

Comments: Appointment of Arbitrators, Appellate Mechanism, and Enforcement
Submitted by the Corporate Counsel International Arbitration Group and the
United States Council for International Business
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1. The Corporate Counsel International Arbitration Group (CCIAG)¹ and the United States Council for International Business (USCIB)² are grateful for the opportunity to comment, as observers in UNCITRAL Working Group III, on two working papers circulated by the UNCITRAL Secretariat: a paper on “Selection and appointment of ISDS tribunal members”³ and a paper on “Appellate mechanism and enforcement issues.”⁴ These papers are valuable contributions to the ongoing discussions on investor-state dispute settlement (ISDS) reform. We hope that our comments can assist the working group in its deliberations on these topics.

2. Our comments are divided into two sections. The first section addresses proposed reforms to the existing *ad hoc* ISDS system, focusing on the proposed use of mandatory rosters or appointing authorities with enhanced powers in the selection and appointment of arbitrators. The CCIAG and USCIB support numerous proposals that have been discussed to reform *ad hoc* ISDS, including a code of conduct for arbitrators; a multilateral advisory center; the disclosure of the identity of third-party funders; tools to manage multiple proceedings such as consolidation, statutes of limitation, and transparency; prior scrutiny of arbitral awards by the disputing parties; optional alternative dispute resolution mechanisms; expedited procedures; and additional case management tools for arbitrators. With respect to arbitrator selection and appointment, we support efforts to ensure that states and investors have better information regarding the qualifications and availability of prospective arbitrators. However, we do not support using mandatory rosters or appointing authorities with enhanced powers to select and appoint arbitrators. Such proposals would seriously undermine party autonomy and thus erode confidence in the dispute settlement process.

3. The second section addresses proposals to replace the *ad hoc* ISDS system with a permanent multilateral investment court and an appellate mechanism in some form. In its December 2019 submission to the working group, the CCIAG outlined significant concerns with these mechanisms.⁵ In addition to undermining party autonomy for both disputing parties, these

¹ The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution.

² USCIB is an association of international companies, law firms, and business associations from every sector of the economy, dedicated to promoting international trade and investment. As sole U.S. affiliate of the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and Business at OECD, USCIB presents informed business views and solutions to government leaders and policy makers worldwide.

³ Possible reform of investor-state dispute settlement (ISDS): Selection and appointment of ISDS tribunal members, Note by the Secretariat (“Selection and appointment”), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_of_isds_tribunal_members.docx.

⁴ Possible reform of investor-state dispute settlement (ISDS): Appellate mechanism and enforcement issues, Note by the Secretariat (“Appellate mechanism and enforcement”), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx.

⁵ Submission by the CCIAG to UNCITRAL Working Group III (December 18, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform_0.pdf.

mechanisms would, for example, create uncertainty regarding the enforceability of arbitral awards, tilt the balance of the dispute settlement system against investors, and greatly increase the cost and duration of disputes. The CCIAG's previous submission contended that these flaws are intrinsic to these mechanisms and cannot be remedied with technical solutions, and the UNCITRAL Secretariat's latest papers confirm and accentuate these concerns. No matter how they are designed, these mechanisms are ill-suited to resolve international investment disputes.

I. Proposals to Reform *Ad Hoc* ISDS

4. The Secretariat states that the working group may wish to consider mechanisms such as mandatory rosters and appointing authorities with enhanced powers to regulate the selection and appointment of arbitrators in *ad hoc* ISDS. This section raises concerns with such approaches.

A. Mandatory Rosters

5. Rosters can take many forms. Our comments focus on mandatory rosters, meaning rosters that the disputing parties or a non-party (*e.g.*, an appointing authority) are required to use to appoint an arbitrator (either all the arbitrators on the tribunal or just the chair).⁶

6. We concur with the Secretariat's finding that mandatory rosters are extremely rare in ISDS.⁷ There may be less than a handful of mandatory rosters in the entire corpus of 2600+ investment agreements currently in force.⁸ The only cases that we have identified in which mandatory rosters have been employed to appoint ISDS arbitrators are ICSID cases in which the Chairman of the ICSID Administrative Council has been tasked with appointing the chair when the disputing parties have been unable to reach agreement – and even that practice may be declining in frequency, for reasons we discuss below. It is not that states are unfamiliar with mandatory rosters; many states employ them in the state-to-state dispute settlement context, including in recent agreements. And the international community has discussed the pros and cons of employing mandatory rosters to augment or replace party appointment for many years. This begs the question: why has the party appointment model stuck in ISDS?

7. The reason is that both states and investors value maximum flexibility in the appointment of arbitrators. Each case presents unique legal, factual, and strategic issues. The disputing parties are best-placed to select arbitrators in each case who will render a correct decision that will be respected by both sides. For example, each disputing party may value certain experience, knowledge of the relevant industry or legal systems, language skills, or other qualifications. Under a selection and appointment approach that favors party autonomy, the disputing parties can appoint a tribunal that reflects these preferences. This “makes the arbitration the *parties'*

⁶ We are agnostic regarding the utility of voluntary rosters.

⁷ See Selection and appointment at para. 32 (“An analysis of rosters in investment agreements notes that disputing parties have not confined appointment to those who are listed on the existing rosters.”).

⁸ The most well-known mandatory roster in an investment agreement – the mandatory roster in the North American Free Trade Agreement for the appointment of the tribunal chair where the parties cannot agree – failed because the United States, Canada, and Mexico could not reach the required consensus on the appointment of roster members.

arbitration, deciding *their* dispute with *their* tribunal.”⁹ A mandatory roster would, by contrast, curtail or even eliminate party choice.

8. A mandatory roster is worrisome even if it is used in a manner that preserves some party autonomy, *e.g.*, for the selection and appointment of the chair where the parties, not an appointing authority, make the selection from the roster in the first instance. It goes without saying that the selection of the chair is monumentally important. In addition to holding a vote that may be decisive, the chair manages the proceedings and generally takes the lead in drafting the award and other decisions. The disputing parties should not be constrained in their choice of the chair. The fact that the disputing parties maintain some role in the appointment of the chair under this model is not sufficient to protect their interests.

9. Similarly, from our perspective, a mandatory roster is worrisome even if investors are permitted to participate in the constitution of the roster, which is an option discussed by the Secretariat.¹⁰ We welcome all efforts to ensure that the ISDS reforms developed by the working group maintain the equality of arms between the disputing parties. But even if a mandatory roster could be developed in a way that maintains that balance, it would nonetheless undermine party autonomy, and with it, both disputing parties’ confidence in the dispute settlement process.

10. The ICSID experience with a mandatory roster – again, perhaps the only experience we have with such a mechanism – warrants further caution. When the disputing parties in an ICSID case cannot agree on the appointment of the tribunal chair, the ICSID Convention requires the Chairman of the Administrative Council to choose the chair from the ICSID Panel of Arbitrators, which is composed mostly of arbitrators appointed by ICSID Member States. But the ICSID Secretariat and ICSID users became frustrated by the paucity of qualified, non-conflicted, and available arbitrators. ICSID Secretary-General Meg Kinnear explained:

[I]t’s awfully difficult to find enough qualified arbitrators who are available, who are not conflicted, and are all of the things you would need in an arbitrator. Particularly for us, as we are usually appointing presiding arbitrators, so on top of all the skills you might expect, we also need people with the skills to preside, to bring their colleagues together, and to advance the case. So you’re asking for a lot of skills in one person, and we’re often going back to this roster. There are also numerous vacancies on the roster or expired nominations, those kinds of issues. So one of the things we heard was that we needed to address the rosters.¹¹

11. In addition, at times the ICSID Secretariat experienced situations where due to a large number of cases filed against a particular sovereign, there were simply not enough roster

⁹ V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva*, Inaugural Charles N. Brower Lecture on International Dispute Resolution (April 5, 2013), in 107 *Am. Soc’y Int’l Proc.* 387, 401 (2013) (emphasis in original).

¹⁰ Selection and appointment at para. 37.

¹¹ David Caron, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear*, 104 *Am. Soc’y Int’l Proc.* 413, 421-422 (2010) (quoting Meg Kinnear).

members who possessed the language skills desired by the parties, and the Secretariat was forced to seek agreements of the parties to depart from the roster.

12. Accordingly, the ICSID Secretariat innovated. In 2009, the ICSID Secretariat introduced a ballot procedure that precedes use of the roster. When the disputing parties notify the Secretariat that they cannot agree on the tribunal chair, the ICSID Secretariat provides each party with a ballot listing the names of several arbitrators – which need not be limited to roster choices – and the disputing parties indicate whether they accept or reject each arbitrator. If both parties accept a single arbitrator, that arbitrator is chosen, and if they both agree on more than one arbitrator, the ICSID Secretariat chooses one. The ICSID Secretariat only resorts to the roster if the parties do not jointly accept any arbitrator on the ballot. The ballot procedure has been a success; the fact that it was needed is an indictment of the mandatory roster approach.

13. There may be a view that a mandatory roster is the silver bullet to increase the diversity of the arbitrator pool, but we disagree. Experience with rosters in the state-to-state dispute settlement context shows the limitations of rosters as diversifiers. For example, the European Union and Japan recently constituted a roster for state-to-state disputes under their free trade agreement. Just 4 of 15 members of that roster are women and 1 is from a developing country. Perhaps governments are prone to appoint non-diverse arbitrators to rosters for the same reason that disputing parties are prone to appoint non-diverse arbitrators to *ad hoc* tribunals: the lure of the “big name” arbitrator. Whatever the cause of the insufficient diversity in ISDS, a mandatory roster is not the solution. Indeed, we are concerned that rather than increasing diversity, reducing the pool of arbitrators to mandatory rosters will undo the significant diversity and inclusion efforts undertaken by ISDS stakeholders.

14. Of course, states that so desire can seek to negotiate the inclusion of a mandatory roster in their individual investment agreements. But it is not clear why this is an issue that the working group should explore further at the multilateral level.

B. Enhanced Role for Appointing Authorities

15. Under nearly all major arbitral rules, appointing authorities play an important role in arbitrator selection and appointment, most notably when the disputing parties cannot agree on the tribunal chair. Now the Secretariat has asked whether appointing authorities should have an “enhanced role” in ISDS cases, such as the discretion to appoint one or all the arbitrators on a tribunal with or without a mandatory roster. We do not recall any delegations in the working group proposing to enhance the power of appointing authorities in this manner. Our recollection is that the working group’s discussion was limited to considering whether appointing authorities’ procedures are sufficiently clear and transparent.¹²

16. In our view, enhancing the power of appointing authorities in the arbitrator selection and appointment process is problematic for the exact same reasons that a mandatory roster is problematic: it would undermine party autonomy. Further, the investment community has even

¹² See Report of UNCITRAL Working Group III on the work of its resumed thirty-eighth session (January 28, 2020), A/CN.9/1004/Add.1, <https://undocs.org/en/A/CN.9/1004/Add.1>, at para. 105.

less experience with appointing authorities with enhanced powers than with mandatory rosters. Caution is therefore warranted in this area.

II. Proposals to Replace *Ad Hoc* ISDS with New Mechanisms

17. We commend the Secretariat for concisely setting out numerous technical questions and options regarding the potential establishment of a permanent multilateral investment court (MIC) and various forms of an appellate mechanism. In our view, the tour of these questions and options reveals certain intrinsic flaws in the proposed mechanisms, thus confirming many of the concerns raised in the CCIAG's previous written submission to the working group on this topic. This section reviews the flaws in the mechanisms that are highlighted in the Secretariat's papers.

A. Multilateral Investment Court

18. The Secretariat highlights each of the five flaws that are intrinsic to the MIC: that it (1) tilts the balance of the dispute settlement system against investors; (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

19. The Secretariat confirms that under any model, states will appoint all the adjudicators on the MIC. Non-state actors may have a role in the process of nominating or vetting candidates: some candidates could be nominated by an independent body or even self-nominated, and there may be a role for a screening committee to review nominees (including state nominees).¹³ But at the end of the nomination and review process, states will exercise sole authority to appoint the adjudicators under each of the models outlined by the Secretariat. This confirms that the MIC would tilt the balance of the dispute settlement against investors, who will entirely lose their current role in the appointment of adjudicators in investment disputes. Such a system will not be perceived as fair by investors, and they will alter their investment decisions accordingly.

20. The Secretariat seeks to explain why some might favor eliminating the investor's role in the appointment of adjudicators: "For most selection processes, the assumption has been that governments represent views from a broad range of stakeholders when they make appointment decisions."¹⁴ We submit that this is the wrong assumption to make with respect to the appointment of adjudicators for investor-state disputes. As previously discussed, there is good reason to expect that most states will be inclined to appoint adjudicators whom they view to be inclined to rule in favor of states.¹⁵

¹³ Selection and appointment at paras. 56-63.

¹⁴ *Id.* at para 63 note 46.

¹⁵ CCIAG December 2019 submission at paras. 21-26.

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

21. The Secretariat confirms that the entire premise of the MIC is that “disputing parties would have no or little influence on the selection and appointment of arbitrators.”¹⁶ As discussed above, states would choose the adjudicators on the court. However, in individual cases, neither the state nor the investor will have a voice in the composition of the “panel” or “division” of the court that handles the case. Rather, “[i]n terms of selecting judges for specific cases, the process could be random or it could fall to the Secretary-General of the institution managing a list of adjudicators or there could be a single full-time president of the permanent body that is tasked with appointing judges to specific cases.”¹⁷

22. The result is that party autonomy – a cornerstone of the current system – will be eliminated, and most cases will be handled by adjudicators whom the parties would not have chosen had they had the choice. This is not in any party’s best interest. As previously discussed, it will result in a less trusted and less successful dispute settlement process.¹⁸

23. The Secretariat’s creative suggestion to take inspiration from the International Court of Justice model and permit the appointment of *ad hoc* judges – e.g., judges of the nationality of the respondent state and the investor – to ensure “domestic, local, or regional interests would be duly understood and taken into account,” is unlikely to work well in practice.¹⁹ If the disputing parties appoint the *ad hoc* judges, it would undermine the premise of the MIC – that party appointment taints the dispute settlement process. If a non-party (*i.e.*, the MIC) appoints the judges, the state would have an inherent advantage: national pride may lead a judge of the respondent’s nationality to favor the respondent, but is less likely to lead an arbitrator of the investor’s nationality to favor the investor. No matter how *ad hoc* judges are appointed, regularly using them would also substantially increase the cost and length of the dispute settlement process.

24. Some states may take solace in the expectation that, even though the MIC may eliminate their ability to appoint adjudicators in each dispute, they will be able to appoint their favored adjudicators to the pool of arbitrators. In fact, that is unlikely. The Secretariat strongly implies that the MIC would need to be constituted by “selective representation” because of the cost and complexity of managing a court in which each state appoints an adjudicator.²⁰ Individual states would therefore have little influence on the appointment of the pool of arbitrators.

¹⁶ Selection and appointment at para. 46.

¹⁷ *Id.* at para. 73.

¹⁸ CCIAG December 2019 submission at paras. 27-30.

¹⁹ Selection and appointment at para. 65.

²⁰ Selection and appointment at paras. 50-51.

3. The MIC reduces the pool of qualified arbitrators

25. The Secretariat appears to assume, without stating explicitly, that MIC adjudicators would generally be prohibited from taking on other vocational activities,²¹ which is a main objective of MIC proponents. As previously discussed, imposing such a requirement, in addition to the other potential requirements discussed by the Secretariat, would reduce the existing pool of qualified arbitrators, making the dispute settlement system much less attractive for both states and investors.²²

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

26. The Secretariat discusses enforcement in the context of examining the enforceability of appellate mechanism decisions, but its analysis of the New York Convention is equally relevant to the MIC. In sum, the Secretariat's analysis confirms that it is highly uncertain whether decisions issued by a MIC would be enforceable under the New York Convention.²³ This is problematic because it means that there is doubt as to whether MIC decisions would be enforceable in any jurisdictions that are not party to the MIC – likely, most jurisdictions. As previously discussed, this is in stark contrast to the reliable enforceability of ISDS awards in nearly every jurisdiction in the current system.²⁴ It is also deeply troubling considering the importance of enforcement to an effective dispute settlement system.

27. To remedy this uncertainty, the Secretariat suggests that the working group could prepare a recommendation on the interpretation of the New York Convention indicating that the Convention applies to decisions rendered by a MIC, “to guide domestic courts faced with the enforcement.”²⁵ There is reason to question whether this interpretation is widely supported in the working group. Further, even if the state delegations in the working group could agree, their courts may not. Uncertainty is guaranteed, which will undermine investors' willingness to invest in reliance on the MIC.

28. Separately, the Secretariat suggests that the working group could develop other tools to incentivize compliance, such as a security for costs mechanism, or allow states that do not join the MIC to opt into its enforcement scheme.²⁶ In our view, neither approach would give states and investors confidence that MIC decisions will have nearly the same currency as arbitral awards in the current system.

²¹ *Id.* at para. 66 (noting the “need to ensure financial security” as a factor in considering the terms of office and renewal for adjudicators on a standing mechanism).

²² CCIAG December 2019 submission at paras. 31-35.

²³ Appellate mechanism and enforcement at para. 43 (noting the “the uncertainty regarding whether an appellate mechanism established as a permanent body could fall under article I(2) of the New York Convention, which refers to awards ‘made by permanent arbitral bodies to which the parties have submitted’”).

²⁴ CCIAG December 2019 submission at paras. 36-39.

²⁵ Appellate mechanism and enforcement at para. 43.

²⁶ *Id.* at para. 44.

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

29. The Secretariat does not address the financing of the MIC, which is a topic that was discussed in the working group.²⁷ That said, the essential features of the MIC discussed by the Secretariat, including salaried adjudicators and permanent facilities, would clearly entail significant costs for states. Unlike in the current system, states will bear these costs regardless of whether they or their investors use the system. The CCIAG previously raised concerns that this approach will not be sustainable over time because states will balk at funding the MIC.²⁸ These concerns are amplified today given the Covid-19 crisis and the uncertain trajectory for the global economy. Investors will think twice about relying on a system that may not be available when disputes arise due to lack of funding and support.

B. Appellate Mechanism

30. As the CCIAG has previously explained, the model of a permanent appellate mechanism that has been proposed in the working group has at least three critical flaws. It will (1) tilt the balance of the dispute settlement system against investors because its members would be appointed by states alone, like the MIC; (2) make erroneous decisions permanent, which could cripple the dispute settlement system; and (3) increase the cost and duration of proceedings.

31. The Secretariat's paper on an appellate mechanism does not provide a basis to elaborate on the first two flaws, since it does not address many of the core features of an appellate mechanism. For example, it does not address how members would be appointed; whether the mechanism would be constituted as a permanent or *ad hoc* mechanism; and the interpretive effect of decisions by the mechanism. Still, the Secretariat's thoughtful discussion of other technical questions and options related to the design of an appellate mechanism clearly confirms and accentuates the third flaw that the CCIAG previously identified: an appellate mechanism will inevitably increase the cost and duration of proceedings, no matter how it is designed. The Secretariat's paper also suggests an additional flaw: the incompatibility of an appellate mechanism with the ICSID Convention.

1. An appellate mechanism increases the cost and duration of proceedings

32. The Secretariat suggests that an appellate mechanism would, at a minimum, have the power to review legal determinations by the first-instance mechanism on a *de novo* basis and factual determinations on a more deferential "manifest error" basis. This alone would significantly increase the use of the review mechanism as compared to existing review mechanisms that have more limited purview, such as the ICSID annulment process. The WTO Appellate Body's experience is illustrative, as that mechanism has similarly broad powers as the

²⁷ Report of UNCITRAL Working Group III on the work of its resumed thirty-eighth session at paras. 82-94.

²⁸ CCIAG December 2019 submission at paras. 40-42.

envisioned appellate mechanism. Between 2011-2018, 71% of WTO cases were appealed.²⁹ By contrast, annulment was requested in just 51% of ICSID cases during the same period.³⁰

33. The Secretariat suggests that the working group could develop conditions or filters to ensure that appeals are not pursued in all or most cases, but there is little reason to believe that the example offered in the Secretariat's draft provisions – empowering an appellate mechanism to order a security for costs – would materially affect the volume of appeals. And even if effective conditions or filters could be devised, an appellate mechanism would still increase the cost and duration of the many disputes that would elude these controls, given the broad scope of an appellate mechanism's powers.

34. These appeals will likely be costly and time-consuming even if the working group establishes strict time limits for appeals, as suggested by the Secretariat. Again, the WTO precedent is useful. WTO rules provide that appeals shall take no more than 60 days “as a general rule” and “[i]n no case shall the proceedings exceed 90 days.”³¹ In fact, no appeal has been completed within 90 days since May 2014. This is one of many reasons why the WTO dispute settlement system is in crisis.

35. Further, there is a strong possibility that an appeal will not end the proceedings in many cases. It can be expected that appeals will succeed at a much greater rate than annulment or set-aside applications in the current system – for example, the WTO Appellate Body modifies or reverses portions of approximately 85% of panel reports, which is dramatically higher than the 3% ICSID annulment success rate this decade.³² Further, when appeals are successful, an appellate mechanism may need to remand the case to the first-instance mechanism for additional proceedings. Noting that some delegations oppose remand, the Secretariat makes the key point: “A further question would be how to address situations where an appellate tribunal would lack remand authority and has insufficient information on the facts to render a final decision, or the parties have not been adequately heard on the facts, to render a final decision.”³³ A remand – or equivalent procedure – is inevitable, and it would exponentially increase the cost and duration of the proceedings.

36. Additional time and expense would be required if arbitral awards are subject to two separate and potentially overlapping layers of review, such as review by an appellate mechanism followed by review by a national court applying domestic arbitration law (for non-ICSID awards). States could endeavor to eliminate national court review by amending their domestic laws, as the Secretariat notes.³⁴ But it is not at all certain that states would do so. For example,

²⁹ WTO Appellate Body Annual Report for 2018 (Mar. 2019), https://www.wto.org/english/tratop_e/dispu_e/ab_an_rep_e.htm, at p. 142.

³⁰ ICSID 2018 Annual Report, <https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>, at p. 36.

³¹ WTO Dispute Settlement Understanding at Article 17.5.

³² See CCIAG December 2019 submission at para 55.

³³ Appellate mechanism and enforcement at para. 30.

³⁴ *Id.* at para. 9.

it may be politically difficult for some states to hand review power from their courts to a new and uncertain multilateral institution. Consequently, it seems quite likely that disputing parties will need to endure multiple time-consuming and expensive review proceedings in some cases.

2. An appellate mechanism is incompatible with the ICSID Convention

37. In addition to the New York Convention issues discussed above that would apply to both the MIC and an appellate mechanism, the Secretariat notes that an appellate procedure is incompatible Article 53 of the ICSID Convention. This is indisputable.

38. The first suggested workaround – amending the ICSID Convention – is not feasible, given the requirement that all 155 ICSID Contracting States approve any amendment. The second suggested workaround – an *inter se* modification of the ICSID Convention pursuant to Article 41 of the Vienna Convention on the Law of Treaties – is legally uncertain. As the Secretariat notes, there is no relevant case law to give the working group confidence that Article 41 can be used in this manner, and further, there is no consensus in the academic community.³⁵ Further, an *inter se* modification will not address enforcement of ICSID Convention awards in jurisdictions that do not subscribe to the modification. This yields the same problem discussed above regarding the New York Convention: an appellate mechanism will eliminate the nearly universal enforceability of ISDS awards and replace it with a patchwork enforcement regime that will undermine investor confidence and constrain investment.

III. Conclusion

39. This submission provides the perspective of the CCIAG and USCIB on the UNCITRAL Secretariat’s papers on “Selection and appointment of ISDS tribunal members” and “Appellate mechanism and enforcement issues,” building from the CCIAG’s December 2019 submission to the working group on many of these topics. While we fully support ISDS reform and many of the proposals being discussed in the working group, we find that the proposals in the Secretariat’s papers – radically changing the appointment of arbitrators in the *ad hoc* ISDS system through the use of mandatory rosters or appointing authorities with enhanced powers, or replacing the *ad hoc* ISDS system altogether with new dispute settlement mechanisms – are ill-conceived and would harm both states and investors.

40. Thank you for the opportunity to share our views on these important topics with the working group.

³⁵ *Id.* at para 54.