

**The United Nations Commission on International Trade Law  
Working Group III (Investor-State Dispute Settlement Reform)  
Comments from the Government of the Republic of Korea on the Draft Working  
Paper on Mediation and other forms of alternative dispute resolution (ADR)**

## **I. Introduction**

The Republic of Korea (“Korea”) expresses its sincere gratitude to the UNCITRAL Secretariat (“Secretariat”) for preparing the Draft Working Paper on Mediation and other forms of alternative dispute resolution (ADR) (the “Draft Working Paper”).<sup>1</sup> Korea hereby provides the following comments on the Draft Working Paper.

## **II. Comments**

### **1. On whether the development of specific rules would be necessary**

At this stage, Korea does not have a firm position yet on whether the development of separate rules would be necessary or appropriate, as there hasn’t been much discussion regarding the existing rules. First of all, the Working Group might want to fully identify the issues to be included in the draft provisions. Then, the relevant rules – UNCITRAL Mediation Rules, ICSID Mediation Rules, and IBA Rules for Investor-State Mediation – can be examined in detail for the Working Group to discern whether all procedural issues are covered therein. Korea is of the view that only after a thorough review of the existing rules will it be possible to decide whether the adoption of a separate set of rules is necessary, and if necessary, what are to be included therein.

### **2. On the nature of the offer to mediate (Draft Provision 1)**

At the outset, Korea generally supports the approach of including a provision that effectively encourages the use of mediation. As noted by the Secretariat, leaving the decision of whether to use mediation “fully in the hands of the disputing parties” would be no different from the current situation where mediation is “rarely used”.<sup>2</sup> Thus, Korea does not support the approach of having no clause on mediation. There should be a specific provision encouraging and prompting the use of mediation, even if the final choice is to be made by disputing parties.

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<sup>1</sup> UNCITRAL, *Draft Paper on Mediation and other forms of Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*.

<sup>2</sup> *Ibid.*, paras. 16-17.

That said, as to the three other options suggested by the Secretariat, Korea does not hold a firm view at this stage.

### 3. On the timeframe (Draft Provision 1)

With regards to the timeframe, Korea is of the opinion that mediation should be possible *at any time*, especially even after the commencement of a dispute settlement proceeding, in light of the fact that the specific details of a dispute are usually uncovered, developed, and elaborated with the progression of ISDS proceedings. As such, the parties may find it useful to resort to mediation at any stage of the proceeding, be it before or in the middle of the ISDS proceedings. Korea does not see a specific reason to confine the timing of mediation to a particular point of time in the life cycle of ISDS proceedings. The possibility of resorting to mediation at any time will allow disputing parties the freedom and flexibility to resolve the dispute at issue, or at least “some elements” of the dispute, through mediation as the details of the dispute unfold.<sup>3</sup>

### 4. On the relationship with arbitration and other ISDS mechanisms (Draft Provision 2)

Paragraph 2 of Draft Provision 2 stipulates that the tribunal “shall stay its proceedings until the mediation is terminated,” “upon the request of all disputing parties”. Thus, whether the proceeding is stayed is dependent upon the will of the parties. On the contrary, the current draft reads that “all timelines” are automatically “suspended from the date on which the disputing parties agreed to have recourse to mediation” until the termination of mediation. It is unclear why the staying of the proceedings and the suspension of timelines are regulated differently (*i.e.*, request by parties vs. agreement of parties), and whether this means that there would be instances where the proceeding is not stayed but the timelines are suspended. In this regard, Korea would like to bring the attention of the Secretariat to this difference in regulation and ask for clarification, if possible.

### 5. On the written notice (Draft Provision 4)

Option 1 of paragraph 1 provides a list of details that should be included in the service of notice for mediation. However, it is feared that such a detailed list may be too complex and in effect may deter disputing parties from resorting to mediation. The Working Group might want to consider that it may be difficult sometimes to provide a “sufficiently detailed memorandum” or “detailed information of the facts and legal basis” of the dispute, especially in the early stages when the details of the dispute are yet to be uncovered. In fact, this point is closely

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<sup>3</sup> *Ibid.*, para. 33.

intertwined with Korea's comments on Item 3 above regarding the timeframe of the request for mediation. In Korea's view, details of the disputes, even those applicable to mediation, may be developed as ISDS proceedings proceed.

#### 6. On the possible link between the guidelines and the establishment of the advisory centre

Korea has previously submitted its comments on the establishment of the advisory centre, which includes Korea's view that the provision of ADR services would be of less importance considering "the exist[ence] of several ADR service providers and facilities [already] available for use ... and the limited resources of the center".<sup>4</sup> However, Korea also noted that the prospective centre may play a role in "providing advice pertaining to ADR".<sup>5</sup> Therefore, if the advisory centre is to be established, it may utilize the guidelines in providing advice on settling disputes through mediation as well, especially in (i) assessing the strengths and weaknesses of a case on a *prima facie* basis, (ii) evaluating whether mediation would be a proper recourse in that case, and (iii) providing assistance with the preparation for mediation proceedings.<sup>6</sup> In short, the prospective centre would not have to conduct or administer mediation but it could still provide guidance and advice to the parties when they consider mediation as an option for settling their disputes.

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<sup>4</sup> *Comments from the Government of the Republic of Korea on the Draft Provisions on the Advisory Centre*, p. 2.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, p. 3.