Compensation and Damages in Investor-State Dispute Settlement

Options for reform

IISD REPORT

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Acronyms

BIT	bilateral investment treaty
DCF	discounted cash flow
FET	fair and equitable treatment
IIA	international investment agreement
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
UNCITRAL	United Nations Commission on International Trade Law

1.0 Introduction

The topic of compensation and damages has been high on the Investor-State Dispute Settlement (ISDS) reform agenda. The growing size of ISDS damages awards (United Nations Trade and Development [UNCTAD], 2024a) makes the topic an important policy issue, not only due to the significant impact on public finances but also because of concerns related to consistency and correctness of ISDS practice. Policy-makers have started exploring ways to curtail the practice of awarding increasingly large amounts of damages at various multilateral normative processes, such as through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III and in their bilateral and regional treaty-making practice.

Rather than discuss potential causes and drivers of the growing damages awards (see Additional Bibliography), this policy report aims to build on the existing approaches and proposals to reform ISDS practice on damages.

The report first introduces the topic of compensation standards. It then proposes a menu of options to reform the existing ISDS practice focusing on different elements of compensation standards as well as other aspects of compensation. The final section concludes by outlining avenues and forums at which the reform efforts may be pursued.

2.0 Compensation Standards in International Investment Agreements

When courts and tribunals award compensation as a form of reparation, they apply specific compensation standards. In the ISDS context, this is most often the customary law standard of "full reparation" (UNCTAD, 2024a). While this standard still leaves plenty of room for guidance by treaty-makers, states are free to adopt different standards (International Law Commission [ILC], 2001a, Art. 55; Shirlow, 2022, pp. 51–3). When aiming to adopt new standards—whether labelled as "fair reparation" or "reasonable reparation"—a best practice for states is to define their operational elements, otherwise the meaning and application of these standards can remain unclear.[1]

The level of detail in compensation standards is crucial in guiding courts and tribunals, particularly regarding common elements, such as:

- When is a particular compensation standard applicable?
- What is the compensable loss?
- When are future profits compensable?
- What factors should be considered when determining compensation?
- What is the required causal relationship?
- What techniques should be used to calculate compensation?
- What type and level of interest should be applied to the compensation awarded?
- Other relevant considerations regarding the application of the standard, such as evidentiary questions.

This policy report aims to guide policy-makers in reforming ISDS practices related to compensation and damages, regardless of the standard used. The report is organized around the key elements mentioned above. Under each heading, it discusses the issue's relevance to policy-making and proposes various reform options, briefly assessing their effectiveness in addressing common policy concerns expressed by states. This approach allows policy-makers to combine different reform options in their instruments to achieve desired policy outcomes. Many elements are interconnected—for example, the approach to causation is closely tied to defining compensable harm—so they benefit from being considered together.

Most of the policy options discussed align with the customary standard of "full reparation" and do not deviate from it. Instead, they provide more detail, nuance, and guidance for the application of this standard in the ISDS context. The policy report does not propose specific treaty language to implement the reform options, leaving flexibility to policy-makers.

[1] States may also incorporate into the treaty compensation standards based on their domestic (tort) law. Examples of such an approach for calculating compensation of expropriation of land can be found in India's bilateral investment treaty (BIT) (e.g., India-Belarus 2018 BIT, Art. 5.1) In this case, it would be useful to guide those applying the standard to the relevant sources of national law.

3.0 Policy Options

3.1 Defining Compensable Loss

According to the ILC's commentary on its Articles on Responsibility of States for Internationally Wrongful Acts, the level of compensation depends, among other factors, on the content of the primary obligation (ILC, 2001b, p. 100, para. 7). Generally, international investment agreements (IIAs) do not specify compensable loss outside the expropriation context, where compensation is required for lawful expropriation. This creates ambiguity regarding compensation for breaches of other investment treaty standards (e.g., expropriation versus fair and equitable treatment [FET], national treatment, or most-favoured nation treatment). The lack of clarity regarding compensable loss can lead to legal uncertainty and excessive damages—such as when the loss caused by an FET breach is treated as equivalent to that caused by unlawful expropriation. To address this issue, policy-makers could specify more clearly what constitutes compensable loss under each protection standard.

Possible approaches include:

Defining protected values, interests, or rights under different protection standards.

Policy-makers should clarify whether obligations like FET, national treatment, or most-favoured nation protect the profit-making value of the investment or whether they concern the exercise of sovereign power in a certain way. For example, some obligations might protect only the investor's lost opportunity due to a sovereign's failure to follow proper procedures, without safeguarding the investment's profit-making expectations. By defining which interests are protected, states can limit tribunal discretion. Alternatively, policy-makers may specify which values and interests are not protected under a given standard. For instance, they may exclude future profits from compensable harm entirely under certain non-expropriation standards (see Section 3.2). This approach directly indicates to the tribunal what losses are compensable under different standards, and as such should delimit the applicable valuation techniques and evidentiary questions, too (see Sections 3.5 and 3.7). However, this approach does not entirely eliminate the tribunal's discretion (and claimant's incentive) to requalify the state's conduct as a breach of particular standards that protect a greater scope of rights.

Limiting compensation to amounts invested.

A related policy option is to cap compensation at the amount invested, or at a different threshold, for certain or all obligations. This approach does not conflict with the principle of "full reparation." The principle requires that the compensable harm is fully compensated but does not specify what harm qualifies as compensable (Marzal, 2024). This policy option merely defines the limit of compensable loss under a particular primary obligation. States could establish this as a ceiling for specific investment protection standards.

It is important to note that defining compensable loss in a treaty is not the only factor determining the harm for which damages are awarded. This issue is closely tied to other

elements of compensation standards, such as compensability of future lost profits, balancing, offsetting and equitable factors, and causation.

3.2 Future Profits and Income

In ISDS practice, compensation for breaches is often based on the potential future earnings of the investment, which implies a preference for certain valuation techniques, such as the discounted cash flow (DCF) method (see Section 3.5). In this sense, arbitral tribunals aim to mimic the decision of an (hypothetical) investor valuing the investment (Marzal, 2024). This might not be appropriate as the loss legally compensable might not include all the expected profits that are valued in a commercial transaction.

While future profits are not excluded from compensation under customary international law (ILC, 2001a, Art. 36(2)), the ILC Articles' commentary advises a cautious approach to awarding damages for future losses due to their inherent uncertainty and speculative nature. As a result, states are encouraged to provide clearer guidance on how tribunals should address future profits, as the "full reparation" standard does not specify what future profits are compensable beyond the need of them being sufficiently certain.

Requiring that lost profits are legally consolidated.

States could specify that tribunals may award damages for lost profits only when the claimant has established a legal right to a future income stream (e.g., through a long-term contract), as opposed to a mere commercial expectation (e.g., ILC, 2001b, p. 104, para. 27). This means, for example, in cases where the investor has not yet obtained all the necessary licenses required for its activity to commence, future profits should not be considered compensable.

States may also specify that the law of the host state—or the law of the contract when the investment is mainly tied to a contract—is used to determine questions relating to the existence and scope of protected rights.

Limiting compensation of future lost profits to reasonable returns.

States might specify that even when future income is legally consolidated, the rate of return should be limited to a reasonable rate. This issue is closely related to causation and the determination of the "but-for" scenario (see Section 3.4). The projected rate of return should account for potential and anticipated regulations and taxation, which could permissibly reduce profits. This is particularly relevant in the context of climate change and the impact of stranded fossil fuel assets. However, merely specifying that the return on future profits is reasonable might not limit the tribunal's discretion. Consequently, states may consider tethering the rate to some widely accepted metric or index.

Clarifying the criteria for determining sufficiently certain lost profits.

Simply stating that only sufficiently certain income is compensable may not provide adequate guidance to tribunals, as this is already a well-established aspect of the "full reparation" standard (ILC, 2001a, p. 104, para. 27). States should specify how to determine what qualifies as "certain," for example, by outlining specific criteria, such as upper time limits. This could

also be achieved by clarifying the applicable rules on causation and valuation techniques (see Sections 3.4 and 3.5).

3.3 Balancing, Equitable, and Offsetting Factors

In ISDS practice, the determination of "fair market value"[2] has generally been understood as not allowing for any contextual or equitable considerations. This approach stems from the narrow view that the valuation of compensable loss is a purely factual determination in which legal considerations have little to no place (Marzal, 2021). Other international courts and tribunals do not approach valuation this way (Shirlow, 2022; UNCTAD, 2024a). Requiring consideration of balancing, equitable, and offsetting factors in the analysis of compensation and damages may lead to ISDS practice more reflective of the circumstances of the breach.

Possible reform policy options include:

Incorporating contextual and equitable factors in the assessment of compensation and damages.

One reform option, adopted in recent IIAs and model treaties[3], aims to expand the factors relevant to the calculation of compensation and damages by providing a list of relevant balancing factors that ISDS tribunals must consider. Among these factors is, typically, an equitable balance between the public interest behind the measure and the interest of the affected investor. While these provisions are valuable in including important contextual references in the damages assessment, without specifying the relative weight of the factors listed, they remain open to a wide range of interpretations. Thus, states may consider further specifying the relative importance of the considerations they refer to in addition to their obligatory nature. Balancing and equitable provisions may apply to any breach under the treaty or can be specified individually for each obligation (see Section 3.1).

Incorporating gain-based considerations in the assessment of compensation and damages.

An approach that allows for a clearer delineation of balancing factors is to integrate considerations of the relative gain and loss of the investor and state into the damages assessment (Aisbett & Bonnitcha, 2021).[4] Under this approach, the state would be liable to pay, at most, the lesser of the investor's loss or the host state's gain arising from the measure causing the breach. The approach disincentivizes bad faith opportunistic behaviour on the part of the state, such as seizing an investment to operate it directly. At the same time, it allows

[2] Typically included in IIAs as a benchmark for compensation conditioning lawful expropriation.

[3] Cabo Verde–Morocco BIT (2023), Art. 10.3; Central African Republic–Rwanda BIT (2019), Art. 7.2; Democratic Republic of Congo–Rwanda BIT (2021), Art. 7.2; Economic Community of West African States Common Investment Code (2019), Art. 11.6. See also Southern African Development Community Model BIT (2012), Art. 6.2, option 1; Pan–African Investment Code (2016), Art. 12.2; Common Market for Eastern and Southern Africa Common Investment Area Agreement (draft), Art. 20.3; see also the African Continental Free Trade Area Protocol on Investment (2023); Türkiye-United Arab Emirates BIT (2023). Recent IIAs signed by India with partner countries incorporate similar considerations as mitigating factors.

[4] The referenced paper contains model treaty language to effectuate this reform option. Also discussed in Bonnitcha & Brewin, 2020, pp. 34–5.

for measures taken for the public interest—from which the state typically does not derive any economic benefits—not to be inhibited by potentially high ISDS damages. The approach may be more effective than the balancing considerations, as it is based on objective parameters and specifically addresses the policy problem IIAs aim to remedy—constraining the state's opportunistic behaviour. It may also have the advantage that in valuing the investment, it relies on historical data, rather than projections of future profits (see Section 3.5). While it may be argued that this option is not aligned with the rule of "full reparation" for all standards of protection, as it caps compensation based on the state's gain, even if the amount of the loss is higher (see Section 3.1, Limiting compensation to amounts invested), states are free to include such a rule in their treaties (ILC, 2001a, Art. 55).

Incorporating the country's GDP in the damages analysis.

Another balancing and equitable factor could be to limit compensation using an external reference point such as the respondent state's GDP. This can be done, for instance, by including a provision that the damages award shall, under no circumstances, be larger than a certain percentage of the respondent's GDP. This policy option directly addresses concerns about the potentially crippling impact of large damages awards (Paparinskis, 2021) and avoids the exacerbation of the high levels of debt in several countries (UNCTAD, 2024b). While this consideration does not seem to fully align with the customary "full reparation" standard, states are free to include such a cap in their treaties (ILC, 2001a, Art. 55).

Incorporating considerations related to the investor's behaviour.

Under the customary international law rule of "full reparation," as under most domestic legal systems, the amount of compensation is also influenced by the behaviour of the aggrieved party. Typically, this consideration takes the form of two complementary rules: the duty for the aggrieved party to reasonably mitigate any damage caused to it and the requirement for adjudicators to take into account contributory fault on the part of that party. To ensure that these aspects of the customary international law rule of full reparation are systematically applied, states may refer to them expressly in their treaties. Recent treaties have started to include such provisions.[5]

3.4 Causation

Clarifying the requisite causal link between the breach and the resulting loss is another element that would increase clarity and predictability of compensable loss. International law authorities are clear that only losses directly caused by a breach are compensable (ILC, 2001a, Art. 36(1); ILC, 2001b, p. 92, para. 9; International Court of Justice, 2022, para. 94). Not any and all consequences flowing from the state's illegal conduct are compensable. States have an opportunity to provide further guidance on this causal relationship in their IIAs.

[5] For example, African Continental Free Trade Area Protocol on Investment (2023), Art. 21.4. See also Indonesia–United Arab Emirates BIT (2019), Art. 9.2. Both provisions apply to expropriation. Canada–Ukraine Free Trade Agreement (2023), Art. 17.36.5(c); Canada Model BIT (2021), Art. 40.5(c) applicable to the whole IIA.

Potential reforms include:

Defining the requisite causal nexus.

Some recent IIAs have taken the first steps in defining the necessary causal link between the loss and the breach.[6] However, merely restating that the loss must "directly" arise out of the breach or is "foreseeable and directly caused" by it might not be sufficient to guide tribunals' interpretations. More precision will be achieved by combining this approach with the following options.

Defining "but-for scenarios" (counterfactuals).

States could provide more guidance regarding the so-called "but-for scenarios" in their treaties. "But-for causation" assesses what the outcome would have been if the state had acted in accordance with its international obligations. The difference between that hypothetical situation and the actual breach forms the basis for determining compensable loss. How this hypothetical scenario is constructed carries significant financial implications, particularly in cases involving lost future profits.

States could specify in their treaties that the "but-for scenario" must include the prospect of reasonable regulation. Regulation naturally imposes economic costs on certain actors and this reality should be reflected in any "but-for scenario." This is especially important in the context of climate change, where policies aimed at complying with the Paris Agreement, such as those affecting stranded fossil fuel assets, may have substantial financial consequences.[7]

States may also clarify that the "but-for scenario" must account for the permissible aspects of the state's conduct, even if these aspects result in losses to the investor (Jarrett, 2024). This is particularly relevant for certain types of investment protection obligations, such as FET (see Section 3.1). Consequently, if regulation causes losses beyond a certain permissible threshold, the state should not bear the costs of the damage it was legally allowed to cause, but only the costs beyond that threshold.

3.5 Valuation Techniques

Under the "full reparation" standard, ISDS tribunals are generally free to choose among available techniques, including, typically, market-, asset-, and income-based methods. The use of different valuation techniques has direct implications for the size of a damages award, with some techniques leading to higher awards than others. Income-based techniques such as the DCF method, which ISDS tribunals have increasingly relied on, have attracted criticism in the litigation context for compensating losses of uncertain future profits (Bonnitcha & Brewin, 2020, pp. 18–21) (see Section 3.2). The DCF method has garnered favour among tribunals despite the ILC Commentary to the Articles on State Responsibility warning that it uses "a

[6] For example, India–Kyrgyzstan BIT (2019), Art. 23.2; Canada–Ukraine Free Trade Agreement (2023), Art. 17.36.5(b).

[7] For example, the Joint Interpretative Declaration on the Investment Protection Agreement of EU-Chile Advanced Framework Agreement.

wide range of inherently speculative elements" (ILC, 2001b, p. 103, para. 26). The application of income-based methods represents a core concern regarding valuation methods in ISDS.

Different policy options to guide ISDS tribunals in the use of valuation techniques exist.

Excluding the use of income-based valuation techniques.

This policy option is most drastic, and likely most effective, in limiting awards of large speculative future profits. Since income-based methods like the DCF method rely on projections of future cash flows, they introduce a high degree of uncertainty, particularly for investments without a proven track record of profitability. By directing ISDS tribunals to use market- or asset-based methods, which are typically grounded in tangible, historical data, this may lead to more conservative and predictable compensation outcomes. Excluding the DCF method reduces the scope for manipulation and interpretation, leading to valuations that may be perceived as fairer and more transparent. Moreover, by introducing greater consistency in how damages are calculated, the variation seen in DCF-driven awards is reduced, leading to increased predictability in ISDS outcomes. Lastly, an exclusion of the DCF method means that the valuation of early-stage and unproven investments is not based on unproven future success. It should be noted that this policy option still allows tribunals to award damages for lost profits as required under the "full reparation" standard. However, such profits would not rely on projected future income streams but rather on an examination of investor's existing legal entitlements.

Limiting the use of income-based valuation techniques to specific exceptional circumstances.

This approach offers a middle ground, addressing concerns about speculation while retaining the possibility of using income-based methods in cases where future income and expenses of the investment are predictable with sufficient certainty. By narrowing its application to investments with, for example, a well-documented history of profitability where future revenue and costs can readily be established—i.e., the prices of inputs and outputs of the investment are not subject to significant variation over time and investment risk can be established with a significant degree of certainty—this option reduces the risk of inflated or overly speculative awards. Moreover, by allowing the DCF method only in specific, well-defined circumstances, this policy option avoids the complete exclusion of the method. It strikes a balance between preventing speculative awards and enabling compensation for investors who can substantiate their expected future profits with credible data, thereby allowing for flexible, case-specific approaches by tribunals. Additionally, by setting clear criteria for the use of the DCF method, tribunals have more objective guidelines to follow, leading to more consistent and justifiable awards.

It should be noted, however, that depending on its formulation, this option may leave significant leeway to tribunals. In essence, it restates the conditions for the use of income-based methods for determining compensation already established in the ILC commentary. Tribunals have disregarded this guidance in the past. Nevertheless, this policy option may be more effective as ISDS tribunals may be more likely to follow an explicit affirmation in a binding treaty.

Limiting any award for lost future profits to non-speculative future profits which, in any case, shall not exceed a specified time horizon.

This policy option constitutes a variation of the preceding option by further specifying the conditions under which lost future profits can be compensated. By limiting the award to non-speculative future profits, it, too, restates the guidance of the ILC commentary. It adds to this by imposing a fixed limit on the time horizon beyond which any future profits are considered speculative. This time frame acts as a ceiling, rather than a floor, and ISDS tribunals may not award compensation where future profits are already speculative before this maximum period. This policy option provides for a relatively high degree of certainty as to what future losses can be compensated while leaving ISDS tribunals with a degree of flexibility to address the specific circumstances of individual investors.

Expressing preference for other than income-based valuation techniques.

This policy option is likely less effective in avoiding speculative awards using the DCF method than the options above. A suggested preference for market- and asset-based methods in a treaty expresses states' discomfort with the use of the DCF method while leaving tribunals the freedom to choose this method as long as they can explain its appropriateness in the case at hand. Nevertheless, this policy option may impact some tribunals in choosing between alternatively available valuation methods and, thus, may, to some extent, limit the use of the DCF method. Some treaties have already started to apply this option.[8]

3.6 Interest

Once the amount of compensation is determined, the tribunal typically sets interest that will apply to the principal amount. Several factors in determining interest can significantly impact the final sum the respondent state must pay, including the date from which interest begins to accrue, the applicable rate, and whether the interest is simple or compound. ISDS tribunals have taken inconsistent approaches to determining the applicable interest rate and have generally favoured compound interest over simple interest. Additionally, tribunals have resorted to pre-award as well as post-award interest.

Possible complementary reform options, all of which are aligned with the customary international law standard of "full reparation," include:

Determining the applicable interest rate.

States may choose to specify the applicable interest rate in their treaties to prevent excessive awards. In doing so, it is important to understand the pros and cons of referencing different rates. Historically, treaties have often referred to the LIBOR (London Interbank Offered Rate). However, since LIBOR has been phased out, alternative benchmark rates like SOFR (Secured Overnight Financing Rate) or SONIA (Sterling Overnight Index Average)—which reflect overnight lending rates between financial institutions—are now used. Some recent treaties have also considered using sovereign bond yields as a benchmark.[9] However, this

[8] For example, Colombia-Spain BIT (2021), Art. 12(2).

[9] For example, Colombia-Spain BIT (2021), Art. 12(5).

approach could result in varying interest rates for different treaty partners, generally to the detriment of developing and least developed countries, as their sovereign bonds tend to carry higher interest rates. Additionally, since interest on compensation awards is not intended to reflect the risks of investing in a country or the respondent's default risk on sovereign debt, applying such rates may be inappropriate and could significantly increase the compensation due.

Specifying that accruing interest will be simple (and not compound).

As a complementary measure to defining the applicable interest rate, states should specify that only simple interest is payable on any damages under their treaties, both pre- and post-award. In the absence of such a provision, ISDS tribunals have typically applied compound interest (PwC, 2017; Grisel, 2014), which has, in some cases, doubled the principal amount by the time the award is issued. Some recent treaties have begun incorporating provisions to address this issue, although mostly in the expropriation context.[10]

Establishing the appropriate start date for interest accrual based on different standards of treatment.

Finally, states may wish to specify that, for some or all non-expropriatory breaches, interest should begin accruing from the date of the award. Given the lengthy duration of ISDS proceedings and the fact that claims are not always filed immediately after the contested measures occur, allowing interest to accrue from the date of the breach can result in several years of interest being owed by the time the award is issued. This increases the state's financial burden for a measure, the wrongfulness of which is only definitively determined at the time of the award. Specifying the start date for interest accrual can help avoid the accumulation of extensive pre-award interest.

3.7 Evidentiary Questions

During the arbitration phase when damages and compensation are determined—the so-called quantum phase—financial expertise becomes critical. Valuation experts provide specialized knowledge and analysis to assist tribunals in calculating the amount of damages. Typically, each party appoints its own experts, including for valuation issues. This often results in significant divergence between the parties' valuations and introduces a high potential for bias, for which the ISDS regime offers limited to no control mechanisms (Boué, 2024). Valuation experts have, in many cases, become "repeat players" in arbitration, serving the interests of their clients rather than providing objective assessments, and have developed an institutional interest and economic stake in the existing practice. Additionally, many arbitrators, who are primarily legal experts, may lack the necessary financial expertise to thoroughly assess party submissions in this area.

In this context, evidentiary approaches to damages have limitations without the support of broader reforms, such as those outlined in the policy options above. While policy options

[10] For example, Belarus–India BIT (2018), Art. 5.2; Argentina–UAE BIT (2018), Art. 6.5; Economic Community of West African States Common Investment Code (2019), Art. 11.4.

focusing on damages reform through evidence aim to streamline procedures, ease the burden on tribunals, and reduce bias and adversarial dynamics, they do not tackle the underlying economic incentives that influence various repeat players in the current ISDS system.

Still, there are several reform proposals aimed to enhance tribunal expertise and reduce bias in expert valuations, some of which are already currently available and used.

Limiting party autonomy with respect to valuation and exclusively rely on tribunal-appointed experts.

This policy option proposes to limit party submissions on damages and rely on tribunal-appointed experts. This avoids the practice of expert shopping, where parties select valuation experts who are likely to favour their positions by deliberately over- or undervaluing the investment. The quantum phase would become more neutral ground during the proceedings, increasing the objectivity of any outcome.

Requiring that tribunal-appointed experts examine the parties' valuations and, if necessary, conduct their own analysis.

Under the International Centre for Settlement of International Disputes and UNCITRAL arbitration rules, tribunals already have the authority to appoint their own experts. This policy option proposes a shift in practice by consistently requiring tribunals to appoint experts to review and assess the submissions and statements of party-appointed experts. This approach addresses the issue of limited expertise among tribunal members by enabling the tribunal to independently analyze the submissions, rather than relying on the parties' experts to critique each other's valuations. While this proposal could enhance the credibility and accuracy of valuations, it is likely to increase the costs of the proceedings.

Requiring party-appointed valuation experts to produce a joint report.

This policy option seeks to encourage collaboration and reduce adversarial dynamics. Joint discussions between experts could mitigate extreme valuations that often arise when each expert adopts a maximalist stance on behalf of their appointing party. Additionally, a joint report could streamline the tribunal's work by providing a clearer overview of key valuation issues, rather than requiring the tribunal to reconcile two differing approaches. While this policy option necessitates coordination among experts, it has the potential to reduce costs and delays compared to the current practice. At the same time, it does not guarantee that the two parties' positions will be reconciled to a useful extent.

Requiring joint examination of expert testimony ("hot tubbing").

Traditional cross-examination fosters adversarial dynamics between party-appointed experts, making it challenging for tribunals to resolve conflicting opinions. This policy option proposes bringing experts from both sides together for a joint session—a less rigid alternative to requiring a joint report from both parties' experts. This approach is widely recognized for reducing time and costs, narrowing the issues in dispute, and improving the quality and objectivity of expert evidence. Current arbitration rules already allow tribunals the flexibility to determine how expert testimony is examined and tribunals have experimented with joint sessions, yielding generally positive results. However, mandatory joint sessions (or "hot

tubbing") have drawbacks. Experts may have differing social standings within their peer groups (e.g., former mentor-mentee relationships), or they may lack the debating and quick-thinking skills necessary for such sessions, which are unrelated to their area of expertise.

3.8 Disincentivizing Excessive Claims

Between 2014 and 2023, the average investor claim in ISDS proceedings was USD 1.1 billion, an increase from approximately USD 400 million between 1996 and 2005 (UNCTAD, 2024a). The amount claimed by the investor may have a cognitive anchoring effect for tribunals and concrete implications for the administrative fees of the arbitration (Bonnitcha & Brewin, 2020, p. 28). Existing studies show that, despite the increase, tribunals have been surprisingly constant in awarding around 40% of the damages originally claimed, suggesting that a cognitive anchor may have a measurable effect in practice (Langford & Behn, 2018).

To disincentivize excessive claims where they are not related to the value of the investment, states have started to include provisions in their treaties to address this. One way is to provide that the final amount awarded would be further decreased if it is lower than 50% of the amount originally claimed. This approach is taken by Colombia and Spain in their recent BIT from 2021. Another approach is to consider any excessive claims at the time of cost allocation. Effectiveness of these provisions is yet to be tested but it is likely that these options only have a limited overall impact on the amounts of damages awarded in ISDS.

4.0 Forms and Avenues to Implement the Options

States have several avenues to pursue reform of ISDS practice on compensation and damages. Multilateral forums, like UNCITRAL Working Group III on ISDS Reform, are effective in shaping broad practice, as they can potentially influence a large portion of the system. However, multilateral efforts require compromise to accommodate diverse interests, which often results in lengthy processes before actual reform is implemented and could also limit the scope and ambition of reform. UNCITRAL's progress shows that multilateral solutions are better suited as a foundational floor for more ambitious reforms. Other multilateral platforms, such as UNCTAD, provide an inclusive forum for discussions on IIA reform and technical assistance directly to individual countries and regional economic integration organizations. Plurilateral organizations (e.g., the Organisation for Economic Co-operation and Development) can also help in paving the way for substantive discussions on selected areas of reform, while regional processes, such as the African Continental Free Trade Area or the Association of Southeast Asian Nations have a significant potential to both consolidate and update large swaths of the investment regime and may help states counteract power imbalances otherwise present in negotiations. States eager to reform compensation and damages should integrate these policies into their national model treaties and their international agreements. A clear national position on damages in ISDS forms a crucial starting point, which can then be mirrored in bilateral, regional, and multilateral negotiations.

References

Aisbett, E. & Bonnitcha, J. (2021). A pareto-improving compensation rule for investment treaties. *Journal of International Economic Law, 24*(1), 181–202. https://doi.org/10.1093/jiel/jgab006

Bonnitcha, J., & Brewin, S. (2020). *Compensation under investment treaties: What are the problems and what can be done?* International Institute for Sustainable Development. https://www.iisd.org/publications/compensation-under-investment-treaties

Boué, J. C. (2024). 'Lying with numbers' in international arbitration against states. *Journal of International Dispute Settlement, 15*(1), 5–34. https://doi.org/10.1093/jnlids/idae007

Grisel, F. (2014). The sources of foreign investment law. In Z. Douglas et al. (Eds.), *The foundations of international investment law: Bringing theory into practice* (pp. 212–233). Oxford University Press.

International Court of Justice. (2022, February 9). *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

International Law Commission. (2001a). *Responsibility of states for internationally wrongful acts*. In Yearbook of the International Law Commission Volume II, Part Two (pp. 26–30). United Nations. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

International Law Commission. (2001b). *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. In Yearbook of the International Law Commission Volume II, Part Two (pp. 31–114). United Nations.https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

Jarrett, M. (2024, July 2). *A proposal for reforming the calculation of damages in investment treaty arbitration*. Investment Treaty News. https://www.iisd.org/itn/en/2024/07/02/a-proposal-for-reforming-the-calculation-of-damages-in-investment-treaty-arbitration/

Langford, M. & Behn, D. (2018). Managing backlash: The evolving investment treaty arbitrator? *European Journal of International Law, 29*(2), 551–580. https://doi.org/10.1093/ejil/chy030

Marzal, T. (2021, April 22). Quantum (in)justice: Rethinking the calculation of compensation and damages in ISDS. *Journal of World Investment and Trade, 22*(2), 249–312. https://brill.com/view/journals/jwit/22/2/article-p249_4.xml?language=en

Marzal, T. (2024). *Reforming damages in ISDS and the problem of full reparation*. Investment Treaty News. https://www.iisd.org/itn/2024/09/19/reforming-damages-in-isds-and-the-problem-of-full-reparation/

Paparinskis, N. (2021). Crippling compensation in the international law commission and investor–state arbitration. *ICSID Review – Foreign Investment Law Journal, 37*(1-2), 289–312. https://doi.org/10.1093/icsidreview/siab029

PwC. (2017). *PwC international arbitration damages research: 2017 update*. PwC. https://www.pwc.co.uk/forensic-services/assets/pwc-international-arbitration-damages-research-2017.pdf

Shirlow, E. (2022). *Approaches of international courts and tribunals to the award of compensation in international private property cases and implications for the reform of investor-state arbitration*. International Institute for Sustainable Development. https://www.iisd.org/publications/report/international-courts-private-property-cases-reform-investor-state-arbitration

United Nations Trade and Development. (2024a). *Compensation and damages in investor-state dispute settlement proceedings*. United Nations. https://unctad.org/publication/compensation-and-damages-investor-state-dispute-settlement-proceedings

United Nations Trade and Development. (2024b). *A world of debt*. United Nations. https://unctad.org/publication/world-of-debt

Additional Bibliography

Beharry, C. L. (Ed.). (2018). *Contemporary and emerging issues on the law of damages and valuation in international investment arbitration*. (Brill | Nijhoff).

Bonnitcha, J. & Aisbett, E. (2021). Against balancing: Revisiting the use/regulation distinction to reform liability and compensation under investment treaties. *Michigan Journal of International Law, 42*(2). https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2107&context=mjil

Bonnitcha, J., Langford, M., Alvarez-Zarate, J. M., Behn, D. (2021). Damages and ISDS reform: Between procedure and substance. *Journal of International Dispute Settlement, 14*(2), 213–241. https://doi.org/10.1093/jnlids/idab034

Boué, J. C. (2023). The investor-state dispute settlement damages playbook: To infinity and beyond. *The Journal of World Investment & Trade, 24*(3), 372–397. https://doi.org/10.1163/22119000-12340291

International Council for Commercial Arbitration & American Society of International Law. (n.d.). *Damages in international arbitration*. https://icca-asil-damages.com/

Kantor, M. (2008). *Valuation for arbitration: Compensation standards, valuation methods and expert evidence*. Wolters Kluwer.

Lakhter, S. (2024, March 27). *Interest rate trends in investor-state disputes in 2022-2023*. https://arbitrationblog.kluwerarbitration.com/2024/03/27/interest-rate-trends-in-investor-state-disputes-in-2022-2023/

Marboe, I. (2017). *Calculation of compensation and damages in international investment law* (2nd ed.). Oxford University Press.

Sabahi, B. (2011). *Compensation and restitution in investor-state arbitration: Principles and practice*. Oxford University Press.

United Nations Commission on International Trade Law. (n.d.). *Procedural rules reform and cross-cutting issues*. https://uncitral.un.org/en/proceduralrulesreformandcrosscuttingissues

United Nations Commission on International Trade Law. (n.d.). *Webinar organized with the Academic Forum on Damages in ISDS – 26 August 2021*. https://uncitral.un.org/en/content/webinar-organized-academic-forum-damages-isds-26-august-2021

United Nations Commission on International Trade Law. (2022, July 5). *Possible reform of investor-state dispute settlement (ISDS): Assessment of damages and compensation*. United Nations. https://documents.un.org/doc/undoc/ltd/221/034/0e/pdf/2210340e.pdf

United Nations Commission on International Trade Law. (2023). *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9–13 October 2023)*. United Nations. https://uncitral.un.org/en/proceduralrulesreformandcrosscuttingissues

United Nations Conference on Trade and Development. (2015). *Investment Policy Framework for Sustainable Development*. United Nations. https://investmentpolicy.unctad.org/investment-policy-framework

United Nations Conference on Trade and Development. (2020). *International investment agreements reform accelerator*. United Nations. https://investmentpolicy.unctad.org/publications/1236/international-investment-agreements-reform-accelerator

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