



ANY REPLY OR SUBSEQUENT REFERENCE SHOULD BE ADDRESSED TO THE FINANCIAL
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June 13, 2019

Ref No: 164/011

Ms. Meg Kramer,
The Secretary General
The International Centre for the Settlement of Investment Disputes
1818 H St. NW
Washington, D.C. 20433
United States of America

Dear Ms. Kramer,

**Re: Proposed Amendment to International Centre for the Settlement of Investment Disputes
Rules and Regulations – ICSID Rule Amendment Project**

Reference is made to the exchange of correspondence between the International Centre for the Settlement of Investment Disputes (ICSID) and the Government of Jamaica (GOJ) over the period January 17, 2019 to date regarding the Proposed Amendment of the ICSID Rules and Regulations. Following Jamaica's participation in the Webinar held on May 21, 2019, during which the relevant Working Paper No. 2 was discussed, Jamaica hereby submits its comments for incorporation as outlined below:

**COMMENTS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN
STATES AND NATIONALS OF OTHER STATES (ICSID CONVENTION)**

The Government of Jamaica (GOJ) notes that the scope of the ICSID Rule Amendment project is specifically in relation to the Rules and Regulations and does not include amendments to the ICSID Convention. We wish to highlight, however, one (1) particular issue which may require amendment to the Convention in the future. The matter has been outlined as follows:

Article 1 (1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides: "There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre)". Article 1.(2) further provides that the purpose of the said Centre shall be to "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention." Article 1 (2) could be interpreted as confining the purpose of the Centre to the provision of facilities only in respect of conciliation and arbitration. However, the proposed amendments to the Rules make provision for other methods of alternative dispute settlement such as mediation and fact finding. The ambit or scope of the proposed amendments is therefore wider than what is stated in Article 1 (2) of the Convention.

For consistency, it is therefore recommended that the provision dealing with the stated purpose of the Centre should also be amended to include the other forms of alternative dispute settlement in addition to conciliation and arbitration.

It is recommended that the provision in Article 1 (2) be rephrased in the following manner:

Article 1

(2) the purpose of the Centre shall be to provide facilities for conciliation, arbitration and other forms of alternative dispute resolution of investment disputes between contracting states and nationals of the other contracting states in accordance with the provisions of the convention;

OR

Article 1

(2) the purpose of the Centre shall be to provide facilities for conciliation, arbitration and other alternative methods of settlement of investment disputes between contracting states and nationals of the other contracting states in accordance with the provisions of the convention.

COMMENTS ON THE RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Chapter X - Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 65 (Submission of Non-disputing Party) and Rule 66 (Participation of Non-disputing Treaty Party)

The proposed deletion of **Rule 65(4) (c)** by ICSID which concerns the conditions which the Tribunal may impose on the non-disputing party with respect to the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation is justified by ICSID, on the basis that "Non-disputing Party (NDP) participation can be very useful, and that requiring NDPs to contribute to case cost might deter such participation". In respect of **Rule 66**, a different stance is adopted. According to paragraph 430 of the Working Paper No. 2, the Member States may wish to delete **Rule 66** entirely.

The GOJ proposes that the appropriate course of action would be for NDP and Non-disputing Treaty Party (NDTP) to bear the additional costs of their participation in the relevant proceedings. In making this recommendation, we would draw attention to Schedule 1, "Memorandum on Fees and Expenses in ICSID proceedings" in Working Paper No. 2.

Chapter XII - Expedited Arbitration

Rule 77 (Acceptance of Appointment by Arbitrators in Expedited Arbitration)

The **Rule 77** provides an alternative to help to reduce costs and the length of the arbitration process. Paragraphs 501-505 of Working Paper No. 2 depict the stages of an expedited arbitration under various scenarios that would allow for an award within 17-21 months from the date of registration of the "Request" which is under the current average length of a case of 3 years and 7 months from the Tribunal constitution to an Award. The length of time for cases to be resolved raises the financial costs and other difficulties for the parties. The frustration of States and practitioners on the extended time taken to receive awards is reflected in the feedback provided in the ICSID Rule Amendment process for example in paragraphs 21, 22 and 164 of ICSID Working Paper No. 2, which suggests that fees be withheld or new fee structures developed to incentivise the issuance of timely reports. It is noted that the ICSID Secretariat has not adopted any of the recommendations advanced to date that would seek to bring additional pressure on arbitrators to perform their duties in an expeditious and cost-effective manner. We note however **Rule 2** establishing the basic principle that the Tribunal and parties should conduct proceedings in an

expeditious and cost-effective manner as well as **Rule 23** concerning Conciliation Commissions. The length of the proceedings will, in principle, also be impacted by the amendments made to **Rule 29** "Written Submissions" which now establish the default rule that the parties submit a reply and rejoinder, whereas previously this was only where "the Tribunal finds it necessary". Practically, however, a reply and rejoinder are almost always filed, thus making that the default rule would seem to be justifiable.

Rule 84 (Opting Out of Expedited Arbitration)

The **Rule 84** (1) provides that "the parties may agree to opt out of an expedited arbitration by notifying the Tribunal and Secretary-General of their agreement. Upon such notification, only Chapters I-XI shall apply to the arbitration."

The GOJ recommends that consideration be given for the inclusion of a provision that addresses a situation where one party wishes to opt out, but the other party does not agree. For example, a State may be faced with a change of circumstances (such as an emergency or financial crisis) that impacts its ability to comply with the expedited arbitration procedure. Where there is no agreement to opt out, the Tribunal could be empowered to assess the circumstances and determine whether opting out would be permissible, and adjust the timelines as required.

COMMENTS ON THE ICSID MEDIATION RULES

Chapter IV - The Mediator

The GOJ recommends that there should be some elaboration on how the mediator will be appointed or the particular criteria for selection or appointment of mediators. In this regard, it may be necessary to have a list of mediators or to select mediators from the list of arbitrators or conciliators.

There should also be details of the special qualifications of mediators if they are being selected from a list of mediators and not from the list of arbitrators or conciliators. For example, mediators should possess qualifications in law, alternative dispute resolution and should have certified training in mediation. Additionally, their qualification may include special competence in business, commerce, finance, trade and industry.

Another issue for consideration is what happens when a mediator cannot continue the mediation and how another mediator is selected or appointed. In this regard, it is recommended that there should be a list of mediators similar to the list of arbitrators and conciliators. It should also be determined whether there will be a system of rotation or whether parties will select mediators of their own choice from the list of mediators.

JAMAICA'S NON-OBJECTION

Jamaica is in support of the amendments proposed by ICSID to date and has no objection to the completion of the Rule Amendment Project with the ongoing participation of Member States.

We ask that the aforementioned comments be incorporated and anticipate receipt of the updated documentation in due course.

Yours sincerely,



Darlene Morrison
Financial Secretary and
Alternate Administrative Council Representative

