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Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea

This Note reproduces a submission from the Government of the Republic of Korea containing a summary of the fourth intersessional regional meeting on ISDS reform held on 2 and 3 September 2021 in Seoul, Republic of Korea. The English version of the summary was submitted on 4 January 2022 and the text received by the Secretariat is reproduced as an annex to this Note.



Annex

Introduction

1. The fourth intersessional meeting on investor-State dispute settlement (ISDS) reform (hereinafter, the “Meeting”) was held on 2 and 3 September 2021 virtually and in Seoul, Republic of Korea. The Meeting was jointly organized by the Ministry of Justice of Korea and the United Nations Commission on International Trade Law (UNCITRAL) Regional Centre for Asia and the Pacific (RCAP). The Republic of Korea takes this opportunity again to thank the UNCITRAL Secretariat for their immense support in the preparation of this Meeting and the Working Group III delegates and observer institutions for their significant input and active participation.
2. The Meeting consisted of four sessions over the course of two days. The first three sessions considered a draft document prepared by the Secretariat on early dismissal of claims, security for costs, and counterclaims. The fourth session comprised of a series of presentations by delegates and observer institutions on cross-cutting issues of procedural reform, including assessment of damages, exhaustion of local remedies, regulatory chill, right to regulate, third-party participation, immunity of execution, and involvement of national courts.
3. The views exchanged at the Meeting provided useful guidance to the Secretariat in its preparation of formal working papers for future sessions of Working Group III. Korea will continue to seek active participation in the ISDS reform discussion and looks forward to joining more collaborative work to come.

Opening remarks

4. The Meeting was opened by the Minister of Justice, Beom-Kye Park, Republic of Korea. Minister Park welcomed and thanked all member States and institutions for attending the Meeting, which Korea was hosting for the second time. Minister Park encouraged participants to actively share views and expressed hope for continued cooperation between UNCITRAL and the Korean Ministry of Justice with regard to the ISDS reform work. Welcome remarks by Ms. Anna Joubin-Bret, Secretary of UNCITRAL, followed. Ms. Joubin-Bret expressed appreciation to the Ministry of Justice and stressed the importance of continued work on the procedural reforms and cross-cutting issues.

Summary of the Meeting

Session 1. Early dismissal of frivolous claims

5. The session on early dismissal of frivolous claims was moderated by Professor Hi-Taek Shin (Professor of Law (Emeritus), Seoul National University).
6. Professor Shin introduced the topic and specifically laid out the following issues for discussion: (i) the types of frivolous claims to be covered; (ii) the consequences of the tribunal’s finding of frivolous claims; (iii) the risk of abuse or misuse of a framework to address frivolous claims; and (iv) early dismissal of claims.
7. The Secretariat provided background information on the draft document, which included a draft provision (possibly to supplement the UNCITRAL Arbitration Rules) and examples of provisions found in international investment agreements and institutional arbitration rules.

General observation

8. There was a recognition on the importance of allowing for early dismissal of frivolous and manifestly unfounded claims in order to prevent abuse of the ISDS system and guarantee effective access to justice for other claims. In that vein, views were expressed that the draft provision should strike the right balance in a clear, sharp and easy-to-understand language. It was pointed out that it was important to have a

clear legal standard that can be applied by decision-makers and arbitral tribunals for addressing frivolous claims. It was also said that the discussion of the draft provision could differ depending on whether it were to be included in a procedural rule or a treaty.

9. As to the title of the draft provision, one suggestion made was to use “unsubstantiated or frivolous claims” instead of “preliminary determination”.

Draft paragraph 1

1. *A party may raise a plea that:*
 - (a) *A claim or defence is manifestly without legal merit;*
 - (b) *Issues of fact or law supporting a claim or defence are manifestly without merit;*
 - (c) *Certain evidence is not admissible;*
 - (d) *No award could be rendered in favour of the other party even if issues of fact or law supporting a claim or defence are assumed to be correct;*
 - (e) *...*

10. It was noted that draft paragraph 1(a) allowed for objections that a claim or defence was manifestly without legal merit to be handled on an expedited basis, which was consistent with emerging trends (e.g., the Investment Arbitration Rules of the Singapore International Arbitration Center (SIAC)). Queries were raised on the inclusion of “defence” in draft paragraph 1(a) as the frivolous claims tool commonly seen in treaties only related to claims, not defences. A view was expressed that including defences would introduce parallel proceedings. In response, it was said that, if the scope was limited to claims without legal merit, it would be easier to envisage the timeframe by following the approach of the International Centre for Settlement for Investment Disputes (ICSID) Arbitration Rules.

11. On draft paragraphs 1(b) and (c), doubts were raised as to the feasibility of front-loading the issues of fact and evidence at an early stage of the proceedings. It was stated that questions of facts and evidence can lead to lengthy fact-finding proceedings and prolong the cost and duration of the proceedings, which may contradict the objectives of having an early dismissal mechanism. It was also noted that tribunals are already able to rule on the admissibility of evidence under existing rules, such as article 9 of the IBA Rules on the Taking of Evidence without the need of draft paragraph 1(c). A view was expressed that consideration could be given to the fact that inadmissible evidence may not always mean inadmissible claims, and that it would be helpful to discuss whether to distinguish these two or how to properly address inadmissible evidence in the context of early dismissal of claims should this category of plea be included.

12. In relation to draft paragraph 1(d), a view was expressed that it has a similar effect as existing treaty provisions that allow for preliminary objection. A question was posed as to why it was drafted differently from the commonly seen language. Another point was raised that the drafting of this draft paragraph is unclear and it was inquired how this draft paragraph interacts with draft paragraph 1(a). It was further stated that draft paragraphs 1(b) through 1(d) may appear to establish a system of “summary judgment”, or disposition as a matter of law, as used in some jurisdictions. Relatedly, it was stated that summary judgment is a legal procedure entirely distinct from early dismissal of manifestly unmeritorious claims.

Draft paragraph 2

2. *A party shall raise the plea as promptly as possible and no later than 30 days after the submission of the relevant claim/defence, issues of law or fact or evidence. The arbitral tribunal may admit a later plea if it considers the delay justified.*

13. It was pointed out that the 30-day-period for the submission of objections may be unrealistically short in practice. As such, 45 or 60 days were suggested. In terms

of late pleas, a proposal was made that a 30-day limit be imposed on the arbitral tribunal's discretion to admit a later plea, even if it considers the delay justified.

Draft paragraph 3

3. *The party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings considering all circumstances of the case.*

14. A point was raised that draft paragraph 3 may need to be reviewed in conjunction with draft paragraph 2 in terms of whether to address a plea as a preliminary matter or pleas that can be raised in later stages as envisaged in draft paragraph 2.

Draft paragraphs 4 and 5

4. *After inviting the parties to express their views, the arbitral tribunal shall determine within [15] days from the date of the plea whether it will rule on the plea as a preliminary question.*

5. *Within [30] days from the date of the plea, the arbitral tribunal shall rule on the plea. The period of time may be extended by the arbitral tribunal in exceptional circumstances.*

15. Suggestions were made to give the arbitral tribunal 30 days from the date of the plea to determine whether it will rule on the plea as a preliminary question (instead of the 15 days). A doubt was expressed as to the necessity of this draft provision, and it was said that whether to consider a plea can be decided by the tribunal in a fairly short time. In that respect, it was suggested to counterbalance with a provision on allocation of costs so a plea without merit would be subject to the risk of facing a decision on costs. Regarding draft paragraph 5, suggestions were made to define the phrase "exceptional circumstances" and to specify the period within which the arbitral tribunal shall rule on the plea.

Draft paragraph 6

6. *A ruling by the arbitral tribunal on a plea shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim or defence lacks legal merit.*

16. It was suggested to consider adding the following phrase at the end of draft paragraph 6: "this does not prevent the party to object to the jurisdiction of the tribunal".

17. It was added that such language can be found in a number of treaties to clarify that the tribunal's ruling on the matter would not affect future objections on the substance and the jurisdiction of the tribunal.

Other issues

18. Two distinct approaches on how to present the draft provision were suggested. One was to include the draft provision in the UNCITRAL Arbitration Rules by drawing examples from relevant rules addressing frivolous claims, such as those of the SIAC and the Hong Kong International Arbitration Centre (HKIAC). Another approach was to consider a default rule that allowed unmeritorious claims to be dismissed in case the rules themselves are silent by taking reference of relevant provisions in existing treaties, such as the United States-Mexico-Canada Agreement (USMCA).

19. On the issue of abuse of process, views were briefly expressed that this was another concept that required further legal clarity and additional information. It was said that matters like denial of benefits should also be taken into account when

considering ways to address treaty-shopping and concerns about misuse of available dispute settlement provisions. It was also noted that treaty-shopping was not an appropriate issue for the Working Group's discussion.

20. Further views were exchanged on whether to combine the provisions on pleas of frivolous claims with the provision on pleas on the jurisdictions. In addition, it was suggested to consider establishing a presumption that a party that prevails in the objection shall be awarded costs in the arbitration, as proposed in the context of ICSID Rules and Regulations Amendment.

Session 2. Security for costs

21. The session on security for costs was moderated by Professor Seung Wha Chang (Professor of Law, Seoul National University).

22. Professor Chang introduced that this topic aimed to address the difficulties of successful respondent States to recover costs in ISDS. Professor Chang further pointed out that there was no proper framework for security for costs other than that of provisional measures. In this regard, a need to develop a clear and predictable framework for security for costs was shared so as to protect respondent States from claimant investors' non-compliance of awards and to deter frivolous claims. Professor Chang added that a balanced approach is required, as security for costs may delay the proceedings and increase costs and further deter certain groups of investors (e.g., individual investors, family businesses or small and medium sized enterprises) from filing claims.

23. The Secretariat provided background information and noted that most investment treaties were silent on security for costs, and tribunals were reluctant to order security for costs due to various uncertainties and concerns such as the impropriety of prejudging the case and its merits, failure to establish concrete risks of non-payment, and insufficiency of proving that the claimant investor has no assets.

General observation

24. Support was expressed for the inclusion of a specific provision on security for costs that is separate and independent from existing provisions pertaining to provisional measures. It was further suggested that the Working Group should consider whether or not to include specific standards to assist tribunals with determining whether an order for security for costs is necessary or justified. On a related note, a comment was made that there should not be a high threshold for ordering security for costs. Further, a preference to grant the tribunal with the capacity and discretion to decide based on its assessment of all circumstances was mentioned. On the other hand, concerns were expressed that creating a general rule on security for costs may hinder justice for certain groups of investors, including small and medium-size enterprises. In similar regard, it was said that the existing system is enough to grant security for costs with the tribunal's capacity to carefully assess all relevant circumstances. It was also said that a careful and balanced approach was required not to create barriers for claims being raised.

Draft paragraph 1

1. *Upon request of a party, the arbitral tribunal may order any party asserting a claim or counterclaim to provide security for costs.*

25. Support was expressed that an order for security for costs should be made upon a request by a party rather than on an *ex officio* basis. Views were shared that it would not be necessary to have States be the subject of security for cost orders. On the other hand, it was stated that equitable treatment between claimant investors and respondent States was necessary, particularly in the situation where it was extremely difficult to enforce a successful award against an unwilling sovereign. In that context, reference was made to the possibility of raising counterclaims.

Draft paragraph 2

2. *The following procedure shall apply:*
- (a) the request shall specify the circumstances that require security for costs;*
 - (b) the arbitral tribunal shall fix time limits for written and oral submissions on the request, as required;*
 - (c) if a party requests security for costs before the constitution of the arbitral tribunal, the arbitral tribunal shall consider the request promptly upon its constitution; and*
 - (d) the arbitral tribunal shall issue its decision on the request within 30 days after the later of the constitution of the arbitral tribunal or the submission on the request.*

26. Regarding the standards for ordering security for costs as set forth in subparagraph (a), a view was expressed that it would be more appropriate to use the term “justify” rather than the term “require”. In response, questions were raised on the feasibility of using the term “justify” as a broader concept. A further explanation was provided that the phrase “written and oral” was included in subparagraph (b) to provide more flexibility to the tribunal, for instance, to schedule a shorter hearing. Another comment was made that subparagraph (b) will be useful only when the institution or secretariat administering the arbitration was involved. With regard to requests for clarification on the meaning of subparagraph (d), it was said that the paragraph was drafted to have the order made as soon as possible regardless of whether the request was made before or after the constitution of the tribunal.

Draft paragraphs 3 and 4

3. *In determining whether to order a party to provide security for costs, the arbitral tribunal shall consider all relevant circumstances, including:*
- (a) that party’s ability to comply with an adverse decision on costs;*
 - (b) that party’s willingness to comply with an adverse decision on costs;*
 - (c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and*
 - (d) the conduct of the parties.*
4. *The arbitral tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.*

27. Diverging views were expressed with regards to the factors to be considered by the tribunal when determining whether or not to order security for costs, including whether the list in paragraph 3 should be a non-exhaustive one and be retained. Some expressed strong support for maintaining the list, one of which specifically mentioned the need to maintain subparagraph (c).

28. With regard to the impact of the existence of third-party funding in ordering security for costs, views were shared that third-party funding shall be one of the factors to be considered but shall not in itself be a determining factor. Concerns were raised with respect to the current structure of the draft provision, that setting forth security for costs in a stand-alone subparagraph may confuse the tribunal in weighing this factor differently from others.

Draft paragraphs 5 and 6

5. *The arbitral tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.*
6. *If a party fails to comply with an order to provide security for costs, the arbitral tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the arbitral tribunal may, after consulting with the parties, order the discontinuance of the proceeding.*

29. It was said that time limitation was not troublesome, but the phrase “any relevant terms” may denote some procedural issues, including the assessment of the amount of security for costs.

Draft paragraphs 7 and 8

7. *A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.*

8. *The arbitral tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.*

30. A question was raised whether the tribunal may modify or revoke the order on its own initiative, whereas the request for security for costs has to be made by a party. It was explained that this was the current approach taken in the ICSID Amendment process.

Session 3. Counterclaims

31. This session was moderated by Professor Jaemin Lee (Professor of Law, Seoul National University).

32. Professor Lee opened this session by noting that the issue of counterclaims received a fair amount of attention in the course of identifying the concerns of States. He noted that counterclaims could help ensure balance in the overall dynamics of the ISDS proceedings, enhance efficiency, and ultimately help address the issue of cost and duration as well as multiple proceedings. Currently, counterclaims may be permitted according to article 46 of the ICSID Convention, article 40 of the ICSID Arbitration Rules, and article 21(3) of the UNCITRAL Arbitration Rules, but in practice have been rarely utilized. Thus, the discussions focused on how to formulate a framework or a provision that can facilitate the use and acceptance of counterclaims in future ISDS proceedings.

33. The Secretariat pointed out that the rules on counterclaims may differ depending on the source of investors' substantive obligations. Such substantive obligations may also be non-mandatory or voluntary, and range from compliance with laws and regulations of host States to ensuring that its activities do not conflict with the social and economic development of those States.

34. The Secretariat further noted that a provision may need to be formulated to dispose of the question of admissibility of counterclaims. Lastly, the Secretariat expressed the need to balance the benefits and the potential downsides of allowing counterclaims, such as the delay of the proceeding and the danger of forming two tracks in the same proceeding.

35. Professor Lee commented that as the issue of counterclaims also related to other issues including early dismissal, security for costs, and frivolous claims, it was necessary to define the scope of the discussion, especially in light of the fact that the mandate required the Working Group to focus on the procedural aspects.

On substantive obligations

36. Various views were expressed about whether it would be appropriate for the Working Group to discuss substantive obligations as the legal grounds for counterclaims. It was stated that the mandate from the Commission was to focus on procedural aspects of ISDS and that the work on counterclaims should, therefore, be focused on the procedural aspects. On the other hand, the necessity to use a broader interpretation of the mandate of the Working Group to obtain a balanced approach was emphasized.

37. At the same time, it was explained that procedural rules to be developed on counterclaims may look different depending on the source, scope and contents of the

investors' obligations. In this regard, it was noted that a provision on counterclaims in some way will have to reflect what the substantive content is.

38. On a separate note, it was said that considerations need to be given to whether it would be appropriate for respondent States to resort to ISDS instead of domestic remedies. It was added that this concern would be particularly pertinent where the obligations of investors are regulated by laws and regulations of the host State.

On the language of the draft provisions in relation to existing treaties

39. It was said that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the ICSID Convention requires a counterclaim to be linked to the factual or legal basis of the claim made by the investor. In this regard, a suggestion was made to consider whether the CPTPP language would suffice, or additional language would be necessary to cover other obligations under treaties which might not be entirely linked to the claim.

40. It was further said that the Working Group should be cautious of excluding the possibility of counterclaims if the relevant treaty so provided. A concern was expressed that it may be challenging to find the proper wording outside of a specific treaty.

41. A question was raised whether the connection to the factual or legal basis of the claim and breach of the obligations within the treaty itself should both be conditions for raising counterclaims. And some preference was expressed that they need not be cumulative.

42. It was also said that language on counterclaims needs to be developed in the context of a permanent tribunal. It was stressed that the Working Group should design a specific text that could be used for the permanent tribunal to deal with the scope of jurisdiction, conditions for the admissibility of counterclaims, and other issues.

43. It was suggested that a permanent tribunal would be more effective in terms of managing counterclaims. However, it was further noted that if counterclaims dealt with non-compliance with a host State's laws and other treaty obligations, it may be asking more from tribunals than what they typically manage. Thus, although it makes sense to bring claims that are linked to one another into the same forum for efficiency, other institutions may be considered if they are better qualified to look at claims that deal with State laws or other treaty obligations.

Session 4. Cross-cutting issues

44. The session on cross-cutting issues was moderated by the Chair of Working Group III, Mr. Shane Spelliscy. State delegates and observer institutions respectively provided a presentation on the cross-cutting issues. Subsequent.

Exhaustion of local remedies – South Africa (Ms. Kekeletso Mashigo)

45. Ms. Mashigo underscored the importance of the issue of exhaustion of local remedies, and suggested four options for consideration. First, domestic courts could be considered as a forum for settlement of all investment disputes or, in the alternative, certain subject-matter disputes such as those involving constitutional rights, issues of taxation, natural resources, obligations for indigenous people, or other public interest issues. Second is having an unequivocal provision that expressly requires exhaustion of local remedies before initiating investment arbitration. Third, decisions of domestic courts, including on jurisdiction and remedies, should be excluded from ISDS. Fourth, domestic courts could be given exclusive jurisdiction to interpret matters of domestic law so that it ensures a balance between private and public interests. The delegate also stressed the need to allocate equitable time and resources in consideration of the cross-cutting issues, including exhaustion of local remedies.

Regulatory chill & Damages – Gabon (Ambassador Aristide Ebang Essono)

46. With respect to the regulation of regulatory chill issue, Ambassador Essono highlighted the need to maintain a balance between protection of investment and exercise of sovereign States' power to regulate in the direction of achieving common good and the need to prevent abuse of process. In light of the need, Ambassador Essono suggested to consider capping compensation and calculation of damages in accordance with the budgetary capacities of States. Furthermore, since the complexity of the methodology used by tribunals in calculation of damages (e.g., discounted cash flow method) can increase the complexity, duration and cost of proceedings, it was emphasized that a more coherent, predictable, and transparent approach to awarding damages would have a substantial impact on States' concerns over regulatory chill.

Exhaustion of local remedies & Regulatory chill – India (Mr. Noor Rahman Sheikh and Mr. George Pothan Poothicote)

47. Mr. Sheikh and Mr. Poothicote reiterated the concerns expressed over the legitimacy of ISDS system particularly on the increase of inconsistent awards and regulatory chill. Mr. Sheikh and Mr. Poothicote pointed out that regulatory chill undermines the rule of law by denying access to justice and remedies for vulnerable or exploited communities. Mr. Sheikh and Mr. Poothicote mentioned that the *Philip Morris Asia Limited v. Australia* and *Vattenfall v. Germany* cases bring to the floor questions of legitimacy of to what extent should political decisions of democratically elected bodies or judicial bodies exercising constitutional powers be overridden by private arbitral tribunals. Mr. Sheikh and Mr. Poothicote further explained that having domestic courts to first examine issues would help arbitral tribunals appreciate the reasoning of such domestic courts, and underlined the importance of exhaustion of local remedies before resorting to international arbitration.

Immunity from execution – Morocco (Mr. Abdou El Azizi)

48. Mr. Azizi identified two types of jurisdictional immunities: (i) immunity from jurisdiction that allows a State to avoid prosecution before tribunals; and (ii) immunity from execution that a State can invoke to prevent forced execution of arbitral awards on its property and assets, in order to ensure the continuity of public service. Regarding immunity from jurisdiction, the delegate stated that the subscription of an arbitration clause or the conclusion of an arbitration agreement by a State or its organ implies a waiver of immunity from jurisdiction by that State. With regard to immunity from execution, however, the delegate pointed out the absence of a coherent international regime on immunity from execution, particularly within the framework of ISDS. As such, Mr. Azizi proposed to establish a unified international instrument that would harmonize the practice of States and provide a balanced approach between States regarding immunity from execution, to improve enforcement of arbitral awards without it being detrimental to public service of host States.

Involvement of national courts – Sri Lanka (Additional Solicitor General Sumathi Dharmawardene)

49. Mr. Dharmawardene shared Sri Lanka's experience where national courts are mandated to play a role in ISDS under the Arbitration Act of 1995, which was enacted based on UNCITRAL Model Law on International Commercial Arbitration (hereinafter, the "UNCITRAL Model Law"). Mr. Dharmawardene identified concerns in relation to national courts' involvement in ISDS, such as the absence of judicial ability to correct errors of law and fact, lack of clear guidance for courts to decide on impartiality and independence of arbitrators, and inadequacy of framework on interim relief and preservation of assets. With that said, Mr. Dharmawardene proposed to take a holistic approach and revise the UNCITRAL Model Law for a framework that permits a limited intervention by courts and to prepare guidance on the assessment of arbitrator and independence and interim measures.

Regulatory chill & Right to regulate – African Continental Free Trade Area (AfCFTA) (Ms. Rosly N’geno)

50. Ms. N’geno explained the concepts of right to regulate and regulatory chill in the context of ISDS and expressed relevant concerns, in particular for African Union member States, including the lack of financial resources to defend ISDS cases or pay an adverse award. As a solution, Ms. N’geno suggested limiting the subject-matter jurisdiction of arbitral tribunals to exclude issues concerning public interest from the realm of arbitration. Ms. N’geno also emphasized the need for a holistic approach to the general reform of the ISDS mechanism that combines procedure and substance, and structural reforms that would ensure governments to regulate for the public good.

Right to regulate – Dominican Republic (Ms. Leidlyn Contreras De Fernande)

51. Ms. Fernande highlighted the need for a proper balance between safeguarding a State’s regulatory space and liberalization and protection of investments. In doing so, Ms. Fernande stated that it would be necessary to properly and carefully draft international investment agreements by, for example, clarifying standards like fair and equitable treatment. Furthermore, citing the Dominican Republic-Central America FTA (DR-CAFTA), Ms. Fernande also emphasized the need for governments to make specific exceptions in sensitive areas, such as national security or economic crisis, to better preserve regulatory space and take measures without infringing their international obligations.

Third-party participation – Columbia Centre on Sustainable Investment (CCSI) (Ms. Lise Johnson)

52. Ms. Johnson pointed out the difficulty of non-parties’ effective or meaningful participation under current ISDS rules, and explained the negative impacts of ISDS on the rights and interests of non-parties with potential solutions to address those impacts. As possible options for reform, Ms. Johnson stated that requiring exhaustion of domestic remedies may better ensure all relevant right holders to participate in the proceedings. Ms. Johnson also suggested that clearer standards on dismissal of cases without legal merit could bring an early halt to certain types of cases, for example, claims that are in effect appeals raised by investors against adverse domestic court decisions against other private parties. Moreover, the use of the UNCITRAL process to facilitate an orderly shift from ISDS to State-to-State dispute settlement for all or some claims can help limit the circumstances in which these issues arise. Ms. Johnson also put forth other potential approaches, which may include (i) participation by interested or affected third parties through intervention or joinder; (ii) dismissal of claims where such parties are unwilling or unable to intervene or be joined; and (iii) reframing of claims, arguments and remedies.

Comments

53. In response to the presentations, it was suggested to improve judicial capacity in settling disputes and for UNCITRAL to organize capacity-building training in ISDS for national judges. At the same time, a view was expressed that the Working Group should keep in mind there are limits as to what can be and cannot be done in the context of judicial conduct.

54. With respect to the right to regulate, a question was posed as to whether protection of the right to regulate can be achieved both on a general, multilateral level as well as on an individual, national level, and whether the Working Group seeks to develop such a principle as model clauses or guidelines. In response, it was stated that States can have model clauses in treaties, but such language alone may not be enough and subsequently there must be a corresponding national law. It was also noted that the issue should be considered at all possible levels, including both national and multilateral levels. Furthermore, a view was expressed that issues relating to the right to regulate can be dealt with in a procedural aspect, only in light of the existing, strong substantive framework enshrined in international investment agreements. As such, it

was stated that it would be helpful to first set the playing field for addressing the issues. Relatedly, it was also emphasized that the Working Group should take a broad approach by considering soft law options such as guidelines or guidance documents in addition to treaty provisions.

55. Regarding the issue of immunity from execution, it was pointed out that a review of existing treaties would be necessary to see what more can be done, if any.

56. Views were expressed that creation of a permanent body can be a valid and effective means to respond to cross-cutting issues such as the right to regulate and calculation of damages. In light of further work by the Secretariat, it was suggested to distinguish and analyse the areas for which there are to be decisions for purely domestic law and the matters for international law to play a part in.

Concluding remarks

57. At the end of the two-day intersessional meeting, closing remarks were provided by Ms. Athita Komindr (Head, UNCITRAL-RCAP), Ms. Natalie Morris-Sharma (Rapporteur, Working Group III) and Mr. Changwan Han (Director of International Dispute Settlement Division of the Ministry of Justice, Republic of Korea).
