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 Working Paper on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters

I. Introduction

The Republic of Korea ("Korea") expresses its sincere gratitude to the Secretariat for preparing the Draft Working Paper on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters[1]. Korea hereby provides the following comments on the draft provisions. Any views or comments presented herewith are without prejudice to Korea's future position on the establishment of the standing multilateral mechanism.

II. Comments to draft provisions

1. Draft provision 2 (Jurisdiction)

(1) Ratione materiae

Draft provision 2 stipulates that the Tribunal shall exercise its jurisdiction over any dispute arising out of an investment, in the condition of the parties' consent.

Korea understands that this phrase is intended to embrace the largest possible scope of disputes under the court's jurisdiction. The key issue would be how to define the term "investment". The current draft may be read as if it requires a double barrel test, as is the case with Article 25 of the ICSID Convention, which requires a dispute to arise out of an investment that qualifies both for the relevant treaty and the ICSID context. Korea would like to seek for the Secretariat's clarification, whether the provision is aiming to follow a similar structure that the ICSID regime requires. If not, Korea suggests that the provision provide a clear definition of the investment that meets the jurisdiction requirement.

In light of a textual reading of the phrase "any dispute arising out of an investment", Korea is of the view that it is safe to understand that the current draft aims to include counterclaims,

[1] Draft Paper on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters.

provided that they also arise out of an "investment". If the Working Group wishes for more clarity, Korea proposes supplementing the provision with a particular sub paragraph or sentence concerning counterclaims.

The jurisdiction is limited to disputes between a Contracting State and a national of another Contracting State. Korea supports this idea, as the jurisdiction of the court is closely related to the court's funding issue which would have to depend heavily on the member States' financial contribution. In this regard, Korea is of the view that it would be practically difficult for the court to have jurisdiction over disputes involving non-contracting States.

2. Draft provision 3 (Governance)

The draft provision stipulates that the Committee of the Parties ("Committee") and the Tribunal will each decide on the matters of its own respective functioning. Since the permanent investment court is suggested to be adopted and created by the voluntary agreement of the States to the multilateral treaty, it seems more appropriate that the representatives of all the Parties, thus the Committee of the Parties, decide on the more fundamental rules of procedure.[2]

In the case of the rules of procedure for the first instance and the appellate level (paragraph 2), it is unclear why the Committee would have the authority to adopt or modify the rules. This may further appear to be overlapping with the Tribunal's determination of the rules for carrying out its functions (paragraph 3). Therefore, in order to clearly distinguish the scope of the rules that the Committee of the Parties and the Tribunal could each establish, the definition of "establish[ing] its own rules of procedure and adopt or modify the rules of procedure for the first instance and the appellate level," as well as "routine functioning" should first be settled. This should be done through the careful consideration of the role of the Committee of the Parties, the terms of office of the Tribunal members, the structure of the Court, etc. One way of preventing any overlap would be to clarify that whatever the Committee of the Parties do not decide on will be decided by the Tribunal through the delegation of such authority to the Tribunal. In other words, the Committee of the Parties may delegate authority to the Tribunal to decide on issues that appear to be "relevant for carrying out its functions" or relating to "regulations necessary for its routine functioning".

Draft provision 3 also does not include any specific process of the adoption and modification of such rules. It may be necessary to provide a guideline for the Committee of the Parties as well as the Tribunal, if not in the form of a provision.

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[2] Draft Paper on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, para. 11.

3. Draft provision 4 (Number of tribunal members and adjustments)

1) On the qualifications of the Tribunal members (Draft provision 4(1))

Korea agrees with setting a high standard for the qualifications of the Tribunal members. However, Korea is aware that one of the problems detected by the Working Group in the early discussions of ISDS reform was the lack of diversity of decision makers.[3] During the informal meeting discussing selection of arbitrators, some States expressed a general concern that the provision sets a high bar that very few individuals would be able to pass. According to draft provision 4(1), only (i) persons of high moral character, (ii) [who possess the qualifications required in their respective countries for appointment to the highest judicial offices], (iii) enjoying the highest reputation for fairness and integrity (iv) with recognized competence in the fields of public international law, including international investment law and international dispute settlement, are qualified to become a member of the Tribunal. Korea would like to comment on each qualification while focusing on maintaining a balance between competence and adequacy of the Tribunal members and diversity in the composition of the Tribunal.

a) On (i) and (iii)

Although "Moral character," "fairness," "integrity," and "reputation" are essential qualifications of an adjudicator, it may be useful to develop ways to ensure the existence of these qualifications, or at least, the non-existence of factors that indicate the absence of such qualifications. The Working Group may consider the example of the International Criminal Court ("ICC"), which adopted a resolution on the nomination and election of judges, including a requirement that the Advisory Committee on Nominations "create a standard declaration for all candidates to sign that clarifies whether they are aware of any allegations of misconduct, including sexual harassment, made against them."[4]

b) On (ii)

The draft provision also requires that one must "possess the qualifications required in their respective countries for appointment to the highest judicial offices". Yet it must be noted that

[3] A/CN.9/964. paras. 91-98.

[4] Reisman, Taegin, 8 January 2020, *ICC Staff Union Council Calls on States to Give Full Meaning to the Provisions on High Moral Character of Elected Officials*, International Justice Monitor, accessed 8 October 2021, <https://www.ijmonitor.org/2020/01/icc-staff-union-council-calls-on-states-to-give-full-meaning-to-the-provisions-on-high-moral-character-of-elected-officials/>.

the qualifications required in each country differ[5], which would lead to a Tribunal consisting of members with different qualifications. Therefore, Korea is of the view that inclusion of this qualification should be carefully considered.

2) On the number of Tribunal members (Draft provision 4(2))

At the current stage of the discussion, it is difficult for Korea to suggest a particular number of members for the Tribunal. However, the number should be based on the case load as well as whether the members should work full-time or part-time.

Korea also agrees with amending the number of members in certain circumstances. Korea is of the view that it would be necessary to provide some variants for the reasons for amendment, so as to provide guidance to the Committee of the Parties in deciding the number. However, it may also be appropriate to not make this an exhaustive list so that it would be possible to include any other reasonable situation in which it would be necessary to amend the number. In short, Korea favors Option 1 while suggesting to add a clause that would encompass any other reasonable situation for amendment.

In addition, Korea notes that the specific procedure for the amendment is also unclear in the provision. Option 1 simply states that the number of the members of the Tribunal may be amended by a [*two-thirds*] majority of the representatives of the Committee of the Parties. There is no indication of (i) who can request the amendment, and (ii) the exact procedure of making the request. Therefore, it would be necessary to first discuss the procedures within the Working Group and aim to include a specified procedure in the provision.

4. Draft provision 6 (Nomination of candidates)

The Secretariat has suggested nomination by any Party to the Agreement establishing the Tribunal (Option 1), and self-nomination following an open call for candidacies (Option 2).

First of all, Korea agrees that a nomination stage is necessary and appropriate. Option 1 is reasonable in that it encourages the participation of the Parties to the Agreement establishing the Tribunal, emphasizing that the standing multilateral mechanism is based on a voluntary agreement of the State parties. However, there are criticisms that nomination by Parties are done through a non-transparent process and may be inconsistent in terms of the standards of evaluation. Therefore, in Korea's view, it would be appropriate to also allow self-nominations (Option 2) to widen the pool of candidates and ensure that every qualified individual has a

[5] For example, in the Republic of Korea, Supreme Court justices must have at least 20 years of experience in the legal field and must be over 45 years of age; whereas in the U.S. there is no qualification specified in the Constitution for who may become a Supreme Court justice.

chance of becoming a Tribunal member, which in turn would foster adequacy and diversity. How to ensure a harmonious operation of both options should be open to discussion within the Working Group.

5. Draft provision 7 (Selection Panel)

Korea agrees with having an independent selection panel to review the nominations and applications to ensure fairness in the composition of the Tribunal. Naturally, the first step would be to create a panel that is capable of an independent and objective review of the candidates. One of the methods of ensuring the panel members' independence is by requiring panel applicants to submit a declaration of interest in order to prevent conflicts of interest. The draft provision lacks, however, the consequences of the situation where a conflict of interest occurs, such as excluding the applicant or panel member from the panel, or forbidding the panel member from reviewing certain nominations or self-applications. It is also unclear according to what standard the Committee of the Parties would recognize a possible conflict of interest serious enough for the applicant to either not be selected as a panel member or removed from the panel once such circumstances are found. Therefore, the clarification of these issues should be open for discussion within the Working Group.

6. Draft provision 10 (Conditions of services)

Korea agrees that a member of the Tribunal "shall not exercise any political or administrative function or engage in any occupation of a professional nature during his or her tenure" to ensure the independence of the members and fairness of the proceedings. However, the phrase "any occupation of a professional nature" is vague. Considering that the Working Group has not yet decided whether the members should serve full-time or part-time, the definition of this phrase would directly impact the scope of activity of the members of the Tribunal. For instance, if "engag[ing] in any occupation of a professional nature" includes academic research, teaching or providing advisory services, the pool of candidates may be narrowed, especially if members of the Tribunal are to serve part-time. Therefore, the Working Group should be cautious in defining the scope of prohibited activities.