INTERNATIONAL
AND COMPARATIVE
LAW RESEARCH CENTER

Comments on the Draft guidelines on the calculation of damages and compensation in investor-State dispute settlement (A/CN.9/WG.III/WP.255)

5 January 2026

1. The following comments have been prepared in relation to document A/CN.9/WG.III/WP.255[1] with the purpose to assist the discussions in the Working Group III of the Draft guidelines on the calculation of damages and compensation in investor-State dispute settlement (guidelines). They reflect solely the views of the International and Comparative Law Research Center as an observer in the Working Group III of UNCITRAL.

1. Comment on recommendations on bifurcation (Section A. Organization of the arbitral proceedings)

2. While the Working Group recommends that tribunals "consider bifurcation" of the damages phase, caution is warranted in advancing such guidance. In practice, bifurcation of liability and quantum remains an exception rather than the norm, with the default being that both issues are heard together. Encouraging tribunals to raise damages bifurcation early in proceedings risks generating additional submissions on bifurcation requests, prolonging timelines, and increasing costs. This outcome runs counter to the efficiency objectives of ISDS reform, particularly given the existing concerns about duration and expense in arbitration.

3. Furthermore, there is little evidence that damages determinations in ISDS are systematically inaccurate or that tribunals have demonstrated a consistent difficulty in assessing quantum. In the absence of such evidence, a recommendation for tribunals to consider bifurcation – potentially even *sua sponte* – appears unnecessary and may create procedural burdens without offering a demonstrable benefit. Rather than enhancing efficiency or accuracy, this measure could inadvertently compound some of the very criticisms of ISDS that the reform process seeks to address.

4. The test remains relatively strict and varies depending on applicable rules. Using ICSID 2022 Arbitration Rules, according to Rule 42(4):

> (4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and
>
> (c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

[1] Draft guidelines on the calculation of damages and compensation in investor-State dispute settlement. Note by the Secretariat. A/CN.9/WG.III/WP.255. URL

5. More often than not, proper assessment of these criteria militates against bifurcation.

6. For instance, practically, the reduced hearing length and cost of a hearing on liability alone, compared to a single non-bifurcated hearing, are vastly overshadowed by the increased hearing length and cost of holding separate hearings (in the event that the claimant succeeds in the liability phase, thus necessitating a further hearing on quantum).

7. As to length, the length of a separate quantum hearing would, in all probability, exceed the number of hearing days dedicated to quantum in a single non-bifurcated hearing (resulting in more hearing days overall), due to the need to call the same witnesses (witnesses who speak on liability also usually speak on quantum) twice, and to consider the same documentary evidence twice, in both the liability and quantum hearings.

8. It necessarily follows from the greater length of a second hearing that the additional cost of a second hearing would squarely outweigh any savings expected from scheduling one or two fewer hearing days at the first hearing on liability – to say nothing of travel expenses.

9. Further, "*Quantum Phase*" would, by definition, require a separate disclosure process in the lead-up to the second hearing on quantum. It is difficult to understand how this will save time and costs.

10. To add to that, in some instances the issue of damages is an essential element of the assessment of liability. This makes bifurcation of quantum impractical and senseless. In *Coropi v. Serbia* the tribunal stated:

> "[T]here are also cases in which quantum evidence will be an essential component of a party's case at the liability phase. The clearest example of this will be in circumstances in which a claimant contends the breach of a non-expropriation provision of an investment treaty on the basis of the inadequate offer or payment of compensation. In such a case, the claimant's valuation evidence is likely to go to the core of the claimant's liability case."[2]

11. The case law suggests that the issue of quantum was bifurcated in a small amount of cases, and that in each there were extraordinary or new circumstances which would justify bifurcation. The suggestion of considering bifurcation at the initial stages (if we read the Recommendations of the Working Group correctly) goes against that trend. If tribunals will offer to the parties to consider bifurcation of quantum at the initial stages, pages of parties' submissions will go to arguing over bifurcation and then tribunal pausing to make a decision on this request. This does not appear to contribute to costs and time efficiency.

12. Examples of cases where quantum was bifurcated include:

    i. In *Churchill Mining v. Indonesia*, the tribunal had initially rejected the respondent's request to bifurcate liability and quantum.[3] It was only upon the emergence of a (subsequently upheld) allegation of forgery that the tribunal moved *proprio motu* to revise its earlier decision and to order bifurcation between liability and quantum.[4] In deciding to bifurcate

[2] *Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 4, 21 August 2023, ¶ 20.

[3] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order. No. 8, 22 April 2014, ¶ 14.

[4] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 12, 27 October 2014, ¶ 50.

in this way, the tribunal also took into account Indonesia's concerns about the claimants' ability to comply with an adverse cost ruling if liability was decided against them.

ii. In *Suez v. Argentina*, it appears that the tribunal decided to conduct a separate examination of quantum issues (with the assistance of a tribunal-appointed independent quantum expert) *only after* the merits hearing.[5] If anything, *Suez* demonstrates that the default approach should be not to bisect liability from quantum in the first instance, but that if it proves to be inevitably necessary, a supplementary quantum phase remains a residual possibility *after* a full merits hearing at which both liability and quantum are argued.

iii. In *Lao Holdings v. Laos*, the tribunal had initially rejected bifurcation.[6] Two months after that ruling, however, an award was issued in a parallel commercial arbitration which addressed significant parts of the factual matrix relevant to the dispute.[7] It was on this basis, *inter alia*, that Laos requested the reconsideration of the bifurcation issue, and the tribunal then decided to bifurcate based on quantum – with the benefit of the commercial arbitral award at its disposal on the relevant factual matters.

iv. In *Gavazzi v. Romania*, Romania filed its fully pleaded Counter-Memorial, including on quantum, and even a Counterclaim, to which the claimant investors then filed a Reply.[8] It was only at this point in the proceedings – i.e., once the tribunal had before it three comprehensive pleadings on jurisdictional, liability, and quantum matters – that bifurcation of jurisdiction/liability (on the one hand) and quantum (on the other hand) was granted and on the specific factual matrix of that case.

v. *Peteris v. Norway* is in a similar vein. The tribunal in that case dismissed an initial quantum-based bifurcation request submitted by Norway prior to the submission of Norway's Counter-Memorial on the basis that it was at that point unable to form a view as to the prospects of success of Norway's arguments on jurisdiction and liability,[9] but reconsidered the bifurcation request afresh after receiving Norway's Counter-Memorial, and thereupon granted it.

13. Beyond this handful of cases, each rendered on its own specific and unique factual and procedural matrix, all other cases – and there are dozens of them – have proceeded to determination with liability and quantum combined. That is the default position.

14. But most important is the fact that the bifurcation of quantum was a reaction to specific procedural developments, and was not considered at early stages. We believe this approach to be correct.

---

[5] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶¶ 21, 244–246. Indeed, the tribunal noted at ¶ 245 that "[t]he Tribunal is aware that a bifurcation of the merits phase of an ICSID case into determination of liability and a determination of damages is not common."

[6] *Lao Holdings N.V. v. Lao People's Democratic Republic (II)*, ICSID Case No. ARB(AF)/16/2, Procedural Order No. 2, 23 October 2017, ¶ 2.

[7] Id., ¶ 5.

[8] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Procedural Order No. 2, 13 September 2013, ¶¶ 2–4.

[9] *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Procedural Order No. 5, 6 December 2021, ¶¶ 1–3.

2. Comment on recommendations on experts (Section A. Organization of the arbitral proceedings)

15. With respect to paragraph 16 and the recommendations on experts, it appears doubtful that arbitral tribunals in ISDS should be recommended to appoint technical advisers or apply the approach set out in the UNCITRAL Model Clause on Technical Advisers (**Model Clause on Technical Advisers**) to tribunal-appointed experts.

16. The category of technical advisers (together with the respective Model Clause) was first proposed in the UNCITRAL Model Clauses on Specialized Express Dispute Resolution developed within the UNCITRAL Working Group II and adopted in 2024. According to the Preamble of the UNCITRAL Decision on their adoption, model clauses provide parties "*with a streamlined and simplified procedure for settling disputes that arise in the context of international commercial relations within a shortened time frame*"; and the UNCITRAL recommends their use "*by parties and administering institutions in the settlement of disputes arising in the context of international commercial relations*" (para 3 of the Decision). The text of the Model Clause on Technical Advisers also does not refer to ISDS. The use of the category of technical advisers for investor-State disputes was not originally envisaged in the model clauses.

17. More importantly, the category of technical advisers is a construct of the Model Clause on Technical Advisers itself and has not yet gained recognition outside it. Arbitral tribunals may appoint technical advisers when the parties agree to such an appointment, for example by including the Model Clause on Technical Advisers (or alike) in their arbitration agreement. The mere fact that the UNCITRAL adopted the model clause format demonstrates that any engagement of technical advisers should be part of the agreement between the parties. It is also reflected in the preface to the model clauses: "*The Model Clauses are* ***contractual texts, flexible enough for users to adapt and adjust them to their circumstances and preferences****. Parties can use any of the model clauses individually or combine them as they wish, depending on their specific needs*".

18. While it is understood that the intention was not to encourage arbitral tribunals to employ third-party technical assistance without due regard to the will of the parties, the suggested wording of the recommendation, without any caveats, may be interpreted this way. Particularly, the recommendation on engaging the tribunal's "*own experts or technical advisors*" merely "*in line with the approach set out in the UNCITRAL Model Clause on Technical Advisers*" may be seen as ignoring the requirement of the parties' consent.

19. Furthermore, paragraph 16 suggests that the role of tribunal-appointed experts can be "*limited to that of a technical advisor*".[10] However, these roles are significantly different, and each has its own scope of functions. While the expert's role is clearly defined and is to report to the arbitral tribunals, in writing, on specific issues to be determined by the arbitral tribunal (Article 29 of the UNCITRAL Arbitration Rules), the role of technical advisers lacks a clear definition and may be interpreted quite broadly. The Model Clause on Technical Advisers provides that the technical advisers "*accompany [the arbitral tribunal] in the proceedings and, as the need arises, […] assist it in the technical understanding of the dispute*". Unlike the experts, the technical advisers can perform their role orally in the absence of the parties, which brings this category closer to that of tribunal secretaries – or even to the fourth arbitrator with technical expertise.

20. The lack of clarity regarding the role and functions of the technical adviser, especially in the ISDS context, could be addressed by referring to the practice of courts or arbitral tribunals;

[10] We retain the original spelling; the Model Clause on Technical Advisers uses 'adviser' instead.

however, as the Model Clause on Technical Advisers was adopted only in 2024, and for commercial disputes which are usually confidential, relevant case law highlighting the practical issues of engaging technical advisers is not yet available.

21. In our view, introducing the category of technical advisers into ISDS proceedings without the agreement of the parties may not be fully consistent with the contractual nature of the UNCITRAL Model Clauses and could give rise to some uncertainty regarding the respective roles and functions within the arbitral process. We believe that it might be preferable to approach this idea with caution.

22. More generally, engaging the tribunal's own experts or technical advisers has the potential to add complexity to the proceedings, as it requires resolving related questions such as selection criteria, professional qualifications, and the parties' role in the selection process, together with issues of procedure proper. This consideration is worth bearing in mind in light of the objective of enhancing the overall efficiency and effectiveness of the proceedings.

3. Comment on recommendations on causation (Section C. Causation)

23. We welcome the Working Group's recommendations on causation, which are broadly aligned with arbitral practice and provide useful guidance on the assessment of damages in ISDS. That said, further nuance in the articulation of causation principles would strengthen legal certainty, fairness, and the efficiency of proceedings.

(a) Differentiated Approaches Depending on Breach

24. Causation is not a monolithic concept but is shaped by the nature of the underlying treaty breach. The evidentiary analysis required in expropriation claims, for example, is generally more straightforward. In such cases, the act of expropriation typically establishes a proximate link between the wrongful act and the economic loss, rendering causation less contested. By contrast, in claims arising from breaches of standards such as fair and equitable treatment, full protection and security, or denial of justice, the causal inquiry may involve a more complex chain of events, requiring tribunals to evaluate whether losses can be legally and factually attributed to the breach as opposed to intervening or unrelated factors. A recommendation that underscores this differentiation would be highly constructive, helping tribunals apply causation principles in a manner that is both proportionate and context-specific.

(b) Scope of the "But For" Test

25. The Working Group's recommendations would also benefit from greater clarity on the operative standard of causation. In practice, tribunals have employed a "but for the breach" analysis to identify the losses legally attributable to wrongful conduct. This test is appropriate if applied narrowly: tribunals must measure causation against the ***wrongful act itself***, and not against broader external factors such as geopolitical instability, regime change, war, or macroeconomic upheaval. In other words, causation must exclude losses that are the product of independent, supervening events, even if such events occur contemporaneously with, or in the aftermath of, the state's breach.

(c) Suggested Refinement of Recommendations

26. We therefore suggest that the Working Group's guidance on causation explicitly:

- acknowledges the differentiated application of causation principles depending on the type of breach;

- clarifies that causation must be measured by reference to the breach, not external supervening events.

4. Comment on recommendations on allocation of costs (Section H. Allocation of costs)

27. While we acknowledge the willingness of the Working Group to develop clear recommendations for the allocation of costs in ISDS, we have several comments with respect to their placement and drafting.

28. First, we have some doubts as to whether this recommendation should be included in the guidelines on the calculation of damages and compensation in ISDS. In general, no specific procedure or criteria apply to the allocation of costs when damages or compensation are claimed. If the Working Group wishes to develop such recommendations, a separate document which specifically addresses costs in ISDS would likely be a more appropriate format.

29. If the Working Group decides to keep this recommendation in the guidelines, we suggest that its wording could be reflective of the applicable rules and the parties' agreement.

30. As to the first paragraph of the recommendation, it states that tribunals "*should allocate costs based on the applicable rules, apply it consistently, and provide reasons for the allocation*". However, when a tribunal allocates costs in accordance with the applicable rules that strictly provide for the "bear your own cost" approach, for example, it appears unnecessary to give detailed reasons for such an allocation. By contrast, if the applicable rules provide for broad discretion of the tribunal in allocating costs, the provision of reasons is justified and, in fact, necessary.

31. Therefore, we suggest revising the drafting of the first paragraph as follows:

> "Tribunals should allocate costs based on the applicable rules, apply them consistently, and provide reasons for the allocation **in line with the applicable rules**."

32. As to the second paragraph of the recommendation, the current wording appears to set a closed list of circumstances tribunals should consider in allocating costs, irrespective of the applicable rules chosen. However, depending on the applicable rules, the circumstances tribunals may consider can vary significantly. In selecting the applicable rules, states may have intentionally chosen a particular approach to the allocation of costs and may expect it to be strictly followed in ISDS. It appears that the proposed wording of the recommendation does not fully reflect this.

33. Moreover, the parties may reach an agreement on the allocation of costs when they settle their dispute. In this case, the tribunal should strictly apply the approach chosen by the parties without taking other circumstances into account.

34. Therefore, to make the wording of the second paragraph more flexible and less prescriptive, we suggest revising it as follows:

> "**When it is consistent with the applicable rules and unless the parties agree otherwise**, in allocating costs, tribunals should consider **inter alia** the disproportionality between damages claimed and awarded, the clarity of the experts' damages analyses, the parties' conduct, and the meritoriousness of the claims."