS to be an important consideration in their decisions to invest abroad.

2. This submission is divided into four main parts. In **Section I**, we establish the importance of foreign investment to global economic growth and public welfare. In order to maintain these benefits, governments need to take proactive steps to cultivate an environment conducive to foreign investment, including ensuring access to neutral, independent dispute settlement procedures. In **Section II**, we survey the current ISDS landscape and offer our views on the three essential features of the current system: (1) ensuring balance between the investor and the respondent state; (2) ensuring balance between consistency, correctness, and finality; and (3) ensuring that arbitral awards are enforceable. In **Section III**, we comment on two ISDS reform proposals put forward for discussion at the second stage of the 38th session of the working group in January 2020: the proposed multilateral investment court and appellate mechanism. In our view, these proposals are fundamentally contrary to the interests of both states and investors. They would significantly undermine investor confidence and reduce global investment flows. Finally, in **Section IV**, we offer our support for numerous ISDS reforms that governments have proposed in the working group, including a multilateral advisory center, a code of conduct for arbitrators, and regulation of third-party funding.

3. The CCIAG and the investor community fully support ISDS reforms that will improve the fairness and efficiency of the dispute settlement system for all stakeholders. We are grateful for the opportunity to make this submission and to observe these important discussions in the working group regarding ISDS reform.

## II. Importance of Promoting Foreign Investment

4. As the working group considers ISDS reform, it is important to remember the many benefits that states obtain from foreign investment. Overall, foreign direct investment (FDI) constitutes 38% of global gross domestic product (GDP).[1] The inflow of foreign capital is essential for the growth of the economy, the provision of infrastructure, and continued economic development in the receiving country. Specific benefits for host states include elevated living standards, foreign expertise in local business, development of human capital, transfer of technology, host country tax revenues, and the creation of quality jobs.

5. The data shows the strong link between FDI and job growth. For example, in the United States, FDI was directly responsible for 6.1 million jobs in 2016, and it contributed indirectly to an additional 2.4 million jobs.[2] In Latin America, FDI in new projects created nearly 1.4 million new jobs between 2013 and 2018, and 45% of new jobs in Mexico and

[1] UNCTAD World Investment Report 2019, Regional Fact Sheet: Developed Economies (June 2019) https://unctad.org/Sections/dite_dir/docs/WIR2019/wir19_fs_dvd_en.pdf, at p. 1.

[2] International Trade Administration, Industry and Analysis Economics Brief: Jobs Attributable to Foreign Direct Investment in the United States (Feb. 2016), https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_005496.pdf, at p. 9.

14% of new jobs in Brazil were attributed to FDI-linked projects.[3] In 2018, more than 170,000 jobs were created across the African continent as a result of 710 FDI projects, comprising $75.5 billion in capital.[4]

6. For many firms, foreign investment remains a core strategy to access markets, customers, innovation, and other resources. However, given increasing geopolitical volatility and the general perception of increased risks of cross-border investment, global FDI flows have seen little growth over the last decade. According to UNCTAD, "FDI net of one-off factors such as tax reforms, megadeals, and volatile financial flows has averaged only 1 percent growth per year for a decade, compared with 8 percent in 2000-2007."[5] In 2018, global FDI flows slipped 13 percent.[6] Competition among states to attract foreign capital is increasing.

7. In this environment, it is more important than ever that states take steps to promote and facilitate foreign investment. Among the most important of these is the development of stable and transparent reinvestment regimes protected by access to effective ISDS mechanisms. Numerous multilateral institutions have recognized that access to impartial third-party dispute settlement is one of the key characteristics of a positive investment climate, along with such factors as open competition, predictability, rule of law, lack of corruption, and stability. It is one of the major factors considered by ratings and assessment mechanisms, including the World Bank Group's Ease of Doing Business Index.

8. Investment environments which do not provide such regimes with access to effective dispute settlement tools create uncertainty for investors, which results in suboptimal outcomes for states and investors. Some companies – particularly smaller, more conservative companies that are unable to negotiate investment protections in their contracts – may not invest at all. Other, larger companies may still decide to invest but will require a higher rate of return, a quicker horizon for the investment, or other incentives to mitigate the added risk of uncertainty with negative consequences for civil society. Access to strong investment protections combined with effective ISDS helps avert these suboptimal outcomes.

## III. Survey of the ISDS Landscape and the Essential Features of the Current System

9. The vast majority of the more than 2600 investment agreements currently in force allow investors to initiate ISDS to resolve investment disputes.[7] New investment agreements

[3] Invest in Bogota, Research (Apr. 2018) https://www.efe.com/efe/english/business/mexico-city-bogota-lead-latin-america-job-growth-linked-to-fdi/50000265-3600092.

[4] EY, Attractiveness Program Africa (Sept. 2019), https://www.ey.com/Publication/vwLUAssets/ey-africa-attractiveness-2019/$FILE/ey-africa-attractiveness-2019.pdf.

[5] UNCTAD World Investment Report 2019, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, at p. xi.

[6] UNCTAD World Investment Report 2019, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, at p. x.

[7] *See* UNCTAD World Investment Report 2019, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, at p. 99 (noting that 3317 investment agreements have been signed and 2658 are currently in force); *see also* UNCTAD Investment Dispute Settlement Navigator search conducted Nov. 7, 2019, https://investmentpolicy.unctad.org/investment-dispute-settlement (showing that 2443 of 2577 mapped investment agreements allow for ISDS).

with ISDS are concluded regularly. In 2018, states concluded approximately 40 new investment agreements, which is broadly consistent with the annual rate since 2010.[8]

10. ISDS is a form of arbitration that has been used to resolve all types of investment disputes on six continents for more than 30 years. Overall, states have won more cases than they have lost. According to UNCTAD, of 602 cases concluded as of January 1, 2019, the state prevailed in 36% of cases, the investor prevailed and was awarded monetary compensation in 29% of cases, and the remainder of the cases were generally settled or discontinued.[9] As has been noted by Chile, Israel, and Japan, over 80% of ISDS cases have been concluded under the auspices of early, first-generation agreements that lack the state-friendly innovations incorporated in more recent investment agreements, including more narrowly drafted substantive provisions.[10] While the impact of new forms of investment agreement on investment and disputes are unclear, it seems likely that states' winning percentage will improve even further under these newer agreements.

11. We would highlight three essential features of the current ISDS system.

12. The **first** essential feature of the current ISDS system is balance between the disputing parties. States are the masters of investment agreements. They choose the states with which to negotiate and conclude investment agreements, and they draft the substantive provisions and the dispute settlement rules in the agreements. But states are in a global competition for investment and rightly want to ensure that their agreements are viewed favorably by foreign investors; otherwise the agreements will not serve the purpose of attracting the foreign investment they want, nor achieve the economic and diplomatic objectives associated with concluding an investment agreement. Accordingly, states have aimed to ensure that their agreements create a framework in which states and investors in ISDS cases are treated in a balanced manner.

13. The most important tool that helps to achieve balance between states and investors in ISDS cases is allowing both parties equal participation in the constitution of the tribunal, a key element of party autonomy.[11] Under most investment agreements, the investor appoints one arbitrator, the state appoints one arbitrator, and the co-arbitrators (or the investor and the state) jointly appoint the chair of the tribunal. In addition, arbitral institutions may offer list procedures and other tools to assist with the appointment of the chair if there is disagreement. This balance, resulting from both parties having an equal opportunity to be involved in the constitution of the tribunal, gives both sides confidence that the tribunal will conduct the

[8] UNCTAD World Investment Report 2019, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, at p. 99.

[9] UNCTAD Fact Sheet on Investor-State Dispute Settlement Cases in 2018 (May 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf, at p. 4.

[10] Submission from the Governments of Chile, Israel, and Japan to UNCITRAL Working Group III (Mar. 15, 2019), A/CN.9/WG.III/WP.163, https://undocs.org/en/A/CN.9/WG.III/WP.163, at footnote 4 (noting that 783 of 931 ISDS cases at that time – 84% – had been initiated under investment agreements that were signed before 2000).

[11] There are numerous other examples of provisions that ensure balance between states and investors, including the following: (1) states negotiate the procedural rules, but they generally give investors 2-3 options to choose from, such as the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules; (2) in the conduct of the arbitration, both sides are given due process and equal opportunities to set out their claims or defenses; (3) both sides are accountable for their conduct during the arbitration and can be required to pay attorneys' fees and costs; and (4) both sides have an obligation to treat a final award as binding and enforceable.

proceedings in a fair and impartial manner. It also makes it more likely that both sides will respect the final decision or award.

14. The **second** essential feature of the current system is balance between consistency, correctness, and finality. In the current system, each tribunal is constituted to hear a discrete dispute and there is no strict rule of precedent requiring a tribunal to follow decisions reached by prior tribunals. In practice, tribunals often rely on decisions in previous cases and, as a result, the jurisprudence is generally consistent over time. But the system was not designed to produce *absolute* consistency, in part because of the need to balance consistency and correctness. States and investors have believed that a correct outcome will be more likely if the disputing parties are able to appoint arbitrators who are best-suited for the given case – based on the arbitrator's knowledge and experience[12] – and not confined by precedents, even if binding precedents might yield more consistency. The need for consistency is balanced against the need for correctness.

15. Further, the need for correctness is balanced against the need for finality. Tribunals may make mistakes. While awards can be annulled on limited grounds, such as for due process violations, the control mechanisms in the current system were not designed to correct errors on the merits. States and investors have supported this approach because alternative control mechanisms, such as an appellate mechanism with the power to review and reverse legal conclusions reached by the first-instance tribunal, may result in more correct decisions in some (but certainly not all) cases, but at an unacceptable cost: longer and more expensive proceedings. Reaching a final decision as expeditiously as possible is important to both states and investors.

16. The **third** essential feature of the current system is enforceable awards. ISDS awards are enforceable in nearly every state. The 154 states that have ratified the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") are obligated to enforce ICSID awards with essentially no review, and the 161 states that have ratified the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") are obligated to enforce awards with limited review. The universal enforceability of ISDS awards is critical to states' and investors' confidence in the system. If there is uncertainty regarding enforcement, investors will put little faith in the dispute settlement process, the investment agreement, and ultimately, the safety and security of their existing or prospective investments.

17. Investors will not support ISDS reforms that threaten the equal rights of the disputing parties, the balance between consistency, correctness, and finality, or the enforceability of awards. However, investors support ISDS reform. In particular, investors agree with the working group's conclusion that ISDS cases are too slow and expensive, which poses particular challenges for small-and-medium-sized companies (on the investor side) and less developed countries (on the state side). Investors also agree that steps need to be taken to ensure that arbitrators are free of conflicts of interest. We provide our comments on the suggestions for reform in Section IV.

[12] The arbitrator's knowledge and experience in relation to the applicable law or the industry or region at issue, for example, are viewed as important by both states and investors.

## IV. Critique of the Proposed Multilateral Investment Court and Appellate Mechanism

18. The European Union has proposed to create a multilateral investment court and appellate mechanism to replace the existing ISDS system. As set out below, implementing the EU proposal would undermine the interests of both states and investors as participants in dispute settlement proceedings. Further, investors would question the reliability of any investment agreement that incorporated these mechanisms. For example, some investors would refrain from making new investments or expanding existing investments in jurisdictions in which access to impartial and effective international dispute settlement procedures is critical.

19. The following discussion is divided into two parts. Section A examines the flaws in the multilateral investment court proposal, and Section B examines the flaws in the appellate mechanism proposal.

### A. Multilateral investment court

20. There are many unanswered technical questions about how a multilateral investment court ("MIC") would function in practice, but we submit that now is not the time to address those questions. We believe it is more important to explore the basic, intrinsic features of the proposal to determine whether the court is worth pursuing. This analysis makes clear that the current proposal has at least five flaws that cannot be remedied with technical solutions. The MIC is flawed because it: (1) tilts the balance of the dispute settlement system against investors, who will change their investment decisions accordingly; (2) eliminates party autonomy for both investors and respondent states in the selection of arbitrators; (3) reduces the pool of qualified arbitrators; (4) introduces uncertainty regarding the enforceability of arbitral awards; and (5) introduces uncertainty regarding how dispute settlement proceedings will be funded and maintained over time.

#### 1. The MIC tilts the balance of the dispute settlement system against investors

21. The centerpiece of the proposal for a MIC is a permanent mechanism composed of adjudicators appointed only by contracting states, not investors. UK Chief Justice Hewart is often quoted in support of the MIC – "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" – but investors will not view a system in which only one side appoints the adjudicators as just. Giving investors a role in the appointment of arbitrators is necessary to maintain investors' confidence in the system, and such confidence is critical to ensuring the flow of foreign investment. And the problem goes beyond perception.

22. As a general matter, states are more likely to appoint adjudicators whom they view to be inclined to rule in favor of states. This phenomenon is familiar from the current ISDS system, in which some arbitrators are perceived as "state-friendly" and appointed exclusively by states. The assumption that states "would be expected to appoint objective adjudicators, rather than ones that are perceived to lean too heavily in favour of investors or states, because they are expected to internalize not only their defensive interests, as potential respondents in

investment disputes, but also their offensive interests"[13] is not supported by any evidence and is probably incorrect. The evidence points in the opposite direction.

23. The reality is that few states have offensive interests related to ISDS. According to UNCTAD data, approximately 83% of all ISDS cases have been filed by investors from one of the 36 OECD member states (811 of 983).[14] Overall, approximately 60% of UN Member States have never had one of its investors file an ISDS claim against another state (116 of 193).[15] It is natural that states that always, or almost always, act as respondents – most states – will take a defensive approach when considering the appointment of adjudicators on a court. These states may reap significant benefits from concluding an investment agreement that includes ISDS, *e.g.*, in attracting and promoting foreign investment, but they are still likely to choose adjudicators who see the world from a government's defensive perspective rather than an investor's perspective.

24. Even states whose investors bring claims regularly tend to prioritize their defensive interests on issues related to dispute settlement. An example is non-disputing party submissions by states. These submissions overwhelmingly side with the respondent's interpretation of the investment agreement, even in cases involving claims by the non-disputing party's own investors, because states are looking to protect themselves should they face similar claims.[16] Another example is treaty practice on ISDS over the past 20 years. Capital-exporting states, which one might expect to promote investor protections, have been at the forefront of introducing new tools in investment agreements that make it harder for investors (including their own investors) to initiate and pursue ISDS claims, such as tools that require the waiver of domestic remedies. It is difficult to identify any examples of tools in recent agreements – or tools under consideration in the working group discussions[17] – that go in the other direction. In the undoubtedly political process of choosing adjudicators on a permanent court,[18] the pressure to favor defensive interests is likely to be particularly acute.

25. Once adjudicators are appointed, they may also feel accountable to the states that appointed them. It is noteworthy in this regard that the proposal has evolved from allowing

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[13] Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 23.

[14] UNCTAD Investment Dispute Settlement Navigator search conducted Nov. 7, 2019, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[15] This conclusion is based on data in Annex 2 of the UNCTAD Fact Sheet on Investor-State Dispute Settlement Cases in 2018 (May 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf.

[16] See Concurring and Dissenting Opinion of Judge Charles N. Brower, *Mesa Power Group v. Government of Canada* (UNCITRAL), https://www.italaw.com/sites/default/files/case-documents/italaw7241.pdf, at para. 30 ("I have never experienced a case in which the other Party or Parties to a treaty subject to interpretation, appearing in a non-disputing capacity, have ever differed from the interpretation being advanced by the respondent State.").

[17] For example, in the first stage of the 38th session of the working group, few states supported allowing small-and-medium-sized companies to be beneficiaries of the proposed multilateral advisory center.

[18] *See* Submission from the Government of Bahrain to UNCITRAL Working Group III (Aug. 29, 2019), A/CN.9/WG.III/WP.180, https://uncitral.un.org/sites/uncitral.un.org/files/wp_180_bcdr_clean.pdf, at para. 29 ("[R]eplacing the entire scheme of arbitrators appointed by the parties to a dispute with one in which judges are appointed by the States party to the treaty establishing the permanent investment court creates a risk of judicial appointments becoming politicized. Indeed, this is a concern that has been expressed by commentators and would undo one of the hallmarks of the existing ISDS regime, which has so far been rather successful in depoliticizing the appointment process.").

adjudicators an opportunity to renew their terms, to the current proposal, which forbids renewal.[19] It is asserted that this new approach is necessary to ensure that adjudicators are "independen[t] from governments," as it is acknowledged that party appointment can skew adjudicators' incentives.[20] But that is not enough. Adjudicators, for example, would be dependent on states to pay their salaries and fund and maintain the court's permanent facilities.[21] This could also skew adjudicators' incentives. And even if an adjudicator demonstrates bias, the adjudicator will continue to receive appointments for the duration of its term.

26. States should resist the temptation to think that tilting the balance of the system against investors is in states' interests. Fundamentally, the purpose of providing investors with effective dispute settlement tools is to give investors the confidence that disputes will be resolved fairly and impartially. This is so that investors will be willing to incur the risks and make the investments that are critical to the host state's achievement of its economic and societal goals. An imbalanced dispute settlement system would directly harm investors, but would also cause lasting, substantial indirect harm for all host states and the civil societies they represent.

### 2. The MIC eliminates party autonomy in the selection of arbitrators

27. Under the latest proposal, when an investor initiates a case, a subset of adjudicators on the permanent court would be assigned on a "randomised basis" to a "division" of the court that would hear the case.[22] Neither the investor nor the respondent state would have any role in the appointment of adjudicators for a given case, contrary to well-established practice. While arbitration systems have justifiable limitations on party autonomy to choose arbitrators (*e.g.*, some exclude arbitrators who lack minimum professional qualifications), the proposal to eliminate party autonomy completely is contrary to the interests of both states and investors as it would prevent them from choosing the best adjudicators to resolve investment disputes.

28. China notes that both states and investors value party autonomy: "Participants in investment arbitration (investors, host-country Government officials, lawyers or arbitrators) generally believe that [party autonomy] is the core and most attractive feature of international arbitration."[23] Party autonomy is important because the disputing parties are experts in the particularities of the case and are therefore best-placed to choose arbitrators with the appropriate knowledge and experience to render a correct decision. As China notes,

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[19] Compare the Canada-European Union Trade Agreement (CETA), para. 8.27(5) ("The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once") with Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 19 ("Independence from governments would be ensured through a long-term non-renewable term of office (many international tribunals provide for nine year terms, for example), combined with a robust and transparent appointment process.").

[20] *See* Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 19.

[21] *Id.* at para. 33 ("Contributions to the financing of a standing mechanism would be made, in principle, by the contracting parties.").

[22] *Id.* at para. 24.

[23] *See* Submission from the Government of China to UNCITRAL Working Group III (July 19, 2019), A/CN.9/WG.III/WP.177, https://undocs.org/en/A/CN.9/WG.III/WP.177, at Section III, para 2.

"investment disputes often involve complex factual and legal issues at the first-instance stage of legal proceedings."[24] Accordingly, "many factors need to be considered by the parties in determining the composition of the arbitral tribunal and the suitability of the arbitrators selected for it, such as legal background, experience and nationality, as well as the level of energy input and special expertise that may be required for a particular case."[25] The proposed MIC denies both parties the opportunity to weigh these factors and to constitute the most effective tribunal. Therefore, we agree with China's conclusion that party autonomy "should be retained in any reform process."[26]

29. In addition, different states will have varying priorities regarding arbitrator qualifications, and it is not clear why a one-size-fits-all approach is necessary or desirable. For example, many investment disputes arise between states and investors from the same region. In such cases, states and investors will likely prefer arbitrators with specific language skills, cultural knowledge, and familiarity with regional legal systems. These divergent priorities cannot be accommodated by the MIC.

30. We suggest that governments ask themselves: If the court is established and I face a claim, how likely is it that I would have chosen any one of the three adjudicators appointed?[27] If not, why is this a better system to adjudicate the claim? Importantly, there is no reason to expect that an arbitrator nominated by a given state to the permanent court will be approved by the other states; and even if the arbitrator is approved, there is no reason to expect that the arbitrator will be randomly selected to sit on the division of the court hearing its case.

### 3. The MIC reduces the pool of qualified arbitrators

31. The MIC proposal requires that adjudicators refrain from participating in any outside activities other than teaching for "a long-term non-renewable term of office" (noting that "many international tribunals provide for nine year terms").[28] Adjudicators would also "have the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law."[29] Taken together, these limitations would indisputably reduce the existing pool of qualified ISDS arbitrators, which is the backbone of the current system, as investors will not use a dispute settlement system if the decision-makers are inadequate.

32. We are not aware of any studies that address the severity of the impact of the MIC on the arbitrator pool, which itself raises red flags, but the limited information we have causes concern. For example, Susan Franck has found that imposing just one of the requirements –

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Investors will be asking themselves the same question.

[28] Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at paras. 16, 19.

[29] *Id*. at para. 20.

requiring public international law expertise – will lead to a "narrow, non-diverse" arbitrator pool.[30]

33. We suggest that these requirements, if adopted, would cumulatively narrow the arbitrator pool to essentially three groups: (1) senior academics; (2) established practitioners transitioning to becoming full-time arbitrators, most of whom are very senior and close to retirement; and (3) retired judges. The common feature of these individuals is that they will be elderly, non-diverse, and non-practicing.

34. We are especially concerned about eliminating practitioners from the pool, since many practitioners have proven to be excellent arbitrators, and they often have experience representing both states and investors and can therefore see both sides and render fair judgments. From a broader perspective, we are concerned about creating major barriers for entry for new arbitrators – and the impact that would have on the arbitrator pool. We should be striving for a dispute settlement system that features age, gender, and regional diversity – qualities that will be essential to the future credibility of the system. The MIC runs directly contrary to ongoing efforts in the international arbitration community to broaden the arbitrator pool and make the arbitration community more inclusive and representative of the disputing parties. It is important to improve the range of experience and views of decision-makers in order to increase the quality and legitimacy of their judgments.

35. Even if states are inclined towards taking steps, such as imposing more requirements for arbitrators, that will reduce the overall pool of arbitrators, states need not create a court to do so. Many treaties impose tailored requirements on arbitrator qualifications. Some treaties also employ rosters. There is no need to adopt a flawed permanent mechanism like the MIC in order to impose more requirements for arbitrators.

### 4. The MIC introduces uncertainty regarding the enforceability of arbitral awards

36. The proposal acknowledges that enforcement of arbitral awards is critical.[31] Indeed, states and investors will quickly lose confidence in a dispute settlement system that results in unenforceable awards. Concerns about enforceability would lead investors to make risk-averse choices that negatively impact international trade, investment, and the flourishing of national economies. But while the proposal recognizes the problem, it lacks a solution: a key intrinsic flaw of the MIC is that it would introduce great uncertainty regarding the enforcement of arbitral awards.

37. Under the current system, as discussed in Section II, ISDS awards are enforceable in nearly every state. In the case of ICSID awards, the 154 states that have ratified the ICSID Convention are obligated to enforce ICSID awards without further review, as the ICSID Convention provides for automatic enforcement. As for ISDS awards rendered in non-ICSID cases, the New York Convention is applicable in 161 states and requires swift enforcement with limited review. The New York Convention has played a unique role in promoting international trade and investment by facilitating the enforcement of arbitral awards for 60

[30] See Susan D. Franck, *International Arbitration – Between Myth and Reality*, McGill Journal of Dispute Resolution Vol. 5, No. 1 (2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3222792, at pp. 9-10.

[31] *See* Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 30.

years in over 2500 cases. For that reason, it has been referred to as "the most effective instance of international legislation in the history of commercial law."[32]

38. The MIC would eliminate the stability and predictability created by the current regime. States that agree to resolve investment disputes using the MIC could commit to enforce awards in their jurisdictions. However, these awards may not be enforceable in jurisdictions that do not agree to the MIC – which could be a substantial number of states, even under the most optimistic projections of court proponents. The EU contends that there is "no reason" to question the enforceability of MIC awards under the New York Convention, [33] for example, but with respect, that will not be for the EU to decide, and cannot be known now. Domestic courts in each of the 161 New York Convention states will need to decide for themselves, and they will likely reach different conclusions, leading to a patchwork enforcement regime in place of today's well-established and nearly universally subscribed regime. This will undermine investor confidence and stunt investment.

39. The legal argument put forward for applicability of the New York Convention is that Article 1(2) of the Convention covers awards by "permanent arbitral bodies."[34] While we do not take a position in this submission, it is important to note that numerous scholars have questioned the conclusion that a MIC can be considered a permanent arbitral body (rather than a judicial or quasi-judicial mechanism) based on analysis of the Convention's *travaux préparatoires*.[35] Again, courts would surely come to different conclusions, which would produce further uncertainty for investors and states seeking foreign investment.

### 5. The MIC introduces uncertainty regarding how dispute settlement proceedings will be funded and maintained over time

40. It is proposed that the contracting parties will finance the court and "consideration should also be given to requiring that users of the standing mechanism pay certain fees," though the "fees should not be so high as to become a hurdle for small and medium sized enterprises to bring a case."[36] There is significant concern that this approach will not be

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[32] Michael Mustill, *Arbitration: History and Background*, 6 J. Intl. Arb. 43, 49 (1989); *see also* Kofi Annan, "Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration," in *Enforcing Arbitration Awards under the New York Convention - Experience and Prospects*, at p. 1 (1999) ("This landmark treaty has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations. (…) International trade thrives on the rule of law: without it parties are often reluctant to enter into cross border commercial transactions or make international investments.").

[33] Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 32.

[34] *Id.*

[35] *See, e.g.*, Marike Paulsson, *Revisiting the Idea of ISDS Within the EU and an Arbitration Court: The Effect on Party Autonomy as the Main Pillar of Arbitration and the Enforceability of Arbitral Awards* (May 21, 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/21/revisiting-idea-isds-within-eu-arbitration-court-effect-party-autonomy-main-pillar-arbitration-enforceability-arbitral-awards/; Alvaro Galindo et al., *The New York Convention's Concept of Arbitration and the Enforcement of Multilateral Investment Court Decisions*, in 60 Years of the New York Convention: Key Issues and Future Challenges (2019), at pp. 459-472; Richard Happ & Sebastian Wuschka, *From the Jay Treaty Commissions to a Multilateral Investment Court: Addressing the Enforcement Dilemma*, Indian Journal of Arbitration Law, Volume VI, Issue 1 (2017), at pp. 113-132.

[36] Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para 33.

sustainable and will put the dispute settlement system at risk, particularly in an environment in which certain states are already questioning, and even scaling back, their financial contributions to international organizations. Indeed, the proposal to weight financial contributions among states based on their level of development[37] calls to mind ongoing debates in other international organizations regarding the identification of "developing countries" and the breakdown of rights and responsibilities resulting from that status.

41. It is important that states do not underestimate the costs associated with the court. It will be very expensive, considering adjudicators' salaries, staff salaries, and the costs of funding and maintaining permanent facilities. In the current system, the investor and the respondent state jointly pay arbitrator fees and administrative expenses, and they do so only for the duration of the given case. Under the MIC, contracting states will bear the cost of paying adjudicators and maintaining the court on a permanent basis – with only nominal contributions from investors, as discussed above – regardless of whether they or their investors use the system. Having states pay for resolving disputes in which they are not involved is an intrinsic feature of the court.

42. This new approach would undoubtedly be sensitive for countries that are already questioning the value of their financial contributions to international organizations. Separately, the majority of states whose investors never or rarely bring ISDS cases would understandably question whether they are obtaining the benefit of the bargain. Based on these types of considerations, investors may ask themselves whether the mechanism will be available when it is needed to resolve disputes, and they would also question the viability of investment agreements that incorporate the MIC.

### B. Appellate mechanism

43. The second main proposal is the creation of an appellate mechanism that would be empowered to review legal conclusions on a *de novo* basis and review factual determinations for manifest errors.[38] In recent working group meetings, we have observed that some states appear to view the appellate mechanism as a "middle ground" that would achieve many of the MIC's objectives while not raising quite the same level of concern to the critics of permanent mechanisms. That is not our view. In our view, an appellate mechanism raises fundamental concerns that, like the MIC, cannot be remedied with technical solutions. The appellate mechanism is flawed because it: (1) tilts the balance of the dispute settlement system against investors in the same manner as the MIC; (2) makes erroneous decisions permanent; and (3) increases the cost and duration of proceedings.

#### 1. The appellate mechanism tilts the balance of the dispute settlement system against investors in the same manner as the MIC

44. The current proposal does not address the constitution of the appellate mechanism, but we can surmise that all appellate mechanism members would be appointed by states, which would create the same imbalance we see with the court. For the reasons discussed above, there are strong reasons to believe that states will appoint appellate mechanism members who would be inclined to rule in favor of states. The imbalance is inescapable. In fact, an appellate mechanism would create *more* imbalance than the court because of the

[37] *Id.*

[38] *Id*. at para. 14.

appellate mechanism's superior power to issue decisions that would be binding in future cases. Investors would not have confidence in this system, which would be reflected in their investment decisions.

45. The suggested "open architecture" approach also does not inspire confidence. Under this approach, states could maintain existing *ad hoc* ISDS but also allow disputing parties to take appeals to a permanent appellate mechanism.[39] In practice, the imbalanced appellate mechanism would reign supreme. Investors would be disinclined to initiate a case – or find much value in the underlying investment agreement – if a one-sided appellate mechanism with power to review the tribunal's legal conclusions *de novo* confronts a successful claim or award. And if investors cannot initiate a case, there is a real risk that they may not invest at all.

### 2. The appellate mechanism makes erroneous decisions permanent

46. The current proposal makes clear that decisions by the appellate mechanism on legal issues would be *de facto* or *de jure* binding in future cases.[40] Indeed, the main argument that is advanced in favor of an appellate mechanism is that it will create more consistent caselaw. While we question the extent to which an appellate mechanism will product more consistent case law across the universe of 2600 investment agreements that are in force, we acknowledge that the mechanism could produce more consistent case law in some instances. But an appellate mechanism is not the right mechanism to achieve consistency. It would be prone to rendering erroneous decisions that would be permanent.

47. In the current system, awards can be corrected on limited grounds (*e.g.*, due process violations) by an ICSID annulment committee (in the case of ICSID awards) or by domestic courts in the arbitral seat or in the jurisdiction in which enforcement of an award is sought (in the case of non-ICSID awards). Other basic errors may not be corrected, but critically, the damage is limited to that one case. By contrast, an appellate mechanism would make a flawed decision permanent and binding in future cases. As discussed in Section II, states created the current system to achieve a balance between consistency, correctness, and finality. The appellate mechanism would disrupt this balance by putting consistency above all other considerations.

48. States should consider the scenario in which a future appellate mechanism takes on an issue of the highest sensitivity – *e.g.*, the scope of the fair and equitable treatment obligation or the essential security exception – and issues a flawed decision that is binding in future cases. The only way to correct that error in the future would be to persuade the other contracting party or parties to amend the treaty or issue an interpretation (which would only be binding on a tribunal if permitted under the agreement). These are difficult paths to pursue. One flawed decision by one division of the appellate mechanism in just one case could effectively undermine the entire system.

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[39] *Id.* at para. 39. Separately, we disagree with the characterization of this approach as "open architecture." Under the suggested approach, states would have just two choices: a court and an appellate mechanism, or just an appellate mechanism. There is almost no flexibility. It is a cafeteria with just two options. In contrast, the present system has a genuine open architecture that offers states many choices to design dispute settlement procedures that suit their and their investors needs and interests.

[40] *Id.* at para. 44 ("In the same institution there will be a greater degree of deference towards an appeal mechanism as compared to that likely to be displayed by ad hoc tribunal.").

49. The current system gives the state better options. It can seek to constitute a tribunal composed of arbitrators that it believes have the right knowledge and experience to render the correct decision on an issue of highest sensitivity. Then, it can seek to persuade the tribunal. The tribunal will decide the case on the merits. In most cases, the tribunal will rely on prior arbitral decisions to support its conclusions because of the strength of the logic of these decisions, not because the tribunal is required to adhere to past decisions because of binding precedent. If the tribunal errs, the state has further choices. It can seek to annul the award based on limited grounds. In addition, it can either seek to persuade the other contracting party or parties to amend or interpret the treaty to prevent the same error in the future, or it can do nothing at all and wait for future opportunities to revisit the issue with a different tribunal. One poor decision cannot do irreparable harm to the system.

50. By contrast, an appellate mechanism would be prone to making errors that would cripple the system. The mechanism's decisions will reflect the quality of its members, and the pool of qualified individuals to choose from will be quite narrow (on the assumption that the same requirements that would apply to MIC adjudicators would also apply to appellate mechanism members). Some of the best arbitrators currently involved in ISDS cases would therefore be excluded from the pool. Also, as discussed, the lack of balance between states and investors in the constitution of permanent mechanisms may lead to errors.

51. In addition, the nature of the task itself will invite errors. States carefully negotiate the terms of their investment agreements, and even the smallest differences in language, context, or structure are significant. In a given case, an appellate mechanism may render a correct interpretation of a provision in one agreement. But the appellate mechanism will be expected to create consistent case law across the universe of over 2600 investment agreements. There is therefore substantial risk that the appellate mechanism, in the interests of consistency, will take a correct interpretation of a provision in one agreement and misapply the precedent to interpret a similar, but inconsistent, provision in a different agreement. In other words, a state will be subject to rules to which it did not consent. The result will be erroneous decisions that are contrary to the interests of both states and investors.

### 3. The appellate mechanism increases the cost and duration of proceedings

52. It is acknowledged in the proposal that the routine use of the appellate mechanism would have negative consequences, as it suggests that "[m]echanisms for ensuring that the possibility to appeal is not abused should be included."[41] The main negative consequence that is implied, but not named, is that disputes will be lengthier and more costly for both states and investors. No technical solutions can prevent that, as the evidence suggests that the losing party in international disputes will likely seek review, particularly when the review mechanism is an appellate mechanism with the power to reverse any legal error. And an appellate mechanism requires more time and cost than other review mechanisms.

53. In the current system, parties seek review with increasing regularity. In the case of ICSID, annulment was rarely requested from 1971-2010, but from 2011-2018, it was

[41] *Id*. at para 15.

requested in approximately 51% of awards (80 of 158).[42] Interestingly, disputing parties regularly requested annulment from 2011-2018 even though the success rate during this period was just 3%.[43] This low success rate reflects, amongst other factors, the narrow grounds for annulment in the ICSID Convention and the overall quality of the awards.

54. Under an appellate mechanism, we believe requests for review by states and investors would significantly increase due to the appellate mechanism's broader review power. We see that in the case of the WTO's Appellate Body, which has essentially the same broad review power as the proposed appellate mechanism. Overall, as of December 31, 2018, appeals were initiated with respect to 67% of panel reports (197/292).[44] From 2011-2018, the percentage of appeals sought was even higher: 71% (68/96).[45] Again, this is compared to annulment requests in 51% of ICSID awards during the same period.

55. Increased second-level review will itself significantly increase the cost and duration of proceedings. But the greatest source of added time and cost will come from the higher success rate to be expected in appeals versus annulments. The best available data suggests that the WTO Appellate Body modifies or reverses portions of approximately 85% of panel reports,[46] which is dramatically higher than the 3% ICSID annulment success rate this decade. We can anticipate a similar upswing in reversals with an appellate mechanism for investment disputes. But the consequences for the length and cost of the dispute will be much greater for investment disputes. When the WTO Appellate Body reverses or modifies a panel report, it generally "fills in the gaps" or leaves elements of the dispute unresolved. An appellate mechanism for investment disputes, by contrast, will often need to remand the case for additional proceedings due to the fact-intensive nature of investment disputes. Any remand procedures – the details of the current proposal are unclear – will produce untold delays and increased costs.

56. It has been suggested that the obvious delays and costs associated with an appellate mechanism will be offset by other aspects of their proposal. It is necessary to rebut each of these arguments.

57. First, it is argued that establishing the MIC and thereby eliminating the arbitrator selection process will save time and money.[47] It may save time in some cases but cause delays in others, if for example, the contracting states fail to agree on appointments of adjudicators on the permanent mechanisms in a consistently timely manner. It is unlikely to save a significant amount of money, as arbitrator selection requires a relatively minimal expenditure of attorney's fees, and no evidence to the contrary is offered. Also, the costs associated with arbitrator selection is money well-spent, as both disputing parties want to

[42] ICSID 2018 Annual Report, https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf, at p. 36.

[43] *Id.*

[44] WTO Appellate Body Annual Report for 2018 (Mar. 2019), file:///C:/Users/31290/Downloads/29%20(2).pdf, at p. 142.

[45] *Id.*

[46] Michel Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, Journal of World Trade, Vol. 46, Issue 5 (2012), at p. 989.

[47] Submission from the European Union and its Member States to UNCITRAL Working Group III (Jan. 24, 2019), A/CN.9/WG.III/WP.159/Add.1, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1, at para. 52.

ensure that they have the most suitable arbitrators to hear the case at hand, and these costs would be dwarfed by the costs of maintaining permanent mechanisms.

58. Second, it is argued that less time and money will be spent on arbitrator challenges because "adjudicators would be considered independent and impartial on account of their tenure" and potential conflicts would only arise in "very specific limited cases."[48] There is simply no way to support this assertion. For example, arbitrators will be required to disclose potential conflicts of interest, and there will surely be regular challenges based on those disclosures or alleged failure to make the required disclosures. Challenges may be even more frequent: in the current system, most challenges are directed at the arbitrator appointed by the other side, whereas in a new regime, all three adjudicators would be prone to challenge by both sides. Also, arbitrators will be required to have extensive professional experience that may give rise to conflicts.

59. Third, it is stated that adjudicators will have incentives not to prolong cases, since their remuneration would not be linked to the time spent on a case.[49] Not only is there no evidence that arbitrators act with such a lack of integrity, but the looming prospect of *de novo* review by an appellate mechanism may actually lead arbitrators to "overdo it" and draw out the proceedings to ensure that all points, even tangential points, are fully briefed and addressed by the parties and the court.

60. Fourth, it is contended that consistency and predictability will reduce cost and duration.[50] In fact, most attorneys' time is spent litigating the facts and the application of the law to facts, not legal standards, so increased consistency regarding legal standards will not significantly reduce time or cost. With respect to the legal standards, good attorneys will surely seek to distinguish prior holdings that are unfavorable to their client – not just throw up their hands – so it is hard to foresee a significant reduction in time or cost. In addition, consistently flawed decisions may actually invite new cases and make those cases longer and more costly.

61. The working group has concluded that the cost and duration of disputes is one of the three principal concerns with the current ISDS system, which makes the appellate mechanism a uniquely unsuitable reform to pursue. Investors share states objectives in streamlining dispute settlement. If years of delay and millions of dollars are added to the cost of resolving disputes, investors will pursue other dispute settlement mechanisms, or else look to alternatives to investing abroad.

## V. Alternative Reforms that Would Improve the System for All Users

62. The ISDS system needs to continue to evolve to reflect lessons learned by states, investors, and other stakeholders from the last 30 years of experience and cases resolved under this system. In that regard, we have listened carefully to the discussion of reform options in the working group, and we would like to offer our support for numerous proposals that have been tabled by government delegations.

[48] *Id*. at para. 53.

[49] *Id*. at para. 54.

[50] *Id*. at para. 55.

### A. Multilateral advisory center, code of conduct, third-party funding

63. In the first stage of the 38th session of the working group, we observed the working group's discussions of three areas of potential reform – a multilateral advisory center, a code of conduct, and third-party funding – and we were heartened by the considerate and thoughtful interventions made by many delegations. As discussed below, we support reform in each of these areas, which we believe would have positive systemic implications for ISDS.

#### 1. Multilateral advisory center

64. We support the creation of a multilateral advisory center on ISDS to complement existing efforts by international organizations and academic institutions to assist developing states. Above all, an advisory center could play a key role in dispute prevention. Based on our experience as investors, we strongly agree with the observations by Morocco and Thailand that many countries are hampered by a lack of knowledge, experience, and institutional capacity to prevent investment disputes arising.[51] A greater understanding of the obligations a state has undertaken to foreign investors in its agreements could reduce the risk of unintended breaches that are difficult to reverse. An advisory center could facilitate the sharing of information between states on best practices, and even spearhead the creation of guidelines on dispute prevention.[52] In addition, an advisory center could train government officials to defend and manage ISDS cases, though we share the concerns raised by others in the working group that it would be inappropriate for the center to act as counsel for states in investment disputes.[53]

#### 2. Code of conduct

65. The absence of a universal code of conduct for arbitrators in ISDS cases is a glaring flaw in the current system. Arbitrators in ISDS cases have generally exhibited great integrity, but a code of conduct is necessary to ensure that arbitrators have a clear understanding of their ethical obligations and ensure that conflicts of interest can be identified and addressed. This will establish a level playing field for all which is transparent and fair for all. The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration are valuable, but insufficient. While the IBA Guidelines have made a significant

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[51] *See* Submission from the Government of Morocco to UNCITRAL Working Group III (Mar. 4, 2019), A/CN.9/WG.III/WP.161, https://undocs.org/en/A/CN.9/WG.III/WP.161, at para. 18 ("Owing to their limited financial resources and lack of legal professionals with significant experience in ISDS, developing countries need assistance in that area."); Submission from the Government of Thailand to UNCITRAL Working Group III (Mar. 8, 2019), A/CN.9/WG.III/WP.162, https://undocs.org/en/A/CN.9/WG.III/WP.162, at para. 11 ("Government agencies responsible for ISDS issues in many developing countries still lack the know-how to recognize a looming dispute, and more crucially, how to manage them. In addition, a knowledge gap exists between the government legal experts and the officials directly responsible for measures potentially breaching treaty obligations.").

[52] Submission from the Republic of Korea to UNCITRAL Working Group III (July 31, 2019), A/CN.9/WG.III/WP.179, https://uncitral.un.org/sites/uncitral.un.org/files/wp179_new.pdf, at Section III(2) (noting that an advisory center "could become a hub for collecting and disseminating best practices and institutional information," including "education on dispute prevention").

[53] Report of UNCITRAL Working Group III on the work of its thirty-eighth session (advance copy) (Oct. 23, 2019), A/CN.9/1004, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_for_website.pdf, at para. 33 ("While support was expressed for the advisory centre providing support during the proceedings particularly for States with limited resources, doubts were expressed as regards the role that the advisory centre could play in representing States, in particular in light of the potential resources that it would require, and the potential liabilities and conflicts that it might incur.").

contribution to the resolution of ethical questions in ISDS cases, they are optional guidelines designed for arbitration matters generally and are not tailored for ISDS cases. They were also drafted by practitioners with little input from states. The working group has a valuable opportunity to build on the IBA Guidelines and recent scholarship and create a code of conduct that will ensure that arbitrators in ISDS cases act in accordance with the highest ethical standards. We are pleased that UNCITRAL has partnered with ICSID in this endeavor, which may help address inconsistencies between UNCITRAL and ICSID approaches identified by Ecuador and others.[54]

66. As for the content of a code of conduct, we agree with the view articulated by many delegations in the first stage of the 38th session that the main elements should include independence and impartiality, integrity, diligence and efficiency, confidentiality, competence or qualifications, and disclosure.[55] We look forward to observing the detailed discussion of each of the areas. At this stage, it is important to note that we strongly oppose a broad double-hatting prohibition, which would narrow the pool of qualified arbitrators and produce other unintended consequences that would outweigh any potential benefits of such an approach.

### 3. Third-party funding

67. As most delegations have expressed, third-party funding should not be prohibited because it can be an important tool for investors, particularly those that lack adequate resources, to pursue ISDS, and it may also benefit respondent states.[56] However, we agree with the consensus view that third-party funding should be regulated with a view to achieving greater transparency. There is a valid concern in the current system that third-party funding may create unacceptable conflicts of interest in some cases.[57] Accordingly, we agree with the position in the current draft proposed ICSID Rules amendments that would require an investor to disclose the identity of a third-party funder, but not the terms of a funding arrangement, at the very earliest stages of the arbitration.[58] The terms of a funding arrangement can be sensitive and are not relevant to assessing a conflict of interest, and as the ICSID Secretariat has indicated, "the Tribunal already has the authority to make the appropriate order to disclose relevant documents or information."[59]

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[54] *See* Submission from the Government of Ecuador to UNCITRAL Working Group III (July 17, 2019), A/CN.9/WG.III/WP.175, https://undocs.org/en/A/CN.9/WG.III/WP.175, at paras. 20-21 (noting, for example, that that ICSID and UNCITRAL rules diverge on standards for arbitrator disqualification).

[55] Report of UNCITRAL Working Group III on the work of its thirty-eighth session (advance copy) (Oct. 23, 2019), A/CN.9/1004, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_for_website.pdf, at para. 56.

[56] *Id.* at para. 81 ("While some support was expressed for prohibiting third-party funding, it was generally felt that flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources, particularly SMEs and, in limited instances, to States.").

[57] *See* Submission from the Government of China to UNCITRAL Working Group III (July 19, 2019), A/CN.9/WG.III/WP.177, https://undocs.org/en/A/CN.9/WG.III/WP.177, at Section II, para 4 (noting that third-party funding "may lead to a convergence of interests among arbitrators and sponsors, or even conflicts of interest").

[58] See ICSID Proposals for Amendment of the ICSID Rules, Working Paper #3 (Aug. 2019), https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf, at p. 294.

[59] *Id*. at p. 295, para. 56.

## B. Additional government-proposed reforms

68. We look forward to the discussion of numerous other reforms that have been proposed by government delegations. In this section, we discuss five select reforms that have been proposed in submissions that have been circulated to date and are summarized in the addendum to the Secretariat's Working Paper 167.[60] At these initial stages, our comments are preliminary in nature; we will make further observations as the discussion of reform proposals proceeds. The absence of an observation on a particular reform proposal should not be construed to indicate a lack of support or interest.

### 1. Prior scrutiny of awards

69. As noted by Morocco: "Most rules on investment arbitration do not provide for a quality control procedure whereby an award can be reviewed before it becomes final."[61] As a solution, Morocco suggests learning from the example of the International Chamber of Commerce (ICC) and giving an independent body a short period of time to review awards to "ensure that each award complied with all the formalities, addressed all claims and set out the grounds on which it was based."[62] We are not certain whether review by an independent body is feasible and anticipate that many technical questions will arise regarding the scope and effect of such review. However, we support Morocco's suggestion to look for additional ways to improve the review of tribunal awards that will not materially affect the duration or costs of the proceedings nor favor one disputing party over another.

70. In this regard, we note another proposal that has been discussed in working group sessions: giving both disputing parties an opportunity to review and comment on the draft award before it is finalized. The Trans-Pacific Partnership Agreement, for example, allows disputing parties to request to review the draft award and provides them with 60 days to provide written comments to the tribunal.[63] This is a novel way to ensure that the tribunal fully considers the views of the parties and makes the correct decision.

### 2. Improving arbitrator selection

71. The working group has an opportunity to help states and investors choose arbitrators who are best-suited to resolve the dispute and who would advance the objectives of the dispute settlement system as a whole. Several delegations have made proposals in this regard that deserve careful consideration. Turkey proposes that the Secretariat maintain an indicative list of arbitrators for use by states and investors that would provide information on the availability and workload of arbitrators such that disputing parties opposed to double-hatting could choose arbitrators accordingly. The database could also have other information about arbitrators to assist party selection. In their joint submission, Chile, Israel, Japan, Mexico, and Peru suggest that states could require that arbitrators in disputes involving highly technical subject matter, such as financial services, have specialized knowledge and

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[60] *See* Addendum to Note by the UNCITRAL Secretariat, Possible Reform of investor-State dispute settlement (ISDS) (July 13, 2019), http://undocs.org/en/A/CN.9/WG.III/WP.166/Add.1.

[61] Submission from the Government of Morocco to UNCITRAL Working Group III (Mar. 4, 2019), A/CN.9/WG.III/WP.161, https://undocs.org/en/A/CN.9/WG.III/WP.161, at para. 21.

[62] *Id*. at paras. 22-25

[63] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.23(10).

experience.[64] Finally, Bahrain focuses on diversity, and proposes that "diversity considerations be formally added to the criteria to be applied when selecting arbitral panel members."[65]

72. These types of proposals are a positive step forward for the existing system. States and investors would benefit from better information on arbitrators – which initiatives like Arbitrator Intelligence[66] are making available. They also benefit from more diverse, expert arbitrators being available. We look forward to hearing your discussions on how to balance these objectives with other important objectives such as ensuring party autonomy.

### 3. Alternative dispute resolution mechanisms

73. We support the proposals of several delegations to explore alternative dispute resolution mechanisms, including mediation and conciliation.[67] As China notes, for example, conciliation can help states and investors "adopt creative and forward-looking methods to promote the settlement of investment disputes."[68] As a result, disputing parties can avoid adversarial dispute settlement proceedings and "maintain[] long-term cooperative relationships."[69] Many investors have successfully used mediation and conciliation to resolve difficult commercial disputes, and there is no reason why similar results could not be achieved in investment disputes. Now would be a good time to pursue mediation and conciliation options, as the UN Convention on International Settlement Agreements Resulting from Mediation, better known as the "Singapore Mediation Convention," has recently been concluded. It will play a valuable role in changing the international legal landscape by allowing parties to enforce post-mediation settlement agreements abroad in a similar manner as arbitral awards.

74. It is important to note that these alternative dispute resolution mechanisms should be optional for disputing parties rather than a prerequisite to pursuing ISDS. In some cases, one or both disputing parties may take the view that a dispute cannot be resolved in mediation or conciliation, and they should not be compelled to pursue that path. If they are compelled, the process is likely to be unsuccessful and result in a waste of time and resources for both parties.

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[64] Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru to UNCITRAL Working Group III (Oct. 2, 2019), A/CN.9/WG.III/WP.182, https://undocs.org/en/A/CN.9/WG.III/WP.182, at p. 6.

[65] Submission from the Government of Bahrain to UNCITRAL Working Group III (Aug. 29, 2019), A/CN.9/WG.III/WP.180, https://uncitral.un.org/sites/uncitral.un.org/files/wp_180_bcdr_clean.pdf, at para. 61.

[66] *See* https://arbitratorintelligence.com/.

[67] *See* Submission from the Government of China to UNCITRAL Working Group III (July 19, 2019), A/CN.9/WG.III/WP.177, https://undocs.org/en/A/CN.9/WG.III/WP.177, at Section III, para. 4; Submission from the Government of Thailand to UNCITRAL Working Group III (Mar. 8, 2019), A/CN.9/WG.III/WP.162, https://undocs.org/en/A/CN.9/WG.III/WP.162, at para. 24; Submission from the Government of Turkey to UNCITRAL Working Group III (July 11, 2019), A/CN.9/WG.III/WP.174, https://undocs.org/en/A/CN.9/WG.III/WP.174, at Section III.

[68] *See* Submission from the Government of China to UNCITRAL Working Group III (July 19, 2019), A/CN.9/WG.III/WP.177, https://undocs.org/en/A/CN.9/WG.III/WP.177, at Section III, para. 4.

[69] *Id.*

### 4. Expedited procedures

75. Investors and states – and particularly small-and-medium-sized companies and developing countries – would benefit from the availability of expedited procedures to resolve investment disputes, as recommended by several delegations.[70] The one-size-fits-all model of ISDS is cost-prohibitive and inappropriate for certain disputes involving a small amount of money or less complex subject matter. While these types of disputes may be more suitable for mediation, conciliation, or other alternative dispute settlement mechanisms, states and investors should not be prevented from pursuing arbitration. Many arbitral institutions have introduced expedited procedures in recent years for that reason. As noted by Thailand, this working group should coordinate with Working Group II to ensure that it benefits from their discussions on expedited procedures.[71]

### 5. Additional case management tools

76. Arbitrators in an ISDS case need to be flexible in structuring the proceedings to ensure that they have the information they need to make the correct decision, and to guarantee both disputing parties due process. At the same time, steps need to be taken to ensure that cases are resolved in a more expeditious fashion. We are interested in exploring both mandatory rules and guidance for tribunals to achieve these results. For example, Thailand proposes requiring the tribunal to consult with the parties to establish a budget for the proceedings.[72] We look forward to the working group's discussions on these types of proposals.

## VI. Conclusion

77. The CCIAG acknowledges the concerns that have been raised by delegates regarding the ISDS system. An opportunity for constructive reform is clear. To be effective this reform must also take into account the concerns, interests, and perceptions of investors. In assessing the benefits and impacts of each reform, we encourage states to consider the effect it may have on existing and future investment, at home and abroad.

[70] Submission from the Government of Thailand to UNCITRAL Working Group III (Mar. 8, 2019), A/CN.9/WG.III/WP.162, https://undocs.org/en/A/CN.9/WG.III/WP.162, at para. 17; Submission from the Government of Turkey to UNCITRAL Working Group III (July 11, 2019), A/CN.9/WG.III/WP.174, https://undocs.org/en/A/CN.9/WG.III/WP.174, at Section III.

[71] Submission from the Government of Thailand to UNCITRAL Working Group III (Mar. 8, 2019), A/CN.9/WG.III/WP.162, https://undocs.org/en/A/CN.9/WG.III/WP.162, at para. 17.

[72] *Id*. at para 16.