

**Fourth Intersessional Meeting
on Investor-State Dispute Settlement Reform**

2-3 September 2021, 19:00-23:00 (Korea Standard Time)

Seoul, Republic of Korea (virtual)

The Republic of Korea, jointly with the UNCITRAL Regional Centre for the Asia Pacific (RCAP), is pleased to host and organize the fourth inter-sessional meeting on investor-State dispute settlement reform in Seoul, Republic of Korea.

This two-day intersessional meeting will focus on the procedural rules and cross-cutting issues based on a paper prepared by the Secretariat (available [here](#)). The paper provides a compilation of information including discussions at the Working Group and examples of provisions on early dismissal, abuse of process, security for costs, allocation of costs and counterclaims. It also contains some draft provisions for discussion purposes. Delegations will be able to exchange preliminary views and observations on a number of topics in the paper, and further discuss cross-cutting issues, which have been identified to include assessment of damages, exhaustion of local remedies, and regulatory chill. The aim would be to provide guidance to the Secretariat in preparing working papers for the sessions of Working Group III. No decisions will be taken at the meeting, though active participation and discussion are strongly encouraged.

Due to the prolonged COVID-19 pandemic, this intersessional meeting will be held online via Zoom and is open for participation to all UNCITRAL Working Group III delegations and observer organizations. To allow for inclusive participation, the Republic of Korea will provide interpretation between English and French.

The meeting will be recorded for the preparation of a summary, which the Republic of Korea will submit to the Working Group. Comments will not be attributed to States or specific delegates.

Programme

2 September 2021 (DAY 1)

OPENING REMARKS

- Mr. Beom Kye Park, Minister of Justice, Republic of Korea
- Ms. Anna Joubin-Bret, Secretary, UNCITRAL

SESSION 1 (EARLY DISMISSAL OF CLAIMS AND ABUSE OF PROCESS)

Moderator: Mr. Hi-Taek Shin, KCAB International

One of the suggested approaches to address the problem of the excess cost and duration of ISDS proceedings and regulatory chill has been the introduction of a mechanism addressing frivolous or unmeritorious claims. In this regard, a draft provision has been prepared based on previous discussions at the Working Group, also making reference to existing rules that aim to regulate frivolous or unmeritorious claims. The draft provision provides a framework for early dismissal or preliminary determination, while giving flexibility to the tribunals and at the same time ensuring due process. It would be important to strike a balance between the efficiency pursued through early dismissal and the need to avoid abusive use of such a mechanism.

Delegations are invited to consider, among others:

- The structure or framework to address frivolous claims including the type(s) of claims to be addressed, and whether the framework would apply to claims that relate to the merits/substance and/or the jurisdiction of the tribunal;
- Possible actions to be taken by the arbitral tribunal when a claim is determined to be frivolous or an abuse of process and the level of flexibility;
- Means to expedite the proceedings to avoid unnecessary delays or abusive use of the mechanism (*e.g.*, imposing strict timelines for parties to make any objection and for the tribunal to make the determination);
- The framework for addressing frivolous claims in conjunction with other reform options (for example, security for costs and allocation of costs) as well as the means of implementation.

SESSION 2 (SECURITY FOR COSTS AND ALLOCATION OF COSTS)

Moderator: Mr. Seunghwa Chang, Professor, Seoul National University

At present, it is often difficult for successful respondent States to recover costs of ISDS from claimant investors. The Working Group has suggested that a mechanism for tribunals to order security for cost would help address such risks. In addition, such a mechanism could also discourage frivolous claims. Meanwhile, a balanced approach is required as security for costs could limit access to justice for certain investors, particularly small and medium-sized

enterprises. Procedural fairness should also be taken into consideration as security for costs may inadvertently delay the proceedings or increase cost.

The paper provides a draft provision on security for costs along with a draft provision on allocation of costs, which have also been identified as a means to address frivolous claims.

Delegations are invited to consider, among others:

- Procedural aspects relating to ordering security for costs, particularly whether security for costs should be ordered upon the request by a party or *ex officio* by the arbitral tribunal and whether the request shall be equally available to claimants;
- All relevant circumstances and conditions for ordering security for costs, also in light of other reforms options (for example, whether the existence of third-party funding should be taken into consideration);
- The consequences of non-compliance with an order for security for costs; and
- Other procedural aspects (*i.e.*, time frames for requesting, ordering and complying with the order and the possible modification or revocation of an order for security for costs).

3 September (DAY 2)

SESSION 3 (COUNTERCLAIMS)

Moderator: Mr. Jaemin Lee, Professor, Seoul National University

The possibility of respondent States bringing counterclaims in ISDS proceedings is quite limited as investment treaties impose obligations on host States, whereas no or very limited obligations are imposed on investors. With the understanding that allowing States to raise counterclaims could reduce uncertainty, promote fairness and rule of law, the Working Group had considered the procedural aspects (the admissibility of counterclaims and jurisdiction of tribunals) as well as the substantive obligations of investors, the breach of which would form the basis of the counterclaims.

Delegations are invited to also consider:

- The formulation of a clause in the State's offer to arbitrate in investment disputes, which would be broad enough to cover any counterclaim that States may raise, in addressing the issue of admissibility of counterclaims in ISDS tribunals;
- The possible formulation of provisions on investor obligations (which may relate to the protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of sustainable development) forming the legal basis for counterclaims, and how to impose such obligations in investment treaties as well as in relevant contracts or domestic laws governing foreign investment;
- The various means of implementing reforms to provide a framework for allowing counterclaims by respondent States in ISDS (*e.g.*, the inclusion of relevant provisions in investment treaties).

SESSION 4 (CROSS-CUTTING ISSUES)

Moderator: Mr. Shane Spelliscy, Chair of Working Group III, Canada

Interventions by delegations of Dominican Republic, Gabon, India, Morocco, South Africa and Sri Lanka as well as representatives from African Continental Free Trade Area (AfCFTA) Secretariat and the Columbia Center on Sustainable Investment (CCSI)

During the Commission session this July, it was suggested that the work plan of the Working Group should put more emphasis on cross-cutting issues, which were of particular interest to developing countries. Such cross-cutting issues, as identified so far, include exhaustion of local remedies, regulatory chill, right to regulate, assessment of damages, involvement of domestic courts, immunity of execution, and third-party participation. Several delegations of States and observer organizations will be sharing their views on those issues to be followed by an open discussion. The aim would be to identify what the cross-cutting issues are and to provide guidance to the Secretariat on any material to be prepared for the Working Group on those topics.

CONCLUDING REMARKS

- Ms. Natalie Morris-Sharma, Rapporteur, Working Group III, Singapore
- Ms. Athita Komindr, Head, UNCITRAL Regional Centre for Asia and the Pacific
- Mr. Changwan Han, Director of International Dispute Settlement Division, Ministry of Justice, Republic of Korea