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 appellate mechanism and selection and appointment of arbitrators

I. Introduction

The Working Group III has taken work on the possible reform of Investor-State Dispute Settlement (ISDS) based on its mandate given at the fiftieth session of the United Nations Commission on International Trade Law (UNCITRAL) in 2017. Since the inception of this Working Group, the Government of the Republic of Korea ("Korea") has participated in and paid a keen attention to the discussions on various ISDS reform options at the Working Group. Korea wishes to take this opportunity to commend and express sincere gratitude to the UNCITRAL Secretariat for its tremendous work on the draft Working Papers on (i) appellate mechanism and enforcement issues and (ii) selection and appointment of ISDS tribunal members.[1] Pursuant to the Secretariat's invitation for comments, Korea provides this submission for the Working Group's consideration. Any views and suggestions presented herewith are preliminary in nature and are without prejudice to Korea's future position on this particular topic. Korea reserves the right to submit additional comments on this issue.

II. Appellate mechanism and enforcement issues

The discussion of the establishment of an appellate mechanism and enforcement issues requires a balanced assessment of various factors, including the basic framework of the mechanism, the final form for adoption, implementation and enforcement of the mechanism, and the mechanism's compatibility with the existing review procedures. As a general matter, the Working Group's work on appellate mechanism should effectively take into account the objectives of the Working Group's discussion for the ISDS reform. The structure of the appellate system itself—whether in an *ad hoc* setting or in a permanent, standing one—or the constitution of the appellate tribunal—whether it introduces a roster of potential candidates for adjudicators or regulates the party-appointment mechanism—should take into consideration any possibility of the appellate mechanism creating further fragmentation of or conflicts with the existing ISDS system. With that in mind, the discussion of the Working Group should aim at achieving a centralized, or at least a less fragmented system.

Considering that the discussion is still in its initial stage, Korea is of the view that the member States of the Working Group interested in the potential establishment of an appellate mechanism may wish to primarily examine how a decision (either award or judgment) of the appellate mechanism would be enforced domestically. By exploring in advance whether domestic jurisprudence and circumstances would allow for an enforcement of an appellate decision, each member State of the Working Group would be able to adequately consider the feasibility and practicality of the appellate mechanism. For each State, this may entail a

[1] A/CN.9/WG.III/WP.---, "Appellate mechanism and enforcement issues"; A/CN.9/WG.III/WP.---, "Selection and appointment of ISDS tribunal members".

consultation within the government and review of, *inter alia*, its domestic legal regime, including arbitration laws, to see whether the prospective appellate mechanism, once established, may not encounter any unexpected obstacle in having its decision enforced through its domestic judicial system. As the discussion proceeds, this would provide the member States of the Working Group with an idea as to which structure would be desirable or most ideal for the future enforcement. In our view, this process would allow for a thorough consideration of the specific implications of the prospective appellate mechanism.

- *Scope and standard of review*

With respect to the scope of review, Korea supports the views that the ground for appeal should be errors in the interpretation or application of the law. This is taking into account the findings that the issue of lack of consistency in ISDS awards often arises from the arbitral tribunals' interpretation of the laws and/or application of the laws to the facts, rather than appreciation of the facts.

A manifest error of facts is another ground that several member States in the Working Group previously have expressed support for inclusion in the grounds. If the question of fact were to be included in the scope of appeal, we are of the view that some degree of deference should be accorded to the factual findings of the first-tier tribunals so as to avoid having to review the facts *de novo*. The scope of the appellate review may also have impact on the cost and duration of the ISDS proceedings, another critical issue that the Working Group should address. Taking all these factors into consideration, the Working Group may continue the discussion to reach consensus on this issue.

An important question to subsequently address would be how it works in parallel with the present annulment and set-aside procedures should they continue to exist alongside an appellate mechanism. Korea acknowledges the distinction between the proceedings under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID proceedings. In the meantime, as the Working Paper on appellate mechanism and enforcement issues refers to "annulment or setting aside procedures" together, this submission also addresses the annulment procedures in the context of ICSID cases and set-aside procedures in the context of non-ICSID cases at the same time.

That said, if the new appellate mechanism as contemplated and the existing systems co-exist, the disputing parties would have the ability to pursue either of them or both. This could potentially complicate the entire ISDS proceedings, possibly leading to a three-tier dispute settlement system as referred to in the Working Paper on appellate mechanism and enforcement issues.[2] To elaborate on the potential three-tier system, three possible scenarios may be contemplated for consideration. The first scenario is either of the disputing parties pursuing an appeal of the first-tier award and, if unsuccessful, subsequently pursuing an annulment of the first-tier award. The second is either of the disputing parties pursuing an appeal and an annulment simultaneously. The last scenario is either of the disputing parties pursuing an annulment first and, if unsuccessful, subsequently pursuing an appeal of the first-tier award. This three-tier scheme, if materialized, would make it difficult to address the cost and duration

[2] A/CN.9/WG.III/WP.---, "Appellate mechanism and enforcement issues".

issue, and would add an additional layer of concern by creating unpredictability and inconsistency in the ISDS regime. This potential consequence appears to merit careful consideration by the Working Group. Hopefully, there may be ways to address or avoid the 'parallel' or 'multiple' post-award proceedings. Upon further internal review, Korea may be able to share some thoughts to this regard at a later point in time.

As a general matter, to prevent any abusive use of appellate mechanism, or to avoid undue delays or unnecessary costs in the ISDS proceedings, setting a deadline for the request for an appellate review might be a plausible option. By way of example, a 60-day restriction could be imposed and, when either of the disputing parties fails to request an appellate review within 60 days from the date the first-tier award was rendered, that award would then be no longer appealable.[3] As such, in our view the language as proposed in the first sentence in paragraph 6 of the preliminary draft provision seems to provide a good starting point: *"A disputing party may [formally notify its decision to] [request to] appeal a decision within ** days from the date the award is rendered."*

- *Appealable decisions and the effect of appeal*

With respect to the question of what would be appealable decisions, only the final award(s) of the first-tier tribunal should be subject to an appellate review. Any other decisions, such as interim orders or procedural orders issued on certain procedural matters during the first-tier proceedings, should be excluded from the scope of an appellate review. If there is a bifurcation of the ISDS proceeding, each and all the awards from bifurcated phases should be appealable. Regardless of whether there is a bifurcation, any appeal should be permitted only after the last award has been issued. That is, if an award is rendered on jurisdiction and, upon finding of jurisdiction, the proceeding proceeds on the merits, any appeal should be permitted once an award on the merit is finally rendered. If a tribunal renders an award finding no jurisdiction and subsequently dismisses the dispute, then an appeal on the finding on jurisdiction can be made because a final decision has been rendered in the dispute.

In the appellate mechanism, if there is no appeal, the first-tier award will be considered a final award. If there is an appellate review, the appellate decision would be made a final award. An appeal would temporarily suspend the effect of the first-tier decision as stipulated in the second sentence in paragraph 6 of the preliminary draft provision: *"An appeal made during that period shall suspend the effect of the decision of the first-tier tribunal."*[4] Upon review, the appellate tribunal should be able to affirm, reverse, or modify the first-tier decision. These views seem to be captured in the language as proposed in paragraph 7 of the preliminary draft provision: *"The appellate [body][court][tribunal] may confirm, modify or reverse the decisions of the first-tier tribunal. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the first-tier tribunal. A confirmation would render the award by the first-tier tribunal final and binding on the parties."*[5] Any appellate decision should be able to dispose of the dispute. Without such finality of the appellate decision, the

[3] For reference, Singapore-EU Investment Protection Agreement imposes a 90-day limit for raising an objection and requesting for an appellate review. When there is no such objection, the first-tier, which was regarded as a provisional award, would then become a final award.
[4] A/CN.9/WG.III/WP.---, "Appellate mechanism and enforcement issues", para. 59 (page 15).
[5] *Ibid*.

objectives of the Working Group to achieve consistency, coherence, and predictability of ISDS awards might be undermined.

- *Constitution of the appellate tribunal*

The constitution of the appellate tribunal also raises an important question. A majority of member States of the Working Group have emphasized the importance of enhancing diversity in selecting and appointing appellate tribunal members. As much as diversity in gender, age, and nationalities are emphasized, diversity in terms of regional, cultural, linguistic, or legal backgrounds would be as important. At the same time, the need for diversity should be balanced with the need for qualified members on the appellate tribunal.

At the same time, rules on appointment and challenge of appellate tribunal members would also have to be developed and elaborated. Party autonomy and cost and duration should be contemplated in developing rules on appointment and challenge.

In short, the implementation and application of an appellate mechanism should strive for consistency, coherence, and predictability whether adopted in a multilateral or bilateral investment treaty, on an ad hoc basis by disputing parties, or through the rules of relevant institutions. The focus of the future discussion of the Working Group on appellate mechanism should be placed on achieving this objective.

III. Selection and appointment of ISDS tribunal members

Korea shares the need for a reform of the selection and appointment of ISDS tribunal members in the current system not only to address concerns over the lack or apparent lack of independence and impartiality, but also to ensure availability and accountability.

Primarily, as previously mentioned at a Working Group session, the question of selection and appointment of ISDS tribunal members may raise two different levels of inquiry depending on whether a reform option requires an individual-level reform, or a system-level or structure-wide approach. An individual-level reform can include, but not limited to, the application of a code of conduct for arbitrators, if and once adopted, and regulation of double-hatting. An example of a system-level or structure-wide approach would include an introduction of a pre-established list or roster system, either within the current arbitration framework, or as part of a permanent body. Future discussions of the Working Group might proceed with the two different levels in mind.

- *Qualifications and other requirements*

The draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("the Code of Conduct") provides certain substantive qualifications and requirements of ISDS tribunals.[6] Article 7 of the draft Code of Conduct, for instance, requires adjudicators to "act with

[6] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. *See* the draft code of conduct available at https://uncitral.un.org/en/codeofconduct.

competence" and "to take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties." The relevant part in the commentary provides a list of subject areas in which the adjudicators should be knowledgeable of, including public international law.[7] Korea wishes to reiterate that an arbitrator's possession of expertise in public international law and any relevant experience should be a substantive qualification of priority. Likewise, an arbitrator's knowledge in the political, legal or cultural situation of the host State in the dispute may also be crucial as it can substantially affect the arbitrator's understanding of the dispute and, in turn, the outcome of the dispute. The commentary also speaks to this effect that "specific knowledge might be required with regard to the dispute at hand, for example, industry-specific knowledge, knowledge of the relevant domestic legal system or of calculation of damages."[8] In that vein, Korea would emphasize that the pool of qualified individuals should ensure high standards of diversity, not only geographical and gender, but also social and cultural. This would further help pursue the objective of 'inclusive diversity'.

When implementing these requirements as part of criteria for the selection process, whether in the context of *ad hoc* or standing mechanisms, a consideration should be given to how much party autonomy would be desirable. The alternative, *i.e.*, "systematically ensuring participation of a more 'junior' person either as part of the ISDS tribunal or perhaps as a silent observer", as suggested in the Working Paper on selection and appointment of ISDS tribunal members can be partly adopted in the context of ensuring diversity of nationality, race, or cultural or legal background.[9] By way of example only, if there is one or more arbitrators of the same race or nationality appointed in an ISDS tribunal of three members, ensuring appointment of a different race or nationality for the remaining position(s), even if *pro tempore*, can be one way of achieving such diversity. However, this again concerns the question of whether such a requirement runs against the notion of party autonomy.

A balanced consideration is also required with respect to the regulation of double-hatting. Korea is of the view that some regulation would be necessary to ensure the availability and diligence of the ISDS tribunal members in hearing a case and rendering a decision in a timely manner. At the same time, regulating double-hatting too stringently, or prohibiting double-hatting entirely, may have a negative impact on achieving diversity in the pool of qualified adjudicators or appointing the best qualified arbitrator in that particular dispute. Any consideration and discussion of the issue of double-hatting in the context of selection and appointment of ISDS tribunal members should be conducted in a consistent manner as in the context of the Code of Conduct. That would include the use of the same definition of the term "double-hatting" as well as the substance, and the extent, of the regulation of "double-hatting". Korea separately submitted its comments on the draft code of conduct for consideration and looks forward to further discussion at the Working Group.

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[7] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, commentary para. 77 for Article 7. *See* the draft code of conduct available at https://uncitral.un.org/en/codeofconduct.

[8] *Ibid*.

[9] A/CN.9/WG.III/WP.---, "Selection and appointment of ISDS tribunal members", para. 11 (page 4).