



# General Assembly

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**United Nations Commission on  
International Trade Law  
Working Group III (Investor-State Dispute  
Settlement Reform)  
Thirty-eighth session  
Vienna, 14–18 October 2019**

## **Possible reform of investor-State dispute settlement (ISDS)**

### **Submission from the Government of Mali**

The present note contains a submission received on 17 September 2019 from the Government of Mali for the thirty-eighth session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat.



## Annex

1. The Ministry for the Promotion of Private Investment, Small and Medium-Sized Enterprises and National Entrepreneurship supports comprehensive investor-State dispute settlement reform that fosters sustainable development by, inter alia, safeguarding the right of States that receive investments to establish regulations aimed at promoting the development goals.
2. We are in favour of a system whereby responsible, sustainable investment that creates stable and decent jobs is promoted and facilitated.
3. In particular, we propose the following:
  - A. Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals
    - Take measures to prevent developed countries from exerting undue influence over developing countries in respect of the form of international investment treaties and agreements that are proposed, signed and ratified
    - Take measures to prevent the investor or the investor's home State from influencing arbitral decisions
    - Identify exemplary arbitral decisions that have not been contested and use them as the basis for relevant case law
    - Opt for State-to-State arbitration rather than investor-State arbitration. Failing that, the sole basis for the arbitration should be the applicable treaty between the investor's State and the host State. Do not allow recourse to other treaties with other States.
  - B. Imbalance in investment treaties
    - Owing to the serious trade imbalance, developing countries such as Mali are at a disadvantage from the outset when signing treaties with developed countries. We are often the parties that receive foreign investment but rarely invest in developed countries. Naturally, therefore, we tend to be the respondents in arbitration proceedings.
      - ✓ Proposed solution: give advance consideration to ways of making treaties more balanced
  - C. Lack of expertise and preparation
    - African States find themselves involved in arbitral proceedings, often without being sufficiently prepared, given the lack of a strategy document for negotiations, with only limited expertise in complex legal issues.
      - ✓ Proposed solution: develop an internal strategy for negotiation and train relevant actors
  - D. Take into account the languages used in arbitration and the languages of the parties to a dispute
  - E. Concerns pertaining to arbitrators and decision makers
    - Establish a system of preliminary background checks to be carried out in respect of arbitrators and decision makers prior to the commencement of arbitration. Also introduce a system for assessing the arbitral process following the completion of arbitration. If that assessment reveals misconduct on the part of arbitrators or decision makers, provide for the award to be set aside and for proceedings to be resumed with a new team (even if that prolongs the process). Depending on the offence, those at fault should be suspended for a long period or banned for life. Such a system would make it necessary to revisit the question of whether awards should be final in all cases.

- We are in favour of providing for counterclaims in order to enable States that are always respondents to better defend themselves by allowing them to make counterclaims against the claimant.
- If possible, provide for sufficient time to enable host countries to better prepare themselves both technically and financially prior to the commencement of arbitration. Our countries do not have adequate technical or financial resources for arbitration proceedings.
- Give particular consideration to the composition of arbitral tribunals, which should be more inclusive and balanced.

F. Concerns pertaining to the cost and duration of ISDS cases

- Avoidance of arbitration through mediation and conciliation measures: developing countries such as Mali would benefit greatly from the avoidance of disputes and arbitration. We invest abroad very little, but receive investments from several countries. We therefore propose strengthening our national mediation and dispute prevention bodies. In order to give those bodies greater credibility, they should be completely overhauled. They should be involved throughout the process (from the conclusion of the investment agreement to the systematic monitoring of investment activities, rapid responses to problems and efforts to reach consensual solutions) and should be composed of public and private actors.
- The strengthening of the system for monitoring the implementation of investments, with the establishment of a joint team comprising representatives of the host State, the investor and civil society. The team should submit reports on a regular basis.
- The establishment of a pool of arbitrators and counsel for Africa, consisting of each country's leading experts, available to assist countries and investors at any time.
- The establishment of a shared fund that would pay for the services of arbitrators and counsel used by African countries. Such a fund would solve problems relating to cost and representativeness.
- Exhaustion of remedies in the courts of the host State: the strengthening of our national courts, with ongoing training, the communication and publication of decisions made, a system for receiving and handling complaints, the strengthening of measures to prevent corruption and intimidation, etc.
- Establish maximum amounts that must not be exceeded regardless of the dispute, in order to prevent speculation and orders to pay disproportionately high costs.
- Make proposals for arbitration venues. Take into account the additional costs that may be incurred when long or multiple journeys have to be made.