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Possible reform of investor-State dispute settlement (ISDS)

Draft supplementary provisions on the conduct of proceedings to resolve international investment disputes

Note by the Secretariat

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I. Introduction and background

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

2. During the first phase of its work, the Working Group identified concerns broadly as those pertaining to: (i) the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; (ii) arbitrators and decision makers; and (iii) cost and duration of ISDS proceedings (A/CN.9/964 and A/CN.9/970). During the deliberations, it was generally felt that improvements in the procedural framework would be desirable to address those concerns. References were made to developing rules on third-party funding, allocation of costs, early dismissal of frivolous claims, security for costs and counterclaims. At its forty-third session in September 2022, the Working Group considered the draft provisions on procedural reform in document A/CN.9/WG.III/WP.219 and identified the "cross-cutting" issues that required further work (see A/CN.9/1124, paras. 89–104).

3. From its forty-sixth session in October 2023, the Working Group considered the draft provisions on procedural and cross-cutting issues (DP) in documents A/CN.9/WG.III/WP.231, A/CN.9/WG.III/WP.244, A/CN.9/WG.III/WP.248, A/CN.9/WG.III/WP.253 and A/CN.9/WG.III/WP.262. The Working Group considered the DPs most recently as follows: (a) DPs 10, 12 (paras. 6 and 8), 13 and 20 at the forty-ninth session in September 2024;[2] (b) DPs 1 to 4 at the fiftieth session in January 2025;[3] (c) DPs 14 to 19 at the fifty-first session (second part) in April 2025;[4] (d) DPs 5 to 8 at the fifty-second session in September 2025;[5] and (e) DPs 9, 10, 11, 11 bis, 12, 13 and 22 at the fifty-third session in January 2026.[6] In addition, DPs 12, 18, 19 and 20 were considered at the ninth intersessional meeting in November 2025.[7]

4. At its fifty-third session in January 2026, the Working Group agreed to prepare the DPs as treaty provisions. It was further agreed that the DPs addressing the conduct of the proceedings would form (i) a supplement to the UNCITRAL Arbitration Rules ("UARs") and (ii) part of a protocol to the multilateral instrument on ISDS reform ("MIIR") as a set of rules, which States could opt into as one package.[8] It was said that the preparation of a supplement to the UARs would require a careful assessment of how the DPs would interact with the UARs. It was agreed that other DPs, which provided purely treaty language, would be presented as separate provisions in a protocol to the MIIR for States to opt into individually.[9]

5. At that session, while noting the importance of continuing to work on the purely treaty DPs, it was generally felt that work should first be carried out to finalize the DPs addressing the conduct of the proceedings (specifically DPs 1 to 9, 11 and 12), so that they could be presented to the Commission in 2026.[10] Noting that it did not have time at the session to consider DPs 1 to 8, the Working Group considered possible ways to finalize that work and requested that sufficient time be allocated

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.
[2] A/CN.9/1194, paras. 57–104.
[3] A/CN.9/1195, paras. 23–69.
[4] A/CN.9/1196/Add.1, paras. 67–109.
[5] A/CN.9/1238, paras. 15–81.
[6] A/CN.9/1239, paras. 14–106.
[7] See summary of the ninth intersessional meeting on ISDS reform submitted by the Government of Chile, A/CN.9/WG.III/WP.263.
[8] A/CN.9/1239, para. 59.
[9] Ibid.
[10] A/CN.9/1239, para. 107.

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during the upcoming Commission session to finalize the DPs. Subsequently, it was decided to carry out additional work on the DPs through informal meetings.

6. Chapter II of this Note presents the draft supplementary provisions on the conduct of proceedings to resolve international investment disputes ("Supplementary Provisions" or "SPs"), reflecting the deliberations and decisions of the Working Group and the informal meetings held after the fifty-third session.[11] The notes to the Commission (*in italics*) highlight issues for consideration.

7. The SPs have been prepared to align with the UARs as well as the 2022 ICSID Arbitration Rules (ICSID Rules) to the extent possible.[12] They are intended to clarify and enhance the rules governing ISDS proceedings, while also seeking to harmonize approaches on key procedural issues.[13] The SPs have been re-numbered using Roman numerals (I, II, III …) to avoid confusion with treaty provisions and arbitration rules, which typically use Arabic numerals. The term "Tribunal" refers to the arbitral tribunal or other adjudicatory body provided for in the instrument of consent for resolving disputes. The term "proceeding" refers to the dispute resolution proceedings before such bodies.

8. Chapter III of this Note outlines the various options for implementing the SPs.

II. Draft supplementary provisions on the conduct of proceedings to resolve international investment disputes

9. *With regard to the SPs generally, the Commission may wish to:*

- *Confirm that the SPs would be presented and operate as a set of provisions and not independently and cross-references to other SPs would be appropriate;*
- *Confirm that the SPs should be adopted as the "UNCITRAL Supplementary Provisions on the Conduct of Proceedings to Resolve International Investment Disputes";*
- *Confirm that the SPs could apply to arbitration under different types of procedural rules (see chapter III.D below) and that references to specific procedural rules (for example, to the articles of the UARs) should be avoided (see SP II(1));*
- *Confirm that the SPs, particularly those outlining the Tribunal's discretionary powers, should not imply that the Tribunal does not possess such powers under the applicable procedural rules;*
- *Confirm that the Tribunal has the discretion to extend or abridge time frames in the SPs applicable to the disputing parties (but not those applicable to the Tribunal), which is usually provided for in the applicable rules (see, for example, UARs 17(2))). This discretion is expressly mentioned in SP IV(2) but not in SPs V(8), VII(2) and (3) and XI(7)(c), where this discretion could be clarified by adding the words "or such other period as may be set by the Tribunal";*
- *Consider whether the SPs should include a general provision similar to ICSID Rules 27(3), which could read: "The Tribunal shall consult with the disputing parties prior to making an order or a decision it is authorized by the Supplementary Provisions to make on its own initiative". If included, references on the need to consult with the parties (in square brackets) in*

[11] Informal meetings took place on 25 February, 4–5 March 2026 and on the margins of the fifty-fourth session of Working Group III.

[12] UARs, available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration; ICSID Rules, available at https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

[13] A/CN.9/1195, para. 43.

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SPs I(3), II(7), V(8), VI(2) and (4), VIII(3), IX(6), XI(6) and (7)(c) could be deleted;

- *Confirm that the use of the articles "a" and "the" in the SPs is accurate. In the context of SP IX(3) and (7), the phrase "an" award is used instead of "the" award to reflect the possibility of the Tribunal making multiple awards.*[14] *This is also the case in SPs IV(5), VII (4) and X(2). On the other hand, reference is made to "the" award in SPs I(5), III(2), VII(4) and (5), and VIII(1) and (3), to indicate generally the final award;*

- *Note that references to the "other disputing party" have been revised to "other disputing parties" to address the possibility of multi-party proceedings, for example in SPs VII(2) and XI;*

- *Confirm that the reference to a "claim" in the SPs (I to V, VII, VIII and XI) should be understood broadly to include counterclaims as well as claims for the purposes of set-off. If so, there would be no need to refer in every instance to claim(s), counterclaim(s), and claim(s) for set-off purposes. However, if the Commission identifies an instance where the notion of "claim" should not include counterclaims or set-off claims, that specific provision could be adjusted.*

Provision I: Evidence[15]

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.

2. At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence within such a period of time as the Tribunal shall determine.

3. At the request of a disputing party, the Tribunal may[, after consultation with the disputing parties and if it deems appropriate,] establish a procedure whereby each party can request another party to produce documents [to the requesting party]. In establishing the procedure, the Tribunal shall [consult with the disputing parties and] consider the benefits and burdens of document production in the circumstances of the particular case.

4. In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including:

(a) The scope and timeliness of the request;

(b) The relevance and materiality of the documents requested;

(c) The burden of production; and

(d) The basis of any objection.

5. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it.

6. Witnesses, including expert witnesses, who are presented by the disputing parties to testify to the Tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the proceeding or in any way related to a disputing party. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.

[14] A/CN.9/1239, para. 30.
[15] A/CN.9/1195, paras. 23–43. Annotations to SP I are found in A/CN.9/WG.III/WP.254, paras. 2–7.

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7. The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

8. The Tribunal shall, at the request of a disputing party or on its own initiative, exclude documents, exhibits or other evidence:

(a) Which were obtained contrary to the law of the State where they were collected;

(b) Which were falsified or fabricated or are found to be fraudulent; or

(c) The use of which as evidence is prohibited under the applicable law or privileges.

9. The Tribunal may, at the request of a disputing party or on its own initiative, order a visit to any place connected with the dispute, if it deems the visit necessary, and may conduct inquiries there as appropriate. The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other relevant terms. The disputing parties shall have the right to participate in any visit or inquiry.

Notes

10. *The Commission may wish to:*

- *Consider adding the words "to the requesting party" at the end of the first sentence in paragraph 3 to confirm that paragraphs 3 and 4 address document production whereby parties request, exchange and submit "documents" (understood broadly to refer to information in any form) among each other. Whether such document is presented as evidence to the Tribunal is not addressed in those paragraphs. By contrast, the remaining paragraphs of SP I address "evidence", which the disputing parties present to the Tribunal either on their own initiative or upon the request of the Tribunal, to prove the facts relied on in support of their claims. The phrase "documents, exhibits, and other evidence" is retained (see UARs 27) to refer to the different types of documentary evidence;*
- *Consider whether to revise the opening phrase in the second sentence in paragraph 3 to read: "In making that determination and in establishing the procedure";*
- *Consider whether paragraph 4 should expressly mention the possible "existence" of such documents as another circumstance to consider, although this may be implied by the phrase "all relevant circumstances";*
- *Consider whether paragraph 5 needs to be included in SP I as it relates to evidence but merely replicates UARs 30(3) and in that connection, whether the non-compliance by a disputing party with the procedure established under paragraph 3 is addressed under paragraph 5 or should be addressed separately in the SP;*
- *In light of the above, consider the placement of paragraphs 3 and 4, including whether those paragraphs would fit better after paragraph 5, which would highlight the linkage between paragraphs 2 and 5 (if retained);*
- *Confirm that broad discretion is provided to the Tribunal to make determinations under paragraph 8, including with respect to the State where the evidence was collected and the applicable law (also relating to where the use of such as evidence is prohibited);*
- *Consider whether the reference to "applicable law" in paragraph 8(c) should be further clarified (e.g. by referring to "applicable rules of law", "domestic" law or "domestic law of the disclosing party or applicable*

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privilege").[16] An alternative formulation could be based on article 7(2)(c) of the Transparency Rules, so that the subparagraph would read: "The use of which as evidence is prohibited, in the case of the evidence of the respondent State, under the law of the respondent State, and in the case of other evidence, under any law or rules determined by the Tribunal to be applicable to the use of such evidence."

Provision II: Bifurcation[17]

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction or the assessment of damages, be addressed in a separate phase of the proceeding ("request for bifurcation"). A request for bifurcation does not prejudice any right that a disputing party may have to raise any other objections on the jurisdiction of the Tribunal [pursuant to article 23 of the UNCITRAL Arbitration Rules or the relevant provision in the applicable rules].

2. A request for bifurcation shall be made as soon as possible and shall state the issues to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When a request for bifurcation is made along with a plea that the Tribunal does not have jurisdiction, the proceeding on the merits shall be suspended until the Tribunal determines whether to bifurcate, unless the disputing parties agree otherwise.

4. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation would materially reduce the time and cost of the proceeding;

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

5. The Tribunal shall decide on the request for bifurcation within 30 days after the last submission on the request. The Tribunal may decide to accept the request in full or in part, or to reject it. The Tribunal shall state the reasons upon which the decision is based[, unless the disputing parties have agreed that no reasons are to be given]. The Tribunal shall fix any period of time necessary for the further conduct of the proceeding.

6. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise.

7. The Tribunal may, on its own initiative [and after consulting with the disputing parties], decide whether an issue should be addressed in a separate phase of the proceeding.

Notes

11. *The Commission may wish to:*

– *Delete the square-bracketed text in the second sentence of paragraph 1 (see third bullet point in para. 9 above);* [18]

[16] A/CN.9/1195, para. 38.
[17] A/CN.9/1195, paras. 44–55. Annotations to SP II are found in A/CN.9/WG.III/WP.254, paras. 8–13.
[18] A/CN.9/1195, para. 46.

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– *Confirm that the square-bracketed text in paragraph 5 should be included.*[19]

Provision III: Interim measures[20]

1. The Tribunal may, at the request of a disputing party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Tribunal orders a disputing party, for example [and without limitation], to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the process itself; or

(c) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The disputing party requesting an interim measure under paragraph 2 (a) to (b) shall satisfy the Tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the disputing party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2(c), the requirements in paragraphs 3(a) and (b) shall apply only to the extent the Tribunal considers appropriate.

5. The Tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any disputing party or, in exceptional circumstances and upon prior notice to the disputing parties, on the Tribunal's own initiative.

6. The Tribunal may require the disputing party requesting an interim measure to provide appropriate security in connection with the measure.

7. The Tribunal may require any disputing party to promptly disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The disputing party requesting an interim measure may be liable for any costs and damages caused by the measure to any disputing party if the Tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The Tribunal may award such costs and damages at any point during the proceeding.

9. A request for interim measures addressed by any disputing party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

10. The Tribunal shall not grant an interim measure:

(a) Which attaches or enjoins the application of the measure alleged to constitute a breach referred to in the claim; or

[19] A/CN.9/1195, paras. 49–50.
[20] A/CN.9/1195, paras. 56–62. Annotations to SP III are found in A/CN.9/WG.III/WP.254, paras. 14–17.

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(b) [Which impedes a State's right to regulate in the public interest, including in order to protect life, health or environment.]

Notes

12. *The Commission may wish to consider:*

- *With regard to paragraph 2, whether the phrase "and without limitation" should be retained, considering that paragraph 10 limits the granting of certain types of interim measures;*
- *Whether interim measures involving the seizure of assets should be prohibited and expressly listed in paragraph 10. By way of background, the Working Group had removed from the list of examples in paragraph 2 the phrase found in UARs 26(2)(c) ("provide a means of preserving assets out of which a subsequent award may be satisfied");*[21]
- *The appropriate placement of paragraph 10 in SP III, which currently mirrors the structure of UARs 26 with paragraph 10 being the only additional paragraph. For example, it could be placed closer to paragraphs 1 or 2;*
- *Whether to retain paragraph 10(b), as it was questioned whether the Tribunal would be in a position to make the necessary assessment given the interim character of these measures*[22] *and that considering their temporary nature, it might be rare for interim measures to impede a State's right to regulate. The Commission may wish to further consider whether paragraph 10(b) should be a factor to consider when the Tribunal grants interim measures.*

Provision IV: Manifest lack of legal merit[23]

1. A disputing party may object that a claim is manifestly without legal merit.

2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than 60 days thereafter. The Tribunal may admit a later objection if it considers the delay justified.

3. The objection may relate to the substance of the claim or to the jurisdiction of the Tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The Tribunal shall fix the period of time for submissions on the objection.

4. The Tribunal shall decide on the objection within 60 days after the last submission on the objection.

5. If the Tribunal decides that all claims are manifestly without legal merit, it shall make an award to that effect. Otherwise, the Tribunal shall make a decision on the objection and fix any period of time for the further conduct of the proceeding.

6. A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to raise a plea that the Tribunal does not have jurisdiction or to argue subsequently in the proceeding that the claim is without legal merit.

Notes

13. *The allocation of costs arising from the procedure in SP IV is addressed in SP IX(3).*

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[21] A/CN.9/1195, para. 58

[22] A/CN.9/1195, paras. 60–61.

[23] A/CN.9/1195, paras. 63–69; A/CN.9/1124, paras. 107–118; A/CN.9/WG.III/WP.214, paras. 5–20. Annotations to SP IV are found in A/CN.9/WG.III/WP.254, paras. 18–22.

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Provision V: Security for costs[24]

1. The Tribunal may, at the request of a disputing party, order any party making a claim to provide security for costs.

2. The request shall include a statement of the relevant circumstances and supporting documents. The Tribunal shall fix the period of time for submissions on the request.

3. The Tribunal shall decide on the request within 30 days after the last submission on the request.

4. In determining whether to order a disputing party to provide security for costs, the 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;

(d) The conduct of the parties; and

(e) In relation to subparagraphs (a) to (d) or any other circumstance that the Tribunal finds relevant, the existence of third-party funding [, including whether the third-party funder agrees to cover any adverse decision on costs]. [For greater certainty, the Tribunal retains the discretion to order a funded party to provide security for costs even when the funding agreement includes a commitment by the third-party funder to cover an adverse decision on costs.]

5. Noting that States and regional economic integration organizations are presumed to have the ability and willingness to comply with an adverse decision on costs, the Tribunal shall not order a State or a regional economic integration organization making a claim to provide security for costs, unless there are exceptional circumstances justifying such an order.

6. The Tribunal shall specify any relevant terms in an order to provide security for costs and fix the period of time for compliance with that order.

7. At the request of a disputing party, the Tribunal may at any time modify or terminate its order to provide security for costs.

8. If a disputing party fails to comply with the order to provide security for costs, the Tribunal shall suspend the proceeding with respect to that party's claim. If the proceeding is suspended for more than 90 days, the Tribunal may[, after consulting with the disputing parties,] order the termination of the proceeding.

9. A disputing party shall promptly disclose any material change in the circumstances on the basis of which the Tribunal ordered security for costs.

Notes

14. *While paragraph 1 requires a request by a disputing party for the Tribunal to order security for costs, Provision XI(7) expressly provides that security for costs may be ordered on the Tribunal's own initiative as a sanction for non-compliance with the disclosure obligations in that provision.*

15. *Paragraph 4(e) clarifies that the existence of third-party funding is not a standalone factor to determine whether to order security for costs but that it should*

[24] A/CN.9/1238, paras. 16–51; A/CN.9/1044, para. 94; A/CN.9/964, paras. 128–133; A/CN.9/WG.III/WP.214, paras. 21–30. Annotations to the previous version of SP V (in A/CN.9/WG.III/WP.253) are found in A/CN.9/WG.III/WP.254, paras. 23–28.

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be considered in conjunction with the circumstances listed in subparagraphs (a) to (d) or any other circumstance that the Tribunal finds relevant.[25]

16. *The Commission may wish to note that SP XI(2)(c) requires the funded party to disclose whether the third-party funder agrees to pay any adverse decision on costs. In that light, it may wish to consider whether the square-bracketed text in paragraph 4(e) needs to be retained as an example of a relevant circumstance. The inclusion of that phrase might further necessitate the following sentence which starts with the words "for greater certainty" to explicitly confirm the authority of the Tribunal.*[26] *However, that additional sentence may require further clarification, for example, that the Tribunal retains the discretion not to order security for costs even when the third-party funder has not expressed its willingness to comply with an adverse decision on costs.*

17. *The Commission may wish to consider whether paragraph 5 should be retained.*[27]

18. *With regard to paragraph 9, the Commission may wish to note that the phrase "on the basis of which" was used instead of "upon which" (ICSID Rules 53(7)) to align with the drafting in UARs 26(7).*

Provision VI: Suspension of the proceeding[28]

1. The Tribunal shall order the suspension of the proceeding when requested jointly by the disputing parties.

2. Unless provided otherwise in the applicable rules, the Tribunal may, at the request of a disputing party or on its own initiative, order the suspension of the proceeding [after consulting with the disputing parties].

3. Unless provided otherwise in the applicable rules, the Tribunal shall specify in its order of suspension, the period of suspension and any relevant terms including the effect of the suspension on time frames set by the Tribunal. Time frames set out in the applicable rules shall be extended by the period of time for which the proceeding is suspended.

4. The Tribunal shall extend the period of suspension prior to its expiry when requested jointly by the disputing parties. Unless provided otherwise in the applicable rules, the Tribunal may, at the request of a disputing party or on its own initiative, extend the period of suspension prior to its expiry [after consulting with the disputing parties].

Notes

19. *There are no pending issues in relation to Provision VI.*

Provision VII: Termination of the proceeding[29]

1. The Tribunal shall order the termination of the proceeding when requested jointly by the disputing parties.

2. A disputing party may request the termination of the proceeding. If the other disputing parties do not object within 30 days after receipt of such request, those parties shall be deemed to have agreed to the termination, and the Tribunal shall order the termination of the proceeding. If an objection is made within 30 days, the proceeding shall continue.

3. Following the submission of a claim, if the disputing parties fail to take any steps in the proceeding for more than 150 consecutive days or any such

[25] A/CN.9/1238, paras. 32–40.
[26] A/CN.9/1238, para. 41.
[27] A/CN.9/1238, paras. 32–40.
[28] A/CN.9/1238, paras. 52–57. Annotations to SP VI are found in A/CN.9/WG.III/WP.254, paras. 29–31.
[29] A/CN.9/1238, paras. 20–26.

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period as they may agree, the Tribunal shall notify the disputing parties of the time elapsed since the last step taken in the proceeding. If the disputing parties fail to take a step within 30 days after that notice, they shall be deemed to have agreed to the termination and the Tribunal shall order the termination of the proceeding. If any of the disputing parties takes a step within 30 days after that notice, the proceeding shall continue. If the Tribunal has not yet been constituted, the appointing authority or the administering institution, as applicable, shall assume the responsibilities of the Tribunal in this paragraph.

4. If, before the award is made, the disputing parties agree on a settlement of the dispute, the Tribunal shall either order the termination of the proceeding or, if requested by the disputing parties and accepted by the Tribunal, record the settlement in the form of an award on agreed terms. The Tribunal is not obliged to give reasons for such an award.

5. If, before the award is made, the continuation of the proceeding becomes unnecessary or impossible for [any reason not mentioned in paragraph 4] [any other reasons], the Tribunal shall inform the disputing parties of its intention to order the termination of the proceeding. The Tribunal shall have the power to order the termination unless there are remaining matters that may need to be decided and the Tribunal considers it appropriate to do so.

Notes

20. *The Commission may wish to consider the discretion of the Tribunal with regard to the time frames in paragraphs 2 and 3 (see the fifth bullet point in para. 9 above).*

21. *As paragraph 5 intended to be a catch-all for all other circumstances where the Tribunal may terminate the proceeding, the Commission may wish to replace the phrase "any reason not mentioned in paragraph 4" with the phrase "any other reasons", which would encompass reasons other than provided in paragraphs 1 to 4.*

Provision VIII: Period of time for making the award[30]

1. The Tribunal shall make the award as soon as possible. In any event and unless otherwise agreed by the disputing parties, the Tribunal shall make an award no later than:

(a) 60 days after the last submission, if the award is made [in accordance with Provision IV, paragraph 5] [pursuant to an objection based on the claim being manifestly without legal merit];

(b) 180 days after the last submission, if [the] [an] award is made [in accordance with Provision II] [in a separate phase of the proceeding following bifurcation]; or

(c) 240 days after the last submission in all other cases.

2. A statement of costs and submission on the allocation of costs pursuant to Provision IX, paragraph 4 shall not be considered a submission for the purposes of paragraph 1.

3. When there are special circumstances justifying a delay, the Tribunal may, after advising the disputing parties of those circumstances [and after consulting with the disputing parties], extend the period of time in paragraph 1 and indicate a period of time within which it shall make the award.

[30] A/CN.9/1238, paras. 70–81. Annotations to SP VIII are found in A/CN.9/WG.III/WP.254, paras. 36–38.

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22. *The Commission may wish to retain only the first square-bracketed text in paragraph 1(a), as the second square-bracketed text is implicit (see the first bullet point in para. 9 above).*

23. *With regard to paragraph 1(b), the Working Group had agreed that the 180-day period would apply to the making of an award on an issue following bifurcation of that issue, which could include "a plea concerning jurisdiction, admissibility of a claim, and the calculation of damages".*[31] *The Commission may wish to consider aligning subparagraph (b) more closely with ICSID Rules 58(1)(b), which specifies that the time frame applies when the decision or award is rendered on preliminary objection on jurisdiction pursuant to ICSID Rules 44(3)(c). This can be done by adding the words "along with a plea that the Tribunal does not have jurisdiction" at the end of the subparagraph. Alternatively, the Commission may wish to consider listing the above-mentioned issues as examples of issues that can be bifurcated.*

24. *Considering that a decision or an award on the bifurcated issue need not necessarily be a final award, it is suggested that reference be made to "an" award instead of "the" award in paragraph 1(b) (see seventh bullet point in para. 9 above). The Commission may wish to also consider replacing the phrase "in accordance with Provision II" with "in a separate phase of the proceeding following bifurcation", which would clarify that the 180-day period commences with respect to the last submission on each of the bifurcated issue, possibly resulting in two separate decisions or awards.*

Provision IX: Allocation of costs[32]

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:

(a) The outcome of the proceeding or any parts thereof;

(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;

(c) The complexity of the issues;

(d) The reasonableness of the costs claimed by the disputing parties considering, among others, the work performed as well as the difference between the costs claimed by each party; and

(e) The amount of monetary damages claimed by a disputing party in proportion to the amount awarded by the Tribunal.

3. If the Tribunal makes an award pursuant to Provision IV, paragraph 5, the costs of the proceeding shall be borne by the unsuccessful party, unless there are exceptional circumstances justifying an allocation of costs between the disputing parties.

4. The Tribunal shall request that each disputing party file a statement of its costs and a written submission on the allocation of costs before allocating the costs between the disputing parties.

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[31] A/CN.9/1238, para. 75.

[32] A/CN.9/1239, paras. 16–38; A/CN.9/1124, paras. 120–124; A/CN.9/964, paras. 124–127. Annotations to the previous version of SP IX (in A/CN.9/WG.III/WP.253) are found in A/CN.9/WG.III/WP.254, paras. 39–46.

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5. Costs incurred by a disputing party that: (i) amount solely to a reward or bonus to its legal representatives based on the outcome of the proceeding and in excess of the remuneration of the work performed; or (ii) relate to or arise from third-party funding, shall not be included in the costs of the proceeding.

6. The Tribunal may, at the request of a disputing party or on its own initiative, make a decision on costs at any time.

7. The Tribunal shall ensure that all decisions on costs are reasoned and form part of an award.

Notes

25. *The Commission may wish to note that:*

- *The definition and scope of the term "costs" would be determined by the applicable rules, subject to paragraph 5, which provides an exception/exclusion;*
- *Provision XI(7) provides that a failure to disclose information with regard to third-party funding is a factor that can be considered by the Tribunal in allocating costs;*
- *Paragraph 2(d) and paragraph 5, item (i) address "success fees", broadly understood as fees payable to legal representatives based on the successful outcome of the proceeding;*
- *The chapeau of paragraph 5 refers to "costs" incurred by disputing parties instead of "expenses" to align with UARs 40(2);*
- *Paragraph 5, item (ii) is to be read in conjunction with Provision XI, which provides the definition of third-party funding. It does not exclude all costs borne or paid by the third-party funder. Only those costs incurred by the disputing party due to the third-party funding arrangement are excluded and discretion is left to the Tribunal to make a determination based on the standard of reasonableness.*

Provision X: Consolidation and coordination of arbitrations[33]

1. Parties to two or more pending arbitrations may agree to consolidate or coordinate those arbitrations.

2. Consolidation joins all aspects of the arbitrations sought to be consolidated and results in [one award] [an award that addresses all consolidated arbitrations].

3. Coordination aligns specific procedural aspects of two or more pending arbitrations, but the arbitrations remain separate proceedings and result in separate awards.

4. The parties referred to in paragraph 1 shall jointly provide the proposed terms for the conduct of the consolidated or coordinated arbitration to any tribunal constituted in the arbitration or any relevant institution. They shall also consult with those tribunals and institutions to ensure that the proposed terms are capable of being implemented. Such tribunals shall make any order or decision required to implement the terms as agreed by the parties.

Notes

26. *With regard to paragraph 2, the Commission may wish to consider replacing the phrase "one award" (ICSID Rules 46(2)) with "an award that addresses all consolidated arbitrations" to allow the Tribunal to make one or more awards, including partial awards (see seventh bullet point in para. 9 above).*

[33] A/CN.9/1239, paras. 61–63. Annotations to the previous version of SP X (in A/CN.9/WG.III/WP.253) are found in A/CN.9/WG.III/WP.254, paras. 52–55.

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27. *The Commission may wish to note that:*

- *Unlike other SPs which refer to "proceedings", Provision X refers to the consolidation and coordination of "arbitral proceedings" based on the consent of all disputing parties and thus includes the reference to "arbitrations(s)". Similarly, instead of the term "Tribunal", the term "tribunal(s)" is used in paragraph 4 to refer to the newly constituted arbitral tribunal handling the consolidated or coordinated arbitration, which might not necessarily be subject to the SPs;*
- *A treaty provision allowing for one of the disputing parties to seek consolidation would be developed at a later stage.*

Provision XI: Third-party funding[34]

1. "Third-party funding" means the direct or indirect provision of any funds to a disputing party by a non-party for the pursuit or defence of a proceeding, either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

2. A disputing party in receipt of third-party funding or that has entered into an arrangement to receive third-party funding (the "funded party") shall disclose to the Tribunal and the other disputing parties the following information:

(a) The name and address of the third-party funder (in case of a legal entity, the name of the person(s), who own or control that entity);

(b) The name and address of the [beneficial owner(s)] [effective beneficiary] of the third-party funder and any person(s) with decision-making authority for or on behalf of the third-party funder in relation to the proceeding;

(c) Whether the third-party funder agrees to pay any adverse decision on costs;

(d) Whether the third-party funder has any right to terminate the funding agreement;

(e) Whether the third-party funder has any right to make decisions regarding the management of the claim or the proceeding; and

(f) Whether the remuneration of the third-party funder is dependent on the outcome of the proceeding.

3. The funded party shall disclose the information listed in paragraph 2 to the other disputing parties, when the recourse to the proceeding is initiated or, if the funding arrangement is entered into afterwards, immediately thereafter. The funded party shall disclose the information listed in paragraph 2 to the Tribunal as soon as it is constituted or, if the funding arrangement is entered into afterwards, immediately thereafter.

4. Upon the request of a disputing party or on its own initiative, the Tribunal may, if it considers necessary, require the funded party to disclose, to the Tribunal and the other disputing parties, information such as:

(a) Further information regarding the funding agreement, including its terms;

(b) Information regarding any other agreement between the legal representative of the funded party and the third-party funder, including its terms; and

[34] A/CN.9/1239, paras. 66–97; A/CN.9/1194, paras. 82–93; A/CN.9/1124, paras. 125–143; A/CN.9/1004, paras. 79–94 and 97; A/CN.9/970, paras. 17–25; and A/CN.9/964, paras. 120, 126, 134 and 136. See also A/CN.9/WG.III/WP.263, paras. 114–118. Annotations to the previous version of SP XI (in A/CN.9/WG.III/WP.253) are found in A/CN.9/WG.III/WP.254, paras. 60–66.

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(c) The number of other proceedings funded by the third-party funder or its related entities against the respondent.

5. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the funded party shall disclose such information to the Tribunal and the other disputing parties as promptly as possible.

6. The Tribunal may[, after consulting with the disputing parties,] make public any information disclosed pursuant to paragraphs 2 to 5 in accordance with the applicable rules, and shall make arrangements to prevent any confidential or protected information from being made available to the public.

7. If the funded party fails to comply with the disclosure obligations in paragraphs 2 to 5, the Tribunal shall take any appropriate measure, such as:

(a) Order security for costs in accordance with Provision V, paragraphs 6 to 9;

(b) Take the failure into account when allocating costs in accordance with Provision IX; and

(c) Suspend the proceeding with respect to that party's claim in accordance with Provision VI, paragraphs 2 to 4. If the proceeding is suspended for more than 90 days, the Tribunal may[, after consulting with the disputing parties,] order the termination of the proceeding.

Notes

28. *With regard to paragraph 2(b), the Commission may wish to consider whether to replace the term "beneficial owner" with other terminology, for example, "effective beneficiary". The two terms are used interchangeably in different languages. It would be the funded party that would need to seek and obtain such information from the third-party funder.*

29. *The Commission may wish to note that:*

- *With regard to paragraph 2(e), the reference to the management of the "claim" in addition to the "proceeding" aims to capture situations where the third-party funder could influence, for example, which claims to settle and which to continue pursuing;*
- *Paragraph 3 addresses to whom the disclosure needs to be made and the time frames for such disclosure;*[35]
- *Paragraph 4 provides a non-exhaustive list of information that could be ordered for disclosure as guidance to the Tribunal. The Tribunal usually has the discretion to request disclosure of such information under the applicable rules.*[36] *It should be noted that when requiring disclosure under paragraph 4, the Tribunal would normally specify the time period within which the information should be disclosed;*
- *Flexibility is provided to the funded party in paragraph 5 by the words "as promptly as possible" (in contrast to "immediately" in paragraph 3), as the funded party might not always be in a position to be aware of new information or any change;*
- *In accordance with paragraph 6, information disclosed by the funded party could only be made public under the following conditions: (i) when so allowed under the applicable rules; (ii) after consultation with the disputing parties; and (iii) subject to measures to protect confidential and protected information;*

[35] A/CN.9/1239, para. 83.
[36] Ibid., para. 76.

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– *In paragraph 7, a non-exhaustive list of possible sanctions for non-compliance with disclosure obligations is provided. The Tribunal is "required" to take appropriate measures.*

30. *With regard to paragraph 7(a), the Commission may wish to confirm that security for costs may be ordered by the Tribunal on its own initiative. With regard to paragraph 7(c), the Commission may wish to note that the 90-day grace period before termination is the same as that provided for in Provision V(8) regarding non-compliance by a disputing party with an order to provide security for costs.*

III. Implementation of the Supplementary Provisions

31. The Commission may wish to adopt the SPs as a standalone set of provisions for use by disputing parties as well as by treaty parties. This would allow such parties to incorporate the SPs by reference as needed. For example, parties could refer to the SPs in their investment contracts and State parties to an investment treaty could refer to the SPs in a future treaty (for existing treaties, see section A below).

32. For this purpose, the SPs have been prepared in a generic manner to be applicable to different types of circumstances, without the need for adjustments. They are provided as a set of provisions, which need to be opted into in their entirety and not on an individual basis. However, the extent to which parties may vary or deviate from the SPs may merit further consideration.

33. The following outlines the possible options for implementing the SPs with a view to facilitating parties' consent to their application.

A. Protocol to the multilateral instrument on ISDS reform

34. It would be possible to make the SPs applicable to investment disputes under existing treaties through a mechanism akin to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which makes the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") applicable to investor-State arbitration under investment treaties concluded before 1 April 2014. The MIIR being prepared by the Working Group would aim to provide such a mechanism. The latest version of the MIIR is available in document A/CN.9/WG.III/WP.246.

35. The application of the SPs to any given treaty would be subject to the consent of the treaty parties. It is envisaged that a State could consent to the application of the SPs, by first becoming a party to the MIIR, then becoming a party to the Protocol containing the SPs, and indicating the treaties that would be modified through a notification mechanism.

36. The Working Group has yet to consider the final form and structure of the MIIR but the following provides an illustration of how the Protocol on the SPs could be formulated to apply to existing treaties. The Working Group has yet to consider whether and how the remaining provisions on cross-cutting issues would be included in the same protocol or in a separate protocol.

PROTOCOL

Article 1

By ratifying or acceding to this Protocol, a Party expresses its consent that the UNCITRAL Supplementary Provisions on the Conduct of Proceedings to Resolve International Investment Disputes (the "Supplementary Provisions") shall apply to any international investment dispute proceeding initiated pursuant to an investment treaty listed in its notification in accordance with article ** of the Convention.

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Article 2

1. Until the other treaty party submits a notification with regard to the same investment treaty, the notification by the Party shall be deemed to constitute a [unilateral] offer to apply the Supplementary Provisions to proceedings under that investment treaty.

2. This offer may be accepted by the other treaty party through a corresponding notification under the Convention.

3. This offer may also be accepted by a claimant initiating proceedings under the same treaty through a written confirmation, unless objected to by the other treaty party.

4. Upon acceptance of the offer, the Supplementary Provisions shall apply to proceedings under that investment treaty. For greater certainty, an investment treaty listed in the notification shall be modified to include the Supplementary Provisions as set out in this Protocol.

Article 3

Relationship with the treaty provisions

In the event of any inconsistency between the Supplementary Provisions and the provisions of the investment treaty listed in the notification, the Supplementary Provisions shall prevail.

Relationship with the applicable arbitration rules referred to in the investment treaty

For greater certainty, any procedural rules incorporated by reference into the investment treaty listed in the notification, including the applicable arbitration rules, shall apply only to the extent that such rules are not inconsistent with the Supplementary Provisions.

B. Incorporation into the UNCITRAL Arbitration Rules

37. The UARs are a widely used procedural framework for both ad hoc and administered arbitrations and reflect developments in arbitral practice. They are often chosen by treaty parties and disputing parties to apply to investment arbitration proceedings. Therefore, it should be possible for parties to agree to the application of the UARs as complemented by the SPs.

The Transparency Rules approach

38. One possibility is to follow the approach taken with regard to the Transparency Rules in UARs 1(4). Under article 1(4) of the UARs, the application of the Transparency Rules is automatic, provided that the conditions therein are met. They apply to treaty-based investor-State arbitration pursuant to a treaty providing for the protection of investments or investors. Their application is further subject to article 1 of the Transparency Rules, which addresses the scope of application. There is no need for a separate or express agreement of the disputing parties to the Transparency Rules as long as they have agreed to the UARs (the 2013 or 2021 versions). The Transparency Rules are also available for use in investor-State arbitrations initiated under rules other than the UARs (article 1(9) of the Transparency Rules).

39. To take this approach, the Commission may wish to consider the conditions under which the SPs would apply, including whether their application should be limited to investor-State arbitration under “investment treaties” or whether it should extend more broadly, for example, to disputes under investment contracts and domestic legislation. A provision similar to article 1 of the Transparency Rules detailing the scope of application of the SPs (including the temporal scope, possible

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opt-out and conflicts) may need to be developed. For example, where the relevant treaty was concluded on or after 1 April 2014, the Transparency Rules apply by default when the UARs are chosen, unless the treaty parties opt out. In the case of the SPs, they could apply, for example, to treaties concluded on or after 1 April 2027, if the scope is limited to investment treaties.

40. This could be done by adding a new paragraph in article 1 of the UARs to read:

> "6. […], these Rules include the UNCITRAL Supplementary Provisions on the Conduct of Proceedings to Resolve International Investment Disputes [subject to …]."

41. The UARs with the new paragraph would come into effect on a specific date to be determined. Parties wishing to apply the UARs and the SPs could expressly agree to the [2026] version of the UARs. In accordance with UARs 1(2), parties to arbitration agreements concluded after 15 August 2010 would be presumed to have referred to the [2026] version, unless they opted to apply a particular version of the UARs. The Commission may wish to consider whether it should be possible for the parties to choose to apply the SPs without the Transparency Rules and vice versa.

The Expedited Arbitration Rules approach (Appendix to the UARs)

42. Another possibility is to incorporate the SPs into the UARs following the approach taken with the Expedited Arbitration Rules (EARs) in UARs 1(5). The EARs form an appendix to the UARs and only apply where the parties so agree. This approach avoids the automatic application of the SPs under certain conditions and leaves their application entirely to the express consent of the disputing parties. This approach was taken in the EARs as the consent of the parties was considered crucial in applying the streamlined and simplified procedure with shorter time frames. The agreement of the parties to apply the EARs is considered a modification to the UARs allowed under UARs 1(1).

43. This approach avoids the need to elaborate the conditions upon which the SPs would apply and leaves such determination entirely to the disputing parties. The disputing parties would need to agree to the UARs and also explicitly to the SPs for the latter to apply.

44. This approach could be adopted by adding a new paragraph in article 1 of the UARs to read:

> "6. The UNCITRAL Supplementary Provisions on the Conduct of Proceedings to Resolve International Investment Disputes in [the appendix] shall apply to arbitration where the parties so agree."

Revisions of the UARs incorporating the Supplementary Provisions

45. Another approach for the Commission to consider would be to task a Working Group to conduct further review of the UARs in light of the Supplementary Provisions (possibly after the adoption of the SPs by the Commission in principle) and to consider whether they should be incorporated into the UARs either by revising the relevant articles and/or adding new articles. This might result in a broader revision of the UARs. Such an approach would affect the manner in which the SPs are ultimately implemented, as a new version of the UARs could be adopted to apply not only to ISDS but also to other types of arbitration. In that context, the Commission may wish to ensure that the text of the Supplementary Provisions is preserved in the ISDS context.

Interaction between the articles of the UARs and the SPs

46. The SPs, which have been prepared as treaty provisions, are generic in nature and are intended to interact with different types of applicable rules. They have also been drafted to align with the UARs introducing new features specific to ISDS. The SPs do not include specific cross-references to the articles of the UARs, except for in

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Provision II(1), which is suggested for revision. When the UARs apply, reference to the "applicable rules" in the SPs would mean the UARs.

47. The following table indicates how the SPs would supplement or displace specific articles of the UARs.

Supplementary Provisions	*Interaction with UARs*
I – Evidence	Replaces UARs 27, and 30(3) and includes new features
II – Bifurcation	New – clarifies discretionary power under UARs 17 and 23
III – Interim measures	Replaces UARs 26
IV – Manifest lack of legal merit	New – clarifies discretionary power under UARs 17
V – Security for costs	New – clarifies discretionary power under UARs 17, 26 and 42
VI – Suspension of the proceeding	New
VII – Termination of the proceeding	New
VIII – Period of time for making the award	New
IX – Allocation of costs	Replaces UARs 42
X – Consolidation and coordination of arbitrations	New
XI – Third-party funding	New

48. The UARs are designed around broad tribunal discretion (UARs 17) and a high degree of party autonomy (UARs 1(1)). Many procedural matters are thus not expressly regulated. Within this architecture, several SPs operate as clarifications of discretionary powers of the Tribunals. Other SPs respond to areas in which the UARs are silent and introduce targeted procedural tools to provide for greater clarity. Other SPs are intended to replace existing articles of the UARs, providing additional clarity and guidance. To the extent possible, these SPs have been prepared in line with the UARs, only departing from the text of the UARs in a few instances to cater for ISDS.

49. In any case, it would be necessary to indicate that the SPs shall prevail over the UARs should both be applicable. To clarify this point, it could be stated that when the SPs apply, articles 27, 30(3), 26 and 42 of the UARs would not be applicable.

C. Application of the SPs to arbitrations not governed by the UARs

50. It would be possible for disputing parties to apply the SPs to arbitration not governed by the UARs, if the parties wish to do so. This would allow the disputing parties to benefit from the ISDS-targeted provisions developed by UNCITRAL, while retaining their preferred choice of institutional arbitration rules.

51. The SPs have been prepared to function primarily in an ad hoc setting. Parties wishing to benefit from institutional support and accompanying rules may choose the rules of those institutions, most of which allow the parties to modify the rules as they agree. In practice, this would mean that the disputing parties could agree to the preferred arbitration rules as complemented by the SPs (for example, in an investment contract), to the extent permitted by and compatible with those arbitration rules. This may also relate to the institutional oversight foreseen in those rules with regard to time frames and scrutiny of awards.

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52. To take this approach, it may be necessary to clarify the relationship between the applicable arbitration rules and the SPs. Should the applicable rules not address the same procedural matter, the SPs could fill the gap and complement the applicable rules. Should the applicable rules already address the same procedural matter, a conflict rule may be developed (or agreed by the parties) indicating which rules would prevail in the case of any incompatibility. Considering that the SPs have been prepared in the context of ISDS and that the parties have chosen to apply the SPs, it would make sense for the SPs to prevail in those cases.

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