



## **Online Preparatory Sessions for UNCITRAL Working Group III, 39<sup>th</sup> Session**

September 29, 2020 Session

### **Damages in ISDS**

### **Background Materials**

This document provides Preparatory Session participants with the resources relevant to Damages in ISDS. While all resources will be relevant for consideration of the issues raised, for purposes of the September 29<sup>th</sup> Preparatory Session we have selected several that are highly recommended to review in advance.

### **Required Background Videos for September 29<sup>th</sup> Preparatory Session:**

\*Please remember that participants may watch the videos at 1.5x or 2x speed

- **Jonathan Bonnitcha, Damages in International Investment Law (IISD)** (duration 1:02:43; July 2019) available at: <https://www.iisd.org/events/webinar-damages-international-investment-law>
- **Martins Paparinskis, A Case Against Crippling Compensation in International Law of State Responsibilities:** [https://ucl.zoom.us/rec/play/YYV-ESXbp-kmHKCufZkuQU0fr7bfXMcfuSXvLnpmDxnaFTY3tGsnafIrx8rUIqmZQ9WFtexUtQRLYAVd.ZN340wQf1RWmiMG0](https://ucl.zoom.us/rec/play/YYV-ESXbp-kmHKCufZkuQU0fr7bfXMcfuSXvLnpmDxnaFTY3tGsnafIrx8rUIqmZQ9WFtexUtQRLYAVd.ZN340wQf1RWmiMG0,(password:z.dQD&8@)), (password: z.dQD&8@)
- **Dinah Shelton, Remedies Available in International Human Rights Law** (duration 27 min) <https://columbiauniversity.zoom.us/rec/share/Zdh25QhUpwOz9QK9XY8yr29soOO1faa2A9l9Xe3pTxFYr2JBDDJIVh6eSIqPGSzK.qzdQFXxcQIV2yeAj?startTime=1600454293000>

### **Other Relevant Materials:**

#### **Publications:**

- **Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties*** (Advance Copy), IISD Best Practices Series (October 2019), <https://www.iisd.org/publications/iisd-best-practices-series-compensation-under-investment-treaties-advance-draft>
- **World Bank, *Legal Framework for the Treatment of Foreign Investment***, <http://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf>,



p. 41-44 (setting forth World Bank guidance on valuation of an asset in cases of expropriation)

- **Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*** (July 2020) <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12562>
- **Jonathan Bonnitcha & Emma Aisbett, *Against Balancing: Revisiting the Use/Regulation Distinction to Reform Liability and Compensation Under Investment Treaties*** (June 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3637634](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637634)
- **Emma Aisbett & Jonathan Bonnitcha, *A Pareto-Improving Compensation Rule for Investment Treaties***, UNSW Law Research Paper No. 18-80 (May 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3281334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281334)
- **Christina Baharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*** (2018) available in dropbox
- **David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community***, OECD Working Paper No. 2012/3 (2012) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2207366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207366) (p. 24-29 and Annex IV – comparing remedies available under investment law to remedies available under domestic legal systems)
- **Kyla Tienhaara, Lise Johnson, & Michael Burger, *Valuing Fossil Fuel Assets in an Era of Climate Disruption***, Investment Treaty News (June 2020), <https://cf.iisd.net/itn/2020/06/20/valuing-fossil-fuel-assets-in-an-era-of-climate-disruption/>
- **Toni Marzal, *We Need to Talk About Valuation in ISDS***, (March 2020) <https://verfassungsblog.de/we-need-to-talk-about-valuation-in-isds/>
- **Dinah Shelton, *Remedies in International Human Rights Law*** (2006)
- **Veronika Fikfak, *Compensation for Human Rights Violations*** (January 2018 (revised)) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080131](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080131)

#### **State Submissions** (that include recommendations on Damages):

- **Indonesia** (WP 156) <https://undocs.org/en/A/CN.9/WG.III/WP.156> (para 8-9: calling for valuation guideline to be established, containing a check-and-balances mechanism for claims, an established method for valuation of businesses in accordance with internationally recognized standards in financial reporting, a code of conduct for



arbitrators in appraising such valuation, and a mechanism to dismiss frivolous claims at an early stage.)

- **Morocco** (WP 161) <https://undocs.org/en/A/CN.9/WG.III/WP.161> (para 14: calling for the adoption of objective and transparent criteria for determining the compensation payable to investors that have suffered damage. In that regard, it is important that the amount of compensation is commensurate with the actual damage suffered.
- **Colombia** (WP 173) <https://undocs.org/en/A/CN.9/WG.III/WP.173> (including “valuation methods” as a core minimum for a multilateral implementation instrument)
- **South Africa** (WP 176) <https://undocs.org/en/A/CN.9/WG.III/WP.176> (para 73, calling for a guidance instrument on damages awards)