

**Comments by the Republic of Panama Regarding
Initial Draft Note on Potential Reform in the Assessment of Damages and Compensation**

The Republic of Panama (“**Panama**”) wishes to thank the UNCITRAL Secretariat for preparing an initial draft note on the subject of potential reforms in the assessment of damages and compensation in ISDS proceedings (“**Draft Note**”). The note will be a useful tool in discussions.

At present, however, as it is still early days, it seems useful to limit these comments to the following high-level observations.

First, although Panama understands and appreciates the various concerns that motivated this exercise, it would note that, in practice, it may prove difficult to resolve all of them (as the “solution” to one problem could serve to exacerbate others).¹ Accordingly, as the discussions move forward, it may be helpful to first consider priorities.

Second, it is important not to lose sight of the fact that a damages assessment (which involves, *inter alia*, an evaluation of such issues as causation, foreseeability, and proportionality) is inherently fact-dependent. Thus, even though — on some level — it might make sense to prescribe the “valuation method to be applied by [a] tribunal,”² an overly strict rule could also lead to unfair results. Accordingly, as with the Draft Code of Conduct for Adjudicators in International Investment Disputes, an effort should be made to ensure that any new mechanisms relating to damages and compensation are “balanced, realistic, and workable.”³

¹ For example, although it may well be true that certain tribunals have not considered an “investor’s [alleged] human rights breaches,” an instruction that *every* tribunal consider that issue could (1) unduly complicate the proceedings, and (2) lead to increased expenses.

² Draft Note, ¶ 70(i).

³ Third Draft Code of Conduct for Adjudicators in International Investment Disputes, ¶ 4.