

The United Nations Commission on International Law
Working Group III (Investor-State Dispute Settlement Reform)
Comments from the Government of the Republic of Korea on the draft
toolkit on prevention and mitigation of international investment
disputes(A/CN.9/1185)

I. Introduction

The Republic of Korea (“Korea”) would like to express sincere appreciation for the work of the United Nations Commission on International Law (UNCITRAL) Secretariat in preparation of the draft toolkit on prevention and mitigation of international investment disputes (“the draft toolkit”)¹ compiling different States’ practices and reflecting the deliberations of the Working Group through forty-seventh to forty-eighth session.

In consideration of the need to share the recent structural reform concerning the prevention of investor-state dispute settlement (“ISDS”) in the government, Korea, while adhering to its position addressed on the Comments on February 2024, hereby provides the following comments to the issues discussed therein. To avoid any doubt, any views or comments are without prejudice to Korea’s future position on relevant issues. Korea’s position on each section of the draft toolkit is set out in annex for the Secretariat’s convenience for compilation.

¹ Possible reform of investor-State dispute settlement (ISDS): Draft toolkit on prevention and mitigation of international investment disputes (A/CN.9/1185).

II. Comments

1. Introduction

Korea supports the idea of having the draft toolkit and the need to have it to be regularly updated to reflect existing and new practices. Korea also hopes to further take part in and meaningfully contribute to the content of the draft toolkit with its best practices. Amongst various issues pertaining to the draft toolkit, Korea wishes to share its recent progress in coordination among governmental and related agencies (section C of the draft toolkit) with the Secretariat and the participants of the Working Group III.

2. Communication with Investors

With regard to the Investor grievance mechanism, Korea would like to share its own unique mechanism established by law and regulation, which is the issuance of the Presidential Directive² that imposes an obligation on governmental authorities to notify the Ministry of Justice in the case of pending or potential investment disputes. This advancement aims to properly identify grievances that may devolve into possible disputes and to avoid unnecessary redundancy. Additionally, Korea has established the Office of the Foreign Investment Ombudsman³ in 1999 in accordance with the Foreign Investment Promotion Act, a complaint handling body for foreign investors or foreign-invested companies,

² Presidential Directive No.468—Regulation on Prevention and Management of International Investment Disputes (“Directive”) obligates governmental agencies and other public entities to notify (to the Intergovernmental Dispute Resolution Committee) in the event there is a possibility of a new ISDS case arising (Article 7).

³ <https://ombudsman.kotra.or.kr/ob-kr/index.do>

which has been devoted to resolving challenges faced by foreign investors or foreign-invested companies in course of business activities in Korea. Korea publishes catalogues providing information on functions and services of the Foreign Investment Ombudsman, and annually reports performances of the Ombudsman, publicly on the website ‘InvestKorea’.

3. Coordination among governmental and related agencies

a. Information sharing and capacity building activities

Korea stresses the need to secure the functioning of the information sharing and capacity-building activities, which may play a significant role in effective prevention of investor-state disputes.

As the Secretariat rightly noted, Korea has published ISDS handbooks and booklets, and circulated them to governmental agencies to provide general information on dispute prevention and the meaning of key provisions of international investment agreements (IIAs).⁴ In an effort to effectively determine grievance of the investor from escalating into disputes, Korea also published ISDS Prevention Checklist booklet (“Checklist”) last November to provide governmental officers with customized information and solutions on ISDS prevention based on actual case analysis. Korea expects that, with the Checklist, field practitioners could be able to carry out preliminary risk

⁴ Submission from the Republic of Korea, 31 July 2019 (A.CN.9/WG.III/WP.179), p. 5; possible reform of investor-State dispute settlement (ISDS): Draft toolkit on prevention and mitigation of international investment disputes (A/CN.9/1185), para. 42.

assessment on their own on a regular basis, and to fulfill the obligation to notify⁵ in a timely manner. As of December 16, 2024, Korea has held at least four seminars successfully with major governmental agencies and public entities on how to utilize the Checklist, and shared some organization-specific knowledge on methods of preventing claims, etc.

In addition, Foreign Investment-related Regulatory Information Service which is being operated by the Office of the Foreign Investment Ombudsman provides an online regulatory information service, together with the Regulatory Reform Committee of the Office for Government Policy Coordination, in order to collect and reflect opinions from foreign-invested companies that may be neglected during the legislation process. The service offers regulations related to foreign investment in English, and delivers positions of foreign-invested companies to related agencies.

b. Identifying or establishing a coordination body

Considering the growing importance of ISDS prevention, Korea established International Legal Advisory Division (ILAD) within the Ministry of Justice in August 2023. As the separate division dedicated to ISDS prevention and mitigation, the division monitors areas of potential disputes by reviewing government policies, measures, laws and regulations that may potentially violate investment treaties. The division is also responsible for providing advice regarding potential treaty violations, if requested by any administrative institution or governmental body.

⁵ Article 6 and 7 of the Directive (*supra* note 2).

To facilitate inter-governmental understanding and cooperation, Korea has established 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 Economy and Finance, Ministry of Trade, Industry and Energy, Ministry of Foreign Affairs, Financial Services Commission and other relevant authorities to effectively and substantially manage pending or potential investment disputes.