

**The ICE Tribunal**

**Concept summary**

This note addresses the “ICE tribunal” concept. This is to be distinguished from the “ICE court” proposal, which is for a more formal institution to be established at a later date, mandated by international convention. The ICE tribunal is envisaged as being a more informal ICE institution that can be set up quickly and cheaply in the interim and which can serve as a working advertisement for the benefits that the ICE court will ultimately bring. The note looks at the how the ICE tribunal might in practice and why it will be prove useful.

At a general level, the most obvious role which the ICE tribunal can play is as the place to which parties who presently refer disputes to ad hoc tribunals under MEAs might wish to refer any future disputes. An ICE tribunal also offers a venue for issues to be addressed for those who at present have no access to MEA tribunals and who find themselves involved in disputes with a cross-border environmental character or with questions in that field which it would help to have clarified.

A number of questions arise on this:

**What would the ICE tribunal be?**

It would be an institution with similar characters to present arbitration institutions. The best-regarded such institutions (both in terms of their procedures and the quality of their dispute resolution) include, for example, the London Court of International Arbitration (“LCIA”) and the International Chamber of Commerce (“ICC”).

These institutions have set rules for resolving disputes referred to them. Those rules are the result of the adoption of best practice from other arbitral institutions and from development of rules on the basis of comments of users.

They also have standing panels of arbitrators, most of whom are practising lawyers (and whose expertise is therefore continuing to develop). These arbitrators are still in the thick of day-to-day practice and not isolated from recent developments – as can sometimes be the case with a bench of judges. The institution picks one or three arbitrators from the panel depending on how many the parties have agreed to and depending on any other specific points of agreement (e.g. as to nationality of the arbitrator).

The arbitrators for an ICE tribunal along these lines could therefore consist of environmental law experts, or pure environmental science experts, or just plain lawyers, or others with any other expertise. The parties could even be permitted to choose their own arbitrators, whomsoever they like, with the two arbitrators so chosen then appointing a chairman from the panel of arbitrators on the ICE tribunal institution’s list.

The tribunal can decide what rules of procedure and evidence to apply. It can also decide what expertise is required in any case. Usually, these points will be decided on the basis of the submissions of the parties.

The parties can decide that the dispute can be heard anywhere they like. For example, arbitrations being determined under the LCIA rules can be heard in Paris, or ICC arbitrations can be heard in London – whatever the parties have agreed.

All that is required to hear the dispute is a room large enough to accommodate the parties and their witnesses – usually nothing more than a large meeting room – and two break-out rooms.

The institution itself is funded entirely by fees levied on the parties. An LCIA case presently costs £1,500 to commence, plus the arbitrators’ fees on an hourly basis – usually around £300-£500 per hour. Alternatively, State members and corporate members could fund the institution with small annual grants – total costs for the entire institution would be unlikely to be more than £500,000 per annum (sufficient for a small body of administrative staff, plus expenses of a part time governing board). This would then permit fees for use to be kept to a minimum. Numerous other funding models could be considered. The main point is that with no need for a building and with administration staff relatively small in number, the costs can be fairly minimal.

The decisions of the tribunal are subject to the ultimate, but limited, supervision of the supervisory court where the arbitration is situated. As explained, that seat can be wherever the parties agree. The parties may want to bear in mind the arbitration act of any country in which they are considering having their dispute resolved. Some countries have very limited rules for court intervention (e.g. England), others permit somewhat more court involvement.

Any decision of the ICE tribunal, as a decision reached by an arbitral tribunal would, so long as it was decided in a country which is a signatory to the New York Convention 1958 (which applies to almost all developed and most emerging economies), be enforceable as a judgment in any country in the world which is also a signatory to the New York Convention 1958. This system is far quicker and simpler than attempting to enforce court judgments in different countries. Since the New York Convention 1958 covers most countries in the world, it is a remarkably effective way of ensuring justice can be secured, wherever the arbitral decision is reached and wherever it is necessary to enforce – whether the enforcement be of a monetary determination or simply a declaration.

**How would it work?**

***Agreement in advance to use the ICE tribunal***

Parties, be they member States, corporates, NGOs or other entities and individuals, could agree in advance that if certain issues arise between them, be they disputes or simply questions as to the interpretation of a particular rule or provision, they will be referred to the ICE tribunal – i.e. that the ICE tribunal would have exclusive jurisdiction. If exclusive jurisdiction is agreed upon, the parties would need to agree what subject matter that exclusive jurisdiction applied to. The parties would need to agree that such reference of issues will only be in certain areas, e.g. where they raise questions of or relating to international environmental law.

An alternative, which might avoid the need to determine areas of jurisdiction, would be for parties to agree for the ICE tribunal to have non-exclusive jurisdiction. That is: they could agree that if an issue arises, one or both of them can refer it to the ICE tribunal. This does not stop the parties also having the matter looked at in another court or tribunal. Usually, where parties agree non-exclusive jurisdiction clauses (for courts or tribunals), which is relatively common, reference of the matter to the non-exclusive court or tribunal by one party will lead to the other party agreeing to have the matter dealt with by that court or tribunal.

This alternative option might avoid the need to set out the subject-matter jurisdiction, since any party can, at the time that an issue arises, decide to use the expertise of the ICE tribunal if it is suitable for the issue in question. If the ICE tribunal’s expertise is unsuitable for the issue in question, it is unlikely a party would choose to use it to pronounce upon that issue.

In addition, the ICE tribunal itself can set a basic minimum subject matter threshold – e.g. that it will only determine questions of or relating to international environmental matters. If it sets this as a minimum, the parties can then either agree in advance the areas of subject matter which can be referred to the ICE, which could be narrower than this basic minimum subject matter threshold of the ICE tribunal itself (e.g. Shell and the Nigerian government could agree only to refer issues in certain technical categories – e.g. which arise between them in relation to oil transportation from wells to ports, not issues in relation to drilling or employment – or in certain geographical categories – e.g. only in relation to the Niger delta and not elsewhere – or in certain temporal categories – e.g. only in relation to issues arising from 2011 onwards – etc). Or the parties can simply agree to use the same basic subject matter threshold as the ICE tribunal itself has set.

A further issue the parties would need to address is the applicable law which the ICE tribunal would apply to any dispute. The most sensible option would be for the ICE tribunal to have a provision written into its rules that any dispute or question referred to it will be considered by way of the application of international environmental law as it stands at the time the matter is heard. That way, if the parties are silent on the issue, that body of law will apply, including customary principles of international environmental law and recently developed principles. The term “international environmental law” is sufficiently broad to permit the tribunal to apply principles of law taken from various national bodies of law as well, if they are appropriate to the case in question. If the parties so wished, they could equally spell out the applicable law in their agreement to use the ICE tribunal, which might be international environmental law or they might agree to restrict the ICE tribunal to apply only a national law. If the latter route was chose, however, the ICE tribunal might wish to retain the right always to give primacy to principles of international environmental law if they conflict with the chosen national law.

It is envisaged that at the outset, a few key anchor parties might be persuaded to sign up to use the ICE tribunal in the event of certain issues arising. These would most likely be States or corporates or NGOs – i.e. larger entities who it is conceivable at present to see could be involved in disputes in future that an ICE tribunal could help to resolve. It would not be necessary to persuade pairs of potential opponents to sign up as such, rather, the ICE tribunal would seek to persuade a party to agree to recommend that an ICE tribunal clause be inserted in any agreement between it and any other party. Thus, ICE would approach a number of States or corporates or NGOs and ask them to recommend in any interactions with others that each of them include such an ICE tribunal clause (a standard form would be created)[[1]](#footnote-2) which they would seek to persuade those with whom they engage/interact to use.

In addition, MEA institutions or regional bodies which have MEAs might be persuaded to use the ICE tribunal either as an alternative to the particular MEA tribunal (i.e. non-exclusive jurisdiction for the ICE tribunal – the parties could choose whether to use it or not), or as a replacement for it (exclusive jurisdiction). Or the MEA tribunals might be persuaded to use ICE tribunal rules (which would be a type of parasitical introduction of the ICE, since what it would be doing would be introducing uniformity in rules and the arbitrator panel across a number of MEA tribunals).

Equally, the ICE tribunal could have referred to it issues which a sole party wishes to be addressed or determined and which is in relation to a matter affecting another party which has not agreed to use the ICE tribunal, or which has never heard of the ICE tribunal. That would not be a bilateral reference; it would merely be unilateral. That other party might decide ad hoc to agree to be bound by or merely take heed of the decision of the ICE tribunal (see below ad hoc usage). Or it might ignore it entirely and the decision of the ICE tribunal would be purely declaratory, of no authority save for that derived from its reputation and the reputation of the panel of arbitrators it has.

***Agreement after an issue has arisen to use the ICE tribunal – ad hoc usage***

Alternatively, parties who find that an issue has arisen which needs addressing can, only once that issue has arisen, agree to refer the matter to the ICE tribunal. This might be helpful for parties who had not expected to have a relationship with each other – e.g. a community which suffers by reason of an unexpected polluting incident.

On any such ad hoc agreement, the parties would also need to decide (as discussed above) the extent of the ICE tribunal’s jurisdiction.

It is envisaged that the most numerous users of this route would be smaller entities, NGOs, communities, individuals etc – i.e. those who had not envisaged that they would one day need to use the ICE tribunal and who only realise the need once an issue has arisen.

***Effect of a pronouncement or decision***

The effect of an ICE tribunal decision will largely be determined by the agreement of the parties, either in advance of the issue arising (see “Agreement in advance” above) or at the time the issue arises (See “Agreement after an issue has arisen – ad hoc” above), as to what the effect will be. If the parties are silent, then under the usual arbitration rules as applied internationally by the New York Convention 1958, the parties will be taken to have agreed to be bound by the decision and that decision can be enforced in any New York Convention State as a judgment.

However, the parties might agree that a decision of the ICE tribunal will only have declaratory effect and thus will only be subject to that declaration. That could be still enforced under the New York Convention and thus become a declaratory judgment – which would mean that any act inconsistent with the declaration might be actionable.

Or the parties might agree that a decision of the ICE tribunal will only have declaratory effect and will not be enforceable under the New York Convention. This would mean that the only real impact of the declaration would be in terms of media coverage and reputational risk to the party which “loses”. As mentioned above, the weight and authority of the decision would be affected largely by the reputation of the ICE tribunal and those who issued the decision. It would thus be very important to have a highly-regarded panel.

**Why would anyone want to do use the ICE tribunal?**

The principal reasons would be:

* A reliable quality of dispute resolution – to be contrasted with some existing tribunals.
* Independence and impartiality – ditto, particularly national courts. This would be especially attractive to corporates which often suffer from partial national tribunals punishing the “outsider”.
* Authority and expertise – ditto.
* Ability to address issues arising across multiple environmental law regimes – be they national or regional or trade-body related etc. No institutions properly offer this at present.
* Where there is no obvious place for the matter in question to be heard – e.g. if it is international, which nation’s courts should hear the matter?
* Where are too many competing candidate courts/tribunals for a matter to be heard, each of which will leave at least one of the parties feeling aggrieved.
* Expense: ICE offers a cheap alternative. It would thus be attractive where the alternatives are all more expensive, which, if an ICE tribunal adopts the straightforward arbitration approach set out above, almost all other alternatives would be.
* Speed: Where the alternatives are all likely to take more time – national courts in many countries have a reputation for being very slow (e.g. India, Italy, name anywhere you care to choose except a very few places). The ICE tribunal, by dint of its simplicity and flexibility would be able to deal with matters quickly – in particular, the court “expands” by way of appointment of arbitrators, to deal with an expanded caseload. There could therefore never be a backlog of cases.
* Where a party unilaterally wants a declaration on a point which will be respected and noted internationally. There are no real options for that party at present.
* Confidentiality, possibly. Arbitration is usually confidential. This is one reason why it is so popular with companies. However, if confidentiality were to be adopted here, it would negate part of the aim of ICE, which is to develop international environmental law – and to publicise itself in case reports, articles and through the media generally. As a result, it is recommended confidentiality only be permitted in exceptional circumstances, by agreement between the parties.
* Access to justice: anyone who wanted to could bring a matter before the ICE tribunal if they want and are able to pay (subject to the funding mechanisms discussed above – e.g. for individuals there might be some small but not prohibitive contribution required, subsidised by larger contributions from States and corporates) and so long as either it is simply a unilateral reference or, in the case of a bilateral reference, the other party has also agreed (in advance or ad hoc).

**Other points**

The ICE tribunal could publish its own reports. This would help develop the corpus of international environmental law.

It would also engage in a fair amount of self-promotion – just as many arbitral institutions do. It would need to evangelise! This would involve talking to the media and directly to governments, corporates, NGOs etc. It would also involve an educational aspect.

**How would the ICE tribunal lead on to an ICE court?**

In theory, if the ICE tribunal worked well enough, it might never need to, since every possible entity (every State, corporate, NGO etc) would sign up and be subject to its authority.

However, that is unlikely. Thus, ultimately, the only way that an environmental tribunal would have a worldwide or near-worldwide mandate will be by UN Convention, transposed into national laws.

An ICE tribunal would provide the template for how that could work in terms of the decision making, procedure and, above all, the application of a corpus of well-reasoned and expertly-reasoned international environmental law. In a sense, all that would be changing with an ICE court would be the means by which parties agree to use it and thus by which it would exercise its jurisdiction. On the ICE tribunal model, parties agree to use it. On the ICE court model, the States of the world, or many of them, would agree that it will have jurisdiction in their territories, thus covering their own acts and the acts of corporates, NGOs, individuals and other entities domiciled in their territories.

Given that (as with the ICC), not all States would sign up, it is likely that there would still be a role for an ICE tribunal, even after the creation of an ICE court.

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**Appendix 1**

**Example ICE Arbitration Clause**

“The parties agree that any issue between them arising out of or relating to this agreement shall/may [depending on exclusive/non-exclusive jurisdiction] be resolved by one/three arbitrators pursuant to the ICE tribunal rules/by the ICE tribunal sitting in [location].”

And

“A party can commence such a reference by making a request for arbitration to the ICE tribunal. The parties agree that the issue between them shall be addressed and/or determined by the ICE tribunal in accordance with the ICE tribunal rules.”

Or

“A party can commence such a reference by appointing its arbitrator and giving notice to the other party of this, upon the receipt of which notice the other party shall have 28 days to appoint its arbitrator. The commencing party shall inform ICE of its appointment and upon appointment of the second arbitrator, those two shall appoint a chairman from a list supplied by ICE. The ICE tribunal so constituted shall address and/or determine the issue referred to it in accordance with the ICE tribunal rules.”

1. See Appendix 1 for example clauses [↑](#footnote-ref-2)