UNCITRAL Working Group III -- USG Comments on Working Paper 248: Additional Provisions on Procedural and Cross-Cutting Issues

Date of Submission: March 7, 2025

The United States thanks the Secretariat for its work on draft provisions 21 and 22 as set out in WP 248 (referred to jointly as the "Draft Provisions") and submits the following comments to those provisions. These comments are preliminary, offered on a technical basis, and subject to further development based on discussions within the Working Group. The United States has not included as part of this submission any additional comments on draft provisions 5-9, 11, or 12(1)-(5) and (7), but maintains the comments it previously submitted regarding those provisions.

Draft Provision 21 – Joint interpretation

The United States generally supports the inclusion of a joint interpretation provision in international investment agreements ("IIA"), in keeping with current U.S. practice. Within the context of this Working Group's reform efforts, the United States supports including a joint interpretation provision as one of the cross-cutting and procedural provisions, rather than as part of, for example, the multilateral instrument on ISDS reform ("MIIR"), as the application of the joint interpretation provision is limited to interpretation of investment agreements. The United States supports the categorization of draft provision 21 as a Section B provision, since it would build on existing provisions in recent IIAs and would require agreement between at least two treaty parties, and is therefore best situated as a treaty provision that could complement existing investment agreements. The categorization of joint provision 21 into Section B is also proper given the omission of a joint interpretation provision from the procedural rules set out in either the UARs or the ICSID Arbitration Rules.

The United States proposes the following line edits to draft provision 21:

> 1. **[To the extent not otherwise addressed in the Agreement, the]** Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to any provision of the Agreement (the "joint interpretation"), including through a body established for such a purpose under the Agreement.
>
> 2. Upon a request by a Party to the Agreement to issue a joint interpretation, the other Party or Parties to the Agreement ~~shall~~ **should** give due consideration to that request.
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> ~~3. The Tribunal may, at the request of a disputing party or on its own initiative, seek a joint interpretation of any provision of the Agreement that is the subject of the dispute.~~
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> ~~4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.~~

5. A joint interpretation issued pursuant to paragraph~~s~~ 1 ~~and 3~~ shall be binding on Tribunals established in accordance with the Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.

The United States supports adding bracketed language to paragraph 1 to clarify that the joint interpretation provision in WP 248 would be subject to existing provisions in the underlying IIA. As noted in paragraph 5 of WP 244, the Working Group needs to further consider how draft provision 21 and any other potential Section B provisions may best be incorporated into and implemented as part of existing IIAs. Depending on the outcome of those negotiations, it is possible that the bracketed language proposed by the United States for paragraph 1 will ultimately not be necessary. But in the meantime and pending the outcome of those discussions, the bracketed language makes clear the U.S. view that draft provision 21 should not be read to replace or otherwise change existing joint interpretation mechanisms in IIAs, including IIA provisions that provide for binding interpretations through a standing commission or other treaty body.

With respect to paragraph 2, the United States proposes deleting "shall," which connotes a binding and enforceable obligation, with "should." This edit tracks the commentary at paragraph 9, which states that the purpose of paragraph 2 is to "encourage[] the Parties to the Agreement to cooperate in the issuance of the joint interpretation, particularly when one of the Parties makes such a request."

The United States proposes deleting paragraphs 3 and 4 and would similarly oppose any provision (as suggested in paragraph 10 of WP 248) that would require a tribunal to seek a joint interpretation if requested by a disputing party. Unlike non-disputing treaty Party submissions, joint interpretations require consultations between the two treaty States. Joint interpretations may therefore be difficult to conclude within the timeframe of specific disputes, particularly in the context of multilateral treaties. The mechanism established in paragraphs 3 and 4 is therefore unlikely to result in a joint interpretation that would be useful to a tribunal during the timeframe suggested. Plus, if a tribunal has the power to request an interpretation, there is a risk that respondent States will be prejudiced if, due solely to the complexities of interstate negotiation, they are unable to arrive at the requested interpretation (particularly within 90 days).

In response to paragraph 13 of WP 248, a joint interpretation by its very nature reflects the authentic intentions of the Parties to the Agreement *ab initio*. The United States therefore would oppose specifying the date upon which the joint interpretation would have binding effect and would instead take the view that any joint interpretation issued under this draft provision would legitimately reflect the Parties' original intent in negotiating the interpreted provision.

<u>Draft Provision 22 – Submission by a non-disputing Treaty Party</u>

This draft provision reflects an amalgamation of ICSID Arbitration Rule 68 (Participation of Non-Disputing Treaty Party) and Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules"). The United States does not have specific line edits to draft provision 22 but does support adding a paragraph to that provision

based on ICSID Rule 68(3) to require the tribunal to provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.

Structurally, the U.S. view is that draft provision 22 would be better categorized as one of the Section A provisions, rather than as a Section B treaty provision to modify or supplement existing IIAs, and that it should be reframed as a supplement to the UAR's procedural rules in order to bring those rules more in line with the more contemporaneous ICSID Rule 68.

Finally, as to paragraph 15 of the commentary to WP 248, the United States does not see the necessity of including a cross-reference to paragraph 4 in paragraph 1.