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Possible reform of Investor-State dispute settlement (ISDS)

Submission by the Government of Burkina Faso

Note by the Secretariat

The present note contains a submission received on 6 October 2020 from the Government of Burkina Faso in preparation for the fortieth session of the Working Group. The submission is reproduced as an annex to the present note in the form in which it was received by the Secretariat.



Annex

Identification and consideration of concerns relating to procedural costs and to damages

1. Burkina Faso commends the Commission and Working Group III for the work carried out to date with respect to reform of the current investor-State dispute settlement (ISDS) regime.
2. The goal of comprehensive reform of the ISDS mechanism is to address the concerns raised by several countries around the world, developing countries bearing the brunt of the adverse effects faced, particularly in terms of their financial resources.¹
3. Rising costs are one of the main causes of countries' growing discontent. ISDS based on investment treaties entails significant financial costs for governments, particularly in the case of developing countries such as Burkina Faso.
4. Burkina Faso commends Working Group III for initiating the discussion of damages as part of its examination of costs arising from ISDS.² It should be borne in mind that it is not only the proceedings that are costly; the amounts paid in compensation are also high. It is essential that Working Group III engage in identifying the best options for reducing the cost of compensation.
5. Burkina Faso takes this opportunity to highlight the impact of the compensation paid to investors in ISDS proceedings and the importance of comprehensive harmonization of the rules governing compensation. The amounts at stake in investment arbitration proceedings are generally high. Compensation amounts have reached hundreds of millions and even billions of dollars in several recent cases.³

Main concerns relating to the determination of compensation

6. A number of concerns relating more specifically to the determination of compensation can be identified.⁴
7. Firstly, the current system does not rule out the possibility of vast differences between the amounts invested and the amounts awarded as compensation. Those differences arise from the rules governing compensation, which require a court to award compensation on the basis of the financial position that the investor would have been in had the host State not violated the investment treaty.
8. Secondly, the present system as shaped by arbitration case law is complex and inconsistent. The courts have discretion in choosing between three main categories of assessment.⁵ However, trends in the courts' choice of assessment techniques are a factor contributing to the increase in compensation under investment treaties.
9. Thirdly, in determining the amount of compensation, arbitral tribunals generally do not take contextual factors into consideration. Those factors may include public interest as a ground for interference with the investment, the ability of the host State to pay and the conduct of the investor (such as the investor's failure to comply with certain obligations).

¹ See A/CN.9/WG.III/WP.153.

² See A/CN.9/1004*, para. 24.

³ E.g. *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/1211, award of 12 July 2019 (\$4 billion).

⁴ Jonathan Bonnitcha and Sarah Brewin, "Compensation Under Investment Treaties", IISD Best Practices Series, October 2019, available at <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf>.

⁵ Courts can choose between a market-based assessment, an income-based assessment and an asset-based assessment. See, for example, Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed. (Oxford University Press, 2018), p. 148.

10. Lastly, the calculation of compensation is linked to the cross-cutting issue of a potential “regulatory chill” arising from the ISDS system. The risk of having to pay high amounts in damages can influence whether or not governments decide to take action in the public interest.⁶

Reform proposals

11. Burkina Faso would like to underscore the importance of rethinking the rules and modalities for calculating compensation under the ISDS system. A number of ways to address related concerns could be considered, such as the following:

- Clarification of the methods used to calculate damages in as clear and explicit a manner as possible. This would reduce the risk of the court’s interpretation being contrary to the intentions of the States parties to the treaty. It is also desirable, therefore, to consider clarifying the evidence required for the calculation of damages.
- Development of rules determining the standard of compensation required in the case of expropriation and the standard of compensation required in the case of other types of investment treaty breaches, since a change in the provisions governing compensation in the case of expropriation would not be sufficient if case law on compensation in the case of other types of investment treaty breaches remained unchanged.
- Establishment of clear rules on the possibility for a court to award compensation for an investor’s lost profits; consideration of the possibility of limiting compensation to the amount actually invested by the investor, at least in certain cases in which the investment project was never implemented.⁷
- Elaboration of clear rules regarding moral or punitive damages that can be awarded.
- The possibility for the court of second instance (possibly a court of appeal) to expand access to the review of mistakes of fact and of law in the assessment of damages.

12. Finally, approaches to ISDS reform in relation to the calculation of compensation should be aimed at ensuring that the principles governing compensation under investment treaties are no more generous than is generally provided for in national legal systems.

⁶ See CCSI, IIED and IISD, “UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options”, 15 July 2019, available at <http://ccsi.columbia.edu/files/2019/07/uncitral-submission-cross-cutting-issues-en.pdf>.

⁷ Bonnitcho and Brewin, *op. cit.*, page 26. The authors propose the following text in order to clarify the rule: “The compensation awarded by a tribunal, whether for expropriation of an investor’s investment or for any other breach of this treaty, shall in no case exceed the total expenditure (adjusted for inflation) actually incurred by the investor in making its investment.”