

**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  
Guidelines on Prevention and Mitigation of International Investment Disputes**

**I. Introduction**

The Republic of Korea (“Korea”) expresses its sincere gratitude to the Secretariat for presenting the Draft Guidelines on Prevention and Mitigation of International Investment Disputes (WP.235). Korea hereby provides the following comments on the issues discussed therein. Any views or comments presented in this paper are preliminary in nature and without prejudice to Korea’s future position on relevant issues.

**II. Comments**

**1. Introduction**

Amongst various issues pertaining to the definition of related terms listed in the draft, Korea proposes that the Working Group prioritize the following issue. The Working Group should consider the *de facto* timeframe of the dispute and advantages and disadvantages that would follow therefrom. While the current draft defines dispute prevention as “handling of a grievance of a foreign investor before it devolves into a disagreement framed *in legal terms*”, a great number of disputes “devolve into a disagreement” framed not only in legal terms but also in non-legal terms, for instance, in the form of media coverage, various complaints and actions. Therefore, the current draft should reflect such possibilities and opt for a broader definition to include diversified methods to effectively mediate and prevent possible arbitration.

**2. Communication with investors**

**a. Easy Access to Information**

Korea recognizes the need for access to relevant information by investors for the sake of investor protection and transparency. However, Korea also stresses the need to secure practicality in providing such accessibility and not to excessively burden relevant authorities in order to ensure effective functioning and governance, especially in the pre-investment phase.

With regard to the post-investment phase, Korea is of the view that the obligation to provide

information could be unnecessarily burdensome, particularly when governments provide and notify each investor of changes in domestic regulations, policies or guidelines. In this regard, Korea would like to suggest substituting “investors need to be informed...” in paragraph 10 with “States may endeavor to inform investors about...,” which would alleviate a possibly excessive burden on the States.

#### **b. Engaging Investors in Policy Discussions**

Korea is hesitant on paragraph 13 relating to emerging policy concerns such as public health, climate change and sustainable development as these areas are closely related to the exercise of sovereignty. In this sense, governments have discretion on how to formulate their policies and prioritize their nationals’ interests and concerns. For instance, in a crisis such as the Covid-19 pandemic, governments might need to be able to utilize their power to the extent possible to rapidly and effectively respond to the situation and to suspend rights of investors under certain circumstances. In this regard, Korea is of the view that whether to include this obligation in the draft is a matter which should be accorded careful consideration.

#### **c. Investor Grievance Mechanism**

In line with the draft, Korea recognizes the need for management of systematic risk to properly identify grievances that may devolve into possible disputes and to avoid unnecessary redundancy. As a reference, Korea has been utilizing many investment dispute prevention and mitigation mechanisms. For example, the Presidential Directive on Investor-State Dispute Prevention and Settlement imposes an obligation on governmental authorities to notify the Ministry of Justice in the case of pending or potential investment disputes. Furthermore, Korea, since 1999, has implemented the Foreign Investment Ombudsman System under the auspices of the Ministry of Trade, Industry and Energy allowing relevant ministries and agencies to work closely together to resolve various grievances of foreign investors and foreign-invested enterprises.

### **3. Cooperation among governmental and related agencies**

#### **a. Identifying or Establishing a Coordination Body**

Under this section of the guidelines, the Working Group focuses on identifying and establishing a body tasked with coordination among relevant authorities for prevention and mitigation of disputes. Korea recognizes the need for efficient management of the dispute prevention

framework and inter-governmental cooperation.<sup>1</sup> Yet, the details regarding how to establish and operate the mechanism should be at the discretion of governments.

#### **4. Coordination and Cooperation with other Governments**

The current draft suggests establishing and institutionalizing inter-governmental coordination to ensure coordination and cooperation with other governments. Korea supports in principle the need for an effective solution. As the draft does not provide specific details on the Joint Committee (such as its composition or legal basis), Korea is of the view that the draft text may only include general ideas such as information sharing and cooperation in dispute prevention and mitigation between governments without necessarily referring to a Joint Committee.

#### **5. Related Issues**

Korea well notes the issues raised on financial and human resources; exoneration from liability for government officials; and confidentiality. Korea generally supports these issues - however, there may be various factors to be considered, including extraordinary situations requiring transparency (such as public interest, social impact, and relevant domestic regulations). Additionally, Korea is of the view that agreements between the relevant parties could be an additional exception to confidentiality.

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<sup>1</sup> For reference, Korea has implemented the Foreign Investment Promotion Act, establishing the Foreign Investment Committee under the Ministry of Trade, Industry and Energy to deliberate on matters concerning integration and coordination of the measures by competent Ministries to enhance the environment for foreign investment, and an inter-governmental Task Force, comprising the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Trade, Industry and Energy, and other relevant authorities to effectively and substantially manage pending or potential investment disputes.