

**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
(UNCITRAL)**

Working Group III: Investor-State Dispute Settlement Reform

Possible reform of investor-State dispute settlement (ISDS)

**COLOMBIA'S COMMENTS ON THE DRAFT
PROVISIONS ON ASSESSMENT OF DAMAGES AND COMPENSATION**

November 15th, 2021

1. Colombia hereby thanks the Secretariat for preparing the draft provisions on assessment of damages and compensation, and submits its comments to such draft.
2. Colombia is of the view that the development of provisions on this topic, particularly on compensation and valuation methods, could be an outcome of the ISDS reform and therefore, attaches high importance to it. In fact, and as Colombia pointed out in its submission (document A/CN.9/WG.III/WP.173), for instance balanced valuation methods should be one of the minimum standards or core provisions a multilateral instrument on ISDS reform should contain.

Matters for consideration and possible work

3. As mentioned in the Secretariat's paper, claimants pursuing inflated and disproportionate amounts of monetary compensation, based on criteria that do not attend realistic valuation methods nor reflect the economic and financial situation of the investment, is currently a concerning phenomenon in investment arbitration.
4. Consequently, Colombia supports any effort to work to address the issue of assessment of damages and compensation by developing relevant provisions (to the extent possible with a binding effect), on procedural issues related to the assessment of damages and compensation to be included in a multilateral instrument on procedure reform. Taking into account such position, Colombia submits specific comments for possible future work on valuation methods and compensation.
5. In particular, Colombia is of the view that in all cases, monetary damages shall not be greater than the proven loss suffered by the claimant, and shall consider any sort of compensation previously granted to the claimant in connection to the same measures or grounds.



Moreover, in its final assessment of monetary damages, the Tribunal shall take into account, for instance, a comparison of multiple valuation methods; and the monetary values that the claimant reported in economic declarations, required by the respondent for the making and operation of the covered investment.

6. Colombia Considers worth noting that a Tribunal should not issue an award that recognizes compensation or monetary damages that cover losses which the investor has not suffered or that were unlikely to occur, neither not probable or unreal expectations of profit. Furthermore, and as previously mentioned, the Tribunal shall not award more than the claimant's amount of monetary damages sought, unless it reflects damages suffered or interest accrued from the moment the claim was submitted to arbitration, as referred to in the previous paragraph.
 7. From Colombia's perspective, such amount must be determined on the balancing equitably public interest with the interest of the harmed Investor, considering all relevant circumstances, and taking into account the current and past use of the property, its depreciation, the history of its acquisition, its market value, the purpose of the expropriation, the extent of previous profit made by the Covered Investor through the Covered Investment, and the duration of the Covered Investment, among others. Moreover, the compensation shall neither include losses which are not actually incurred nor probable or unreal profits.
 8. In addition, the market value referred shall amount to the one present at the moment immediately before the adoption of the measures, or immediately before the imminent adoption these measures was of public knowledge, whichever is earlier, it is, the date of value. The date of value shall be applied to assess compensations to be paid regardless of whether the expropriation was adopted for reasons of public purpose or social interest, made in accordance with due process of law; and made in a non-discriminatory manner.
 9. Compensation shall be calculated in a freely usable currency, at the applicable exchange rate in force on the date of value and include simple interests at a commercial rate fixed in accordance with the market criteria for such currency, accrued from the date of expropriation until the date of effective payment.
-