UNCITRAL Working Group III – USG Comments on A/CN.9/WG.III/WP.246: Draft Multilateral Instrument on ISDS Reform

Date of Submission: February 16, 2025

The United States submits the following comments on the Draft Multilateral Instrument on ISDS Reform ("MIIR"), as set out in A/CN.9/WG.III/WP.246, in response to the request for comments made in the Annotated provisional agenda for the fifty-first session of Working Group III (A/GN.9/WG.III/WP.250). These comments are preliminary, offered on a technical basis, subject to further development based on discussions within the Working Group, and are made without prejudice to whether the United States would join the MIIR or any of the underlying Protocols. Furthermore, the fact that the United States has not commented on any particular provision below does not mean that the United States concurs with the text as-drafted.

Generally, the U.S. comments divide the instruments identified in the draft MIIR into two groups—Protocols[1] and Model Provisions—based on the nature of those instruments and how they are structured. The U.S. comments also envision a structure whereby the MIIR and each Protocol would constitute stand-alone agreements with separate administrative provisions. That approach would allow for the establishment of different ratification requirements and entry into force procedures for different Protocols, which is essential given the varied content, objectives, and intended effects of those instruments.

The United States thanks the Secretariat for the opportunity to submit comments.

Preamble

The United States proposes the following changes to the draft Preamble:

> The Parties to this Convention,
>
> [PP1:] *Noting* the great number of ~~treaties, which~~ **bilateral and multilateral investment agreements and free trade agreements with investment chapters (together, "international investment agreements") that** contain provisions on the protection of **foreign** investments and investors and mechanisms to address disputes arising therefrom,
>
> [PP2:] *Recognizing* the importance of the rule of law and the need for a fair and effective system to ~~prevent and~~ resolve disputes arising from **foreign** investments,
>
> [PP3:] *Mindful* of **diverse** concerns regarding investor-State dispute settlement, which include, among others, those relating to coherence and **correctness** ~~consistency~~ of decisions, the independence and impartiality of adjudicators, **and** the cost and duration of proceedings~~ as well as the overall legitimacy of the dispute settlement system~~,

[1] Depending on how the Protocols are drafted, and in particular how those instruments characterize their relationship to the MIIR, it may be more appropriate to use a different term rather than "Protocol." However, the United States has maintained the term "Protocols" here for the sake of consistency and to avoid confusion.

[PP4:] *Recognizing* the need to take public interest into account in ~~preventing and~~ resolving disputes arising from **foreign** investments,

[PP5:] ~~*Reaffirming* the right of States to regulate and to introduce measures relating to investments in their territories in order to meet policy objectives as well as the sovereign right of States to commit to international standards and agreements in this regard,~~

[PP6:] *Mindful* of the desire to ~~undertake~~ **carry out** reforms in investor-State dispute settlement~~, which consist of a wide range of reform elements~~,

[PP7:] ~~*Desiring* to build on efforts undertaken by States in treaties to improve investor-State dispute settlement and similar efforts by international and regional organizations,~~

[PP8:] ~~*Desiring* to compile and integrate a range of reforms relating to investor-State dispute settlement into an international instrument, which would allow for a holistic and coherent approach,~~

[PP9:] ~~*Desiring* also to develop an efficient and flexible tool for States to implement such reforms as embodied in the Protocols to this Convention,~~

[PP10:] *Duly* recognizing the diversity of legal systems and policy choices of States with regard to investor-State dispute settlement,

Have agreed as follows:

Note that the United States has provided numeric headings for each of the preambular paragraphs solely to clarify the comments below and does not intend to suggest that such headings should be added to the MIIR.

In PP1 (and throughout the draft), references to "treaties" should be replaced with "international investment agreements," as defined above, for greater specificity. It may also be appropriate to add a definitions article to the draft MIIR to define terms like "international investment agreements," "Protocol," and "Model Provisions," among others. Also, in PP1 as well as in PP2 and PP4, "foreign" should be added to modify "investment" to avoid confusion with domestic investment and related remedies.

In PP2, the United States proposes striking "prevent," since the substantive ISDS reform elements contemplated in the Protocols and Model Provisions are focused on the dispute resolution process.

In PP3, the focus should be on the coherence and correctness of decisions, rather than their consistency. We should not seek to achieve consistency in decisions at the expense of coherence or correctness. Also, the "legitimacy" of the ISDS system arises from the consent of States to participate in that system, so the last clause of PP3 should be struck.

In response to paragraph 5 of the commentary to WP 246, the United States notes that the right to regulate is only addressed in the current draft of the procedural and cross-cutting provisions. The MIIR is structured to allow countries the flexibility to choose which of the Protocols and Model Provisions they would like to implement. It is therefore feasible that a country would become party to the MIIR and to certain of the Protocols, without wanting to apply the procedural and cross-cutting provisions. The United States therefore supports striking PP5 and avoiding any suggestion in the MIIR that all parties to the MIIR necessarily accept or reaffirm the right to regulate or any other potential substantive provisions in any of the draft Protocols.

The last phrase of PP6 and the entirety of PP7, PP8, and PP9 are unclear and/or unnecessary. Specifically, PP7 could be read to incorrectly suggest that the MIIR is distinct from State efforts to reform ISDS and, potentially, that the MIIR is being entered into by entities other than States. PP8 and PP9 are unnecessary. Those paragraphs could be revised or the substance of those paragraphs could be moved from the Preamble to the draft Article on Objectives.

Draft Article 1 – Objectives and scope

The United States proposes the following changes to draft Article 1:

> 1. This Convention provides a framework for the Parties ~~to apply or to be bound by~~ **to implement** Protocols **and Model Provisions** relating to international investment dispute resolution.
>
> 2. Each Protocol **and Model Provision** may specify its **objectives and** scope ~~of application~~.

To avoid confusion, paragraph 1 should describe the operation of the Convention using language that would apply equally to all of the Protocols and Model Provisions. The United States has proposed language focused on the implementation of the Protocols and Model Provisions.

The United States has also proposed revisions to paragraph 2 to match the language used in the Article title, in an effort to clarify the understood intent of the provision.

Draft Article 2 – Protocols

The United States proposes the following changes to draft Article 2:

> 1. ~~This Convention includes~~ **T**he following **instruments, and any amendments thereto, constitute** Protocols **to this Convention**:
>
> ~~• Protocol A: UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023);~~
>
> ~~• Protocol B: UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023)~~

~~• Protocol C: [Draft provisions on procedural and cross-cutting issues – subject to possible categorization];~~

• Protocol X: [Statute of an advisory centre on international investment dispute resolution];

• Protocol Y: [Draft statute of a standing mechanism for the resolution of international investment disputes]; and

• Protocol Z: [Draft statute of an appeal mechanism for the resolution of international investment disputes].

1bis. The following rules, and any modifications thereto, constitute Model Provisions within the meaning of this Convention:

• Model Provision A: UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023);

• Model Provision B: UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023); and

• Model Provision C: [Draft provisions on procedural and cross-cutting issues].

2. In accordance with article 10, additional ~~protocols~~ **instruments and rules** may be ~~included~~ **added as, respectively, Protocols** to **or Model Provisions within the meaning of** this Convention.

~~3. The Protocols shall constitute an integral part of the Convention.~~

4. Unless expressly provided otherwise, references to "the Convention" or "this Convention" shall **not** include ~~all~~ **the** Protocols **or Model Provisions**.

The United States proposes striking the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023) (the "Code of Conduct"), the UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023) (the "Model Provisions on Mediation"), and the draft provisions on procedural and cross-cutting issues from the list of Protocols, and instead referring to those documents as "Model Provisions" in a new paragraph 1bis.[2] The United States would also be open to considering the inclusion of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") in the list of Model Provisions. As noted in paragraph 10 of the commentary to WP 246, the Code of Conduct, Model Provisions on Mediation, draft provisions on procedural and cross-cutting issues, and Rules on Transparency provide procedural rules upon which parties may agree for the conduct of arbitral proceedings. Those instruments are not international

[2] However, depending on the categorization, content, and structure of the draft provisions on procedural and cross-cutting issues, it may be necessary to later revisit whether certain of those provisions would be better categorized as a Protocol rather than a Model Provision.

agreements and do not, themselves, include State-to-State commitments. They could also be utilized outside of any international agreement; for example, the United States recently negotiated to have the Code of Conduct applicable to a dispute through a procedural order in a specific case. The ACIIDR and MIC statutes, on the other hand, would necessarily include State-to-State commitments related to the relevant entity's funding and operation, and therefore would operate as international agreements with standalone ratification, entry into force, and implementation processes. Those procedural differences necessitate divergent treatment of those two categories of instruments for purposes of the MIIR. The United States has made conforming changes elsewhere throughout the MIIR to account for its proposed addition of Model Provisions. It would also be appropriate, if the U.S. proposal is adopted, to edit the title of draft Article 2 to "Protocols and Model Provisions."

In line with the above, the proposed revised language included in paragraphs 1 and 1bis clarifies the relationship between the MIIR, on the one hand, and the Protocols and Model Provisions, on the other. Also, including the language "and any [amendments/modifications] thereto" in paragraphs 1 and 1bis would clarify that the MIIR would still apply to the Protocols and Model Provisions named in Article 2 even if those instruments are later amended or modified, without requiring an amendment to the MIIR. The U.S. proposed edits to paragraph 2 are similarly intended to more accurately capture the relationship between the MIIR, Protocols, and Model Provisions, as well as the process outlined in Article 10 for adding Protocols and Model Provisions to the Convention.

The proposed edits to paragraphs 3 and 4 reflect the U.S. understanding that, in most circumstances where "the Convention" or "this Convention" is used in the draft MIIR, the intent is to refer just to the MIIR and not to the Protocols or Model Provisions. (See, e.g., draft Articles 3 and 5, which establish procedures for the ratification, acceptance, and entry into force of the MIIR.) It would therefore be most sensible to establish as a default rule that "the Convention" and "this Convention" refer only to the MIIR and not to the Protocols or Model Provisions. And having established that as the default rule, it is no longer necessary or appropriate to refer to the Protocols or Model Provisions as an integral part of the MIIR.

Draft Article 3 – Signature, ratification, accession

The United States proposes the following changes to draft Article 3:

> 1. This Convention is open for signature by all States in [date and location], and thereafter at [United Nations Headquarters in New York].
>
> 2. This Convention is subject to ratification by the signatories.
>
> 3. This Convention is open for accession by all States~~, which~~ **that** are not signatories as from the date it is open for signature.
>
> 4. Instruments of ratification or accession are to be deposited with the depositary.

~~5. When depositing the instrument of ratification or accession, a State shall indicate the Protocol(s) that it ratifies or accedes to in the same instrument.~~

~~6. A Party may subsequently deposit an instrument of ratification or accession to any other Protocol(s).~~

~~7. If a Protocol contains provisions on ratification or accession with regard to that Protocol, a Party shall also comply with the requirements therein to ratify or accede to that Protocol.~~

Paragraphs 5, 6, and 7 should be struck. Some of those paragraphs are unnecessary and, in any event, it would be less confusing and more appropriate for the Protocols to establish their own ratification and accession procedures.

Draft Article 4 – Participation by regional economic integration organizations

The United States proposes the following changes to draft Article 4:

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign~~,~~ **and** ratify**,** or accede to**,** this Convention. The regional economic integration organization shall ~~in that case~~ **upon ratification or accession** have the rights and obligations of a Party to the Convention, to the extent that the organization has competence over matters governed by this Convention.

2. ~~Unless specified otherwise in a Protocol,~~ **W**here the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

3. The regional economic integration organization shall, at the time of signature, ratification or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred, fully or in part, to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

4. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

~~5. Unless specified otherwise in a Protocol, regional economic integration organization, on matters within its competence, may exercise its right to vote with a number of votes equal to the number of its member States that are Parties to this Convention. Such an~~

> ~~organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.~~

The United States has proposed edits to the second sentence of paragraph 1 to properly differentiate signature and ratification from accession and to avoid suggesting that signatories that have not yet ratified the MIIR nonetheless "have the rights and obligations of a Party."

Also, the U.S. view is that the MIIR is not the best vehicle for mandating participation and voting procedures applicable to the Protocols, and vice versa. The United States therefore proposes striking language in paragraph 2 purporting to suggest that provisions of the Protocols might overrule the participation and voting procedures specifically applicable to the MIIR.

Furthermore, the United States has elsewhere proposed striking draft Article 10(3), which is the only provision in the MIIR that envisions calling a vote of the Parties to the MIIR. Paragraph 5 to draft Article 4 is therefore also unnecessary. However, to the extent Article 5(4) is retained (or similar voting provisions are added to the Protocols), the U.S. maintains its view that REIOs should not have a vote in addition to their constituent members.

<u>Draft Article 5 – Entry into force</u>

The United States proposes the following changes to draft Article 5:

> 1. This Convention shall enter into force [three] months after the date of deposit of the [third] instrument of ratification or accession.
>
> ~~2. Unless specified otherwise in the Protocol, each Protocol shall enter into force [three] months after the date of deposit of the [third] instrument of ratification or accession.~~
>
> 3. When a State ratifies or accedes to this Convention after the deposit of the [third] instrument of ratification or accession, this Convention enters into force in respect of that State [three] months after the date of the deposit of its instrument of ratification or accession.
>
> ~~4. Unless specified otherwise in the Protocol, when a State ratifies or accedes to a Protocol after the deposit of the [third] instrument of ratification or accession, that Protocol enters into force in respect of that State [three] months after the date of the deposit of its instrument of ratification or accession.~~

The MIIR is not the best vehicle for establishing entry into force procedures applicable to the Protocols. Depending on the content of the Protocols, it may be appropriate for different entry into force procedures to apply to different instruments, rather than imposing a one-size-fits-all approach. The United States therefore proposes striking paragraphs 2 and 4 in their entirety and leaving it to the Protocols to define their own entry into force procedures.

The United States has not proposed editing the number of ratifications or accessions needed for the MIIR to enter into force, but would appreciate hearing from the Secretariat whether it

believes that three ratifications or accessions is appropriate and whether there are examples of other, similar multilateral agreements where only three ratifications or accessions were required for entry into force.

Also, in response to paragraph 28 of the commentary to WP 246, the United States notes that as drafted this Article does not explicitly suggest that the Protocols can only enter into force once the MIIR has entered into force. If those instruments are intended to truly operate as Protocols to the MIIR, it may be appropriate to add such a provision both to the MIIR and to each individual Protocol.

Draft Article 6 – Submission of a list of investment treaties (notification)

The United States proposes the following changes to draft Article 6:

> 1. ~~Within [three] months~~ **At any time** after its deposit of **an** instrument of ratification or accession, ~~the~~ **a** Party ~~shall~~ **may, together with one or more Parties with which it shares one or more international investment agreements,** submit to the secretariat a **signed joint notification** ~~list of investment treaties to which each Protocol shall apply (referred to as the “notification”)~~.
>
> 2. The **joint** notification shall **identify the international investment agreement(s) and the Protocol(s) or Model Provision(s) to which the joint notification applies. International investment agreements and Protocols shall only be included in the joint notification if all notifying Parties are party to those instruments and they have entered into force** ~~relate only to the Protocol(s) that the Party has ratified or acceded to and list only investment treaties to which the Party is a party~~.
>
> 3. ~~A Party shall detail how the Protocol(s) would modify the investment treaties listed in the notification to the extent possible. It may provide additional information in its notification.~~ **By submitting a joint notification identifying one or more Protocols, the notifying Parties agree that the provisions in those Protocols shall apply to and be binding on the notifying Parties with respect to the international investment agreement(s) identified in the joint notification. In the event of any inconsistency between the identified international investment agreement(s) and the provisions in the identified Protocols, the Protocols shall prevail to the extent of the inconsistency. In their joint notification, the notifying Parties shall describe in detail how the Protocol(s) applies to and/or affects the Parties’ rights and obligations under the international investment agreement(s) identified in the joint notification.**
>
> **3bis. By submitting a joint notification identifying one or more Model Provisions, the notifying Parties agree that claims submitted under the international investment agreement(s) identified in the joint notification shall be conducted in accordance with those Model Provisions.**
>
> 4. **Unless specified otherwise in the joint notification,** ~~T~~**t**he **joint** notification shall take effect [three] months after ~~[~~the date of the **joint** notification to the secretariat~~] [the~~

~~notification is made available to the public by the secretariat]~~. ~~A~~ **The notifying** Part**ies**~~y~~ may modify **or rescind** ~~its~~ **a** notification by submitting a~~n amendment~~ **revised, signed joint** notification to the secretariat. **Such modification or rescission shall take effect [three] months after the date of the joint notification to the secretariat.**

4bis. Unless specified otherwise in ~~the Protocol or in~~ the **joint** notification~~ by a Party~~, a ~~Protocol~~ **joint notification** shall apply only to international investment dispute proceedings that are commenced after the date when the **joint notification** ~~Protocol enters into force or~~ takes effect~~ in respect of each Party concerned~~.

~~5. A Party shall ensure that its notification(s) and the list therein is up to date and submit an amendment notification if there are any changes in the status of the investment treaties listed therein.~~

6. The secretariat shall maintain and make publicly available the **joint** notifications made by the Parties, including the **international** investment **agreements, Protocols, and Model Provisions** ~~treaties~~ listed therein.

As originally drafted, the proposed notification process would have been insufficient to effectively amend the Parties' international investment agreements, particularly given the variations in those agreements and the breadth of issues set out in the various Protocols. The United States has therefore proposed a modified procedure that would require joint, signed notifications to be submitted by all relevant parties to an underlying investment agreement. All joint notifications would need to identify the international investment agreements, Protocols, and Model Provisions to which they apply, with the caveat that international investment agreements and Protocols could only be included if all notifying Parties are party to those instruments and they have entered into force. The U.S. proposed process would avoid several pitfalls, including by ensuring consistency and avoiding confusion by requiring parties to investment agreements to coordinate their notifications to the secretariat.

Furthermore, the U.S. proposal would clarify in the text of the MIIR itself the legal effect of a joint notification in the case of both Protocols and Model Provisions. Specifically, the revised paragraph 3 explains that, by identifying a Protocol in a joint notification, the notifying Parties agree to apply and be bound by that Protocol with respect to the international investment agreements also included in the joint notification. Notifying parties would also be required, in their joint notification, to explain how the Protocol applies to and/or affects the rights or obligations of the Parties in the underlying investment agreements. The proposed paragraph 3bis further specifies that, by identifying a Model Provision in a joint notification, the Parties agree that claims submitted pursuant to the underlying investment agreements shall be conducted in accordance with the Model Provisions included in the joint notification.

The United States also proposes adding paragraph 4bis to draft Article 6, which is a revised version of paragraph 6 from draft Article 7 ("temporal scope of application"). Given the other edits proposed by the United States to draft Articles 6 and 7, the content of that paragraph is now more appropriately placed in draft Article 6.

Other U.S. proposed edits to the provisions above include the replacement of references to "treaties" and "investment treaties" throughout with the phrase "international investment agreements," for clarity and consistency.

Finally, draft Article 6 envisions that several actions will be performed by a "secretariat," but the current draft of the MIIR does not contain provisions establishing a secretariat or defining its operations. Those details will need to be fleshed out before the MIIR can be finalized.

<u>Draft Article 7 – The effect of the notification and application of the Protocols</u>

If the U.S. edits and comments to draft Article 6 are accepted, a separate article establishing the effect of the notifications is no longer necessary. The United States therefore proposes striking paragraphs 1-5 of draft Article 7 in their entirety. As noted above, paragraph 6 of draft Article 7 ("temporal scope of application") has been added as a new paragraph 4bis to draft Article 6. As to paragraph 7 of draft Article 7 ("most favoured nation provision"), the U.S. view is that it would be more appropriate to address MFN issues in each individual Protocol.

<u>Draft Article 8 – Reservations</u>

The United States proposes the following changes to draft Article 8:

> 1. No reservations may be made with respect to the Convention.
>
> ~~2. Reservations with respect to any of the Protocols may only be made to the extent permitted in that Protocol and in accordance with the provisions of that Protocol.~~

The United States does not object conceptually to the notion that the Protocols might allow for reservations, but would appreciate clarification about the types of reservations that the secretariat anticipates parties to the MIIR might want to make. Additionally, because the MIIR is not the best vehicle for mandating how the Protocols will operate, provisions like paragraph 2 should be included in the Protocols themselves, rather than the MIIR.

Finally, the United States would appreciate clarification about the intended meaning of paragraph 52 of the commentary. What type of statement regarding harmonization with domestic laws is the Secretariat envisioning, and what would be the purpose of making such a statement (if not to make a reservation)?

<u>Draft Article 9 – Depositary</u>

The United States does not recommend line edits to draft Article 9 at this time.

<u>Draft Article 10 – Additional protocols and amendments</u>

The United States proposes the following changes to draft Article 10:

1bis. The Parties may agree to amend this Convention, including to add an additional Protocol or Model Provision, pursuant to the procedures set forth in this Article.

1. A Party to the Convention may propose ~~the adoption of an additional protocol or~~ an amendment to the Convention**, including the addition of a Protocol or Model Provision,** by submitting it to the secretariat. The secretariat shall thereupon communicate the proposal to the Parties to the Convention with a request that they indicate whether they favour a conference of the Parties for the purpose of considering and adopting the proposal. In the event that within [three] months from the date of ~~such~~ **the secretariat's** communication at least [one-tenth] of the Parties favour ~~such~~ a conference **of the Parties**, the secretariat shall convene the conference.

2.The conference of the Parties shall make every effort to achieve consensus on each proposal. If all efforts at consensus are exhausted and no consensus is reached, the proposal shall **not** be **adopted** ~~submitted to a vote, which requires the presence of a majority of the Parties to the Convention~~.

~~3. An additional protocol shall be adopted by a [majority] vote of the Parties present and voting. An amendment to the Convention shall be adopted by [two-thirds majority] vote of the Parties present and voting. If the amendment concerns a Protocol, the amendment shall require [two-thirds majority] vote of the Parties to that Protocol present and voting.~~

4. Any adopted ~~additional protocol or~~ amendment to the Convention shall be submitted by the depositary to all the Parties for ratification.

5. ~~The additional protocol enters into force [three] months after the deposit of the [third] instrument of ratification or accession, unless otherwise provided.~~ The adopted amendment enters into force [three] months after **all Parties have** ~~the~~ deposit**ed** ~~of the [third]~~ **an** instrument of ratification.

~~6. When a State ratifies an amendment after its entry into force that has already entered into force, the amendment enters into force in respect of that State [three] months after the deposit of its instrument.~~

~~7. Paragraphs 1 to 6 shall not apply to the amendment of a Protocol, which specifies a separate procedure for its amendment.~~

8. Any State which becomes a Party to the Convention after the entry into force of the amendment shall be considered Parties to the Convention as amended.

The addition of any new Protocol or Model Provision should require a formal amendment, since such an addition would require a change to the language of the MIIR. Additionally, any amendment to the MIIR should be agreed and ratified by all Parties to the MIIR before being adopted in order to promote uniformity and predictability with respect to ISDS reform. Allowing non-consensual amendments would create confusion in the context of an already

complex and multilayered mechanism and would stratify the process of ISDS reform. The United States also proposes the addition of paragraph 1bis to clearly establish the available procedures for amending the MIIR.

Draft Article 11 – Denunciation

The United States proposes the following changes to draft Article 11:

> 1. A Party may denounce this Convention at any time by means of a formal communication to the depositary. The denunciation shall take effect [twelve] months after the communication is received by the depositary.
>
> ~~2. Unless specified otherwise in a Protocol, a Party may denounce a Protocol to this Convention at any time by means of a formal communication to the depositary. The denunciation shall take effect [twelve] months after the communication is received by the depositary.~~
>
> ~~3. This Convention and its Protocols shall continue to apply to international investment dispute resolution proceedings that are commenced before the denunciation takes effect.~~

As noted above, the MIIR is not the best vehicle for mandating how the Protocols will operate. Paragraph 2 should therefore be deleted.

Paragraph 3 should also be deleted, because the MIIR itself does not contain any provisions related to the operation of dispute resolution proceedings.

Finally, the United States concurs with paragraph 61 in the commentary to WP 246 that further discussion is warranted regarding both whether the MIIR and Protocols should mutually set the terms of their relationship, and what impact denunciation of the MIIR would have on obligations to apply Protocols and Model Provisions undertaken by way of MIIR-related notifications (e.g., by specifying that Protocols remain in force for a State only so long as the MIIR remains in force for that State).