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Compilation of comments on the draft supplementary provisions on the conduct of proceedings to resolve international investment disputes (A/CN.9/1246)

The present note reproduces comments received from International Centre for Settlement of Investment Disputes (ICSID) on the draft supplementary provisions on the conduct of proceedings to resolve international investment disputes (A/CN.9/1246). The submission received on 23 June 2026 is reproduced below in the form in which they were received, with minor formatting and editorial adjustments.

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Introduction

1. The ICSID Secretariat appreciates the opportunity to submit written comments for the consideration of States participating in the Commission considering the draft supplementary provisions on the conduct of the proceedings to resolve international investment disputes (“SP”s). These comments build on our written comments of 16 January 2024 and 29 November 2024, as well as the oral comments ICSID has made at the sessions of Working Group III from the outset.

2. Having administered more than 1100 investment arbitrations to date, including almost 200 cases under the 2022 ICSID Arbitration Rules, ICSID’s observations are based on practical experience with administering ISDS cases. They are also informed by ICSID’s comprehensive procedural reforms which took place from 2016 to 2022 and resulted in the 2022 ICSID Arbitration Rules which have now been in force for approximately 4 years. Feedback from users so far has been positive.

3. As noted by the UNCITRAL Secretariat (A/CN.9/WG.III/WP.244), the SPs were prepared to closely align with the 2022 ICSID Arbitration Rules and to supplement the UNCITRAL Arbitration Rules. They were intended to clarify and enhance rules governing ISDS proceedings, while also seeking to harmonize approaches on key procedural issues.

4. The SPs under consideration all overlap with a rule or rules in the 2022 ICSID Arbitration Rules. The goal of these comments is to share ICSID’s experience implementing the 2022 ICSID Arbitration Rules and to highlight how they compare with the SPs as articulated in A/CN.9/1246.

Comments on Draft Supplementary Provisions

SP I: Evidence

5. SP I and ICSID Rules 36-40 address issues related to evidence. Evidence is also addressed in Articles 27-29 of the UNCITRAL Arbitration Rules. Generally speaking, the existing ICSID and UNCITRAL Arbitration Rules contain more detailed provisions than SP I.

6. Whilst these frameworks overlap, they are not identical. For example, the ICSID Arbitration Rules contain a framework for tribunal-appointed experts, which can also be found in the UNCITRAL Arbitration Rules but not the SPs. In addition, while all grant the tribunal the power to determine the admissibility and probative value of evidence, only the SPs expressly include a provision (SP I(8)) requiring tribunals to exclude documents improperly obtained or the use of which is prohibited under the applicable law. Under the ICSID Rules, the decision to exclude a document is left to the discretion of the tribunal.

SP II: Bifurcation

7. The 2022 ICSID Arbitration Rules distinguish between requests for bifurcation of preliminary objections (AR 44), and all other requests for bifurcation (AR 42) which most often consist of a request to bifurcate the liability phase from quantum. Preliminary objections include objections to jurisdiction and admissibility of the claim.

8. The ICSID Rules separate bifurcation into two distinct rules because preliminary objections must be raised early in the process if they are to be bifurcated. Rule 44(1) states that unless the parties agree otherwise, the request for bifurcation shall be filed 45 days after the filing of the Memorial on the Merits. This default time limit for requests relating to preliminary objections was meant to make the timing of these requests more predictable, thus enhancing procedural efficiency.

9. The SPs only have one rule to address bifurcation, and it does not contain a default time limit. The practical consequence of this may be that it is less predictable

whether and when a request for bifurcation will be filed, which may result in a delay and increased cost.

10. To date, there have been 51 Decisions on Bifurcation under the 2022 ICSID Arbitration Rules. The vast majority relate to preliminary objections under AR 44. Seventeen of the 51 decisions on bifurcation granted bifurcation in whole or in part.

SP III: Interim Measures

11. The ICSID provisions relating to provisional measures can be found at Article 47 of the ICSID Convention and Rule 47 of the 2022 ICSID Arbitration Rules. SP III closely aligns with Rule 47, which itself was inspired by Article 26 of the UNCITRAL Rules.

12. SP III(2) mirrors AR 47(1) on the possible types of measures.

13. Unlike SP III(3), AR 47(3) does not contain any standard such as "irreparable harm," or a "risk thereof," or "harm not adequately reparable by an award of damages," as these notions have not been uniformly adopted in investment cases and may not be suitable in every circumstance. Rule 47(3) does, however, specify that the tribunal must consider all the circumstances and imposes the requirements of urgency and necessity, which have uniformly been required in cases to date.

SP IV: Manifest lack of legal merit

14. A provision on manifest lack of legal merit was first introduced into the ICSID Rules in 2006. In 2022, Rule 41 clarified that an objection for manifest lack of legal merit can relate not only to the substance of a claim, but also to jurisdiction, and added detail on the procedure.

15. SP IV largely aligns with ICSID Arbitration Rule 41(1), but SP IV(2) adds that the tribunal may admit an objection on this basis after the 45-day deadline if it considers that the delay is justified. Under the ICSID Rules, a party can raise an objection after the expiration of the time limit, but it will be examined under the regular standard for a preliminary objection, not under Rule 41(1).

16. ICSID has had two Awards and five Decisions on Rule 41 under the 2022 ICSID Arbitration Rules. An award under Rule 41 disposes of the case because all claims manifestly lacked legal merit, while a decision means not all claims were disposed of under that standard.

SP V: Security for Costs

17. SP V is modelled on ICSID Arbitration Rule 53.

18. Prior to the 2022 ICSID Arbitration Rules, there was no express provision on security for costs in the ICSID Rules and security for costs orders were treated as provisional measures. Security for costs orders were of special concern to States to ensure compliance with costs awards.

19. Provisions on security for costs are now included in a stand-alone rule. Rule 53 requires that the tribunal consider all relevant circumstances and in particular the ability to pay, the willingness to comply with an adverse costs decision, the effect that security for costs would have on the pursuit of the claim or counterclaim, and the conduct of the parties.

20. Under the 2022 ICSID Arbitration Rules, the mere existence of third-party funding ("TPF") does not justify ordering security for costs. However, pursuant to AR 53(4), the existence of TPF is to be considered as evidence in the tribunal's assessment of the relevant circumstances justifying security for costs. Several tribunals have found that a claimant's lack of adequate assets, coupled with TPF and the funder's lack of liability for adverse costs, warranted security for costs. They found that ordering security for costs did not raise unsurmountable access to justice concerns, especially given the funder's support. Therefore, when neither the claimant

nor the funder can prove their ability to pay a potential adverse costs award, tribunals have ordered security for costs. Also of note is that in at least one ICSID case where the claimant did not comply with the security for costs order, the case was discontinued.

21. To date, ICSID has had 10 Decisions on security for costs under the 2022 ICSID Arbitration Rules. Some tribunals found that requests for security for costs should no longer be treated as provisional measures, and that the case law-based requirements, in particular urgency and irreparable harm, for provisional measures are therefore inapplicable. The legal standard is therefore developing toward a slightly lower threshold for security for costs than what used to be the case when security for costs was considered a provisional measure.

22. Finally, we note that SP V provides that the tribunal shall suspend the proceeding with respect to a party's claim for a fixed period of time if that party fails to comply with an order to provide security for costs. The use of the word "shall" as opposed to "may" which is used in Rule 53, does not appear to give the tribunal any discretion. Suspension of the proceeding is not always ideal, as it automatically suspends all time limits unless the parties agree otherwise.

SP VI: Suspension

23. SP VI is partially modelled on ICSID Arbitration Rule 54, yet it does not address certain scenarios covered by the ICSID Rules, including the period after a case is registered but before the tribunal is constituted. Under the ICSID Rules, it is the Secretary-General that has the authority to suspend proceedings by agreement of the parties during that time.

24. Although these safeguards are tailored to the ICSID context and may not be suitable for other frameworks, they underscore the importance of envisaging situations arising prior to the constitution of the tribunal and more generally highlight the importance of adopting a complete set of rules that fit together.

SP VII: Termination

25. SP VII is based in part on ICSID Rules 55-57. As with suspension, SP VII does not envisage termination before the constitution of the tribunal, save for in the event the disputing parties fail to act. Under the ICSID Rules, the Secretary-General steps in to terminate the proceedings in certain situations, including before the tribunal is constituted or when there is a vacancy on the tribunal. SP VII addresses some, but not all, of the scenarios covered by the ICSID Rules. It is thus unclear how the proceedings would be terminated under SP VII in certain instances in the absence of a tribunal (other than by agreement of the parties).

SP VIII: Timing of the Award

26. One of ICSID's main objectives in amending the ICSID Rules was to reduce time and costs.

27. ICSID Arbitration Rule 12 requires tribunals to use their best efforts to meet certain time limits to issue orders, decisions and the award. If the tribunal cannot comply with an applicable deadline, it must advise the parties of the special circumstances justifying the delay and the date when it anticipates rendering the ruling. If the tribunal does not comply, ICSID may withhold paying the arbitrators, but the delay does not affect the validity or enforceability of the eventual award.

28. The time limits in SP VIII mirror those in ICSID Arbitration Rule 58. SP VIII prescribes that arbitrators "shall" meet these time limits. However, there appears to be some flexibility in SP VIII(3), which, mirroring ICSID Rule 12, adds that when there are special circumstances justifying the delay, a tribunal may, after consulting with the parties, extend the time periods and indicate when it will render the award. SP VIII does not address non-compliance by the arbitrators with their obligation under this provision and how it may affect the award.

SP IX: Costs

29. Under Article 61(2) of the ICSID Convention, the tribunal has full discretion in the allocation of costs. Tribunals decide on the allocation of costs based on a number of factors that were introduced in ICSID Arbitration Rule 51(2) based on case law.

30. There is no presumption that the unsuccessful party bears the costs (as is the case in the UNCITRAL Rules and in SP IX), except where an award is rendered pursuant to AR 41(3) (manifest lack of legal merit). This was added at the request of many States.

31. ICSID has had two Awards under Rule 41(3) where the tribunals found that the claims manifestly lacked legal merit. In both cases, the tribunal allocated costs in accordance with AR 52(2) and awarded them to the respondent, which was the prevailing party.

SP X: Consolidation and Coordination

32. The 2022 ICSID Arbitration Rules include a provision on the coordination and consolidation of proceedings. It was designed to ensure that like cases are decided in a like manner and as cost-effectively as possible.

33. In the amendment process, the ICSID Secretariat proposed both voluntary and mandatory consolidation provisions. However, mandatory consolidation did not garner consensus.

34. Voluntary consolidation under the ICSID Rules leads to one award and is therefore only available for two or more ICSID Convention cases or two or more AF cases, not for proceedings administered under other rules or by other institutions. Coordination, by contrast, aligns procedural aspects of one or more arbitrations (possibly under different procedural rules) and results in separate awards. If one of the cases being coordinated is an ICSID Convention or an AF case, the coordinated cases would need to be administered by ICSID.

SP XI: Third-Party Funding

35. The 2022 ICSID Arbitration Rules introduced Rule 14, which requires disclosure of third-party funding. Rule 14 is intended to address any potential conflict of interest arising out of a relationship between an arbitrator and a funder.

36. Rule 14 requires both disputing parties to file a written notice of TPF as soon as the request for arbitration is registered, or immediately upon securing TPF if that happens later in the proceeding. Only the name and address of the funder and persons owning or controlling them (in case of a juridical person) must be disclosed. SP XI includes wider disclosure obligations for funders, requiring not only the names of persons who own or control the third-party funder, but also the name and address of the beneficial owner of the third-party funder.

37. At the end of May 2026, third-party funding was disclosed in approximately 14% of all arbitrations registered under the 2022 ICSID Arbitration Rules.

38. There have not been any instances where a party has suggested that the other party is failing to disclose TPF. However, there have been instances where more information was requested from the party that disclosed having TPF. Under the ICSID Rules, the tribunal may order the disclosure of such additional information and some tribunals have done so.

39. Unlike Rule 14, SP XI includes sanctions if a party fails to comply with disclosure obligations, including suspension or termination of the proceeding, ordering security for costs, or considering non-compliance when allocating costs.

Form and Implementation

40. Working Group III embarked on drafting procedural provisions to create consistency, coherence, and uniformity of procedural rules.

41. These objectives demand broad coverage in ISDS cases. Over 92% of known ISDS cases proceed under ICSID or UNCITRAL Rules. The UNCITRAL Arbitration Rules, as currently drafted, lack key safeguards introduced in the 2022 ICSID Arbitration Rules, including mandatory disclosure of third-party funding and stand-alone provisions on security for costs. This creates real asymmetries in procedural protections. Any approach that does not update the UNCITRAL Arbitration Rules leaves a critical gap.

42. ICSID has consistently recommended that procedural provisions such as the SPs be adopted as rules, rather than as treaty text. The UNCITRAL Secretariat has proposed different approaches to the form and implementation of the SPs. Taken individually, each of the proposed solutions may not provide the widespread procedural reform the Working Group set out to achieve.

43. This is why ICSID supports a comprehensive, hybrid, two-track approach:

Track 1 – Update the UNCITRAL Arbitration Rules by integrating the SPs into an updated version of the UNCITRAL Arbitration Rules for use in investor-State disputes. Updating the UNCITRAL Arbitration Rules for ISDS cases need not be a difficult exercise because in drafting the SPs, Working Group III has done the majority of the work. What remains is to integrate the SPs into the existing UNCITRAL Arbitration Rules so that they are adapted to the needs of ISDS cases.

Track 2 – Adopt a protocol to the Multilateral Instrument on ISDS Reform (“MIIR”) that refers to the UNCITRAL Arbitration Rules updated for ISDS cases. Such a protocol would allow States that wish to update their existing treaties through the MIIR, rather than through bilateral negotiations, the opportunity to do so. The application of the updated UNCITRAL Arbitration Rules would be activated by the consent of treaty parties to: (i) the MIIR; (ii) the protocol; and (iii) a listing of the treaties to be amended.

44. Alternatively, and if there is no consensus in the Working Group to update the UNCITRAL Arbitration Rules for ISDS disputes with the SPs, a protocol to the MIIR could simply refer to the standalone text of the SPs. The problem with this approach is that the SPs do not constitute a full set of procedural rules (like the 2022 ICSID Arbitration Rules or the UNCITRAL Arbitration Rules) and other applicable arbitral rules would still need to apply to situations that are not covered by the SPs. Clear conflict rules would need to be developed if the SPs were to be implemented in this manner and not through an update of the UNCITRAL Arbitration Rules.

45. In addition, it is critical that any protocol to the MIIR on the conduct of the proceedings should only refer to rather than reproduce the SPs as treaty text. Keeping the SPs outside of treaty text – as a reference rather than embedded provisions – preserves the flexibility to modernize them as arbitral practice evolves, through a rules-amendment process rather than a cumbersome treaty amendment process.

46. This two-track approach best meets the objectives of the reform. Updating the UNCITRAL Arbitration Rules directly harmonizes the rules governing the majority of ISDS cases, closing the current gap with the ICSID Rules and reducing incentives for rules-shopping. It is an important and essential first step and would achieve a significant part of the objectives of the reform. Coupling this with the possibility for States to sign on to a protocol to the MIIR referencing the updated UNCITRAL Arbitration Rules or, in the alternative, the SPs, would even more fully achieve the goals of Working Group III because it would also allow them to update existing treaties. Together these tracks would best achieve a consistent, coherent and durable procedural framework for ISDS.

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