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Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules

Note by the Secretariat

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I. Explanatory note to the UNCITRAL Expedited Arbitration Rules

1. Expedited arbitration is a streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner ([A/CN.9/969](#), para. 14). The UNCITRAL Expedited Arbitration Rules (hereinafter the “Expedited Rules”) provide a set of rules which parties may agree for expedited arbitration. The Expedited Rules balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and fair treatment.

[Note to the Commission: The Commission may wish to confirm that the references to previous reports of the Working Group need not appear in the final version of the explanatory note.]

2. Article 1(5) of the UNCITRAL Arbitration Rules (hereinafter the “UARs”) incorporates the Expedited Rules, which are presented as an appendix to the UARs. The phrase “where the parties so agree” in that paragraph emphasizes the need for the parties’ consent for the Expedited Rules to apply to the arbitration.

3. In the following, any reference to “article(s)” is to that in the Expedited Rules, unless otherwise expressly indicated.

A. Scope of application

Article 1

4. Article 1 provides guidance on when the Expedited Rules apply ([A/CN.9/1010](#), para. 23). Express consent of the parties is required for the application of the Expedited Rules ([A/CN.9/1010](#), paras. 21 and 27).

5. Parties are free to agree on the application of the Expedited Rules at any time even after the dispute has arisen (see model arbitration clause in the annex) ([A/CN.9/1010](#), para. 24). For example, parties that had concluded an arbitration agreement or had initiated arbitration under the UARs before the effective date of the Expedited Rules can subsequently refer their dispute to arbitration under the Expedited Rules ([A/CN.9/1003](#), para. 31). Likewise, a party may propose to the other party or parties that the Expedited Rules shall apply to the arbitration ([A/CN.9/1043](#), para. 18).

6. However, parties should be mindful of the consequences when changing from non-expedited to expedited arbitration ([A/CN.9/1010](#), para. 32). For example, a notice of arbitration communicated in accordance with article 3 of the UARs might not meet the requirements in article 4 of the Expedited Rules, whereby the claimant has to communicate proposals for the designation of an appointing authority and for the appointment of a sole arbitrator. Therefore, it would be prudent for the parties to agree on how such requirements could be met, should they agree to refer their dispute to arbitration under the Expedited Rules after the proceedings had begun. Similarly, if a three-member arbitral tribunal was constituted in accordance with the UARs, the parties need to agree whether to preserve the three-member tribunal (which is possible under article 7) or to appoint a sole arbitrator in accordance with article 8 ([A/CN.9/1010](#), paras. 50 and 54). If the constitution of the tribunal is changed, the parties may also need consider the status of statements and evidence submitted to the former tribunal.

[Note to the Commission: While paragraph 6 provides useful guidance, the Commission may wish to consider whether to retain it in the explanatory note, as it could inadvertently prevent parties from considering expedited arbitration due to the complications mentioned therein.]

7. Article 1 indicates that the UARs generally apply to expedited arbitration, unless and as modified by the Expedited Rules ([A/CN.9/1010](#), para. 23). The phrase “as

modified by these Expedited Rules” means that rules in the UARs and the Expedited Rules need to be read in conjunction for the proper conduct of the proceedings. The rules in the UARs are either supplemented or replaced by those in the Expedited Rules. For the avoidance of doubt, the footnote to article 1 provides a list of articles in the UARs that would not apply in the context of expedited arbitration. However, parties retain the flexibility to tailor the rules to their proceedings (A/CN.9/1043, para. 17).

8. As the Expedited Rules are presented as an appendix to the UARs, reference to “these Rules” in the UARs (see articles 1(3), (4), 2(6), 4(2), 6(3), (4), (5), 10(3), 17(1), (2), 30(1), (2), 32 and 41(4)(b) of the UARs) include the Expedited Rules in the context of expedited arbitration.

9. In relation to article 1(2) of the UARs, parties to an arbitration agreement concluded before the entry into force of the Expedited Rules will not be presumed to have referred their dispute to the Expedited Rules, even though the Expedited Rules are presented as an appendix to the UARs. This is because the Expedited Rules only apply when so agreed by the parties (A/CN.9/1003, para. 25; A/CN.9/1010, para. 28; A/CN.9/1043, para. 57).

Article 2

10. Even when the parties had initially agreed to refer their dispute to arbitration under the Expedited Rules, the circumstances may be such that the Expedited Rules are not appropriate to resolve the particular dispute. Article 2 addresses such circumstances, with paragraph 1 allowing parties to agree to withdraw from expedited arbitration.

11. In accordance with paragraph 2, a party that had agreed to refer the dispute to arbitration under the Expedited Rules may subsequently request withdrawal from expedited arbitration, when the circumstances evolved in a manner that would make expedited arbitration no longer suitable for resolving the dispute (A/CN.9/1010, para. 36). While there is no time limit within which a party can request withdrawal (A/CN.9/1003, para. 49; A/CN.9/1010, para. 39), the arbitral tribunal should consider at which stage of the proceedings the request is being made (see para. 13 below).

12. The phrase “in exceptional circumstances” means that the party requesting withdrawal should provide convincing and justified reasons for the request and that the arbitral tribunal should uphold the request only in limited circumstances (A/CN.9/1043, para. 44). It introduces a high threshold for allowing a unilateral withdrawal from expedited arbitration.

13. When making the determination, the arbitral tribunal should consider whether the Expedited Rules are no longer appropriate for the resolution of the dispute (A/CN.9/1043, paras. 41, 46 and 49). It may wish to take into account, among others, the following:

- The urgency of resolving the dispute;
- The stage of the proceedings at which the request is made;
- The complexity of the dispute (for example, the anticipated volume of documentary evidence and the number of witnesses);
- The anticipated amount in dispute (the sum of claims made in the notice of arbitration, any counterclaim made in the response thereto as well as any amendment or supplement);

The terms of the parties’ agreement to expedited arbitration and whether the current circumstances could have been foreseeable at the time of the agreement; and

- The consequences of the determination on the proceedings.

14. The above is a non-exhaustive list of elements that can be taken into account (A/CN.9/1003, paras. 49 and 50; A/CN.9/1010, para. 46; A/CN.9/1043, para. 43) and it would not be necessary for the arbitral tribunal to consider all the elements therein.

15. When making the determination, the arbitral tribunal, in accordance with article 17(1) of the UARs, may decide that the Expedited Rules in their entirety would no longer apply or that certain provisions would no longer apply to the arbitration (A/CN.9/1010, para. 48; A/CN.9/1043, para. 39).

[Note to the Commission: The Commission may wish to consider whether to retain paragraph 15 in the explanatory note. While it reflects the flexibility inherent in the UARs and the Expedited Rules, uncertainties could arise whether after such a determination, the arbitration is being conducted under the UARs or the Expedited Rules.]

16. If the arbitral tribunal is not yet constituted, the determination would need to be made after it is constituted. However, if the parties are not able to reach an agreement on the arbitrator or if there is a disagreement between the parties on (i) whether the Expedited Rules apply or (ii) whether the criteria in the arbitration agreement triggering the application of the Expedited Rules are met, the appointing authority may be involved in constituting the arbitral tribunal in accordance with article 10(3) of the UARs (A/CN.9/1003, para. 33; A/CN.9/1010, para. 25). The appointing authority will make a prima facie decision on whether the arbitration would be conducted under the Expedited Rules. However, the ultimate determination on the application of the Expedited Rules would be left to the arbitral tribunal (A/CN.9/1010, para. 41).

17. When the Expedited Rules no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall conduct the arbitration in accordance with the UARs. However, this does not mean that the arbitral tribunal, if already constituted, would have to be re-constituted in accordance with the UARs (A/CN.9/1043, para. 54). Instead, the arbitral tribunal shall remain in place in accordance with paragraph 3. There may, however, be instances where the parties agree to replace any arbitrator or reconstitute the arbitral tribunal (A/CN.9/1003, paras. 44 and 51; A/CN.9/1010, para. 50; A/CN.9/1043, paras. 51 and 52). There may also be instances where an arbitrator resigns, for example, if the arbitrator appointed under the Expedited Rules believes that his or her schedule of future commitments does not allow for the conduct of non-expedited arbitration (A/CN.9/1043, para. 53).

18. Unless the arbitral tribunal decides otherwise, the non-expedited proceeding should resume at the stage where the expedited proceeding was when the parties agreed to withdraw or the arbitral tribunal made the determination (A/CN.9/1010, para. 50). Decisions made during the expedited proceeding should remain applicable to the non-expedited proceedings, unless the arbitral tribunal decides to depart from its earlier decisions or from a decision made by the previous tribunal (A/CN.9/1043, para. 54).

B. General provision on expedited arbitration

19. Considering that a fair and efficient resolution of the dispute is a common goal of arbitration under both the UARs and the Expedited Rules, article 3 highlights the expeditious nature of the proceedings under the Expedited Rules and emphasizes the obligation of the parties and the arbitral tribunal to act expeditiously (A/CN.9/1003, paras. 78 and 112; A/CN.9/1043, para. 27).

20. Paragraph 1 is a reminder to parties that when referring their dispute to arbitration under the Expedited Rules, they are agreeing to cooperate in ensuring the efficiency of the proceeding as well as for a swift resolution of the dispute, particularly in an ad hoc setting where there is no administering institution to further expedite the process (A/CN.9/1043, paras. 27 and 29).

21. Paragraph 2 should be read along with article 17(1) of the UARs. Therefore, arbitral tribunals in expedited arbitration have the same duty to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process to resolve the dispute.

22. Arbitral tribunals, when conducting arbitration under the Expedited Rules, should be mindful of the objectives of the Expedited Rules, of the parties' intentions and expectations when they chose the Expedited Rules and of the time frames therein, in particular that in article 16 for the rendering of the award. The annex to the Expedited Rules includes a model statement which parties could request the arbitrator to add to the statement of independence. The model statement highlights that the arbitrator would conduct the arbitration expeditiously and in accordance with the time frames in the UARs and the Expedited Rules.

23. Designating and appointing authorities as well as arbitral institutions administering arbitration under the Expedited Rules should also be mindful of the objectives of the Expedited Rules as well as any applicable time frames (see para. 58 below) (A/CN.9/1043, para. 31, 33 and 35).

24. Paragraph 3 emphasizes the discretion provided to the arbitral tribunal to make use of a wide range of technological means to conduct the proceeding, including when communicating with the parties and when holding consultations and hearings. It also mentions that consultations and hearings can be held without the physical presence of the parties as well as remotely. The inclusion of such a rule in the Expedited Rules does not imply that the use of technological means is available to arbitral tribunals only in expedited arbitration (A/CN.9/1043, para. 96). The rule aims to assist the arbitral tribunal in streamlining the proceedings and avoiding unnecessary delay and expense, both of which are in line with the objectives of expedited arbitration. The arbitral tribunal should be mindful that the use of technological means is subject to the rules in the UARs to provide for a fair proceeding and to give each party a reasonable opportunity to present its case. In that light, the arbitral tribunal should give the parties an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties.

C. Notice of arbitration, response thereto, statements of claim and defence

Article 4

25. Article 4 addresses the initiation of recourse to arbitration by the claimant and modifies articles 3(4) and 20(1) of the UARs.

26. Two elements, which are optional under article 3(4) of the UARs, are required in the notice of arbitration. This is to facilitate the speedy constitution of the arbitral tribunal in expedited arbitration. In accordance with paragraph 1, the claimant is required to propose an appointing authority (unless the parties have previously agreed thereon) and the arbitrator. It is important for the claimant to include such information in its notice of arbitration because the 15-day time frames in articles 6 and 8 begin with the receipt by the respondent of the respective proposals.

27. A proposal for the appointment of the arbitrator does not mean that a party needs to put forward the name of the arbitrator; rather, a party may suggest a list of suitable candidates or qualifications, or a mechanism to be used by the parties for agreeing on the arbitrator. This would also cater for cases where the parties agreed to more than one arbitrator in expedited arbitration (A/CN.9/1043, para. 64).

28. To further expedite the process, paragraph 2 requires the claimant to communicate its statement of claim along with its notice of arbitration. This modifies the rule in article 20(1) of the UARs, which provides that the statement of claim should be communicated within a period of time to be determined by the arbitral tribunal.

29. In summary, when initiating recourse to expedited arbitration, the claimant needs to include the following in its notice of arbitration and the statement of claim:

- A demand that the dispute be referred to arbitration (UARs art. 3(3)(a));
- The names and contact details of the parties (UARs arts. 3(3)(b) and 20(2)(a));
- Identification of the arbitration agreement that is invoked (UARs art. 3(3)(c)) and a copy thereof (UARs art. 20(3));
- Identification of any contract or other legal instrument out of or in relation to which the dispute arises (UARs art. 3(3)(d)) and a copy thereof (UARs art. 20(3)) – in the absence of such contract or instrument, a brief description of the relevant relationship (UARs art. 3(3)(d));
- A brief description of the claim and an indication of the amount involved, if any (UARs art. 3(3)(e));
- The relief or remedy sought (UARs arts. 3(3)(f) and 20(2)(d));
- A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon (UARs art. 3(3)(g));
- A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon (Expedited Rules art. 4(1)(a));
- A proposal for the appointment of an arbitrator (Expedited Rules art. 4(1)(b));
- A statement of the facts supporting the claim (UARs art. 20(2)(b));
- The points at issue (UARs art. 20(2)(c));
- The legal grounds or arguments supporting the claim (UARs art. 20(2)(e)); and
- As far as possible, all documents and other evidence relied upon by the claimant, or references to them (UARs art. 20(4)).

30. In light of article 7 which provides a default rule of a sole arbitrator, the claimant would not need to propose the number of arbitrators in its notice of arbitration, unless it wishes to suggest the constitution of an arbitral tribunal of more than one arbitrator ([A/CN.9/1010](#), para. 57, [A/CN.9/1043](#), para. 75).

31. With respect to the last item on the above list, the objective is to require the presentation of the complete case for the sake of efficiency. It does not, however, mean that all evidence has to be communicated at this stage, which may be burdensome and counterproductive. This is highlighted by the words “as far as possible” and the claimant may decide to make reference to the evidence to be relied upon ([A/CN.9/1003](#), paras. 81 and 101; [A/CN.9/1043](#), para. 63). For example, witness statements need not be submitted at this stage. The claimant could instead identify in its statement of claim: (i) any witness whose testimony it would rely on; (ii) the subject matter of the testimony; and (iii) any subject matter for which the claimant intends to submit expert reports ([A/CN.9/1043](#), paras. 62 and 103). It would be preferable to determine which evidence is to be submitted during the consultation between the arbitral tribunal and the parties (see para. 62 below).

32. The claimant may elect to treat its notice of arbitration as its statement of claim, as long as the notice of arbitration complies with the requirement of the statement of claim (see second sentence of article 20(1) of the UARs). In that case, the claimant would be communicating a single document combining its notice of arbitration and statement of claim.

33. Paragraph 3 requires the claimant to communicate its notice of arbitration and statement of claim to the arbitral tribunal as soon as it is constituted. In the case that the arbitral tribunal consists of more than one arbitrator, the claimant would, in practice, communicate its notice of arbitration and statement of claim to each of the arbitrators upon his or her appointment.

Article 5

34. Article 5 addresses the actions required by the respondent upon receipt of a notice of arbitration and a statement of claim from the claimant. It envisages a two-stage reply with a shorter time frame for the response to the notice of arbitration (hereinafter the “response”) and a longer one for the statement of defence. This is to facilitate the speedy constitution of the tribunal and to provide sufficient time for the respondent to prepare its case (A/CN.9/1043, paras. 67 and 68).

35. The respondent is required to communicate a response within 15 days of the receipt of the notice. Article 5(1) thus modifies article 4(1) of the UARs, which provides for a 30-day time frame (A/CN.9/1010, paras. 55 and 56; A/CN.9/1043, para. 68). A shorter time frame is imposed on the response, as it addresses procedural issues, in particular those relating to the constitution of the arbitral tribunal.

36. The response shall respond to the information set forth in the notice of arbitration. As article 4(1) of the Expedited Rules requires a claimant to include in its notice of arbitration proposals on an appointing authority and the appointment of the arbitrator, the respondent is required to include a response to those proposals. If the respondent disagrees with the proposals, the respondent is free to make its own proposals in accordance with article 4(2)(b) and (c) of the UARs (A/CN.9/1043, para. 70).

37. In summary, the respondent would need to provide, within 15 days of the receipt of the notice of arbitration, the following in the response:

- The name and contact details of each respondent (UARs art. 4(1)(a));
- A response to the information set forth in the notice of arbitration, pursuant to article 3(3)(c) to (g) of the UARs (UARs art. 4(1)(b)); and
- A response to the information set forth in the notice of arbitration, pursuant to article 4(1)(a) and (b) of the Expedited Rules (Expedited Rules art. 5(1)).

38. To provide the respondent with sufficient time to prepare its statement of defence and to ensure equality of the process, the respondent has 15 days from the constitution of the arbitral tribunal to communicate its statement of defence (A/CN.9/969, para. 71; A/CN.9/1003, para. 81; A/CN.9/1010, para. 56). Article 5(2) introduces a 15-day time frame in contrast to article 21(1) of the UARs, which provides that the statement of defence shall be communicated within a period of time to be determined by the arbitral tribunal. If the respondent requests for additional time, the arbitral tribunal may extend the 15-day time frame in accordance with article 10.

39. The respondent may, of course, elect to treat its response to the notice of arbitration as its statement of defence, as long as the response complies with the requirement of article 21(2) of the UARs (see second sentence of article 21(1) of the UARs).

D. Designating and appointing authorities

40. The appointing authority has a significant role in expediting the proceedings, especially with regard to the constitution of the arbitral tribunal. Therefore, it is important that the parties agree on the choice of an appointing authority (see model arbitration clause, paragraph (a)). When the parties have not agreed on that choice, article 6 of the Expedited Rules provides a mechanism for the Secretary-General of the Permanent Court of Arbitration (PCA) to designate an appointing authority or to serve as one, both of which would lead to an earlier engagement of the appointing authority.

41. Article 6(1) simplifies the process provided for in article 6(2) of the UARs by allowing a party to request the Secretary-General of the PCA to serve as the

appointing authority. It provides a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the PCA.

42. The process is accelerated by allowing any party to engage with the Secretary-General of the PCA any time after 15 days have lapsed from the receipt by all parties of a proposal on an appointing authority. In practice, this means that a claimant that has included in its notice of arbitration a proposal for an appointing authority in accordance with article 4(1) is able to make the request to the Secretary-General of the PCA 15 days after the receipt of the notice by the respondent.

43. It should, however, be noted that article 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the proposal for an appointing authority. Therefore, it would be prudent for the claimant to consider such response before engaging the Secretary-General of the PCA. In any case, the Secretary-General of the PCA in exercising its functions under article 6(1) would be required to give the parties an opportunity to present their views, including any proposals on the appointing authority.

44. Similar to article 6(1), article 6(2) modifies article 6(4) of the UARs and allows a party to request the Secretary-General of the PCA to designate a substitute appointing authority or to serve as one, where the appointing authority refuses or fails to act. However, this would not be possible when the Secretary-General of the PCA is already serving as the appointing authority.

45. Paragraph 3 provides a level of discretion to the Secretary-General of the PCA to address practical questions that could arise, for example, (i) when a party has previously rejected or rejects a proposal for the Secretary-General of the PCA to serve as appointing authority; (ii) when a party requests the Secretary-General of the PCA to serve as appointing authority and the other party requests it to serve as designating authority; and (iii) when a party requests the Secretary-General of the PCA to either designate an appointing authority or to serve as an appointing authority.

46. Paragraphs 1, 3, 5, 6 and 7 of article 6 of the UARs continue to apply to expedited arbitration ([A/CN.9/1043](#), para. 73).

E. Number of arbitrators

47. Article 7 provides that an arbitral tribunal composed of a single arbitrator is the default rule in expedited arbitration ([A/CN.9/969](#), paras. 37–38; [A/CN.9/1003](#), paras. 53 and 55; [A/CN.9/1043](#), para. 75). As such, article 7(1) of UARs is replaced by article 7 of the Expedited Rules. Parties, however, can agree on more than one arbitrator, in light of the particulars of the dispute and if collective decision-making is preferred ([A/CN.9/969](#), para. 40; [A/CN.9/1003](#), para. 53). However, they should be mindful that proceedings involving an arbitral tribunal composed of more than one arbitrator may be less expeditious (see para. 59 below).

48. When the parties have referred their dispute to arbitration under the Expedited Rules and there is no separate agreement on the number of arbitrators, the appointing authority should not have any role in determining that number ([A/CN.9/1003](#), paras. 54 and 55) and should appoint a sole arbitrator in accordance with articles 7 and 8. While the appointing authority may make a prima facie decision on whether the arbitration is to be conducted under the Expedited Rules, the ultimate determination on the application of the Expedited Rules would be left to the arbitral tribunal (see para. 16 above) ([A/CN.9/1010](#), para. 41).

49. Article 7(2) of the UARs continues to apply in expedited arbitration when the parties agreed to constitute the arbitral tribunal with more than one arbitrator.

F. Appointment of the arbitrator

50. Article 8 addresses how a sole arbitrator is to be appointed in expedited arbitration. If the parties agreed on more than one arbitrator, articles 9 and 10 of the UARs apply (A/CN.9/1003, paras. 64–65; A/CN.9/1010, para. 67).

51. Paragraph 1 encourages the parties to reach an agreement on the sole arbitrator (A/CN.9/1003, para. 57).

52. Paragraph 2 provides a mechanism in the absence of an agreement by the parties on a sole arbitrator. Any party may request the engagement of the appointing authority 15 days after a proposal for the appointment of a sole arbitrator has been received by all other parties. This is shorter than the 30-day time frame in article 8(1) of the UARs. The involvement of the appointing authority can only be triggered by a request by one of the parties.

53. Considering that the claimant is required to include a proposal for the appointment of a sole arbitrator in the notice of arbitration (see article 4(1) and para. 27 above), if there is no agreement within 15 days after the respondent's receipt of the notice of arbitration, the claimant would be able to make a request to the appointing authority, if previously agreed by the parties. If a proposal is not included in the notice, the 15-day time frame would commence when a proposal is made.

54. It should, however, be noted that article 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the claimant's proposal of a sole arbitrator. Therefore, it would be prudent for the claimant to consider the response before engaging with the appointing authority. If the respondent foresees that an agreement cannot be reached (A/CN.9/1003, paras. 60 and 62; A/CN.9/1010, para. 61), it could also engage with the appointing authority at the same time it communicates the response to the notice of arbitration.

55. If there is no agreement by the parties on the appointing authority and the sole arbitrator 15 days after the receipt of the notice by the respondent, any party may request the Secretary-General of the PCA to designate the appointing authority or to serve as appointing authority in accordance with article 6(1). In the latter case, a party can also request the appointment of a sole arbitrator in accordance with article 8(2), which would likely facilitate a speedy constitution of the arbitral tribunal.

56. Article 8(2) of the UARs, which mentions a list-procedure for the appointment of a sole arbitrator, also applies to expedited arbitration (A/CN.9/1010, para. 62).

57. In exercising the functions under the Expedited Rules, the appointing authority and the Secretary-General of the PCA should be mindful of article 6(5) of the UARs, which requires them to give the parties and, where appropriate, the arbitrators an opportunity to present their views (A/CN.9/1043, para. 73). Any proposal made by the parties on the appointment of a sole arbitrator should thus be taken into account.

58. When appointing an arbitrator for expedited arbitration, the appointing authority shall make an effort to secure not only an independent and impartial arbitrator in accordance with article 6(7) of the UARs but also an arbitrator who is available and ready to conduct the arbitration expeditiously in accordance with article 3(2) of the Expedited Rules.

59. The time frames in article 9 of the UARs on the constitution of a three-member arbitral tribunal apply to expedited arbitration. However, parties may wish to reduce the time frames therein to expedite the constitution of a three-member arbitral tribunal (A/CN.9/1003, paras. 61 and 64; A/CN.9/1010, para. 68; A/CN.9/1043, para. 79; A/CN.9/1049, para. 31).

G. Consultation with the parties

60. Consultation between the arbitral tribunal and the parties at an early stage of the proceedings is particularly key to an efficient and fair organization of expedited arbitration (A/CN.9/1043, para. 81).

61. Article 9 requires the arbitral tribunal to consult the parties on how to organize the proceedings and mentions that one way would be through a case management conference (A/CN.9/1003, para. 75; A/CN.9/1010, paras. 82 and 85). A case management conference can be an important procedural tool, particularly in expedited arbitration, as it permits an arbitral tribunal to give parties a timely indication as to the organization of the proceedings and the manner in which it intends to proceed (A/CN.9/969, para. 56).

62. A number of issues could be discussed during consultations so as to create a basis for a common understanding of the proceedings, for example: (i) a list of points at issue including those that need to be addressed with priority; (ii) the need for further written statements and evidence; (iii) whether and how to conduct further consultations as well as hearings, including whether they would be in person or using technological means, including remotely; (iv) other procedural issues as well as the timetable. Similarly, the parties could indicate the witnesses that they will present to testify as well as the content of their testimony.

63. Article 9 introduces a short time frame within which the tribunal should consult the parties as it is useful for this to be done at the very early stages of the proceedings (A/CN.9/969, para. 62; A/CN.9/1003, para. 71; A/CN.9/1010, paras. 83 and 85). The arbitral tribunal should conduct the consultation with the parties promptly after and within 15 days of its constitution. In certain cases, the respondent might not yet have communicated its statement of defence as it is to be communicated within 15 days of the constitution of the arbitral tribunal (see article 5(2)). Nonetheless, it would be useful for the arbitral tribunal to consult the parties at an early stage based on the notice of arbitration, response thereto as well as the statement of claim. Upon receipt of the statement of defence from the respondent, the arbitral tribunal may decide to hold further consultations with the parties, particularly if agreement on a provisional timetable has been deferred pending the arbitral tribunal's review of the statement of defence or if the agreed timetable requires an update following such review (A/CN.9/1049, para. 32).

64. Consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication as provided for in article 3(3) (A/CN.9/969, para. 63; A/CN.9/1003, para. 74; A/CN.9/1010, para. 85). Considering that sufficient flexibility is provided to the arbitral tribunal, it should not be burdensome to meet the 15-day time frame in article 9 (A/CN.9/1003, para. 74).

65. In accordance with article 17(2) of the UARs, the arbitral tribunal should establish the provisional timetable. In so doing, the tribunal should be mindful of the time frames in the Expedited Rules, in particular those in article 16 (A/CN.9/1003, para. 73; A/CN.9/1010, para. 84). Similarly, following the consultations, the arbitral tribunal should communicate to the parties the outcome of the consultations to ensure that the parties are fully aware of the time frames and avoid delays.

H. Time frames and the discretion of the arbitral tribunal

66. Article 10 addresses the discretion of the arbitral tribunal with regard to time frames in expedited arbitration. It should be read along with the second sentence of article 17(2) of the UARs.

67. As such, article 10 clarifies that the arbitral tribunal may extend or abridge any period of time prescribed under the UARs and the Expedited Rules or agreed by the parties (A/CN.9/1003, para. 79; A/CN.9/1043, para. 91). Even after a time frame has been fixed in accordance with article 10, flexibility is provided to adjust the time

period when the adjustment is justified (A/CN.9/969, para. 52). However, this discretion is subject to a specific rule in article 16, as the extension of the period for rendering the award is possible only in exceptional circumstances and is further restricted by a maximum overall time frame of 9 months (see paras. 87-89 below).

68. Article 10 clarifies and reinforces the discretionary power of the arbitral tribunal to adapt the proceedings to the circumstances of the case, further limiting the risk of challenges at the enforcement stage (A/CN.9/969, para. 50; A/CN.9/1010, para. 95). In other words, it provides the arbitral tribunal with a robust mandate to act decisively without fearing that its award could be set aside for a breach of due process.

69. While shorter time frames constitute one of the key characteristics of expedited arbitration, arbitral tribunals should endeavour to preserve the flexible nature of the proceedings and comply with due process requirements (A/CN.9/1003, para. 77).

70. With regard to the consequences of non-compliance by the parties with the time frames, article 30 of the UARs on default applies to expedited arbitration (A/CN.9/1003, para. 80, A/CN.9/1043, para. 92). With regard to late submissions, considering that flexibility is provided to the arbitral tribunal in setting and modifying time frames, the arbitral tribunal can reject or disregard such submissions, while such discretion should be exercised with care (A/CN.9/969, para. 69; A/CN.9/1043, para. 92).

I. Hearings

71. Article 11 emphasizes the discretionary power of the arbitral tribunal to not hold hearings in expedited arbitration in the absence of a request by any party. It should be read together with article 17(3) of the UARs, which provides that: (i) the arbitral tribunal shall hold hearings if any party so requests at an appropriate stage of the proceedings; and (ii) in the absence of such a request, the arbitral tribunal shall decide whether to hold hearings. Parties themselves may agree to hold hearings, in which case that agreement is binding on the arbitral tribunal.

72. A hearing may cause delays particularly if the scheduling of the parties and the arbitral tribunal need to be coordinated. A hearing may be useful, however, when witness testimony and expert opinions are critical for the tribunal's decision-making. Moreover, a direct exchange between the parties and the tribunal at a hearing (whether in person or remotely) may facilitate a better understanding of the case and make the proceedings more efficient.

[Note to the Commission: The Commission may wish to consider whether to retain paragraph 72 as it does not pertain specifically to expedited arbitration.]

73. Considering the short time frame of six months for rendering the award in expedited arbitration, the arbitral tribunal may wish to decide at an early stage of the proceedings whether to hold hearings (A/CN.9/1010, para. 110). A request to hold a hearing at a later stage may delay the proceedings and may have a negative impact on the arbitral tribunal complying with that time frame.

74. As parties have a right to request the holding of a hearing, article 11 requires the arbitral tribunal to invite the parties to express their views on whether hearings are to be held. This may also be done during the consultation with the parties (see para. 62 above). If a party so requests at that stage, the arbitral tribunal would need to hold a hearing in accordance with article 17(3) of the UARs. In the absence of such a request prior to and during the consultation, the arbitral tribunal may go ahead and decide to not hold hearings.

75. This means that the proceedings shall be conducted on the basis of documents and other materials. A request by a party to hold a hearing after a decision by the arbitral tribunal to not hold one can be denied as the request would no longer be considered as being made at "an appropriate stage of the proceedings" (see

article 17(3) of the UARs). Article 11 thus has the effect of limiting the time frame during which requests for holding hearings can be made.

76. As provided for in article 3(3) of the Expedited Rules and article 28(4) of the UARs, the arbitral tribunal may utilize any technological means to hold hearings without the physical presence of the parties or witnesses, including remotely. The remaining paragraphs of article 28 of the UARs also apply to the conduct of hearings in expedited arbitration (A/CN.9/1003, para. 97). The arbitral tribunal has a broad discretion on how to conduct the hearings in a streamlined manner (A/CN.9/969, para. 65, A/CN.9/1003, paras. 80 and 99; A/CN.9/1010, para. 111). Efforts should be made to limit the duration of the hearings (A/CN.9/1043, para. 95), the number of witnesses as well as cross-examination (A/CN.9/969, paras. 75 and 82; A/CN.9/1003, para. 97; A/CN.9/1010, para. 111) and at the same time, to maintain a fair process.

J. Counterclaims and claims for the purpose of set-off

77. Article 12 preserves the right of the parties to make counterclaims and claims for the purpose of set-off (hereinafter referred to as “counterclaims”), but introduces certain qualifications, which can be lifted by the arbitral tribunal (A/CN.9/1003, para. 88; A/CN.9/1010, para. 97). This is to ensure that counterclaims do not result in delays in expedited arbitration.

78. Article 12 replaces article 21(3) of the UARs and introduces a higher threshold for counterclaims. Paragraph 1 requires the respondent to make any counterclaim at the latest in its statement of defence (A/CN.9/1010, para. 98). A counterclaim can be made at a later stage of the proceedings, but only when the arbitral tribunal considers it appropriate under the circumstances.

K. Amendments and supplements to a claim or defence

79. Article 13 replaces article 22 of the UARs. It introduces a higher threshold for parties to make amendments and supplements to a claim or defence, including a counterclaim or a claim for the purposes of set-off (hereinafter referred to as “amendments”) in the context of expedited arbitration. Nonetheless, it provides flexibility in its application to different circumstances (A/CN.9/1049, paras. 40-41). Accordingly, a party is not allowed to make amendments unless the arbitral tribunal considers it appropriate to allow such amendments. When determining whether to allow amendments, the arbitral tribunal should take into account at which stage of the proceedings such a request for the amendment is made, prejudice to other parties in allowing the amendment and any other circumstances.

80. Counterclaims and amendments might result in the expedited arbitration no longer being appropriate for resolving the dispute. In such a circumstance, parties may agree that the Expedited Rules shall no longer apply to the arbitration or a party may request the arbitral tribunal to determine that the Expedited Rules shall no longer apply in accordance with article 2 (A/CN.9/1010, para. 100).

L. Further written statements

81. Article 14 reinforces the discretionary power of the arbitral tribunal under article 24 of the UARs to limit further written statements (A/CN.9/1010, para. 102). It clarifies that the arbitral tribunal may decide that the statement of claim and the statement of defence are sufficient and that no further written statements are required from the parties. It should, however, not be interpreted that the arbitral tribunal does not have such discretion under article 24 of the UARs.

M. Evidence

82. Article 15 clarifies the discretionary power of the arbitral tribunal with regard to taking of evidence in expedited arbitration. Article 27(3) of the UARs provides that the arbitral tribunal may require the parties to produce documents and other evidence during the proceedings. The first sentence of article 15(1) clarifies that the arbitral tribunal may decide which documents or other evidence are to be produced by the parties. The second sentence reaffirms the discretionary power of the arbitral tribunal to reject a request for a document production stage, which can lead to unjustified delays (A/CN.9/1010, para. 103; A/CN.9/1043, para. 104; A/CN.9/1049, para. 44). The inclusion of article 15(1) in the Expedited Rules should, however, not be interpreted as meaning that the arbitral tribunal does not have such discretion under article 27(3) of the UARs.

83. Article 15(2) provides that in expedited arbitration, statements by witnesses shall be presented in “written” form and signed by them (A/CN.9/1003, para. 100; A/CN.9/1010, para. 105). Paragraph 2 thus replaces the second sentence of article 27(2) of the UARs. While the rules for meeting the requirements of “in writing” and “signature” through electronic communication vary depending on the jurisdiction, it should be noted that article 9(2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts provides a functional equivalence rule (A/CN.9/1043, para. 103).

N. Making of the award

84. Article 16 provides a 6-month time frame for making the award and a mechanism for extending that time frame in exceptional circumstances (A/CN.9/969, para. 49; A/CN.9/1003, para. 103). The 6-month time frame for rendering the award commences with the constitution of the tribunal (A/CN.9/1003, para. 104; A/CN.9/1010, paras. 85–87, 89, 92, 112 and 116) and parties are free to agree on a time frame different from that in paragraph 1 (A/CN.9/1003, para. 103; A/CN.9/1043, para. 109).

85. Paragraph 2 provides the possibility for the arbitral tribunal to extend the time period in paragraph 1. Whereas article 10 provides general discretion to the arbitral tribunal to extend or abridge any period of time prescribed under the Expedited Rules, article 16(2) specifically authorizes the arbitral tribunal to extend the time frame for rendering the award, but only in exceptional circumstances (A/CN.9/1003, para. 106; A/CN.9/1010, para. 117). It would be up to the tribunal to determine whether the circumstances are exceptional or not. While the arbitral tribunal should generally indicate the reasons when extending the time period, paragraph 2 does not expressly require them in order to provide flexibility to the arbitral tribunal, particularly when the extended period is rather short to finalize the award.

86. Considering that in certain jurisdictions, extension of the time frame could only be granted upon the agreement or consent of the parties or by an entity other than the arbitral tribunal (A/CN.9/1003, para. 107; A/CN.9/1010, para. 120), paragraph 2 underlines that parties, by agreeing to the application of the Expedited Rules, are granting the arbitral tribunal the authority to extend the time period in paragraph 1 (A/CN.9/1043, para. 107).

87. Paragraph 3 provides that the maximum overall time frame, including any extended period, should be no longer than 9 months from the constitution of the arbitral tribunal. This responds to the expectations of the parties that an award would be rendered within a short time period, one of the key features of expedited arbitration. Paragraph 3, however, does not impose limitations on the number of extensions within the overall time frame and parties are free to agree on a different time frame (A/CN.9/1049, para. 54).

88. Parties and the arbitral tribunal should, however, be mindful of the consequence when the 9-month time frame lapses. Depending on the applicable law, this may result in the termination of the proceedings or an annulment of the award rendered after that period. If it is foreseen that an award cannot be rendered within the 9-month time frame, the arbitral tribunal should alert the parties, upon which the parties may agree to a period exceeding nine months. It may also be possible for a party to request that the Expedited Rules no longer apply to the arbitration pursuant to article 2(2). This would be particularly useful if one of the parties intentionally delays the proceedings as well as the issuance of the award within the time frame and does not agree to an extension. In such a case, the arbitral tribunal should be able to promptly determine that the Expedited Rules, including article 16(3), no longer apply to the arbitration before the lapse of the 9-month time frame. If the parties agree on a period exceeding 9 months or the arbitral tribunal determines that the Expedited Rules would no longer apply to the arbitration, the proceedings could continue and the arbitral tribunal would be able to render an award even after 9 months from the date of its constitution.

89. Should the parties wish to avoid the consequences of the lapse of time frame in article 16(3) and want to provide flexibility to the arbitral tribunal, they may consider inserting in their arbitration agreement paragraph (d) of the model arbitration clause found in the annex, that article 16(3) does not apply to the arbitration. The parties may also wish to consider whether the applicable law provides other solutions, for example, by allowing the parties to involve the local courts for a possible extension of the time frame.

90. Article 16 should be read together with article 34 of the UARs, in particularly paragraph 3. Unless the parties have agreed that no reasons are to be given, arbitral tribunals in expedited arbitration shall state the reasons upon which the award is based. Requiring the arbitral tribunal to provide a reasoned award can assist its decision-making and ensure fairness as the parties will find that their arguments have been duly considered and would be aware of the basis upon which the award was rendered (A/CN.9/969, paras. 85–86; A/CN.9/1003, para. 110; A/CN.9/1010, para. 121). The absence of reasoning in an award may impede any control mechanism, as the court or other competent authority would not be in a position to consider whether there are grounds for setting aside the award or refusing its recognition and enforcement.

O. Model arbitration clause for expedited arbitration

91. The annex to the Expedited Rules contains a model arbitration clause for parties to include in their arbitration agreement to agree to expedited arbitration under the Expedited Rules.

92. The model arbitration clause also notes that the parties should agree on the appointing authority, the place and the language of arbitration. Furthermore, it invites the parties to consider whether to lift the overall maximum time frame for rendering the award provided in article 16(3).

93. When considering whether to refer their dispute to arbitration under the Expedited Rules, the parties should take into account, among others, the following elements;

- The urgency of resolving the dispute;
- The complexity of the transactions and the number of parties involved;
- The anticipated complexity of the dispute;
- The anticipated amount of the dispute;
- The financial resources available to the party in proportion to the expected cost of the arbitration;
- The possibility of joinder or consolidation; and

- The likelihood of an award being rendered within the time frames provided in article 16 of the Expedited Rules.

P. The Expedited Rules and the Transparency Rules

94. The suitability of the Expedited Rules for investment arbitration is a question left to the disputing parties, as express consent of the parties is required for the Expedited Rules to apply (see paras. 2, 4 and 5 above). States could refer to and consent to the Expedited Rules in their respective investment treaty, based on which an investor claimant may consent to refer a dispute under the Expedited Rules. However, a reference to the UARs in investment treaties (regardless of whether the reference was included prior to or after the effective date of the Expedited Rules) would not be construed as consent by the State Parties to the Expedited Rules.

95. According to article 1(4) of the UARs, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) form part of the UARs. Article 1 of the Transparency Rules addresses the applicability of the Transparency Rules to “investor-State arbitration initiated under the UNCITRAL Arbitration Rules”. As the Expedited Rules are presented as an appendix to the UARs, an investor-State arbitration initiated under the Expedited Rules should be considered as being initiated under the UARs and therefore, the Transparency Rules could apply.

96. If the investor-State arbitration is initiated pursuant to an investment treaty concluded before 1 April 2014, the Transparency Rules would only apply when the disputing parties have agreed to their application or the States Parties to the treaty have agreed to their application after 1 April 2014. Therefore, even if the disputing parties agree to the application of the Expedited Rules, the proceedings would not be subject to the Transparency Rules unless above-mentioned conditions are met.

97. If the investor-State arbitration is initiated pursuant to an investment treaty concluded on or after 1 April 2014, the Transparency Rules would apply unless the States Parties to the treaty have agreed otherwise. In other words, if States Parties to the treaty have not agreed otherwise and the disputing parties agree to the application of the Expedited Rules, the proceedings would be subject to the Transparency Rules.

98. Parties that have agreed to refer an investor-State dispute to arbitration under the Expedited Rules may agree that the Transparency Rules shall not apply to the arbitration. For example, States could include a reference to the Expedited Rules in their investment treaties, while opting out of the Transparency Rules, for example, by making a reference to (i) the 2010 version of the UARs as modified by the Expedited Rules or (ii) the Expedited Rules without article 1(4) of the UARs.

99. However, the flexibility for the disputing parties to opt out of the Transparency Rules in investor-State arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014 which includes a reference to the UARs will be restricted, if the States Parties to that treaty have not opted out of the Transparency Rules. For example, if two States conclude a treaty after 1 April 2014 allowing an investor to refer a dispute to the UARs and the States have not opted out of the Transparency Rules, it would not be possible for a claimant investor and the respondent State to agree to the Expedited Rules without being subject to the Transparency Rules.

Q. Early dismissal and preliminary determination

100. Early dismissal, a tool for arbitral tribunals to dismiss claims and defences that lack merit and preliminary determination, a tool that would allow a party to request the arbitral tribunal to decide on one or more issues or points of law or fact without undergoing every procedural step (A/CN.9/969, paras. 20 and 21; A/CN.9/1003, paras. 82–87; A/CN.9/1010, paras. 122–129) could improve the overall efficiency of arbitration (A/CN.9/1010, para. 123). The use of such tools would be within the inherent power of the arbitral tribunals under article 17(1) of the UARs. As long as

such tools are utilized with caution to avoid adding another stage in the proceedings, they could usefully expedite the proceedings.

[Note to the Commission: At its seventieth and seventy-first sessions, Working Group II considered the provisions on early dismissal and preliminary determination (A/CN.9/969, paras. 20 and 21; A/CN.9/1003, paras. 82–87; A/CN.9/1010, paras. 122–129) without prejudice to the decision by the Working Group on whether those provisions would be included in the Expedited Rules or would apply more generally to arbitration under the UARs (A/CN.9/1003, para. 87; A/CN.9/1010, para. 122). One view was that providing such tools explicitly in the Expedited Rules could make it easier for the tribunals to utilize them and could discourage frivolous claims by parties (A/CN.9/1003, para. 85; A/CN.9/1010, para. 123). The latest formulation of the provision on early dismissal and preliminary determination is available in document A/CN.9/WG.II/WP.216 (see paras. 76–81).

Recalling the previous deliberations and the divergence in views on whether such a provision should be placed in the Expedited Rules (A/CN.9/969, paras. 20 and 116; A/CN.9/1003, paras. 83 and 84; A/CN.9/1010, para. 124), the Working Group, at its seventy-third session, decided to not include such a rule in the Expedited Rules. This was also based on the fact that views had been expressed that the appropriate placement of such a rule would be in the UARs (A/CN.9/1003, para. 87; A/CN.9/1010, para. 122; A/CN.9/1049, para. 58).

The Commission may wish to recall that at its fifty-third session, it had requested the Working Group to consider how the Expedited Rules could be presented in connection with the UARs.¹ Considering the support that had been expressed for providing arbitral tribunals with tools to dismiss non-meritorious claims and defences as well as to make preliminary determinations, the Working Group made a suggestion to the Commission that it be mandated to consider and develop such a rule for possible inclusion in the UARs at its next session (A/CN.9/1049, para. 59).]

¹ Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17 (A/75/17), part two, para. 29.

R. Time frames in the Expedited Rules

The following provides an overview of the different time frames in the Expedited Rules. In the “time frame” column, “A + number (days(d)/months(m))” indicates “within” the number of days/months from stage A (in certain cases, receipt thereof).

<i>Time frame</i>	<i>Stages of the proceedings and procedural actions</i>	<i>Relevant articles</i>
A	Notice of arbitration (including a proposal for the designation of an appointing authority (A1) and the appointment of a sole arbitrator (A2)) to the respondent	Expedited Rules 4(1)
A+0d	Statement of claim to the respondent	Expedited Rules 4(2)
B	A+15d Response to the notice of arbitration (including responses to A1 and A2) to the claimant	Expedited Rules 5(1)
C	15d after A1 or any proposal If no agreement on the appointing authority, any party may request the Secretary-General of PCA to designate appointing authority or to serve as appointing authority.	Expedited Rules 6(1)
D	15d after A2 or any proposal If no agreement on the arbitrator, any party may request the appointing authority to appoint the sole arbitrator → Appointing authority to appoint as promptly as possible	Expedited Rules 8(2)
E	Constitution of the tribunal	Expedited Rules 8; UAR 8 & 9
E+0d	Claimant to communicate its notice of arbitration & statement of claim to the tribunal (as soon as it is constituted)	Expedited Rules 4(3)
E+15d	Consultation with the parties through a case management conference or otherwise (promptly after and within 15 days) Establishment of a provisional timetable (as soon as practicable)	Expedited Rules 9 UAR 17(2)
F	E+15d Respondent to communicate its statement of defence to the claimant and the tribunal (possible extension)	Expedited Rules 5(2); 10
F+0d	Counterclaim or a claim for purposes of set-off to be included in the statement of defence (permitted at a later stage, if tribunal considers that it appropriate)	Expedited Rules 12
G	E+6m Making of the award	Expedited Rules 16(1)
E+9m	Possible extension of the time period for making of the award	Expedited Rules 16(2) & (3)