UNCITRAL Commission, 58th Session, Vienna

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The United States submits the following comments to A/CN.9/1220 ("Draft UNCITRAL Toolkit on Prevention and Mitigation of International Investment Disputes") for consideration under Agenda item 9 of the fifty-eighth session of the United Nations Commission on International Trade Law. The United States thanks the Secretariat for its excellent work in preparing the revised and greatly improved draft toolkit.

On review, the U.S. delegation has identified the following three substantive concerns with the revised toolkit on the prevention and mitigation of international investment disputes:

- First, the U.S. previously suggested defining "States" on page 3 of A/CN.9/1220 to include REIOs, but defining the singular "State" to not include REIOs. In part, that edit was intended to account for references later in the document to "State sovereignty," which would not appropriately apply to REIOs. The revised text has adopted a new parenthetical to define the terms "State" and "States," but that parenthetical still incorrectly lumps together nation-states and REIOs under the same term of art. Conducting a comprehensive review of the toolkit to determine where it would be correct to include REIOs in a reference to a "State" or multiple "States" would take considerable effort. An alternative may be to strike the parenthetical defining "States" as including REIOs and instead add a new sentence or footnote acknowledging that REIOs may also, depending on their structure and the scope of their regulatory authority, engage the strategies or impose the measures listed in the toolkit.

- Second, the new caveating language at the end of paragraph 12 in Section B.2 could use some refining. For one thing, the word "duty" operates as a legal term of art in many jurisdictions, and it may not be the case that investors always have a strict "duty" in all jurisdictions to conduct due diligence prior to making any investment, even if that is standard practice. As an alternative, paragraph 12 could be revised to suggest that investors "should" conduct due diligence, or that portion of the second sentence could specify that actions on the part of the host state should not create any expectation on the part of investors *particularly in jurisdictions where* investors have a duty to conduct due diligence prior to investing. Also, whether the provision of information "should" be deemed as creating expectations on the part of investors is a policy choice that should be left to individual States and regulators. That text might therefore be modified to make clear that, for example, only express, intentional commitments not to change a regime would give rise to such expectations.

- Third, the U.S. previously suggested that references to "investor grievance mechanisms" in Section B.3 of the toolkit should be revised to reference investor grievance *or feedback* mechanisms. The Secretariat has revised the text to define the phrase "grievance mechanism" to incorporate both grievance and feedback mechanisms, but that change is ineffective. Grievance and feedback mechanisms serve fundamentally different functions that the toolkit should be careful not to conflate. Most importantly,

when referring generally to mechanisms that States might impose in order to engage with investors, it is appropriate for the text to refer to both grievance and feedback mechanisms. However, where the text refers to an example of a specific mechanism, that reference should make clear whether that specific mechanism is for feedback or the resolution of grievances.

In addition to the above, the U.S. delegation proposes the following minor edits to further improve the text:

- p. 4, ¶ 3 – In the last sentence, the phrase "which was based" has an unclear antecedent. If referring to the toolkit, that phrase should be made into a new sentence that begins: "The Toolkit was based . . ."

- p. 7, ¶ 19 – The word "the" should be deleted in the phrase "in the rule and policymaking."

- p. 11, ¶ 37 – The second sentence would be more accurate grammatically if revised to read: "Such information can help avoid inconsistent investment instruments."

- p. 16, ¶ 62 – Paragraph 62 should be revised as follows: "~~Once established and operational,~~ The Advisory Centre on International Investment Dispute Resolution that is the subject of ongoing operationalization efforts is expected to function . . ."

- p. 17, ¶ 67 – The word "do" should be replaced with "does" in the phrase "[i]t would also be crucial that exchange of information during that process do not prejudice . . ."

Finally, the characterization of the U.S. system in the second sentence of paragraph 66 on page 17 is taken out of context and is therefore inaccurate as applied to investment issues. The legal rule discussed in the manual relates to constitutional torts in U.S. law, not regulatory or investment issues. The U.S. delegation therefore proposes striking that language (from "In the United States of America . . ." through ". . . wilful misconduct or gross negligence," including the footnote).