



General Assembly

Distr.: Limited
13 December 2011

Original: English

**United Nations Commission
on International Trade Law**
Working Group II (Arbitration and Conciliation)
Fifty-sixth session
New York, 6-10 February 2012

Settlement of commercial disputes

Transparency in treaty-based investor-State arbitration

Comments by arbitral institutions regarding the establishment of a repository of published information (“registry”)

Addendum

Contents

	<i>Paragraphs</i>	<i>Page</i>
III. Comments received from arbitral institutions	1-15	2
E. International Centre for Settlement of Investment Disputes (ICSID)	1-15	2
F. International Court of Arbitration of the International Chamber of Commerce (ICC)		6



III. Comments received from arbitral institutions

E. International Centre for Settlement of Investment Disputes (ICSID)

Date: 8 December 2011

1. The International Centre for Settlement of Investment Disputes (ICSID or the Centre) herein provides a description of the potential costs of holding open hearings and creating a registry system in treaty-based investor-State arbitration.
2. ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). Currently, there are 147 ICSID Contracting States. The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the ICSID Administrative Council and comprise Administrative and Financial Regulations, Rules of Procedure for the Institution of Proceedings, Rules of Procedure for Conciliation Proceedings, and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).
3. Under the Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The ICSID Administrative Council also adopted Additional Facility Rules (AF Rules) authorizing the ICSID Secretariat to administer proceedings that fall outside the scope of the ICSID Convention, such as when one of the parties is not a Contracting State or a national of a Contracting State (e.g., Canada or Mexico) or when the proceedings are between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.
4. ICSID also administers arbitration proceedings governed by the UNCITRAL Arbitration Rules on an ad hoc basis, such as in the context of NAFTA and various BITs.

1. Registry

5. In accordance with Regulation 22(1) of the Administrative and Financial Regulations (the Regulations), “[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.”
6. Similarly, pursuant to Regulation 23(1), “[t]he Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.”

7. In compliance with the above Regulations, the Centre has developed a practice to publish relevant information regarding arbitration proceedings on its website.¹ The Centre also publishes on its website decisions, awards, and sometimes parties' submissions.²

8. In view of its experience, the Centre has been asked by the UNCITRAL Secretariat to provide cost estimates for the creation and maintenance of a "*registry system*" for UNCITRAL arbitration cases as discussed by the Working Group II on transparency. The purpose of the registry would be to centralize and make publicly available information concerning UNCITRAL investment arbitration cases. More specifically, the registry would provide basic information on every case (i.e., names of parties, field of activity, and investment treaty under which the claims arose) and would host documents provided to, or issued by, arbitral tribunals during the proceedings. Moreover, every case would have a unique URL, which would be posted on the UNCITRAL website. As a "*unique*" registry provider, ICSID would be expected to maintain and publish information in approximately 50 cases per year. As one of several registry providers, an option which is also being explored, the number of cases could be less than 10.³

9. In principle, and subject to obtaining relevant approvals, ICSID would be willing to serve as a registry provider.

10. The Centre will now answer the questions put forward by the UNCITRAL Secretariat:

(1) "*How much do you estimate it would initially cost your organization to put in place an online public registry system (either through tailoring existing electronic systems or developing a new system)?*"

ICSID would develop an external-facing website to host the registry using the World Bank's web content management system. By leveraging this institutional platform, and by hosting the site in ICSID's servers, development and operational costs could be relatively low. Initial costs could be reduced to a few days from a consultant to assist with the design of the site. Based on the brief description of the requirements provided to ICSID, these costs could range from US\$ 15,000 to US\$ 20,000.

(2) "*How much do you estimate the registry would cost your organization on an annual basis?*"

Technical maintenance of the registry website would cost approximately US\$ 5,000 per year. This estimate does not include staff time required to administer the registry and which the Centre estimates to be a portion of the time of an administrative support staff and a legal counsel from its Secretariat, depending on the specific requirements of the project and the number of cases per year. Further, such staff costs might be covered by the flat fee the Centre would charge for the registry services (see below).

¹ See ICSID Comments — U.N. Doc. A/CN.9/WG.II/WP.167 (8 August 2011), para. 7.

² *Id.*, paras. 8-14.

³ Letter dated 18 October 2011 — LA/TL 133(3-7) CM/CE/ota.

- (3) *“How would your organization expect to cover the costs of the registry system?”*

Pursuant to the ICSID Regulations, the direct expenses of ICSID proceedings are covered by the parties from funds which are advanced to the Centre periodically. The Centre also charges every case a flat fee to cover its costs in connection with the administration of the proceedings. This fee covers, among other things, registry-type services, including the maintenance of online case registers. In UNCITRAL cases administered by the Centre, including NAFTA cases, the Centre does not usually provide a website registry service since documents concerning these cases are typically published online by the disputing States.⁴

With respect to the UNCITRAL registry system, ICSID would propose to charge each case an annual flat fee for the duration of the case.

- (4) *“If your organization would expect to charge a fee to parties, how much do you estimate that fee would be?”*

Subject to a more detailed description of the requirements and the actual volume of documents, ICSID estimates that an annual fee of US\$ 1,800-2,000, payable to the Centre, would cover the costs to administer the registry.

11. Documents published on the ICSID website are usually submitted in pdf format and normally originate from tribunals. When the Centre is requested to publish documents originating from the parties, each party provides the documents to the Centre in pdf format.⁵

2. Hearings open to the public

12. Article 32(2) of the ICSID Arbitration Rule reads:

“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

A similar provision was introduced under Article 39(2) of the ICSID Additional Facility Arbitration Rules.

13. Open hearings are subject to appropriate logistical arrangements. In practice, some hearings, usually in the context of NAFTA or CAFTA cases, have been either

⁴ See the practice of Canada and the USA, see UNCITRAL, Settlement of commercial disputes, Transparency in treaty-based investor-State arbitration, Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA), Fifty-fourth session, New York, (Feb. 7-11, 2011), U.N. Doc. A/CN.9/WG.II/WP.163 (Dec. 7, 2010).

⁵ See ICSID Comments — U.N. Doc. A/CN.9/WG.II/WP.167, para. 9.

broadcast through closed-circuit television to a separate room⁶ or have been streamed live through webcasts over the Internet.⁷

14. There are thus two ways for a hearing to be open to the public through broadcast facilities: closed circuit television broadcast (side room open to the public where the hearing is broadcasted live), and webcast (i.e., live streaming/feed over the Internet).

15. As requested by the Delegations and the UNCITRAL Secretariat, and in order to share its experience, the Centre has prepared estimates of the costs related to holding an open hearing. These estimates are conservative and are based on certain standard requirements, as described below. They relate to costs incurred in Washington, D.C., for 8-hours per day hearings within the World Bank premises held during business hours. In addition, the Centre's hypothesis is based on a hearing that would take place in one procedural language with no interpretation services, and no particular videoconferencing needs. The webcast estimations further include the costs of recording in order to be posted on a website.

Live streaming (webcast)	Closed circuit broadcasting
<u>Estimate for 1 weekday</u> Standard set up: \$2000 (one time fee) Video Recording including technician: \$900 Audio Recording: \$250 Streaming weekday: \$1,200 Recording: \$400 <u>Total: \$4,750</u>	<u>Estimate for 1 weekday</u> Standard set up: \$2,000 (one-time fee) Video Recording including technician: \$900 Technician (overflow room): \$500 Audio Recording: \$250 Video Conferencing Services: \$500 Security costs: \$300 <u>Total: \$4,550</u>
<u>Estimate for 5 weekdays</u> Standard set up: \$2,000 Video Recording: \$900 x 5 days: \$4,500 Audio Recording: \$250 x 5 days: \$1,250 Streaming weekday: \$1,200 x 5 days: \$6,000 Recording: \$400 x 5 days: \$2,000 <u>Total: \$15,750</u>	<u>Estimate for 5 weekdays</u> Standard set up: \$2,000 Video Recording: \$900 x 5 days; \$4,500 Second Technician: \$500 x 5 days: 2,500 Audio Recording: \$250 x 5 days: \$1,250 Video Conferencing: \$500 x 5 days: \$2,500 Security: \$300 x 5 days: \$1,500 <u>Total: \$14,250</u>

⁶ See, e.g., *Methanex v. the USA*.

⁷ See, e.g., the webcast available on the ICSID website of the hearing in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) - Public Hearing- announcement dated May 18, 2011. See more recently, the announcement dated November 18, 2011, made in the case of *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) of a public hearing transmitted live via Internet feed, <http://icsid.worldbank.org>.

F. International Court of Arbitration of the International Chamber of Commerce (ICC)

Reply by the Chairman
Date: 9 December 2011

As a preliminary point, I confirm that, in principle, the ICC is prepared to act as a repository of information to be published under the rules on transparency under preparation at UNCITRAL.

A number of factors have made it impossible to devote time to the preparation of answers to the questionnaire — mainly due to the introduction of the new ICC Rules of Arbitration on 1 January 2012.

In relation to the questionnaire, ICC needs to consider in particular:

- The costs attendant upon the acquisition of the necessary software
- Development costs
- Maintenance
- Data entry and site monitoring

I will ensure that it receives that attention as soon as we can apply the relevant human resource within the Secretariat and the ICC's IT department to the task.
