

**UNCITRAL Working Group III – USG Comments on A/CN.9/1185:
Draft Toolkit on Prevention and Mitigation of International Investment Disputes**

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The United States submits the following comments on the Draft Toolkit on Prevention and Mitigation of International Investment Disputes, as set out in A/CN.9/1185. The United States thanks the Secretariat for the opportunity to submit comments and for its work on the draft toolkit.

Section A—Introduction

- In paragraph 1, the United States proposes splitting the second sentence into two sentences, to read as follows: “In the Toolkit, ‘international investment disputes’ refer to a wide range of disputes between a foreign investor and a State or any constituent subdivision of a State or any agency of a State. These disputes arise out of a treaty providing for the protection of investments or investors, legislation governing foreign investments or an investment contract (referred to collectively as ‘investment instruments’).”
- In the first sentence of paragraph 2, the United States proposes replacing “devolves” with “develops.”
- In paragraph 3, the United States proposes the following clarifying edit to the parenthetical defining “States”: “(references to ‘States’ hereinafter include REIOs, while references to a single ‘State’ do not).” References to “State” throughout the text do not appear to contemplate REIOs—in paragraph 4, for example, where the text refers to the “sovereign regulatory powers” of a “State.”
- In paragraph 5, the United States proposes replacing “empower governments” with “offer ideas that governments can employ” and deleting the last two sentences of the paragraph (beginning with “In other words...”).

Section B—Communication with Investors

- In general, paragraphs 7–9 at the beginning of Section B include unnecessary editorializing and repetition. The examples in the toolkit should speak for themselves. The United States therefore proposes condensing these three paragraphs.
- In paragraph 7, the United States proposes replacing “which are essential elements for maintaining positive relationships with investors” with “which can help maintain positive relationships with investors.”

- In the first sentence in paragraph 8, the United States proposes adding “Some States have found that” to the beginning of the sentence and replacing the phrase “engaging investors in policy discussions” with “providing a mechanism for investor feedback on potential policy changes.” The United States further proposes combining the second and third sentences and adding “Similarly, States have found that” to the beginning of that combined sentence. The revised paragraph would then read: “Some States have found that effective communication with investors can be achieved by providing a mechanism for investor feedback on potential policy changes. Similarly, States have found that simply providing information may not always suffice and that policy choices may need to be explained and conveyed in a different manner.”
- In paragraph 9, the United States proposes deleting “In this context” and adding “shop” to “one-stop shop” in the first sentence, deleting the last phrase of the second sentence (beginning with “aiding them”), and adding “In some cases” to the beginning of the third sentence.

Section B.1—Easy Access to Information

- The United States proposes combining the second and third sentences of paragraph 10, and adding “Some States have found” to the beginning of the revised sentence, which would then read: “Some States have found that prospective investors need information on how to establish their investment, the regulatory framework that will govern their investment, the applicable laws and compliance procedures, and governmental or related agencies that investors may need to interact with (referred to generally as ‘competent governmental agency or agencies’ in the Toolkit).”
- In the first sentence of paragraph 11, the United States proposes deleting the phrase “and be informed, for example, whether any assurances given by a specific governmental entity are binding under domestic law.” Conforming changes will be necessary, possibly to combine the remainder of the first sentence with the second sentence. The United States also proposes adding relevant citations to this paragraph.
- In paragraph 14, the United States proposes deleting “comprehensive” and replacing “serving as” with “which business have noted is,” so that the first sentence would read: “In certain jurisdictions, technology has been employed to improve communication with investors and provide information, which businesses have noted is a valuable resource.”
- In paragraph 16, the United States proposes adding “can” before “provides” in the second sentence, so that sentence would read: “This can provide investors with greater transparency and predictability regarding the legal framework in which they operate.”

Section B.2—Engaging Investors in Policy Discussions

- The United States proposes modifying the header to Section B.2 to read: “Investor Feedback on Policy Issues”
- In paragraph 17, the United States proposes adding “the likelihood of” before “claims” in the second sentence, so that sentence would read: “To reduce grievances of investors and mitigate the likelihood of claims being raised at a later stage...” The United States also proposes replacing “by involving investors in the policy discussions leading to” with “by providing a means for investors to provide feedback regarding potential changes to” in the second sentence.
- The United States proposes deleting the second sentence of paragraph 20.
- In the first sentence of paragraph 21, the United States proposes replacing “this” with the concept that “is also embodied in investment agreements.” It is not clear what concept the text intends to identify as being embodied in investment agreements.

Section B.3—Investor Grievance Mechanism

- Throughout the draft toolkit, the United States proposes replacing references to “grievance mechanism” with “grievance or feedback mechanism,” including in the title to Section B.3. It may also be appropriate throughout the document to replace certain references to “grievance” with “grievance or feedback,” depending on the context of the particular reference.
- The United States notes that the text in paragraph 22 is not supported by citations. The United States therefore proposes providing citations or examples to illustrate the assertions contained therein.
- The United States notes that the text in paragraphs 24, 25, and 26 is not supported by citations. The United States therefore proposes either deleting those paragraphs or providing citations or examples to illustrate the assertions contained therein.
- In paragraph 27, the United States proposes adding “In the examples surveyed” to the beginning of the first sentence.
- In the first sentence of paragraph 28, the United States proposes adding “to” after “governments” and before “set up,” so that the sentence would read: “The experience of the World Bank in supporting governments to set up investor grievance mechanisms may be useful.”

Section C—Coordination Among Governmental and Related Agencies

- The United States notes that the text in paragraphs 33, 34, and 35 is not supported by citations. Furthermore, paragraph 35 engages in a hypothetical, which may not be appropriate for this document. The United States therefore proposes deleting paragraph 35, and also either deleting paragraphs 33 and 34 or providing citations or examples to illustrate the assertions contained in those two paragraphs.

Section C.1—Information-Sharing

- In the second sentence of paragraph 38, the United States proposes replacing “would” with “could” and removing “that is the cause of many grievances,” so that the sentence would read: “Such information could assist in avoiding having inconsistent investment instruments.”
- In paragraph 41, the United States proposes deleting the first sentence, deleting the phrase “To address this problem” in the second sentence, and replacing “provides” with “could provide” in the third sentence.
- In the first sentence of paragraph 43, the United States proposes moving the phrase “, such as the Asia-Pacific Economic Cooperation (APEC),” so that it comes after “intergovernmental organizations.” The first sentence would then read: “Regional intergovernmental organizations, such as the Asia-Pacific Economic Cooperation (APEC), have also provided similar tools.”

Section C.2—Identifying or Establishing a Coordination Body

- In the first sentence of paragraph 44, the United States proposes replacing “may” with “could” and deleting “crucial.”
- The United States proposes deleting the second (and final) sentence in paragraph 45.
- In the second sentence of paragraph 49, the United States proposes replacing “is crucial” with “could impact.”
- In the second sentence of paragraph 50, the United States proposes replacing “it is important that” with “often.”
- The United States notes that the text in paragraph 52 is not supported by citations. The United States therefore proposes either deleting that paragraph or providing citations or examples to illustrate the assertions contained therein.

Section C.3—Functions of a Coordination Body

- In the third sentence of paragraph 54, the United States proposes replacing “contributes” with “can contribute.”
- The United States proposes deleting the second sentence in paragraph 57, which discusses topics outside the purview of this Working Group.
- The United States notes that the text in paragraphs 58 and 59 is not supported by citations. The United States therefore proposes either deleting those paragraphs or providing citations or examples to illustrate the assertions contained therein. If paragraph 59 is nonetheless retained, the United States proposes replacing “would” with “could.”

Section D—Coordination and Cooperation with Other Governments

- In the first sentence of paragraph 62, the United States proposes replacing “may” with “could.”

Section E.2—Exoneration of Liability of Government Officials

- In the second sentence of paragraph 69, the United States proposes replacing “reassures” with “could reassure.” The United States also notes that the text in paragraph 69 is not supported by citations and recommends providing citations or examples to illustrate the assertions contained therein.