

*USG Comments on Draft Note on Assessment of Damages and Compensation
November 15, 2021*

The United States thanks the UNCITRAL secretariat for its draft note on “Assessment of damages and compensation,” which seeks to synthesize a complex area of international law related to investment disputes for consideration by the Working Group. In light of the Working Group’s mandate to “work on the possible reform of investor-State dispute settlement (ISDS),”¹ any reform options that are developed should be consistent with that mandate for considering procedural reform. To be consistent, elements of the assessment of damages and compensation that relate to the dispute settlement process should be separated from those that relate to the substantive legal principles that are used to guide such an assessment. Once this separation has been completed, it will be easier for the Working Group to assess the scope and type of any reform that may be appropriate, desirable and achievable in light of the mandate for procedural reform.

It is also important for the Working Group to avoid taking on issues that, while relevant background for understanding damages and compensation, would exceed the Working Group’s expertise. For example, it would be outside UNCITRAL’s general expertise (as well as the Working Group’s mandate), to develop broadly applicable guidance or provisions related to causation as a principle for the assessment of damages and compensation that may derive from general legal principles or the types of available damages derived from the law of State responsibility.

Turning to the draft note’s contents, given the breadth and scope of this topic, in addition to sorting out procedural topics from substantive topics, it may also be useful to distinguish between procedural reforms that are technical and ones that implicate policy choices. The technical elements of the procedure related to the calculation of damages and associated compensation could be addressed in one document, and potential policy issues related to procedural matters that influence the assessment of damages and compensation could be addressed in a second document.

- ***Technical elements:*** In identifying best practices related to technical matters, it will be important to focus on the process of assessing damages and compensation, such as listing evidentiary standards, or the need for competence and ethical considerations when selecting experts, rather than the substance of assessing damages and compensation, such as recommendations about the appropriate valuation methodology, evidentiary standard, causation, mitigation and other legal standards. These latter topics are not elements of the dispute resolution process itself, but the merits of a damages claim and as such exceed the Working Group’s mandate.
- ***Policy Issues:*** Similarly, with respect to issues of assessing damages and compensation that implicate policy choices, the Working Group should only address those that relate to the dispute settlement process itself, such as the consideration of awarding costs when

¹ Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263-264.

damages calculations are unreasonable because they are inflated to “anchor” an award as a matter of litigation strategy. Treaty provisions that mandate a particular type of valuation method or impose ex ante limits on damages would, in contrast, fall within the substantive law of damages, and outside the Working Group’s mandate.

In sum, further refinement of the topic would help focus the Working Group’s efforts on the determination of whether there are desirable, feasible and achievable reforms in this area.