United Nations A/CN.9/WG.III/WP.272

General Assembly

Distr.: Limited
8 October 2026

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Fifty-sixth session
Vienna, 11–15 January 2027

Summary of the tenth intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of Viet Nam

This note reproduces a submission from the Government of Viet Nam containing the summary of the tenth intersessional meeting on investor-State dispute settlement (ISDS) reform held from 7 to 9 September 2026 in Ninh Binh, Viet Nam. The summary was submitted to the secretariat on 5 October 2026 in English and is reproduced as an annex to this note.

Advance copy

Annex

Introduction

1. The tenth intersessional meeting of Working Group III on investor-State dispute settlement (ISDS) reform (the Meeting) was held from 7 to 9 September 2026 in Ninh Binh, Viet Nam. The Meeting focused on two topics: (i) standing mechanisms for international investment disputes – the permanent tribunal (PT) and the permanent appellate tribunal (PAT) – on the basis of an informal document prepared for the Meeting;[1] and (ii) the assessment of damages and compensation, based on draft provision 20 (DP20) contained in A/CN.9/WG.III/WP.267, together with the draft Guidelines on the calculation of damages and compensation (the Guidelines) contained in A/CN.9/WG.III/WP.255; and a submission from the Governments of Viet Nam and Nigeria contained in A/CN.9/WG.III/WP.261.

2. The Meeting was organized in two parts: (i) the public sessions, held in the format of expert panel discussions, which provided an opportunity for an in-depth examination of issues relating to the standing mechanisms and the assessment of damages and compensation; and (ii) the closed sessions, held in the format of roundtable discussions, which built on the panel discussions. The roundtable discussions enabled participants to consider possible drafting approaches, assess areas of convergence and divergence and share views on matters that warranted further consideration by the Working Group. Where appropriate, participants considered whether the exchanges could support the presentation of a Chair's proposal to the Working Group at its fifty-fifth session in October 2026.[2]

3. The Meeting was jointly organized by the Ministry of Justice of the Socialist Republic of Viet Nam and the UNCITRAL secretariat. It was held in a hybrid format, with participants attending both in person and online. There was a total of 237 participants, including 111 in-person and 126 online. There were representatives of 47 States, including delegates of Working Group III, as well as representatives of international organizations, academia and the private sector. Simultaneous interpretation in English, French and Vietnamese was provided.

Session 1: Opening remarks

4. Mrs. Dang Hoang Oanh, Member of the Executive Bureau of the Communist Party of Viet Nam (CPV) Committee, Deputy Minister of Justice of the Socialist Republic of Viet Nam, welcomed the participants and reaffirmed Viet Nam's support for the work of UNCITRAL.

5. Mr. Nguyen Anh Chuc, Member of the Executive Bureau of the CPV Committee of Ninh Binh province, Vice Chairman of the People's Committee of Ninh Binh province, also welcomed participants to the Meeting and to Ninh Binh, reaffirming Viet Nam's commitment to contributing to the work of UNCITRAL Working Group III and its intersessional process.

[1] Available at: https://uncitral.un.org/sites/default/files/2026-08/informal_document_-_standing_mechanisms.pdf. The informal document contained in-progress drafts of the PT protocol and the PAT protocol for purposes of facilitating discussions at the Meeting. The drafts reflected initial changes made by the secretariat based on the report of the fifty-fourth session (Vienna, 23-27 March 2026) of Working Group III (A/CN.9/1240). It was noted that the drafts were in the course of being reviewed and revised and would be incorporated into forthcoming working papers for consideration at the fifty-sixth session of Working Group III (Vienna, 11-15 January 2027). The summary uses the terms draft protocol or protocols and draft statute or statutes interchangeably, consistent with the use of those terms during the Meeting.

[2] A revised text of DP20 was prepared by the Chair, the Rapporteur and the secretariat based on the discussions at the Meeting in order to facilitate the deliberations of the Working Group and is contained in A/CN.9/WG.III/WP.268.

Advance copy

6. Ms. Anna Joubin-Bret, Secretary of UNCITRAL, recalled the progress achieved by Working Group III, including the texts already adopted, and highlighted the usefulness of the Meeting for advancing discussions on two key topics: the standing mechanisms and the assessment of damages and compensation.

7. Mr. Shane Spelliscy, Chair of UNCITRAL Working Group III, thanked the organizers and emphasized the role of intersessional meetings in advancing the Working Group's work. He also outlined the agenda and the key issues for discussion.

Session 2: Scope and jurisdiction of the standing mechanisms for the resolution of international investment disputes

8. The session was moderated by Ms. Natalie Morris-Sharma (Rapporteur of UNCITRAL Working Group III) and featured the following speakers: Ms. Doan Thanh Huyen (Lecturer at the Hanoi Law University), Mr. Zhao Sun (Director, Investment Law Division, Department of Treaty and Law, Ministry of Commerce, China) and Ms. Nora Bellec (Legal Officer, Directorate-General for Trade and Economic Security, European Commission).

9. The panel discussed whether the jurisdiction of the PT should be limited to treaty-based disputes or extended to disputes arising under domestic legislation governing foreign investments and investment contracts under articles 14(1)-(3) of the draft PT statute, as reflected in the informal document (see para. 1 above). It was said that States should retain control over the categories of disputes submitted to the standing mechanisms and that consent should not be presumed to extend to all potential claims. In that context, it was suggested that a flexible opt-in approach could allow States to determine the categories of disputes in respect of which consent would be granted. It was further highlighted that gatekeeping mechanisms and preliminary review procedures could help ensure that only disputes meeting specified jurisdictional requirements would proceed. The importance of respecting domestic legal processes and ensuring that investors did not circumvent applicable domestic legal requirements was also stressed.

10. Various views were expressed regarding the inclusion of disputes arising under domestic legislation and investment contracts. It was said that treaty-based disputes were rooted in public international law, whereas disputes arising under legislation and investment contracts possessed a different legal character. Concerns were raised about treating treaty-based, legislation-based and contract-based disputes identically without adequate consideration of their distinct nature and the different legal frameworks that might govern them.

11. It was further said that the rationale for establishing the standing mechanisms related to treaty-based disputes and that the expertise required of adjudicators was primarily in public international law and international investment law. Concerns were expressed that extending jurisdiction to non-treaty-based disputes could raise questions regarding whether the adjudicators would possess the expertise necessary to address issues arising under domestic law and contractual arrangements.

12. At the same time, it was noted that disputes might arise on multiple legal bases and involve overlapping treaty, legislative and contractual elements. It was said that, where broader jurisdiction was to be contemplated, appropriate safeguards and jurisdictional thresholds should be established. It was also noted that the PT might not always be the most appropriate forum for all non-treaty claims.

13. Questions were raised as to whether separate procedural rules for different categories of disputes could address the concerns. It was, however, noted that disputes involving treaty obligations, contractual obligations or other legal issues could continue to present difficulties despite the adoption of different procedural regimes.

14. The interactions between the jurisdiction of the PT and that of the PAT were also discussed. It was said that, where disputes involved multiple legal bases,

Advance copy

consideration would need to be given to whether both standing mechanisms should be empowered to hear such disputes and how any related jurisdictional complexities should be addressed.

15. The panel further discussed whether article 14(4) of the draft PT statute should confer jurisdiction on the PT to hear State-to-State disputes (SSDs). It was highlighted that, if included, such disputes could be limited to requests for declaratory relief and treaty interpretation. It was also noted that excluding SSDs could leave a significant category of disputes outside the system. However, concerns were raised that allowing monetary claims through such proceedings could increase the risk of inter-State tensions. It was suggested that specialized chambers with tailored procedural rules could be established to hear such cases. At the same time, concerns were raised regarding how to avoid inconsistencies among decisions.

16. Regarding treaty interpretation-related SSDs in particular, it was suggested that procedural mechanisms could be established to facilitate the consistent interpretation of treaties. It was proposed that treaty-interpretation proceedings could give rise to an automatic stay of related proceedings and that joint interpretations could contribute to consistency and predictability.

17. With regard to plurilateral investment treaties and the references to relevant Party or Parties to the treaty in article 14, it was discussed whether jurisdiction should depend on the consent of the Parties to the treaty that were directly concerned (i.e. the home State of the investor and the respondent State) or on the consent of all Parties to the treaty. It was noted that decisions rendered in such proceedings would not be binding on treaty Parties that had not given their consent. The possible role of non-disputing treaty Party submissions and joint interpretations was also discussed as a means of addressing the interests of other treaty Parties.

18. Various views were expressed regarding the exclusive jurisdiction of the PT. It was said that leaving it just as one of several possible options for dispute settlement could undermine the effectiveness of the PT, as investors might continue to favour ad hoc arbitration. It was suggested that, where jurisdictional requirements were met and consent had been expressed to that effect, the PT should exercise exclusive jurisdiction. Other views emphasized the continued importance of preserving existing investor-State dispute settlement mechanisms as alternative options.

19. Practical methods for reflecting and determining consent were discussed. It was suggested that notification mechanisms could be used to identify where jurisdiction had been accepted and whether exclusive jurisdiction applied. It was noted that consent might be expressed through treaty provisions, the notification mechanism envisaged under the draft multilateral instrument to implement the reforms (MIIR) or other instruments adopted by States.

20. Support was expressed for an opt-in approach to consent as envisaged in the draft informal document.[3] It was noted that such an approach would provide States with discretion and flexibility in determining whether and to what extent to participate in the standing mechanisms. It was further said that matching the consent of the respective States could be difficult to operationalize, particularly in relation to legislation-based and contract-based disputes. Concerns were also raised regarding the practical difficulties associated with identifying and maintaining comprehensive lists of notifications and relevant instruments.

21. The panel further addressed issues relating to withdrawals from the protocols and the possible effects of withdrawal on pending proceedings. It was said that withdrawals should not affect pending cases. Questions were raised regarding proceedings that might be at different stages before the PT and PAT, including situations where first-tier proceedings remained pending while appellate review might potentially no longer be available following withdrawal, and whether additional guidance would be required to address such situations.

[3] See footnote 20 and 58 of the informal document linked in footnote 1 above.

Advance copy

Session 3: Structure of the standing mechanisms for the resolution of international investment disputes and cooperation between the permanent tribunal and the permanent appellate tribunal

22. The session was moderated by Ms. Anna Joubin-Bret (Secretary of UNCITRAL) and featured the following speakers: Mr. Martin Doe (Deputy Secretary-General, Permanent Court of Arbitration), Ms. Laura Janssen (former Senior Policy Officer, Trade and Investments, Ministry of Foreign Affairs of the Kingdom of the Netherlands) and Assoc. Prof. Dr. Nguyen Thi Lan Anh (Judge-elect of the International Tribunal for the Law of the Sea (ITLOS) and Deputy Director of the Diplomatic Academy of Viet Nam).

23. The discussion focused on possible forms of cooperation between the proposed PT and the PAT and built on previous discussions concerning the development of separate statutes for the two institutions and the need to ensure an appropriate level of coordination between them while preserving their independence.[4]

24. It was noted that experiences from existing international adjudicatory institutions could provide useful guidance in designing the proposed governance structure. Reference was made to the experience of host States and international institutions in supporting international dispute settlement through political commitment, infrastructure and administrative services.

25. It was noted that The Hague had developed into a global centre for international peace, justice and the rule of law over more than a century and currently hosted various international organizations, including several international adjudicatory bodies. It was said that the successful functioning of such bodies depended not only on legal frameworks but also on the existence of adequate legal infrastructure, support from the host Government, as well as other services. It was further noted that, notwithstanding the development of separate statutes, the PT and the PAT should be viewed as components of a coherent mechanism designed to address concerns regarding the current ISDS system.

26. The desirability of aligning the articles of the two statutes to the greatest extent possible was emphasized. It was suggested that consistency in drafting could facilitate cooperation between the institutions and contribute to administrative efficiency. It was further noted that efforts should focus on achieving consistency where necessary while avoiding undue complexity.

27. Various forms of administrative cooperation were discussed. It was noted that the institutions could coordinate in the development of staff regulations, administrative and procedural rules, ethical frameworks and financial regulations. The possibility of sharing personnel and establishing a common registry serving both institutions was also mentioned as a means of promoting efficiency and reducing costs. Questions were raised regarding which functions could appropriately be shared and which should remain distinct in order to preserve institutional independence.

28. Different views were expressed regarding governance arrangements. The possibility of joint meetings of the Conferences of the Parties was discussed. It was pointed out that membership in the two institutions might not be identical. It was noted that certain functions could potentially be carried out jointly in the interest of consistency, including screening processes and administrative matters, while other functions might need to remain separate. The possibility of cooperation in financing and budgeting was also discussed, particularly in light of uncertainties regarding future caseloads and corresponding budgetary requirements.

29. Reference was made to institutional funding models used by existing international organizations. It was noted that fixed operational costs could be covered through assessed contributions, including in circumstances where no cases were brought before the institutions, while additional revenues could be generated

[4] See A/CN.9/1238, paras. 112-113.

Advance copy

through user fees. It was suggested that flexible budgeting arrangements could assist in addressing uncertainties related to caseloads. It was further noted that, during their initial years of operation, the standing mechanisms could potentially benefit from sharing infrastructure, administrative services and institutional expertise with existing organizations.

30. Information was provided regarding the structure and operation of existing international tribunals. Reference was made to the operation of tribunals established under the United Nations Convention on the Law of the Sea, and it was noted that judicial members could play an active role in supporting the administration of an institution through commissions and other internal bodies.

31. The discussion further focused on article 6 of the draft statutes and the role of the registries. It was noted that a common registry headed by a single registrar appointed through a joint meeting of the Conferences of the Parties could provide a unified institutional interface and help ensure administrative consistency. The benefits of having a single visible institutional point of contact were emphasized. At the same time, questions were raised concerning the appropriate scope of the registrar's responsibilities and whether a single registrar should exercise a broader oversight role across both institutions. Concerns were also expressed regarding the practical ability of one registrar to oversee proceedings before both institutions. Reference was made to existing models under which registrars were elected by members of a tribunal and worked closely with them in the administration of the institution. It was noted that such approaches differed from models in which the registrar was appointed directly by State Parties.

32. The possibility of locating both institutions in the same city or building was discussed. It was noted that co-location could generate efficiencies, facilitate cooperation and contribute to the development of a common institutional culture while preserving the separate legal identity of each institution. Such efficiencies could include a shared building and shared services (such as human resources, information technology and security services, as well as legal research resources). Support was expressed for locating the institutions together, if feasible. It was questioned how much the building and services would cost, in order to be able to assess what efficiencies and synergies there could be in practice. However, concerns were raised regarding the need to preserve both actual and perceived institutional independence. It was said that excessive operational integration could create concerns regarding the separation between first-instance and appellate functions, including perceptions arising from the close interaction of judges and staff within shared facilities.

33. Support was expressed for the possible establishment of a single screening committee serving both institutions. It was noted that such an arrangement could promote consistency in screening processes and reduce administrative burdens.

34. It was suggested that language should be included on cooperation and coordination between the two institutions in article 2 of the draft statutes, which addressed general principles. Throughout the discussion, emphasis was placed on achieving an appropriate balance between financial optimization, operational efficiency and institutional independence. It was noted that cooperation mechanisms should be designed in a manner that supports operational effectiveness without compromising the autonomy of either institution.

35. The discussion also addressed issues relating to entry into force. It was noted that the statutes establishing the PT and the PAT could enter into force at different times. As a result, the respective Conferences of the Parties might not exist simultaneously, which could affect the feasibility of certain joint arrangements during an initial transitional period. It was observed that such timing differences could require governance arrangements capable of functioning independently until both institutions become operational. It was also said that implementation arrangements should preserve flexibility and avoid assuming simultaneous entry into force.

Advance copy

Session 4: Recognition and enforcement of decisions of the permanent appellate tribunal for the resolution of international investment disputes

36. The session was moderated by Mr. Jae Sung Lee (Principal Legal Officer, UNCITRAL secretariat) and included the following speakers: Dr. Margie-Lys Jaime Ramirez (Head of the Investment Arbitration Office, Ministry of Economy and Finance of Panama), Mr. Chin Heng Ong (Deputy Director-General and Senior State Counsel, Attorney-General's Chambers, Singapore), Ms. Aurelia Antonietti (Chief Counsel, International Centre for Settlement of Investment Disputes (ICSID)) and Ms. Alicia Martin Blanco (Senior Legal Counsel, ICSID).

37. It was noted that questions relating to the recognition and enforcement of PAT decisions were closely linked to broader policy issues currently under consideration, including the scope of jurisdiction of the PAT, the means of expressing consent to its jurisdiction, the relationship between appellate proceedings and other post-award remedies, the possible appeal of awards rendered pursuant to the ICSID Convention, and the consequences of recognition and enforcement in Contracting and non-Contracting Parties to the PAT statute. It was also recalled that article 28 of the draft PAT statute sought to establish a self-contained recognition and enforcement mechanism.

38. The different outcomes of an appeal, including decisions upholding, modifying or reversing a first-tier award or decision, and the implications of each outcome for recognition and enforcement, were discussed. Questions were raised as to whether enforcement should relate to the PAT decision itself, the underlying award or decision as upheld or modified, or a PAT decision incorporating that award or decision. It was noted that the articles in the draft PAT statute appeared to proceed on the basis that the relevant award or decision would be treated as having been rendered by the PAT for purposes of recognition and enforcement. The importance of the final and binding character of the underlying award or decision once upheld or modified was also emphasized. It was generally noted that the drafting in the statute would have to be refined and clarified in this regard.

39. It was further noted that the framework should avoid parallel enforcement proceedings with respect to a first-tier award and a PAT decision, respectively. Concerns were raised regarding the potential for overlapping enforcement proceedings and the need to clarify the relationship between the PAT enforcement mechanism and other applicable enforcement regimes. Questions were also raised regarding decisions reversing and remanding a dispute or resubmitting it to a newly constituted tribunal. It was generally noted that such decisions might not themselves require recognition and enforcement and that awards rendered following remand or re-submission could remain subject to their otherwise applicable enforcement regimes.

40. With regard to awards rendered pursuant to the ICSID Convention, the discussion addressed the possible implications of a future inter se modification of the Convention to allow appeals before the PAT. It was noted that such a modification could be implemented through different approaches, including comprehensive and selective models, each presenting different advantages and disadvantages. Discussions focused on the enforcement regime under article 54 of the ICSID Convention, which required recognition and enforcement of an award as if it were a final judgment of a court in that State. It was noted that preserving the benefits of that regime could be desirable, particularly where an ICSID award had been upheld on appeal.

41. Different approaches to accommodating appellate review, while maintaining access to existing enforcement mechanisms, were discussed. It was suggested that different consequences could follow depending on the type of decision rendered on appeal, with different recognition and enforcement approaches potentially being appropriate in each circumstance. It was noted that awards rendered under a modified ICSID Convention might be enforceable only in States also participating in that

Advance copy

modification. The implications of such an outcome for the effectiveness and attractiveness of the appellate mechanism were discussed.

42. The discussion further focused on article 28(4), which provided that a PAT decision should be considered an arbitral award for the purposes of recognition and enforcement under the New York Convention. It was noted that the provision sought to facilitate enforcement in non-Contracting Parties, including where assets were located outside the territories of Contracting Parties. Concerns were raised regarding the practical effectiveness of relying on the New York Convention for the enforcement of PAT decisions in non-Contracting Parties. It was noted that the Convention did not contain a dedicated dispute settlement mechanism, did not define the term "arbitral award" and was developed on the premise that awards would generally not be subject to appeal. It was further noted that domestic courts in non-Contracting Parties would not be bound by the PAT statute and that the treatment of PAT decisions would depend to a significant extent on domestic legislation and judicial practice, creating legal uncertainty.

43. Discussions then focused on the comparative advantages of different enforcement regimes. It was noted that, where a first-tier award was modified on appeal, the dedicated enforcement mechanism under the draft PAT statute could provide important benefits by allowing enforcement of the appellate outcome through a self-contained regime. It was also noted that, where awards were upheld following appeal, existing enforcement frameworks under the ICSID Convention or the New York Convention could continue to offer advantages because of their established operation and use.

44. Practical considerations relating to the location of assets and the seat of arbitration were also discussed. It was suggested that locating the seat in a Contracting Party could reduce enforcement risks and provide greater certainty regarding the operation and effectiveness of the PAT. At the same time, it was noted that such an approach would not eliminate difficulties where enforcement would be sought in non-Contracting Parties.

45. In concluding, it was generally noted that the recognition and enforcement of PAT decisions would depend on a range of interrelated policy choices concerning jurisdiction, consent, appeals and post-award remedies. Further consideration of the interactions between the PAT enforcement mechanism and existing enforcement regimes was considered necessary. It was suggested that further discussions would be required to ensure the development of a coherent and effective framework.

Session 5: Damages and compensation: Principles and scope

46. The session was moderated by Mr. Neale Bergman (Senior Legal Officer, UNCITRAL secretariat) and featured the following speakers: Ms. Lai Thi Van Anh (Deputy Director-General, International Law and Investment Disputes Department, Ministry of Justice of the Socialist Republic of Viet Nam), Ms. Sylvie Tabet (General Counsel, Trade Law Bureau, Canada) and Ms. Ladan Mehranvar (former Senior Legal Researcher, Columbia Center on Sustainable Investment (CCSI)).

47. The panel considered the text of DP20 in document A/CN.9/WG.III/WP.267, together with the draft Guidelines on damages and compensation contained in A/CN.9/WG.III/WP.255 and the submission from the Governments of Viet Nam and Nigeria annexed to A/CN.9/WG.III/WP.261. The discussion began by considering causation issues and concerns regarding the high level of damages awarded in investor-State disputes. Reference was made to the proposal submitted by the Governments of Viet Nam and Nigeria, which would provide that awards should reflect only legally compensable loss or damage established to have been caused "directly" by the breach. The importance of establishing a causal link between the breach and the loss claimed was highlighted, and the burden on the claimant to establish that link was emphasized.

48. Particular attention was given to the distinction between factual and legal causation and to whether both concepts should be reflected expressly in DP20(3). It

Advance copy

was said that factual causation, including the "but-for" test, could be addressed in the draft text, while additional guidance could be provided in the draft Guidelines. Reference was also made to the need to ensure that compensation reflected only loss resulting from the breach and not from commercial, financial, market or operational circumstances unrelated to the breach.

49. Intervening causes and their relevance to determining whether a sufficient causal nexus existed between the breach and the loss were also discussed. It was said that intervening causes should be assessed separately when determining causation and that both factual and legal causation should be established. It was noted that the claimant should demonstrate that the specific wrongful aspect of the measure caused the loss claimed. Questions were raised as to whether issues relating to burden of proof should be addressed in DP20(3) or elaborated upon in greater detail in the draft Guidelines. It was said that tribunals should carefully distinguish between the existence of a breach and proof of compensable loss and causation. It was also said that damages should not be presumed merely because a treaty breach had been established.

50. The panel then discussed interest and the appropriate methodologies for calculating pre-award and post-award interest. Questions were raised regarding the applicable interest rate and whether interest should be simple or compound. It was said that interest should not necessarily be awarded in every case and that DP20(2) could clarify that point. It was noted that compound interest had become common in investment arbitration, whereas simple interest had traditionally been applied in public international law cases. It was said that compound interest could be justified where supported by the particular circumstances of the case.

51. The discussion then focused on whether a reasonable risk-free rate should serve as a default rate for both pre-award and post-award interest. It was suggested that simple interest could operate as the default rule and that compound interest should only be awarded in exceptional circumstances where the claimant could demonstrate that compound interest was specifically justified to compensate for the breach. The need to avoid double compensation was emphasized, and reference was made to relevant treaty practice, including in the Comprehensive Economic and Trade Agreement (CETA).

52. The panel further examined remedies under DP20(1) and the relationship between restitution and monetary compensation. Questions were raised regarding the circumstances in which monetary compensation should be awarded in lieu of restitution and whether further guidance was needed regarding the valuation date in such situations.

53. It was discussed whether the valuation date for expropriation should remain unchanged irrespective of whether the expropriation was characterized as lawful or unlawful. Concerns were expressed regarding approaches that could allow valuation at a different date based solely on a finding of unlawfulness, and it was suggested that the draft text could provide additional clarification on this issue.

54. It was recalled that earlier drafts of the provision had referred to monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever was earlier. It was noted that the fair market value language had been removed from the draft text in A/CN.9/WG.III/WP.267 on the basis that it related to substantive treaty obligations and valuation standards that might be addressed differently in investment treaties. In that context, concerns were raised regarding the interaction between DP20 and the substantive provisions in investment treaties, and reference was made to the possibility of including language comparable to that in article 9.8 (Expropriation and Compensation) under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Advance copy

Session 6: Damages and compensation: Valuation methods and procedural safeguards

55. The session was moderated by Ms. Nikola Kovacikova (Associate Legal Officer, UNCITRAL secretariat) and featured Ms. Elom Gold Amaka (State Counsel and Deputy Director, International and Comparative Law Department, Team Lead Migration and Trade, Federal Ministry of Justice, Nigeria), Mr. John Daley (Deputy Assistant Legal Adviser for International Claims and Investment Disputes, Department of State, USA), Assoc. Prof. Jonathan Bonnitcha (Associate Professor, University of New South Wales and former co-Chair, Academic Forum on ISDS) and Mr. Simon Batifort (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP and Vice President, American Society of International Law (ASIL)).

56. At the outset, a recent study was presented showing that, since 2005, discounted cash flow (DCF) and other forward-looking valuation methods had been used more systematically in investment arbitration, alongside a significant increase in the quantum of damages awarded in larger-value cases. It was said that the study raised a broader systemic concern that tribunals might be too willing to award damages based on expectations of future income. It was also said that comparable data from domestic legal systems indicated a more limited use of DCF and that political risk insurance generally provided for less extensive compensation. It was suggested that the concerns raised by the study extended beyond DCF to forward-looking valuation methods more generally.

57. The discussion then focused on the distinction between the burden of proof and the standard of proof and on the need for both concepts to be adequately reflected in DP20. Questions were raised as to whether the same evidentiary standard should apply to causation and quantification of damages. It was said that the standard applicable to the quantification of damages may warrant separate consideration, particularly given that concerns relating to speculative damages awards often arose at the quantification stage rather than in establishing causation. Reference was made to the proposed text for DP20 in A/CN.9/WG.III/WP.261, requiring damages to be established by “clear and convincing evidence”, and it was questioned whether that standard might be too high and demanding in some legal systems and would thus effectively prohibit the use of forward-looking valuation methods. It was noted that greater precision could be provided with respect to the notion of “satisfactory evidence” and that damages might instead be required to be established with a reasonable degree of certainty.

58. The discussion also addressed safeguards aimed at reducing the risk of excessive or speculative damages awards. Questions were raised regarding the possibility of introducing compensation caps and other limitations on damages. Reference was made to political risk insurance and other limitation mechanisms, including approaches based on sunk costs or limits linked to the amount invested or the actual loss suffered. It was said that limitations on compensation could be viewed as risk-management tools designed to address the unique exposure created by ISDS. At the same time, questions were raised regarding the potential impact of such limitations on investor confidence and investment protection. The discussion also touched upon the broader question of whether DP20 should primarily codify existing standards on compensation under customary international law or establish a more specialized regime governing damages in ISDS.

59. The discussion then turned to safeguards relating to the use of DCF and other forward-looking valuation methods, including those proposed in A/CN.9/WG.III/WP.261. Particular attention was given to the assumptions underlying projected cash flows and discount rates, and it was said that both elements should be scrutinized independently.

60. It was said that, where DCF was used, the claimant should establish the profitability of the investment. Questions were raised, however, as to whether a track record of profitability should be required, including within the host State, in all cases. It was noted that a proven profitability record could serve as a general rule for the

Advance copy

use of DCF and similar forward-looking methodologies. At the same time, concerns were expressed that an absolute requirement might be overly restrictive in exceptional circumstances where profitability could be demonstrated through other reliable evidence.

61. Reference was made to the need for greater predictability in the valuation process used by tribunals, including through the use of appropriate safeguards. It was stressed that safeguards should apply irrespective of the valuation method employed. It was noted that preserving a plurality of valuation methods remained important and that completely excluding DCF could be overly restrictive. At the same time, questions were raised as to whether the existing bracketed text in DP20(4) sufficiently addressed the risks associated with forward-looking valuation methods.

62. The potential impact of damages awards on respondent States, particularly developing countries, was also discussed. It was said that the economic impact of awards constituted an important policy consideration when assessing possible safeguards and limitations on compensation.

Roundtable discussions

63. The roundtable discussions, limited to Working Group III participants and moderated by Mr. Shane Spelliscy (Chair of UNCITRAL Working Group III) and Ms. Natalie Morris-Sharma (Rapporteur of UNCITRAL Working Group III), enabled participants to exchange views on the discussions and proposals made during the expert panel discussions.

Roundtable discussions I-III: Damages and compensation

64. DP20(1) and the treatment of valuation in cases of expropriation was considered. The discussion focused on whether language referring to fair market value should be reinstated in DP20(1)(b), particularly where the respondent State opted to pay compensation in lieu of restitution. It was recalled that earlier drafts had included such language but that it had subsequently been removed because it touched upon substantive treaty obligations and valuation standards that might be addressed differently in investment treaties. It was noted that the inclusion of such language could create difficulties where treaty provisions differed from DP20, while it was also noted that the absence of such language could lead to uncertainty regarding the applicable valuation standard.

65. It was discussed whether additional text on the valuation date should be provided in DP20 or in the draft Guidelines. Questions were raised as to whether the valuation date should differ depending on whether an expropriation was lawful or unlawful, particularly where the failure to pay compensation was the basis for the unlawfulness. It was suggested that the valuation date should not change depending on the characterization of the expropriation and that a more general provision on the valuation date could be considered. Different views were expressed regarding the appropriate location and formulation of any such guidance.

66. It was noted that the issue was relevant not only to compensation in lieu of restitution under DP20(1)(b), but more generally to the assessment of compensation for expropriation and thus also applied to DP20(1)(a). It was suggested that the matter could be better addressed in the draft Guidelines or through “for greater certainty” language in the provision. However, concerns were expressed regarding the interaction between DP20(1) and the substantive provisions of investment treaties.

67. Turning to DP20(2), clarification was sought regarding the meaning of a “reasonable risk-free rate”. It was said that the text should clarify that interest was not automatically available in all cases and should be awarded only where justified.

68. Issues related to simple and compound interest were then discussed. It was suggested that simple interest could be the default under the rule, while allowing for compound interest where specifically justified by the claimant. Questions were also

Advance copy

raised regarding legal systems which did not recognize interest or handled interest through alternative mechanisms.

69. Turning to DP20(3) and whether it should expressly address both factual and legal causation, broad support was expressed for the provision to refer to the "but-for" test in relation to factual causation and to require the claimant to establish, with a sufficient degree of certainty, that the breach caused the loss claimed. It was considered whether (i) the reference to loss "directly" caused by the breach sufficiently captured factual causation and (ii) concepts such as "proximate" causation would provide greater clarity. It was suggested that the first sentence of DP20(3) could be refined to reflect both factual and legal causation. It was noted that the claimant should establish that the specific wrongful aspect of the measure caused the loss claimed and that compensation should be limited to loss resulting from the breach and not from broader commercial, financial, market or operational circumstances. It was further noted that the draft Guidelines could further elaborate on the relationship between factual and legal causation.

70. Turning to the factors listed in DP20(3), consideration was given to possible additional factors, including the nature of the breach, the conduct of the claimant, the economic situation of the respondent State and the potential crippling effect of an award on the respondent State.

71. It was suggested that the nature and purpose of the measure giving rise to the breach, including whether the measure was adopted to pursue public health, environmental protection, or other public-interest objectives, could be relevant to the assessment of damages. Questions were raised as to whether such considerations should be reflected in DP20(3) or addressed in other DPs. It was noted that matters relating to the right to regulate might be more appropriately addressed in that separate draft provision.[5]

72. It was considered whether the economic situation of the respondent State, including the potential crippling effect of an award on the respondent State, should be taken into account in the assessment of compensation. Different views were expressed regarding the relevance of such factors, including their consistency with established principles governing damages and their implications for predictability and legal certainty. It was further clarified that references to the "nature of the breach" in A/CN.9/WG.III/WP.261 were intended to refer to the nature of the measure giving rise to the breach rather than to the breach itself.

73. Turning to DP20(3)(d), it was suggested that the reference to the "same breach" could be replaced with a reference to the "same loss or damage". It was also suggested that DP20(3)(d) could refer more broadly to compensation or other benefits received by the claimant.

74. Turning to DP20(4), the relationship between the burden of proof and the standard of proof in the assessment of damages was discussed. It was suggested that the first sentence should clarify that the claimant bore the burden of establishing damages. Questions were raised regarding whether damages should be established by "clear and convincing evidence". Concerns were expressed that that standard might be overly demanding in some legal systems, while the reference to "satisfactory evidence" in the draft text was also viewed as insufficiently precise. Alternative formulations were discussed, including references to a balance or preponderance of probabilities, reasonable certainty and a sufficient degree of certainty.

75. While views differed regarding the appropriate evidentiary standard, broad support was expressed for requiring damages to be established with a reasonable degree of certainty and not on the basis of inherently speculative evidence. Questions were raised regarding the phrase "inherently speculative" and whether "inherently" added any particular value or guidance. It was noted that forward-looking valuation

[5] See DP19 in A/CN.9/WG.III/WP.267.

Advance copy

methods necessarily involved some degree of estimation and that any evidentiary standard adopted would need to accommodate that reality while still constraining speculative claims.

76. The use of DCF and other expected future cash flow methods was then discussed. It was emphasized that concerns regarding excessive damages were not limited to DCF alone but extended more broadly to valuation approaches based on expected future cash flows and assumptions regarding future economic performance. Questions were raised regarding the circumstances in which such methods should be available and whether a proven record of profitability should generally be required. Broad support was expressed for considering a proven record of profitability as the general rule governing the use of expected future cash flow and other forward-looking valuation methods, while recognizing that limited exceptions might be warranted where future profitability could be established through reliable evidence.

77. It was considered whether compensation caps or other limitations could constitute appropriate safeguards against excessive or speculative awards, including in the context of claims involving future profits. Questions were raised as to whether such caps or limitations would be appropriate in cases of direct expropriation.

78. Questions were also raised regarding how exceptions to profitability requirements should be formulated and whether they could be defined with sufficient precision. It was suggested that tribunals should undertake a case-by-case, fact-based inquiry and apply appropriate safeguards to ensure that future-loss claims were established with sufficient certainty. The discussion also touched upon whether a higher evidentiary standard should apply to future-loss claims and other forward-looking valuation methods. Particular caution was suggested where substantial compensation for future losses could have significant consequences for the public finances of the respondent State.

Roundtable discussion IV: Scope and jurisdiction of the standing mechanisms

79. The roundtable discussion continued the consideration of the scope and jurisdiction of the standing mechanisms in connection with article 14 of the draft statutes, with a particular focus on consent to the jurisdiction of the PT, notification mechanisms, exclusive jurisdiction and consent by non-Contracting Parties.

80. The manner in which consent to the jurisdiction of the PT should be expressed was considered. It was said that consent should be expressed clearly and in writing. It was noted that different categories of disputes, including treaty-based disputes, disputes arising under domestic legislation and disputes arising under investment contracts, would require different mechanisms for expressing consent. It was also observed that consent to jurisdiction and consent to exclusive jurisdiction raised separate questions. It was suggested that parties might consent to jurisdiction first, while separately determining whether such jurisdiction should be exclusive.

81. Regarding treaty-based disputes, it was noted that consent could be expressed by the relevant Parties to the treaty. It was, however, said that, in the case of plurilateral treaties, the relevant Parties to the treaty would be all Parties to the treaty. It was suggested that references to notification mechanisms could be retained for treaty-based disputes and that the details of such mechanisms could be addressed in the draft MIIR, while appropriate cross-references could be included in the draft statutes.

82. Regarding disputes arising under domestic legislation, it was said that consent could be expressed through legislative measures adopted by States. Where exclusive jurisdiction of the PT was intended, it was said that such intention should be clearly reflected in the relevant legislation. It was also said that, in the context of disputes arising under domestic legislation, the relevant consent could be that of the States concerned rather than the investor.

83. Regarding disputes arising under investment contracts, it was suggested that consent could be provided through dispute resolution clauses contained in the

Advance copy

contract. It was noted that a State could subsequently determine that certain categories of investment contracts would fall within the jurisdiction of the PT. It was said that the PT could operate as an additional dispute resolution forum and that an investor could perfect consent by commencing proceedings before the PT. Questions were raised, however, regarding whether such arrangements would result in exclusive or non-exclusive jurisdiction.

84. Various views were expressed regarding the categories of disputes that should fall within the jurisdiction of the PT. Support was reiterated for limiting jurisdiction to treaty-based disputes. Concerns were also expressed regarding references in articles 14(1) and (2) of the draft PT statute and article 14(1) of the draft PAT statute to constituent subdivisions or agencies of States and regional economic integration organizations.

85. Notification mechanisms and their relationship with the expression of consent were then considered. It was suggested that examples of notifications could be prepared to illustrate how consent could be communicated in practice. It was further suggested that notification mechanisms could be elaborated in the MIIR while being appropriately cross-referenced in the draft statutes. The possibility of notifications to the registrar in relation to contract-based disputes was mentioned.

86. The opt-in or opt-out nature of the proposed notification mechanism was also discussed. It was suggested that any notification mechanism should clearly reflect that consent would be provided on an opt-in basis. Concerns were expressed regarding the opt-out option, which could be interpreted as creating implied consent.

87. The desirability of a simpler approach to consent was emphasized. It was said that the provisions should focus on the requirement of express consent and avoid excessive detail regarding notification procedures.

88. It was recalled that the Working Group had previously requested consideration of practical approaches for recording consent and exclusive jurisdiction. At the same time, it was noted that underlying policy questions remained unresolved, including whether future treaties should continue to offer access to arbitration or confer exclusive jurisdiction on the PT. It was suggested that the draft could refer either to jurisdiction or to exclusive jurisdiction, thereby preserving flexibility for States.

89. Support was expressed for a general provision providing that exclusive jurisdiction should be based on written consent. It was suggested that article 14(5) of the draft PT statute should provide that the PT would have exclusive jurisdiction over an international investment dispute where all relevant Contracting Parties had consented in writing to the jurisdiction of the PT to the exclusion of any other remedy.

90. Questions were raised regarding consent by non-Contracting Parties. It was emphasized that the treatment of non-Contracting Parties should remain clear and that the draft text should continue to address such circumstances expressly. It was suggested that the text should more clearly distinguish between “Contracting Parties”, “non-Contracting Parties”, “relevant Parties” and “disputing parties”.

91. In that context, article 14(6) of the draft PT statute was considered, in particular the situation where only one treaty Party had consented to the jurisdiction of the PT. It was suggested that references requiring the use of the notification mechanism by Contracting Parties or communications to the registrar could be removed from the draft text. It was further suggested that a new, separate paragraph could be drafted to address consent by non-Contracting Parties in a more streamlined manner.

92. The consequences of withdrawal from the draft statutes were discussed. It was generally noted that withdrawal should not affect ongoing proceedings. It was also said that withdrawal should not affect the possibility of an appeal in proceedings that had already commenced. Consideration was given to whether article 37(2) of the draft PAT statute should be revised accordingly and whether references should be broadened to encompass first-tier proceedings generally.

Advance copy

93. There was discussion regarding article 14(7) of the draft PT statute concerning the characterization of consent to the jurisdiction of the PT as an "agreement in writing" for the purposes of the New York Convention and the prohibition on unilateral withdrawal of consent. It was noted that different views had previously been expressed on these issues. Accordingly, it was suggested that the relevant language should remain bracketed for further consideration by the Working Group.

94. Turning to article 14(3), it was said that that provision, concerning the possibility of extending or limiting jurisdiction through decisions of the Conference of the Contracting Parties, should remain in brackets. It was noted that the paragraph reflected a proposal developed by the secretariat following earlier discussions of the Working Group and that further guidance from the Working Group would be required.

95. In concluding the discussion, support was expressed for continuing work on provisions concerning consent, exclusive jurisdiction and the treatment of non-Contracting Parties. It was noted that further drafting would be required to clarify the different categories of consent, simplify the text where appropriate and highlight the policy choices that remained under consideration by the Working Group.

Roundtable discussion V: Recognition and enforcement of decisions of the PAT

96. Turning to article 28 of the draft PAT statute, it was considered whether an award or decision upheld or modified by the PAT should be, for purposes of recognition and enforcement, treated as a decision of the PAT or an award or decision of the first-tier tribunal.

97. It was said that, until an award had been set aside, annulled or otherwise deprived of legal effect, it remained an award of the first-tier tribunal. It was therefore suggested that recognition and enforcement could continue to be based on the first-tier award, including where that award had been modified on appeal. Concerns were raised that treating the award as a decision of the PAT could result in the loss of access to existing recognition and enforcement regimes.

98. It was said that the benefits of preserving existing enforcement mechanisms, including those available under the ICSID Convention and the New York Convention, should be taken into account. It was said that ICSID awards should continue to benefit from the enforcement regime established under the ICSID Convention notwithstanding review by the PAT. It was also noted that reliance on article 28 could be acceptable for awards rendered outside the ICSID Convention framework.

99. In this regard, different views were expressed. It was said that the self-contained enforcement regime envisaged under the PAT statute would provide sufficient clarity and certainty. It was further said that, under such a regime, no additional remedy against the award or decision should remain available. Concerns were raised, however, regarding how annulment or set-aside proceedings could be excluded following an appeal and how duplicative review mechanisms could be avoided.

100. Questions were raised regarding the interaction between the appellate mechanism and existing remedies available under international instruments and domestic law. With regard to article 52 of the ICSID Convention, questions were raised as to how the proposed mechanism would operate alongside existing annulment procedures. It was noted that, if the first-tier award continued to be regarded as the operative award, difficulties could arise in excluding recourse to annulment or set-aside proceedings.

101. It was suggested to structure the appellate mechanism as an intermediate review stage before an award became final and binding. Under that approach, an award would become final only after completion of the review by the PAT. It was said that such an approach could permit continued reliance on existing recognition and enforcement regimes while avoiding parallel review proceedings. Questions were

Advance copy

raised, however, as to whether the introduction of such a review stage would affect the operation of those regimes.

102. Questions were also raised regarding the treatment of provisional awards, interim measures and other non-final decisions. Clarification was sought as to whether article 28 was intended to apply only to final awards and decisions and whether such an approach would be consistent with existing recognition and enforcement regimes.

103. Turning to article 28(4) in particular, differing views were expressed. It was said that the provision could serve as a useful clarification of the understanding or intent of the Contracting Parties regarding the New York Convention, while acknowledging that it would not be binding on non-Contracting Parties. Concerns were raised, however, regarding whether decisions of a standing appellate body could properly be characterised as arbitral awards for the purposes of the New York Convention. It was noted that the Convention had not been drafted with such bodies in mind and that caution should be exercised in extending its scope. It was further noted that a statement by Contracting Parties regarding the characterization of PAT decisions would not, in itself, determine the obligations of non-Contracting Parties. Concern was also expressed regarding treaty language directed specifically at non-Contracting Parties, and it was said that such references were not commonly found in treaty practice.

104. With regard to domestic systems, it was noted that existing domestic legislation might not contemplate the recognition and enforcement of decisions rendered by a standing appellate body of the type envisaged under the draft PAT statute. It was therefore said that implementing legislation might be required in some jurisdictions. At the same time, it was noted that article 28(1) would impose an international obligation on Contracting Parties to recognize and enforce PAT decisions and that domestic steps might be necessary to ensure compliance with that obligation.

105. In concluding, it was noted that two principal issues remained under consideration. The first concerned whether article 28 should preserve access to existing recognition and enforcement regimes applicable to first-tier awards. The second concerned whether appellate review should take place before a first-tier award would become final and binding, with a view to enabling those regimes to continue to operate. It was suggested that further consideration could be given to approaches that would combine elements of a self-contained enforcement regime with the continued availability of existing enforcement mechanisms.

Roundtable discussion VI: Structure of the standing mechanisms and cooperation between the PT and the PAT

106. It was suggested that a general provision on cooperation and coordination between the two institutions should be included in article 2 of the draft statutes. It was also noted that both tribunals would be subject to the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution and that an appropriate institutional link should be maintained to ensure consistency in areas such as staffing, regulations and ethical obligations.

107. Issues relating to the registry and article 6 of the draft statutes were considered. Views were expressed in support of both a single registry and two separate registries, including the possibility of appointing a joint registrar while maintaining separate registries. The advantages and disadvantages of each approach were discussed, without the emergence of a preferred model.

108. It was emphasized that the appointment of the registrar should preferably be made by the tribunals rather than by the Conferences of the Parties. It was stated that neither a single registrar nor separate registrars should be prescribed in the draft statutes. Questions were raised regarding the functions of the registrar. It was said that the proposed language referring to assisting with the functions of the tribunals in article 6(1) of the draft statutes appeared overly broad and that the scope of such

Advance copy

assistance would depend on the interpretation of other provisions in the draft statutes. It was suggested that those functions should be specified more clearly.

109. Turning to provisions relating to joint meetings of the Conferences of the Parties under article 4(4), it was suggested that references to such meetings as "special" be omitted while retaining the possibility of convening them. Another view was that the draft statutes should simply provide for the possibility of joint meetings without encouraging them as a default arrangement. Various drafting suggestions were made. It was suggested that the term "special" be replaced with "joint" and that the word "including" be replaced with "together". Another proposal was to retain the concept of special meetings while adding a separate provision addressing joint meetings. In that regard, it was suggested that the Conferences could meet annually, convene special meetings and, where appropriate, convene joint meetings with one another.

110. Regarding nominations and appointments under article 9, it was suggested that common rules and regulations could be adopted for both institutions. It was also noted that the draft statutes already envisaged an open call for candidates and consultation with stakeholders. It was further noted that the interests of investors should also be reflected in that process. Questions were raised regarding which organizations would be permitted to nominate candidates. Support was expressed for a provision allowing the Conferences to conduct an open call for candidates and to adopt regulations governing the nomination processes, including the organizations entitled to nominate candidates.

111. With regard to the screening committee and article 10 of the draft statutes, concerns were raised regarding the establishment of minimum requirements and qualifications under article 7. It was also suggested that former members of the PT and PAT could be included among the potential members of the screening committee, with the relevant text remaining in square brackets.

112. Turning to financing issues, concerns were expressed regarding a requirement of a four-fifths majority for the adoption of the budget. It was said that such a threshold could create a risk of paralysis, particularly as the consequences of a failure to adopt a budget had not been clarified.

113. Regarding entry into force under article 30 of the draft PT statute and article 35 of the draft PAT statute, the relationship between the PT and PAT was discussed. It was suggested that any linkage between the two institutions could be addressed through different thresholds for the number of parties required for entry into force. It was also said that a linkage should exist because the PAT should already be available when the PT became operational.

114. Finally, the possibility of phased implementation was considered. It was suggested that language on phased implementation could be included in the draft statutes, although it was noted that the timing of such implementation had not yet been determined.

Closing Remarks

115. The closing remarks were delivered by Mr. Shane Spelliscy. He expressed his sincere gratitude to the hosts for the organization of the Meeting and to all participants for the productive discussions, which would facilitate the work of Working Group III.

Advance copy