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Note on the costs and financing of an Advisory Centre on International Investment Law

by

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I. Introduction

1. A Working Group¹ prepared this Note (1) to estimate the costs of establishing and operating an Advisory Centre on International Investment Law (“ACIIL” or “Centre”) that provides assistance to States in handling treaty-based investor-State disputes; and (2) to identify possible sources of finance for the Centre’s operation.

2. It does not deal with the desirability of establishing an ACIIL and the range of other issues to be considered in this respect.²

3. Since the specific objectives, beneficiaries and scope of services of the ACIIL are not known at this point, certain assumptions have been made to arrive at rough estimates. Naturally, these estimates can be—and need to be—adjusted in light of further discussions by States. Moreover, since the number of disputes varies across years (and it is not known how many of them would be brought to the Centre), the approach taken here does not start with the question of how many staff a Centre would need to handle treaty-based investment disputes involving potential beneficiaries that arose, for example, during the past three years; rather, the approach taken in this Note is to assume that the Centre has a certain number of staff and it then estimates how many cases that staff can handle.

¹ The Working Group comprised the authors of this Note and Charles Bouttier, Secretary of the IAI Working Group on Strengthening the Right of Defence in ISDS, in their private capacity. It was chaired by Nicolas Angelet and Karl P. Sauvant.

² For such a discussion, see, United Nations Commission on International Trade Law, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019)”, document A/CN.9/1004, paras. 28-50 of 23 October 2019, available at <https://undocs.org/en/A/CN.9/1004>; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), “Possible reform of investor-State dispute settlement (ISDS): Advisory Centre. Note by the Secretariat”, in preparation of the Thirty-eighth session, Vienna, 14–18 October 2019, document A/CN.9/WG.III/WP.168 of 25 July 2019, available at <https://uncitral.un.org/sites/uncitral.un.org/files/wp168.pdf>; Karl P. Sauvant, “An Advisory Centre on International Investment Law: key features”, Academic Forum on ISDS Concept Paper 2019/14, 10 Sept. 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450919; and Lise Johnson and Brooke Guven, Columbia Center on Sustainable Investment, “Securing adequate legal defense in proceedings under international investment agreements: a scoping study”, November 2019, available at <http://ccsi.columbia.edu/files/2020/04/Securing-Adequate-Legal-Defense-in-Proceedings-Under-International-Investment-Agreements.pdf>.

II. Assumptions

4. There are two sets of assumptions.

a. General assumptions

Services

5. The ACIIL provides advisory and representation services (“services”) in (1) mediation and other forms of amicable treaty-based investor-State dispute settlement (including during cooling-off periods) where such an approach is advisable³ and (2) in treaty-based investor-State arbitrations or multilateral investment court proceedings.

6. As part of promoting capacity-building, the Centre has a secondment programme.⁴

Beneficiaries

7. Only developing country members of the ACIIL are entitled to benefit from the full range of services provided by the Centre,⁵ with priority given to least developed countries (“LDCs”) as defined by the United Nations. (During 2017-2019, 14 treaty-based investor-State dispute-settlement cases were brought against 10 LDCs.⁶) Developed countries are invited to become members of the Centre; while they are not entitled to advisory and representation services, they can benefit from

³ The ability of the Centre—as a neutral institution—to advise respondents to settle before formal proceedings begin may be one of the most important services the Centre could provide. If this should indeed be the case, the Centre may want to allocate more of its staff to mediation.

⁴ It would have to be decided whether secondees from only LDCs would be entitled to participate in the secondment programme or also from other developing countries.

⁵ It is assumed here that the ACIIL is a membership-based organization. This model has the advantage of generating income for the Centre soon after it is established. Other options include (1) a membership-based centre with access to non-members, with non-members paying higher fees for services; and (2) a non-membership centre with services available to States according to criteria to be agreed upon when the centre is established.

⁶ Based on data available at UNCTAD’s Investment Dispute Settlement Navigator, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>. In the case that LDCs are in the process of graduating out of the LDC category, it would have to be decided when, precisely, they lose the status of being LDCs for the purpose of the ACIIL’s various functions. This should arguably be made the object of transitional measures so that, for instance, if secondment is limited to nationals of LDCs, the secondees should be allowed to terminate their secondment, and fee arrangements for representative work in mediation and arbitration would remain applicable in pending proceedings.

other services (e.g., the exchange of best practices) and participate in the Centre's governance. The financial contributions of developed countries to the Centre are agreed as part of the process of becoming members of the Centre.⁷

Human resources

8. To allow the preparation of an estimated budget, it is assumed that the ACIIL would either have (1) 15 lawyers (including two for mediation services and three secondees), at various levels of experience and seniority, as well as three administrative staff ("scenario 1"); or (2) eight lawyers (including one for mediation services and two secondees), as well as two administrative staff ("scenario 2"). The second option would allow for a phasing-in of the operation of the Centre.

9. Increasing the number of staff may lead to certain economies of scale, for instance, through staff specializing in certain subjects (e.g., damages) or in cases requiring particular linguistic skills.

Financing

10. The financing of the Centre should meet various objectives, which call for various sources of financing.

11. Ideally, the Centre's activities are financed to a significant extent by sources that contribute to its long-term autonomy. Accordingly, while voluntary contributions to its budget will be important, the ACIIL should not face the constant risk of non-renewal of such voluntary contributions. Initial entry fees and income from the services delivered contribute to this aim. So would users' fees levied on all users of ISDS (for more details on these various sources, see Section V below).

12. When the ACIIL takes up a case, it should be capable of handling it until the end, which may take several years. The stability of income is therefore critical.

⁷ It should be noted that, with the level of staff assumed for the purposed of this Note, it might not be possible to represent every developing country in every case in which assistance from the Centre is requested. Hence, an approach to prioritisation would have to be established (e.g., beginning by giving priority to LDCs)—but the establishment of the prioritisation criteria is beyond the scope of this Note. It should also be noted that not every developing country might seek the assistance of the Centre.

As a consequence, the financing of the Centre should not be solely dependent on income generated by the investment of initial entry fees.

13. All beneficiaries bear at least part of the costs of services received. This will ensure that States value these services and maintain ownership of the disputes in which they are involved and the services provided on their behalf—and hence also ensure that they have a direct interest in, and commitment to, the efficient handling of disputes.

14. At the same time, charging for the Centre’s services should not stand in the way of offering services at the lowest price, in particular to LDCs. Rates for services are based on the ability to pay, assessed through a “means test” that is informed by the level of economic development of States.⁸ Rates would range from market rates for high-income developing countries to discounted rates for middle-income countries. LDCs pay a nominal rate, with a cap.⁹ Rates for amicable settlement approaches are further discounted for each category of States, to incentivize them—where the nature of the dispute so allows—to utilize such approaches. It is also desirable to avoid a situation in which services that generate income receive priority over other services. From this perspective, a part of the Centre’s income should be derived from voluntary contributions.

15. There may also be an interest in earmarking funds that may be used for specific purposes, e.g., various technical assistance activities or the preparation of legal opinions. These costs are not estimated here.¹⁰

16. Income from fees for work performed (either paid directly by a State or through the recovery of costs at the end of successful arbitral proceedings) will not be available when the ACIIL starts its operations. Accordingly, the Centre’s establishment and operation must initially be funded entirely from other sources.

⁸ The criterion of “level of economic development” could be adjusted, for example, by a country’s share in global foreign direct investment flows.

⁹ Caps could also be introduced for other developing countries, an option considered in Annex 4.

¹⁰ For possible sources of funds, see section V below.

b. Assumptions related to cases

17. The quality of the services provided is very important.

18. Not all cases are active all the time; rather, they are at various stages and “mature” at different times (e.g., amicable settlement services; notices and consultations with investors and respondents; appointments of mediators or tribunal constitutions; challenges of arbitrators; interim relief; procedural meetings and hearings; document requests and production; written pleadings (preparation of memorials and counter-memorials); hearings; post-hearing work; post-award stage).

19. The spread of cases across various stages is important, so that not too much bunching takes place (although, as the number of cases increases, conflicts in scheduling become more likely).

20. The complexity of cases varies, as does the sophistication of clients.

21. Some support is available from respondents, including from practitioners within the legal departments of respondent governments and local law firms, for issues of domestic law, as well as various other expenditures related to defences.

22. The Centre’s lawyers are focused only on counsel work and have no other responsibilities (such as assisting in the negotiation of international investment agreements).

23. At least initially, the Centre only handles representative work in arbitration or multilateral investment court cases based on international investment treaties. It does not handle claims that are based on investment contracts or national laws.¹¹

¹¹ The reason for this is twofold. First, the reform of investor-State dispute settlement at UNCITRAL (of which the creation of an ACIL partakes) is essentially focused on weaknesses specific to treaty-based arbitration. Second, while treaty-based claims are based on a fairly uniform set of substantive rules of international investment law, the substantive rules applicable to contract claims vary widely and often require high-level expertise in a specific subject-matter which may not always be available to the Centre, at least during the first years of its existence.

III. Estimate of possible workload

a. Estimate of the staffing requirements for mediation services

24. The limited number of investor-State mediation cases, and the inaccessibility of data for those that exist, meant that members of the Working Group had to conduct off-the-record interviews with practitioners from various continents who had been involved in State-State mediations, investor-State mediations and complex commercial mediations. The interviewees had acted as counsel or mediator or provided administration services in mediation centres.

25. The Working Group found that, on average, mediations take less time than arbitration. On average, mediations that are carried out by experienced counsel and mediators who can focus on key issues early on in a dispute could be completed in 6–24 months. Importantly, the number at the higher end of this range is based on the time taken to complete an ICSID conciliation, which is a more formal process than the one that would likely be adopted by the parties seeking the assistance of the ACIIL.

26. According to most interviewees, the work required of counsel in a mediation would be about half that required in an arbitration of the same dispute, and sometimes less. Mediation cases typically do not require a full briefing of the case by the parties, and 2-3 days are usually enough for the final stage when the mediator meets with both parties to reach a settlement.¹²

27. Given the assumptions spelled out in section II.b. of this Note, the consultations suggest that (1) two specialised mediation lawyers (one senior, one junior) could handle approximately 4-6 active mediations concurrently, and (2) one (senior) specialised mediation lawyer could handle approximately 2-3 active cases concurrently.¹³ The actual number would depend on several factors, including the complexity of the dispute and whether parties exchange detailed position statements.

¹² The interviews suggested that the success rate of complex mediations (including those involving States) is about 70%, i.e., a settlement/agreement reached during the mediation process. In another 10% of mediations, parties reach an agreement soon after the mediation.

¹³ This is not meant to be an absolute division of labour among staff of the Centre. For example, if a mediation case should become an arbitration case, the same staff who handled the mediation could continue working on the arbitration.

28. In addition to representation in mediation and arbitration services, lawyers at the ACIIL could also assist States in negotiating and reaching amicable settlements of their disputes during the cooling-off period contained in some treaties (and it may be possible to settle more disputes during this period), and throughout the dispute-resolution process. (One variable to be taken into account is that cases may overlap, as illustrated for cooling-off periods in Annex 1.) This service could be provided by the arbitration and mediation lawyers already on staff at the ACIIL on an *ad hoc* basis, when available.

b. Estimate of the possible workload for representative work before arbitral tribunals or a potential multilateral investment court

29. The staffing needs for representative work in arbitration have been estimated by means of two different but complementary methods. The first is essentially statistical. A calculation is made based on lawyers' fees reported in a sample of ICSID awards, a range of blended hourly rates and the average duration of the cases in the sample. The second method consists in interviewing practitioners in governmental departments and private practice.

30. These methods have been chosen because of their complementary nature. The statistical or 'forensic' approach has the advantage of avoiding unconscious bias or other psychological mechanisms influencing the recollection of past events or prognoses of future events. It has the disadvantage of being based on an accumulation of averages that do not necessarily reflect 'real life' conditions. Interviews with practitioners in their capacity as field experts have the opposite advantages and disadvantages.

31. The statistical approach also complements existing studies aimed at estimating the cost of investment arbitration, which are based on a larger sample than the present one but—because of their objective to estimate costs, not staffing needs—do not differentiate between lawyers' fees and other costs.¹⁴

¹⁴ See the study of the cost and duration of investment arbitration proceedings by the international law firm Allen & Overy: <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase>.

32. As shown hereafter, both methods have produced substantially the same results, which are also in line with the data from existing studies.

Estimate based on an analysis of past cases

33. The forensic analysis summarized here is presented in detail in Annex 2. It is based on a sample consisting of the 46 ICSID arbitration cases concluded between 1 May 2019 and 1 May 2020, and more specifically on the 12 cases that contained a section on costs that differentiated between lawyers' fees and expenses.

34. The average of the lawyers' fees in the sample was divided by a range of blended hourly rates between US\$300 and US\$600. This resulted in the average number of lawyers' hours per case, which was between 9,805 hours to 4,903 hours.¹⁵ The average duration of the cases was determined to be 2 years and 8 months. This allowed for the calculation of the average number of hours per case per year. Depending on the hypothetical flat rate used as a basis for the calculation, the number of hours per case per year varied between 3,700 and 1,850 hours.¹⁶

35. This yearly workload per case was then related to the yearly working hours of an ACIIL team of 13 lawyers, and more specifically to the number of working hours spent on legal work for a specific client (as opposed to other work such as knowledge management).

36. This mathematical estimate led to the conclusion that an ACIIL team of 13 lawyers could handle seven arbitration cases concurrently, and possibly up to eight or nine. This estimate does not include work in possible annulment proceedings and in (accompanying local lawyers in) possible enforcement proceedings.¹⁷

¹⁵ Instead of working with averages, one could also take a different approach, for example, by setting up a grouped frequency table.

¹⁶ In the study by Allen & Overy mentioned in the previous footnote, the overall respondent costs amount on average to US\$4,559,000. The average length of cases is also higher than in the sample of our study (3 years and 8 months instead of 2 years and 8 months). As a consequence, the average number of hours per case per year calculated on the basis of Allen & Overy's data is broadly the same as in our study, e.g., calculated at a blended hourly rate of US\$ 450: $(4,559,000 : 450 : 3,66) = 2,768$ hours per case per year, as compared to 2,466.79 in our study. On that basis, a team of 13 ACIIL lawyers would, depending on the number of working hours taken into account, be capable of handling between 6,6 and 8,1 cases concurrently.

¹⁷ Since the ACIIL will also have to provide assistance in these proceedings, although in a less intensive manner than during arbitral proceedings, the number of cases the Centre will be able to handle could be slightly lower.

Estimate based on expert opinions

37. Members of the Working Group conducted off-the-record interviews with (1) practitioners in governments from various continents who have handled investor-State disputes in-house and (2) lawyers in law firms from various continents who have handled investor-State disputes. Hence, all of them spoke from personal experience. (Most of the assumptions outlined earlier in section II.b. of this Note emerged from these consultations.)

38. The issues discussed in these interviews concerned the number of cases that ten ACIIL lawyers (at various levels of seniority), together with three secondees and support from respondents, could handle simultaneously on a long-term basis, taking into account the assumptions spelled out in section II.b. of this Note.

39. Given these assumptions, the expert consultations suggest that ten ACIIL lawyers—together with three secondees (i.e., a total of 13 lawyers), administrative support from the Centre and support from respondents—can competently handle approximately eight active cases concurrently. However, some government and law firm representatives indicated that a team of 13 lawyers could handle more than nine cases, while others indicated that they could not handle more than six to seven cases if quality were to be maintained.

40. Naturally, the assumption of the number of ACIIL lawyers, secondees and administrative staff is meant for illustrative purposes only, to arrive at a rough estimate of how many cases can be handled and in light of certain assumptions. Most interviewees observed that cases can vary greatly in size and complexity: one very big case would diminish the Centre's capacity to take up as many other cases as expected, while relatively simple cases would have the opposite effect.

41. For reference only, and recognizing significant differences: the closest example of an institution like the ACIIL, the Advisory Centre on WTO Law ("ACWL"), currently has 12 lawyers, 4 secondees and 3 supporting staff; they provided support in 17 WTO disputes in both 2018 and 2019 (and also prepared over 200 legal opinions in each of these years, in addition to undertaking training activities). The duration of WTO disputes is approximately three years (covering consultations, panel and Appellate Body proceedings).

c. Conclusions

42. It follows from the above that a team of 15 ACIIL lawyers (including three secondees), composed as described above, and three administrative staff (including two paralegal-type staff) could handle 4-6 mediation cases and 7-9 arbitration cases concurrently, while also possibly providing assistance during cooling-off periods.

43. If it were decided to start with a smaller team and expand it over time, a team of eight ACIIL lawyers (including two secondees), composed as described above, and two administrative staff (including one paralegal-type staff) could, on the basis of a conservative estimate, handle 2-3 mediation cases and 3-4 arbitration cases concurrently, while also providing assistance during cooling-off periods.

44. It should be noted that, if ACIIL lawyers would just advise on cases and provide stand-by assistance (as opposed to full representation), the Centre would be able to handle more cases. Moreover, if a multilateral investment court were to be established and if measures of reform of investor-State arbitration currently discussed in UNCITRAL's Working Group III were adopted, proceedings could become less lengthy and/or require fewer working hours, and the total number of cases that the Centre would be able to handle over time with the same team would increase.

45. It may well be that more eligible developing countries would seek the ACIIL's assistance than it can handle with its complement of staff. In that case (and the question of the prioritisation of beneficiaries aside), arrangements would have to be made to ensure that the States seeking assistance can receive it—but identifying such arrangements goes beyond the scope of this Note.¹⁸

¹⁸ The ACWL has made arrangements with private law firms to provide, for fixed rates, services to its beneficiaries under certain circumstances. Other arrangements one could consider is to finance outside counsel, hire on a short-term basis, seek short-term secondments from law firms, or seek pro bono assistance.

IV. Hypothetical basic budgets

46. This section seeks to estimate the expenditures of the ACIIL for its first years of operation (see Annex 3 for details), based on the scenarios spelled out in section II.a, para. 8.

47. Scenario 1 assumes that the ACIIL has a staff of fifteen lawyers: one executive director, three senior associates, three upper mid-level associates, two mid-level associates, three junior associates, three secondees (deemed to be P2 UN staff), assisted by three administrative staff (of whom one or two are paralegal-type staff).

48. Scenario 2 assumes that the ACIIL has a staff of eight lawyers: one executive director, two senior associates, one upper mid-level associate, one mid-level associate, one junior associate, and two secondees (deemed to be P2 UN staff), assisted by two administrative staff (of whom one is a paralegal-type staff).

a. Assumptions

49. Costs were calculated on the basis of the assumption that the ACIIL would be exempted from taxes, as it would be an international organization with diplomatic privileges and immunities.

50. The salaries are based on the 2020 Revised UNODC Standard Salary Cost Manual, with adaptations.

51. Information and communication technologies costs, furniture costs and building maintenance and utilities costs are based on 2019 UNOV/UNODC Standard Cost Manual.

52. Both scenarios include the costs related to a secondment programme as UNCITRAL's Working Group requested the exploration of a capacity-building programme (see A/CN.9/1004, para 44). Under such a programme, government lawyers from member countries could join the staff of the ACIIL as paid secondees for a defined period.

b. Various costs not included in the basic budget

53. Rental costs, a potentially important item of expenditure regarding the functioning of the ACIIL, are not included in either scenario, as such costs can vary significantly depending of the location of the seat of the ACIIL. These costs would eventually have to be incorporated in the ACIIL's budget unless the Centre is hosted by a country that provides the premises free of charge or the Centre is organised as a virtual institution.

54. Premiums for professional negligence insurance were not included in the estimate.

55. Important items of expenditure commonly associated with investment arbitration were not included in the ACIIL's budget, as it is assumed that the Centre's work is focused on legal advice. These costs include:

- Arbitral institutions costs (registration fees, administrative charges, etc.).¹⁹
- Tribunal costs (tribunal costs can range between US\$1 million and US\$1.4 million).²⁰
- Travel and translation costs.
- The costs of technical experts (financial, technical, legal (in particular on the domestic law of the respondent State)). Such costs can be significant. They can vary from US\$100,000 to US\$1 million, depending on the field of expertise, the nature of the dispute, the sector, the complexity of the case, etc.

56. These costs would have to be assumed by the State involved or the ACIIL, or they could be shared between the ACIIL and the State involved according to a formula based on the State's level of economic development. Alternatively, a separate trust fund could be established to finance such expenditures.

57. For example, the ACWL works on a co-pay basis whereby the ACWL and the country involved share the costs. The ACWL has established a separate technical

¹⁹ Administrative and registration fees are a relatively minor cost item for disputing parties. Nonetheless, cost differences exist between arbitral institutions.

²⁰ M. Hodgson and A. Campbell, "Damages and costs in investment treaty arbitration revisited", *GAR*, 14 December 2017.

assistance fund for technical experts, financed by voluntary contributions from developed countries.

c. Estimated costs

58. Scenario 1: Fifteen lawyers

- a. The *installation* (and therefore non-recurring) costs of the ACIIL such as furniture and information technology equipment (see Annex 3) would amount to US\$274,336.
- b. The *recurring costs* would amount to US\$3,070,466 per annum.
- c. The total costs of establishing the Centre and operating it for the first year would be US\$3,344,802.

59. Scenario 2: Eight lawyers

- a. The *installation* (and therefore non-recurring) costs of the ACIIL such as furniture and information technology equipment (see Annex 3) would amount to US\$232,489.
- b. The *recurring costs* would amount to US\$1,924,124 per annum.
- c. The total costs of establishing the Centre and operating it for the first year would be US\$2,156,613.

60. For reference, in 2019 the ACWL had a budget of US\$4,665,000 for 16 lawyers (including 4 secondees) and 3 administrative staff. ICSID's 2019 budget amounted to US\$12,809,864 for a staff of 65 (1 Secretary-General, 2 Deputy Secretary-Generals, 30 lawyers, 13 paralegals, 6 legal assistants and 13 administrative staff).

V. Sources of funds

61. As mentioned at the beginning of this Note (section II.a., para. 12), it would be desirable for the ACIIL to be financed to a significant extent from sources that do not make it dependent on the renewal of voluntary contributions. Moreover, the Centre needs to avoid a situation in which services that generate income receive

priority over other services. A combination of the sources discussed below could be considered.

62. An Endowment Fund could be established as the recipient of all funds that the Centre receives.

a. One-time membership fees

63. One-time membership fees would be paid by the developing countries, other than LDCs, that become members of the Centre.

64. Membership fees should not be too high in order to encourage developing countries to become members early-on, rather than at a later stage when they face a dispute for which they might wish to call on the Centre's assistance. This would allow the Centre to receive a more substantial amount of money as a start-up fund during the first year(s) of its existence. It would also encourage the largest possible number of countries to become members of the Centre, which would foster a working relationship between the Centre and States at the earliest possible stage; early on participation would also be important for the success of the Centre, as it would lead to other positives, such as increased legitimacy. From this perspective, having forty countries each paying, for instance, US\$50,000 should be preferred to twenty countries each paying US\$100,000.

65. In light also of these considerations, the ACWL is a useful comparator.

66. As in the case of the ACWL, the protocol of accession would specify the one-time membership fee that a developing country acceding to the ACIL would pay into an Endowment Fund. That fee could be determined on the basis of a "means test" that is informed by the level of economic development of States. Developing countries could be subdivided in four categories, with the LDCs as one category and three further categories based on the World Bank's income-related classification:

- Category A: high-income developing countries
- Category B: upper-middle income developing countries
- Category C: non-LDC lower-middle and low-income developing countries

- Category D: LDCs.²¹

67. If the precedent of the ACWL were to be followed, Category A countries would pay US\$486,000, Category B countries US\$162,000 and Category C countries US\$81,000 to become members of the ACIIL.²² LDCs could become members and be entitled to the services of the ACIIL (at rates outlined below), but they would not have to contribute to the Endowment Fund.

68. There would be no fixed membership amount for developed countries. Rather, a financial contribution would be agreed as part of the accession protocol.

69. On the basis of these assumptions, the following tentative scenario could be envisaged:

- 1 high-income developing country: US\$486,000
- 10 upper-middle-income developing countries: US\$1,620,000
- 15 lower-middle-income developing countries: US\$1,215,000

70. Under these assumptions, the sum of the membership fees would be US\$3,321,000. It needs to be repeated, though, that these would be one-time contributions to the Endowment Fund.

b. Fees charged for services rendered by the Centre

71. The ACIIL could charge for its services as a means of financing its activities. This potential objective must be balanced against that of offering the Centre's services at discounted rates depending on the level of income of the beneficiaries concerned. It must also be considered in the light of the countries' interest in the predictability of costs. How these potentially conflicting objectives can be achieved is analysed in detail in Annex 4.

²¹ The classification of countries used here follows that of the World Bank, except that three countries classified as "low income developing countries" are included here in category C; at the same time, one country classified by the World Bank as "low income developing country" is included in the LDC group.

²² These were about the amounts that had been established in 2001 to become a member of the ACWL; these amounts have not changed since then. It may be appropriate to update these amounts accounting, for example, for inflation.

72. The analysis bears out that it would be difficult to charge fees with a purpose of achieving break-even for the Centre. However, some degree of financial autonomy could be achieved even if the Centre were to charge heavily discounted hourly rates as compared to market rates.

73. Assuming that the recurring yearly cost of running the Centre (in scenario 1) is US\$3,070,466 and that a team of 15 lawyers works a total of 22,500 ‘billable hours’²³, break-even is achieved with an average hourly rate of US\$136.

74. Pursuing break-even becomes more complicated if different hourly rates are applied for the various categories of States identified above (section V.a, para. 66). Assuming that each of the four categories of States would use the Centre’s ‘billable services’ to the same extent, break-even could be achieved, for example, by charging the following hourly rates, which have been set by trial and error starting from the assumption that States in category A would pay US\$400:

- States in category A pay US\$400 per hour = US\$2,250,000
- States in category B pay US\$90 per hour = US\$506,250
- States in category C pay US\$40 per hour = US\$225,000
- LDCs pay US\$20 per hour = US\$112,500

For reference only: the hourly rate for arbitrators paid by ICSID is US\$375.

75. In practice, however, the Centre might want to give priority to LDCs, and then to States in category C. It would therefore not achieve break-even on the basis of the above hourly rates. At the same time, the scenario shows that some degree of financial autonomy can be achieved even with heavily discounted rates. It is also possible to increase the rates for some or all categories of States so as to increase the Centre’s financial autonomy and/or expand its activities. For example, on the basis of the discounts applied by the ACWL (albeit to different hourly rates and with low caps), the fee structure would be as follows:

²³ In the management practice of international law firms, the notion of “billable hours” refers to the work that can be charged to a client. The billable hours are only part of the working hours actually performed by lawyers, which also include legal and non-legal work that cannot be charged to a client, such as knowledge management and marketing.

- Cat. A pays US\$400 per hour (market rate of US\$500 – 20%) = US\$2,250,000
- Cat. B pays (-40%) US\$300 per hour = US\$1,687,500
- Cat. C pays (-60%) US\$200 per hour = US\$1,125,000
- LDCs pay (-90%) US\$50 per hour = US\$281,250
- Total = US\$5,343,750

76. In addition, predictability of costs for States could be pursued by capping the hourly fees (for example at the average number of hours per case calculated in Annex 4) and by combining hourly fees with one or more lump sum amounts covering a whole series of services (e.g., the entire proceedings on jurisdiction and admissibility).

77. Mediation and amicable dispute-settlement services could be charged at lower rates (e.g., at a discount of 25%) so as to incentivize States to use these services to the optimal extent depending on the nature of the case. Such a discount would of course affect the income of the Centre, but it would be minimal.

c. Recovery of costs

78. When a State prevails in a dispute where it is represented by the ACIIL, tribunals may order claimants to reimburse all or part of the respondents' costs (lawyers' fees, experts' fees, tribunal's costs, as well as other costs such as for travel and translation).

79. In such a case, the Centre's fees that have been charged to the respondent State will be recovered by the State itself (subject to the State's obligation to use the recovered amounts to pay any arrears on the fees due to the Centre), and arrangements would have to be made that the amounts be reimbursed to the Centre. This will not generate any additional income for the Centre.

80. A related question concerns the work done by the Centre but not charged to a State. This includes the difference between market rate fees and the fees effectively charged by the Centre to a State, as well as the remuneration of hours effectively worked above the cap, where the Centre is representing LDCs. Absent a specific rule to that effect, it is not guaranteed that such 'fees' could be recovered from the

claimant. Tribunals might consider that fees that have not been charged to the State are not recoverable; this is hence a matter to be clarified further.

81. One possibility that could be considered is for the main arbitral institutions (or for a future multilateral investment court) to enact a specific rule according to which tribunals (or the future multilateral investment court) may also order claimants to pay to the Centre all or part of the market rate fees corresponding to work done by the Centre, but not charged to the State.

82. In any event, the ability to fund the ACIIL based on cost-recovery is not predictable.

*d. ISDS users' fees*²⁴

83. An approach that could be explored is to institute a kind of “users’ fee”, in the form of a (for instance) 1% levy on all monies spent pursuing investment arbitration and conciliation, or on some categories thereof. For example, in 2019 ICSID (which handles most disputes) generated US\$13,552,187 from lodging and administrative fees; in addition, parties advanced US\$37,735,934 for such case expenses as arbitrator fees, transcribers, interpreters, room charges, and the like.²⁵ The amounts generated by other institutions such as the PCA, ICC or SCC are unknown. If the totality or part of such funds, and the equivalent funds earned by a future multilateral investment court, could be taxed and dedicated to an ACIIL, it could provide a steady source of financial support for the Centre. A further benefit of this source of revenue would be that it is correlated with the overall number of investment arbitrations cases and, therefore, is more likely to fit with the evolution of the needs of the ACIIL.

84. Another (long-term) approach would be to include in future international investment agreements a provision that conditions a State’s consent to investor-State dispute settlement to a fee to be paid by claimants into the ACIIL’s Endowment Fund, contributing in this manner to the financing of the Centre. While such a users’

²⁴ The idea of users’ fees was raised in UNCITRAL’s Working Group III. See, UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session 38th session”, op. cit., para. 38.

²⁵ ICSID, *2019 ICSID Annual Report* (Washington: World Bank Group, 2019), p. 60.

fee raises all sorts of questions and hence would need to be further thought through, it could also contribute to more conservative claims and furthermore discourage frivolous claims.

e. Voluntary contributions

85. Given that the largest part of the Centre's services is likely to be delivered to LDCs and countries in Category C, it is almost certain that the funds generated in the manner described above would not be sufficient to cover the costs of the ACIIL, as calculated in section IV.c. In any event, some of these sources of funds would only become available in the course of the operation of the Centre.

86. Accordingly, other sources of funds need to be identified.

Private donors

87. It may be possible to obtain some funding from private foundations, as at least two of them have financed part of the defence of a developing country in an ISDS case.²⁶ While efforts should be made to obtain such funding (including through a high-level approach to major foundations), it is not possible at this time to ascertain whether such efforts would be successful. Also, as the 'tobacco' precedent illustrates, such donations may be earmarked for specific types of cases, involving for example the protection of public health or the environment.

Official development assistance

88. This leaves official development assistance. Such contributions could be made by States and public institution in a position to make them. (It should be noted that the bulk of the budget of the ACWL is financed from voluntary contributions by States, on a five-year cycle.)

²⁶ Bloomberg Philanthropies and the Bill and Melinda Gates Foundation had announced, on 18 March 2015, the creation of the Anti-Tobacco Trade Litigation Fund, partly to help finance Uruguay's defence of its tobacco control laws against Philip Morris International; see, <https://www.tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund>.

89. In this context, it needs to be considered that one important objective of the ACIIL is presumably to enhance the legitimacy and fairness of investor-State dispute settlement by strengthening the assistance to, and defence of, under-resourced developing countries, and especially the least developed among them. From this perspective, establishing and financing an ACIIL contributes to ensuring a robust, legitimate international investment regime in which the option for investors to make direct claims against States in an international forum is maintained while States are in a position to defend themselves adequately.

90. If this is accepted and the services provided by the ACIIL are seen as a public service and public good in the interest of enhancing the legitimacy of the international investment law and policy regime, States and public institutions in a position to do so would need to commit themselves to provide the financing required to establish and operate the ACIIL. Without a commitment to do that, an ACIIL would not be viable. In fact, it may not be advisable to establish the Centre unless, under scenario 1, sufficient funding of around a total of US\$16 million is assured to allow the Centre to be established and operate for five years, or, under scenario 2, a total of US\$10 million.

VI. Conclusions

91. This Note estimates the costs and financing associated with establishing an ACIIL that assists developing countries in treaty-based investor-State disputes. It was prepared on the basis of certain assumptions, including—for illustrative purposes—the possible size of the Centre.

92. It follows from the above discussion that a team of 15 lawyers and three administrative assistants (composed as described above) could handle 4-6 mediation cases and 7-9 arbitration cases concurrently, while also providing some assistance during cooling-off periods. If it were decided to start with a smaller team and expand over time, a team of eight lawyers and two administrative staff could, on the basis of a conservative estimate, handle 2-3 mediation cases and 3-4 arbitration cases concurrently, while also providing some assistance during cooling-off periods.

93. It should be noted that, if ACIIL lawyers would just advise on cases and provide stand-by assistance (as opposed to full representation), the Centre would be able to handle more cases.

94. In the first scenario (15 lawyers), the installation (and therefore non-recurring) costs of the ACIIL would amount to US\$274,336 and the recurring costs (not including rent, travel and translation costs, experts, tribunal costs, etc.) would amount to US\$3,070,466 per annum. In the second scenario (8 lawyers), the installation (and therefore non-recurring) costs of the ACIIL would amount to US\$232,489, and the recurring costs would amount to US\$1,924,124 per annum.

95. It is theoretically feasible to entirely finance these costs by means of discounted fees for the services charged by the Centre, but this would go at the expense of some objectives that could be assigned to the Centre, such as delivering services at the lowest possible rate, in particular to the poorer countries among its members. A more elaborate approach to the Centre's financing could combine various objectives, such as assuring the Centre's autonomy, predictability of costs for member States and differentiated burden-sharing in accordance with developing States' financial means. Such an approach could combine one-time entry fees paid by the developing countries becoming members of the Centre (except LDCs), fees for the services rendered that may consist of (capped) hourly fees and/or lump sum amounts, ISDS users' fees, and voluntary contributions from private donors and official development assistance.

96. The financing required to establish an ACIIL with 15 lawyers under the assumptions spelled out earlier in this Note and to secure its operation for five years would require around US\$16 million; for an ACIIL with 8 lawyers, this amount would be US\$10 million. In addition, it may be advisable to establish trust funds for specific purposes not covered in the basic budget.

Annex 1

Overlapping Cooling-off Periods, 2009-2020, for LDCs, Treaty-based Disputes, ICSID and PCA

(Count of number of months of the applicable cooling-off period until the date of registration or notification)

1. This annex estimates the potential staffing needs for assistance of ACIIL lawyers during the cooling-off period of a dispute.
2. The sample consists of treaty-based cases brought before ICSID and the PCA involving LDCs as respondent States during the period 2009 – 2019. The applicable bilateral investment treaty (“BIT”) was reviewed to identify the cooling-off period. Some BITs did not have a cooling-off period, other BITs had a cooling-off period of between 1-9 months, while still others were not available in a language the researchers could read.
3. The annexed table allows for drawing the following tentative conclusions:
 - The number of overlapping cooling-off periods ranges between 0 and 6.
 - In 9 of the 10 years, there were between 1 and 3 cooling-off periods running at the same time (except for 4 in December 2016).
 - In one year, 2017, there was a peak up to 6 overlapping cooling-off periods. There is no self-evident explanation for this peak (there were two cases against Madagascar, but they do not appear to be related). It must be assumed that such peaks can occur on a more or less regular basis.
 - If, for argument’s sake, States would receive the full-time assistance of an ACIIL lawyer during the whole of a cooling-off period, this service could, leaving the peaks aside, be delivered by two ACIIL lawyers.

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2019								ARB/19/31	ARB/19/31	ARB/19/31	ARB/19/31 (registered)	
	ARB/19/17	ARB/19/15 ARB/19/17	ARB/19/15 ARB/19/17	ARB/19/15 ARB/19/17	ARB/19/5 (registered) ARB/19/7 (registered)							
2018	ARB/18/21	ARB/18/21	ARB/18/21	ARB/18/21	ARB/18/21	ARB/18/21	ARB/18/21 (registered)				ARB/19/17	ARB/19/17
2017	ADHOC/17/1	ADHOC/17/1	ADHOC/17/1	ADHOC/17/1 (notification)								ARB/18/21

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
	ARB/17/18	ARB/17/18	ARB/17/18	ARB/17/18	ARB/17/18	ARB/17/18	ARB/17/18 (registered)	ARB/17/28	ARB/17/28 (registered)			
	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28	ARB/17/28 (registered)			
	ARB/17/23	ARB/17/23	ARB/17/23	ARB/17/23	ARB/17/23	ARB/17/23	ARB/17/23 (registered)	ARB/17/33	ARB/17/33 (registered)			
	PCA 2017-26 (registered)	PCA 2017-26	PCA 2017-26 (registered)									
2016										ADHO C/17/1	ADHO C/17/1	ADHO C/17/1

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
												ARB/17/18 ARB/17/28 PCA 2017-26 PCA 2017-26
2015	ARB/15/12 ARB/15/21	ARB/15/12 ARB/15/21	ARB/15/12 ARB/15/21	ARB/15/12 (registered) ARB/15/21	ARB/15/21	ARB/15/21 (registered)						
2014										ARB/15/12	ARB/15/12	ARB/15/12

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
	ARB(AF)/14/2)	ARB(A F)/14/2)	ARB(A F)/14/2)	ARB(A F)/14/2)	ARB(AF)/14/2)	ARB/14/31 ARB(AF)/14/2)	ARB/14/31 ARB(A F)/14/2)	ARB/14/31 ARB/14/19	ARB/14/31	ARB/14/31	ARB/14/31	ARB/15/21 ARB/14/31 (registered)
	ARB/14/2)	ARB/14/2 (registered)	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19	ARB/14/19
2013	ARB/13/7)	ARB/13/7)	ARB/13/7)	ARB/13/7)	ARB/13/7 (registered)			ARB/14/2)	ARB/14/2)	ARB/14/2)	ARB/14/2)	ARB/14/2)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
			ARB/13 /34	ARB/13 /34	ARB/13/3 4	ARB/1 3/34	ARB/1 3/34	ARB/1 3/34	ARB/13 /34	ARB/13 /34	ARB/13 /34	ARB/13 /34 (register ed)
2012	ARB(A F)/1 2/2	ARB(A F)/12/2	ARB(A F)/12/2 (register ed)								ARB/13 7	ARB/13 7
2011									ARB(A F)/12/2	ARB(A F)/12/2	ARB(A F)/12/2	ARB(A F)/12/2
2010	ARB/ 10/12	ARB/10 /12	ARB/10 /12	ARB/10 /12	ARB/10/1 2	ARB/1 0/12 (regist ered)						
2009												ARB/10 /12

Source: own research based on publications of ICSID and PCA treaty arbitration cases.

Annex 2

Estimate Based on an Analysis of Past Cases

A. Objectives and method

1. The budget of an ACIIL depends, to a large extent, on its staffing, and more specifically on the number of lawyers it will employ. It is therefore necessary to determine the staffing needs of an ACIIL for each of the tasks that could be entrusted to it.

2. This Annex aims at estimating the staffing needs for representative work in arbitration proceedings. More specifically, it aims at making this estimate on the basis of objective data, as a complement to information gathered from interviews with field experts (see above, section III.a., paras. 24-28).

3. The method applied is the following:

- It starts from the lawyers' fees charged in a series of arbitration cases, as mentioned in the cost sections of arbitral awards. The average of these fees is divided by a blended (or 'flat') hourly rate, i.e., the average rate obtained by mixing a number of partners' hours with a number of associates' and junior associates' hours.¹ Dividing the overall fees by the blended hourly rate allows for determining the average number of lawyers' hours spent on an average case. The same calculation is made for a series of blended hourly rates within a range that is considered reasonable based on information obtained from practitioners in the field.
- Next, the average duration of the same cases is calculated so as to determine the number of years over which the lawyers' working hours have been spread. This allows for the calculation of the average number of hours per case per year.
- To conclude, this average number of hours per case per year must be related to the total number of yearly working hours per lawyer. This allows to determine the number of cases which a team of ten lawyers could handle on average.

4. By way of example:

- Assuming the average lawyers' fees would be of US\$3,500,000;

- the blended hourly rate is estimated at US\$350;
- therefore, 10,000 lawyers' hours were spent on average on a case;
- the duration of a case was three years on average;
- therefore, a case took 3,333 lawyers' hours per year on average;
- the number of yearly working hours of an ACIIL lawyer is estimated at 1,500;
- therefore, handling an average case takes a bit more than two lawyers;
- in conclusion, a team of ten lawyers can handle around five cases.

5. The method has its strength and limits. Its strength, as compared to interviews, is that it is based on objective facts not subject to (unconscious) bias or other psychological mechanisms influencing the recollection of past events or prognoses of future events. Its limits are that it is based on an accumulation of averages, and that it is purely mathematical and factors out ups and downs in the workload. Because of these strengths and limits, the method usefully complements the results obtained through interviews.

6. There are also more specific limitations related to the relevance of the data used. The legal fees mentioned in awards do not reflect possible write-offs, i.e., counsel time effectively spent on a case but not invoiced to the client. This may lead to an underestimation of the time spent on a case. In order to compensate for this underestimation, an hourly flat rate at the lower end of the range should be used. Applying the lower flat rate leads to an overestimation of the time spent on a given case, which compensates for the underestimation due to write-offs.

7. The calculation made in this section is based on the following specifics:

- The sample of cases consists of the 46 ICSID arbitration cases concluded between 1 May 2019 and 1 May 2020 (table 1). Out of these 46 cases, 25 led to an award on jurisdiction or on the merits containing a section on costs (table 2). Out of these 25 cases, 12 allow to differentiate between lawyers' fees and expenses (table 2).
- The calculation is made on the basis of the lawyers' fees paid by the respondent, whenever an estimate could be made of their blended hourly rate based on the available knowledge of the market. In some instances, notably where the respondent was represented only by a local law firm, no such estimate could be made in the context of the present study. In that case, if the claimant hired a law

firm for which an estimate of the blended hourly rate could be made, the calculation is made on the basis of the lawyers' fees paid by the claimant. This was done in two out of the twelve cases retained (table 2, nos. 9 and 23).

- Where the relevant party was represented by both a foreign specialist law firm and a local firm, and where the figures were available, only the fees of the foreign specialist firm have been taken into account. This allows for a better estimate of the (range of) flat fees to be applied. It also better corresponds to what an ACIIL would do if it were to engage in representative work in arbitral proceedings. Where a party's defence is entrusted jointly to an international law firm and a local firm, the former handles the international investment law aspects whereas the latter most often handles the issues of domestic law. An ACIIL's representative would cover the work traditionally done by an international law firm but not that of a local firm. In two cases (table 2, nos. 14 and 16), no distinction could be made between the fees of the local firm and the foreign lawyers. These two cases have nevertheless been included in the statistics.
- No distinction is made between cases terminated at the jurisdiction phase and cases that proceeded on the merits. It is presumed that the sample of 46 cases comprises an average number of cases of all relevant categories.

8. While this analysis aims at estimating the staffing needs of an ACIIL, it also produces data relevant for the formulation of a policy on the charging of ACIIL's representative work.

B. Average number of hours spent by lawyers

9. The 25 cases which led to an award on jurisdiction or on the merits include 13 cases where the lawyers' fees cannot be distinguished from the expenses. These cases are excluded from the statistics. The calculations were thus made on the basis of 12 remaining cases where the lawyers' fees are identified separately from expenses.

10. In these 12 cases, lawyers' fees ranked between US\$633,854.91 (case no. 16) and US\$12,791,718.00, US\$11,976,662.00 of which charged by an international law firm (Case No. 23) (table 2).

11. Calculated at a flat fee of US\$300, the time spent in these cases ranges between 2,122 hours (case no. 16) and 42,639 hours (case no. 23). Calculated at a flat fee of US\$600, the time spent ranks between 1,056 hours (case no. 16) and 21,319 hours (Case no. 23).

12. In order to calculate the average number of hours spent per case, the fees paid in all the 12 cases have been added up and divided by 12 so as to obtain the average number of hours per case (table 3). That number is then divided by various flat fees. This leads to the following *average number of hours per case*, depending on the flat fee (table 4):

- Calculation at flat fee of US\$300: 9,805 hours per case
- Calculation at flat fee of US\$400: 7,354 hours per case
- Calculation at flat fee of US\$450: 6,537 hours per case
- Calculation at flat fee of US\$500: 5,883 hours per case
- Calculation at flat fee of US\$600: 4,903 hours per case

13. While the various estimates are addressed throughout the analysis, the flat fee of US\$450 is considered the most appropriate for the following reasons:

- On the basis of information available from interviews with practitioners it was considered that flat fees in continental Europe appear to be lower than in the United States and the United Kingdom, with the former being around US\$400 while the latter may sometimes be akin to US\$600. Knowing that the sample of cases comprised a roughly equal number of law firms from continental Europe on the one hand, and from the United States and London, on the other hand, the better estimate would – from this perspective – be that of US\$500.
- At the same time, the blended rates effectively applied in a given case may differ from those officially announced by law firms, in particular because law firms and their clients often agree on a ‘lump sum’ payment that covers most of the work and reflects lower hourly rates. It was considered that, in particular where the clients are respondent States (and mainly developing countries) rather than claimant corporations, this practice would impact most on the higher flat fees of US\$500-600.
- To end with using the flat fee of US\$450 rather than that of US\$500 is also warranted in the light of possible write-offs, i.e., working hours effectively performed but not invoiced to the client.

C. Average duration of cases

14. The average number of working hours per case is performed during a total amount of working hours spread over several years.
15. In order to calculate the workload per year, the number of hours must be divided by the number of years over which such working hours are performed.
16. This requires the identification of a starting and ending date, in a manner that corresponds best to the period when most of the work is done.
17. The starting date chosen is the date of the request for arbitration. This comes with the following caveat. In two instances (cases nos. 9 and 18), our estimate is based on the fees charged by the claimant's counsels instead of the respondent's. claimants' counsels perform a significant amount of work before of the request for arbitration. The real workload may therefore be (slightly) less concentrated than appears from the calculations.
18. The ending date chosen is the date of the last hearings rather than the date of the award. Most of counsel's work is finished after the last hearings. Possible post-hearing briefs and other subsequent work are not taken into account. Again, therefore, the real workload in the course of the arbitral proceedings may be (slightly) less concentrated than appears from the calculations. More importantly, the calculation does not include work in possible annulment proceedings and work in (accompanying local lawyers) in possible enforcement proceedings.
19. Subject to these caveats, the total amount of time spent on the 12 referenced cases amounts to 31 years and 9 months. This gives an average of 2.65 years per case or 2 years and 8 months (table 5).

D. Average number of hours per case and per year

20. The average number of hours per case, identified under B above, must therefore be performed on average over a period of 2.65 years as identified under C above. This gives the following figures (table 6.a):

- Estimate of 9,805 h. per case: 3,700.00 h. per case per year.
- Estimate of 7,354 h. per case: 2,775.09 h. per case per year.
- Estimate of 6,537 h. per case: 2,466.79 h. per case per year.
- Estimate of 5,883 h. per case: 2,262.69 h. per case per year.
- Estimate of 4,903 h. per case: 1,850.19 h. per case per year.

E. Capacity of an ACIIL team of 13 lawyers

21. In order to estimate how many cases an ACIIL team of 13 lawyers could handle, one must have regard to the number of yearly working hours of the team and divide that number by the hours per case per year mentioned in section D above.

22. A first possible approach consists of applying the number of working hours for UN civil servants, namely 1,729 a year. In that case, a team of 13 lawyers can handle the following number of cases on a permanent basis (table 6.b):

- Flat fee of US\$300: 13 lawyers handle 6.07 cases.
- Flat fee of US\$400: 13 lawyers handle 8.10 cases.
- Flat fee of US\$450: 13 lawyers handle 9.11 cases.
- Flat fee of US\$500: 13 lawyers handle 9.93 cases.
- Flat fee of US\$600: 13 lawyers handle 12.15 cases.

23. An alternative approach would take into account that the numbers of hours calculated in D above are those which in the management practice of international law firms qualify as ‘billable hours’. These are only part of the working hours actually performed by lawyers.²⁷ It is therefore appropriate to also calculate the workload on the basis of a more limited number of ‘billable hours’. This gives the following figures:

- Assuming each ACIIL lawyer yearly works 1,500 ‘billable hours’, a team of 13 lawyers could handle between 5.27 and 10.54 cases (see table 6.b).
- Assuming each ACIIL lawyer yearly performs 1,400 ‘billable hours’, a team of 13 lawyers could handle between 4.91 and 9.84 cases (see table 6.b).

²⁷ In the management practice of international law firms, the notion of “billable hours” refers to the work that can be charged to a client. The billable hours are only part of the working hours actually performed by lawyers, which also includes legal and non-legal work that cannot be charged to a client, such as knowledge management and marketing.

24. If one focuses on the calculation at a flat fee rate of US\$450 (which is the most appropriate for the reasons set out above, para. 13), the number of cases that a team of ten lawyers can handle varies between 7.38 and 9.11.²⁸

25. Importantly, the lowest estimate is based on the assumption that part of the lawyers' working hours are not 'billable hours'. As a consequence, the fact that this estimate is lower than 5 should not lead to the conclusion that the ACIIL should not take up five cases because it will not be able to handle the fifth one adequately. The medium and the highest estimates show that the team would be able to handle five cases without doing overtime work. However, this may require the team to postpone 'non-billable' work, which would be unsustainable in the long term.

F. Conclusion

26. It follows from the above that, on the basis of a limited sample of cases, a team of 13 ACIIL lawyers would be able to handle approximately 7 cases simultaneously, and *possibly* more up to 8 or 9.

27. This is a mathematical estimate based on an accumulation of averages. Reality may be different for a number of reasons:

- First, cases vary greatly in complexity. One very large case may limit the ACIIL's capacity to take up additional work as expected. Conversely, a small case may leave more capacity to take on more cases.
- Second, the workload cannot be spread equally over all the days of a year. There will be ups and downs. The team must be capable of handling the work at all times in all the cases it has accepted to handle.

²⁸ This may be compared with a calculation based on the data in the study of the cost and duration of investment arbitration proceedings by the law firm Allen & Overy: <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase>. The study is based on a larger sample. However, since it aims at estimating the cost (as opposed to the number of hours spent in order to determine staffing needs), it does not differentiate between lawyers' fees and other costs but provides the overall respondent costs (US\$4,559,000). Since the average length of cases is also higher than in the sample of our study (3 years and 8 months instead of 2 years and 8 months), the average number of hours per case per year calculated on the basis of Allen & Overy's data is broadly the same as in our study, e.g. calculated at a blended hourly rate of US\$ 450: $(4,559,000 : 450 : 3,66) = 2,768$ hours per case per year, as compared to 2,466.79 in our study. On that basis, a team of 13 ACIIL lawyers would, depending on the number of working hours taken into account, be capable of handling between 6,6 and 8,1 cases concurrently.

28. Also, this estimate does not include work in possible annulment proceedings and in (accompanying local lawyers in) possible enforcement proceedings. This will likely not occur in every arbitration entrusted to the Centre, and where it occurs, the work will not be as intensive as in arbitral proceedings. However, it will come in addition to the work in arbitral proceedings estimated above.

Table 1: ICSID arbitration cases concluded between 1 May 2019 and 1 May 2020

<u>ARB/18/44</u>	SAUR and STEREAU	People's Democratic Republic of Algeria	Concluded discontinued
<u>ARB/18/38</u>	Talal Al Awamleh, Arab Telemedia Services LLC and Ain Telemedia Studios LLC	State of Qatar	Concluded discontinued
<u>ARB/18/37</u>	Oļegs Roščins	Republic of Lithuania	Concluded discontinued
<u>ARB/18/33</u>	GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others	Kingdom of Spain	Concluded discontinued
<u>ARB/18/14</u>	HOCHTIEF Infrastructure GmbH	Kingdom of Saudi Arabia	Concluded discontinued
<u>ARB/18/6</u>	Cem Selçuk Ersoy	Republic of Azerbaijan	Concluded discontinued
<u>ARB/17/46</u>	Cunico Resources N.V.	Republic of North Macedonia	Concluded discontinued
<u>ARB/17/30</u>	Lotus Holding Anonim Şirketi	Turkmenistan	Concluded Award, manifestly without merit
<u>ARB/17/23</u>	CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA	Republic of Mozambique	Concluded award

ARB/17/18	(DS)2, S.A., Peter de Sutter and Kristof De Sutter	Republic of Madagascar	Concluded Award not public
ARB/17/13	Grenada Private Power Limited and WRB Enterprises, Inc.	Grenada	Concluded award
ARB/17/10	Itisaluna Iraq LLC and others	Republic of Iraq	Concluded Merits award
ARB/17/9	Lidercón, S.L.	Republic of Peru	Concluded Merits award
ARB/17/4	Bank of Cyprus Public Company Limited	Hellenic Republic	Concluded Award not public
ARB/17/1	Ortiz Construcciones y Proyectos S.A.	People's Democratic Republic of Algeria	Concluded Award not public
ARB/16/38	Staur Eiendom AS, EBO Invest AS and Rox Holding AS	Republic of Latvia	Concluded Merits Award
ARB/16/32	Thomas Gosling and others	Republic of Mauritius	Concluded Merits Award
ARB/16/16	Global Telecom Holding S.A.E.	Canada	Concluded Award not public
ARB/16/2	Champion Holding Company and others	Arab Republic of Egypt	Concluded Award not public
ARB/15/43	State General Reserve Fund of the Sultanate of Oman	Republic of Bulgaria	Concluded Award not public

<u>ARB/15/41</u>	Standard Chartered Bank (Hong Kong) Limited	United Republic of Tanzania	Concluded Merits Award
<u>ARB/15/40</u>	Belenergia S.A.	Italian Republic	Concluded Merits Award
<u>ARB/15/18</u>	Capital Financial Holdings Luxembourg S.A.	Republic of Cameroon	Concluded Award on Jurisdiction
<u>ARB/15/12</u>	PT Ventures, SGPS, S.A.	Republic of Cabo Verde	Concluded Discontinued
<u>ARB/15/8</u>	Aktau Petrol Ticaret A.Ş.	Republic of Kazakhstan	Concluded Award not public
<u>ARB/15/6</u>	Mobil Investments Canada Inc.	Canada	Concluded Settlement Award
<u>ARB/14/29</u>	Ioan Micula, Viorel Micula and others	Romania	Concluded Merits Award
<u>ARB/14/26</u>	Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l.	Republic of Albania	Concluded Award not public
<u>ARB/14/24</u>	United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi	Republic of Estonia	Concluded Merits Award
<u>ARB/14/14</u>	EuroGas Inc. and Belmont Resources Inc.	Slovak Republic	Concluded Award on Jurisdiction
<u>ARB(AF)/14/2</u>	Oded Besserglik	Republic of Mozambique	Concluded Award on Jurisdiction

ARB/14/3	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein	Italian Republic	Concluded Merits Award
ARB/13/38	Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim	Hashemite Kingdom of Jordan	Concluded Merits Award
ARB/13/21	Edenred S.A.	Hungary	Concluded Award not public
ARB/13/10	Impresa Grassetto S. p. A., in liquidation	Republic of Slovenia	Concluded Discontinued
ARB/13/1	Karkey Karadeniz Elektrik Uretim A.S.	Islamic Republic of Pakistan	Concluded Merits Award
ARB/12/33	UAB E energija (Lithuania)	Republic of Latvia	Concluded Merits Award
ARB(AF)/12/6	Lao Holdings N.V.	Lao People's Democratic Republic	Concluded Merits Award
ARB/12/21	Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A.	Bolivarian Republic of Venezuela	Concluded Award on Jurisdiction
ARB/12/13	Saint-Gobain Performance Plastics Europe	Bolivarian Republic of Venezuela	Concluded Merits Award
ARB/12/10	RSM Production Corporation	Saint Lucia	Concluded Award not public
ARB/11/21	DP World Callao S.R.L., P&O Dover (Holding) Limited, and The Peninsular and Oriental Steam Navigation Company	Republic of Peru	Concluded discontinued

<u>ARB/11/1</u>	Highbury International AVV and Ramstein Trading Inc.	Bolivarian Republic of Venezuela	Concluded Award on Jurisdiction
<u>ARB/09/1</u>	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.	Argentine Republic	Concluded Merits Award
<u>ARB/04/16</u>	Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A.	Argentine Republic	Concluded Merits Award
<u>ARB/98/2</u>	Victor Pey Casado and President Allende Foundation	Republic of Chile	Concluded

Source: ICSID website.

Table 2: number of hours spent on the cases

This table gives an overview of the 25 cases that proceeded to an award on jurisdiction or on the merits.

Out of these 25 cases, 12 provide an overview of costs that makes a distinction between lawyers' fees and expenses. No such distinction is made in cases 3, 5, 11, 12, 15, 17, 18, 19, 20, 21, 22, 24 and 25. These cases have been excluded from the statistics.

Cases 14 and 16 do not allow for distinguishing between the fees of the local law firm and the foreign specialist firm acting as counsels. The cases have nevertheless been included in the statistics.

Two of these cases, *Grenada Private Power v Grenada* and *Standard Chartered Bank v Tanzania*, are contract-based, whereas it is proposed that the Centre should (at least initially) handle treaty-based cases only. These two cases have been included in the sample because there is no indication that cases being contract-based, rather than treaty-based, has an impact on the specific issues analysed here.

For the first case hereinafter, the average number of hours has been calculated on the basis of four different flat hourly rates, ranging between US\$300 and US\$400. For the other cases, the calculation has been made on the basis of one single flat hourly rate of US\$350. The calculation on the basis of the four different rates is made again for the sum of all the relevant cases.

1. *Lotus v Turkmenistan* (award, manifestly without merit)

Claimant: Offit Kurman, US\$59,815.00; Butzel Long, US\$63,614.00; Egemenoglu, US\$25,575.00.

Respondent: Squire Patton Boggs, legal fees US\$884,817.66.

Respondent's legal fees lead to the following estimate of the number of lawyers' hours spent on the case, depending on the flat hourly rate chosen:

- Flat hourly rate US\$300: 2,949 hours
- Flat hourly rate US\$350: 2,528 hours
- Flat hourly rate US\$375: 2,360 hours
- Flat hourly rate US\$400: 2,212 hours

2. *CMC v. Mozambique (merits award)*

Claimant: firm in Johannesburg, legal fees US\$341,659.65 (EUR307,027).

Respondent: Dorsey & Whitney, legal fees US\$778,252.34.

At a flat hourly rate of US\$350, counsels for the Respondent spent 2,224 hours on the case.

3. *Grenada Private Power v Grenada (merits award)*

Claimant: White & Case, US\$5,813,011.30; Co-counsel US\$383,559.00; local counsel US\$181,826.80.

Respondent: Debevoise & Plimpton, all costs without details US\$5,916,030.36.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

4. *Itisaluna v Iraq (award on jurisdiction)*

Claimant: Herbert Smith, US\$1,702,035.55, of which US\$439,244.87 on the jurisdictional objection.

Respondent: Debevoise & Plimpton: fees of US\$1,120,000.

At a flat hourly rate of US\$350, counsel for the Respondent spent 3,200 hours on the case.

5. *Lidercón v Peru (merits award)*

The Parties have claimed costs as follows: Lidercón (Hogan Lovells) EUR3,609,986.49 plus US\$642,106.77, and Peru (Sidley Austin and S. Alexandrov) US\$6,742,880.54. The amount claimed by the parties included the advance payments made to ICSID. The dollar amounts received from each party by ICSID amounted to the following: Lidercón US\$524,823.00 and Peru US\$525,000.00. The final costs of arbitration amounted to US\$929,402.93. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

6. *Staur Eiendom v Latvia (merits award)*

Claimant: Norway firm & Professor F. Baetens.

Respondent: Lalive, legal fees of EUR2,386,868.75 (which the Tribunal reduced by 10 pct.), which equals US\$2,620,065 at the date of the award.

At a flat hourly rate of US\$350, counsel for the Respondent spent 7,485 hours on the case.

7. *Gosling v Mauritius (merits award)*

Claimant: Latham Watkins, fees and expenses EUR3,643,821.74.

Respondent: Foley Hoag and Alison MacDonald QC, fees US\$4,576,334.12.

At a flat hourly rate of US\$350, counsel for the Respondent spent 13,075 hours on the case.

8. *Standard Chartered Bank (Hong Kong) Limited v Tanzania (merits award)*

Claimant: Herbert Smith & Linklaters, GBP2,145,668.15 + GBP142,835.15.

Respondent: Curtis Mallet-Prevost, US\$4,000,000 and local firm US\$529,607.94.

At a flat hourly rate of US\$350, Respondent's foreign law firm spent 11,429 hours on the case.

9. *Belenergia v Italy (merits award)*

Claimant: Watson Farley, EUR1,250,000, which equals US\$1,398,375 at the date of the award.

Respondent: Government, EUR309,220.00.

Account is taken of the fees charged by Claimant's counsel.

At a flat hourly rate of US\$350, Claimant's counsel spent 3,995 hours on the case.

10. *Capital Financial v Cameroon (award on jurisdiction)*

Claimant: Jones Day, EUR1,313,101.33.

Respondent: Curtis Mallet-Prevost, EUR2,055,025.39, which equals US\$2,295,257 at the date of the award.

At a flat hourly rate of US\$350, counsel for the Respondent spent 6,557 hours on the case.

11. Micula II v Romania (merits award)

Claimant: Mannheimer Swartling and Dentons: n/a.

Respondent: Lalive: reimbursement of EUR1,303,368.55 (corresponding to 75% of the Respondent's legal fees and expenses). Total of fees and expenses is therefore EUR1,737,824.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

12. United Utilities v Estonia

Claimant: Herbert Smith & Matthew Weiniger: EUR5,207,672.06 including costs.

Respondent: Squire Patton Boggs: EUR1,997,966.77 including costs and experts.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

13. EuroGas & Belmont v Slovakia (award on jurisdiction)

Claimant: Holland & Hart and Derains Gharavi: EUR1,103,510.38 (incl expenses).

Respondent: Squire Patton Boggs, counsel fees EUR3,051,946.52 which equals US\$3,582,984.6 at the date of the award.

At a flat hourly rate of US\$350, counsel for the Respondent spent 10,237 hours on the case.

14. Oded Beserglik v Mozambique (award on jurisdiction)

Claimant: first several firms from various countries, then Arent Fox. Fees in the arbitration strictly speaking are difficult to determine but certainly include US\$975,186.95 + US 361,730.13 = US\$1,336,917.08.

Respondent: Dorsey & Whitney, USA, and MACT, Mozambique, US\$1,432,040.47. No separate amounts available.

At a flat hourly rate of US\$350, counsel for the Respondent spent 4,091 hours on the case.

15. Blusun v Italy (merits award)

Claimant, Dentons, fees and expenses, EUR3,343,908.37.

Respondent: *Avvocatura dello Stato* (Government), did not file a submission on costs.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

16. Fouad Alghanim v Jordan (merits award)

Claimant: Mayer Brown, GBP3,582,940.28 + US\$2,724,350.58 + US\$444,850 + KWD66,247.34.

Respondent: a local firm and Essex Court Chambers barristers, US\$633,854.91.

At a flat hourly rate of US\$350, counsel for the Respondent spent 1,811 hours on the case.

17. Karkey Karadeniz v Pakistan

Claimant: Arnold & Porter a.o., US\$12,559,526.08 for Arnold & Porter, among many others up to 22 million.

Respondent: Allen & Overy, no data available.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

18. UAB v Latvia (merits award)

Claimant: Vincent & Elkins and Salans, legal fees and expenses EUR744,946; local firm Sorainen, legal fees and expenses EUR300,478, i.e. a total of EUR1,045,424, minus 20% expenses = EUR836,339 of legal fees, which at the date of the award equals US\$991,312.62.

Respondent: the State requests award on costs of no less than EUR166,555.28.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

19. Lao Holdings v Lao People's Democratic Republic (merits award)

Claimant: Stinson LLP and Todd Weiler, lawyers' fees cannot be deducted from aggregate amount of costs.

Respondent: Womble Carlyle, fees and expenses US\$1,293,720.27.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

20. Fabrica de Vidrios v Venezuela (award on jurisdiction)

Claimant: Volterra Fietta, all costs included US\$11,434,636.09.

Respondent: Argentinean firm Guglielmino & Ass., all costs included US\$3,031,233.51.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

21. Saint-Gobain v Venezuela

Claimant: Alston & Bird, total costs approx. US\$6.5-7 million.

Respondent: Curtis Mallet-Prevost, total fees and expenses approx. US 6.5-7 million.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

22. Highbury v Venezuela

Claimant: local firm, no data available.

Respondent: Foley Hoag, no data available.

The case is excluded from the statistics.

23. Teinver v Argentina

Claimants, King & Spalding, fees (not expenses) US 11,976,662.00 and local firm US 815,056,00, in total US 12,791,718.

Respondent: Government, not available.

At a flat hourly rate of US\$350, the Claimant's foreign law firm spent 34,219 hours on the case.

24. Mobil v Argentina

Claimant: King & Spalding and local firm, Las Demandantes han cuantificado que sus costos ascienden al monto total de US\$15.280.960,34.

Respondent: Government, La Demandada ha cuantificado que sus costos ascienden al monto total de US\$2.170.719,60.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

25. Pey Casado v Chile (1st award)

Claimants: Gides, Ropes & Gray, Les demanderesses ont soutenu que leurs coûts encourus serait d'US\$1.730.000 en tant que comme coûts de procédure; et de EUR8.835.996, plus US\$1.032.253 comme coûts exposés pour sa représentation et les honoraires de ses conseils, experts, etc.

Respondents: Government, Arnold & Porter, La défenderesse a déclaré avoir payé un total d'US\$4.389.111,56, ce qui exclut pourtant les coûts de procédure proprement dit.

Since fees cannot be separated from expenses, the case is excluded from the statistics.

Source: own research, based on data published on the ICSID website and www.italaw.com.

Table 3: calculation of average lawyers' fees per case

Case 1	US\$884,817.66
Case 2	US\$778,252.34
Case 4	US\$1,120,000
Case 6	US\$2,620,065
Case 7	US\$4,576,334.12
Case 8	US\$4,000,000
Case 9	US\$1,398,375
Case 10	US\$2,295,257
Case 13	US\$3,582,984.60
Case 14	US\$1,432,040.47
Case 16	US\$633,854.91
Case 23	US\$11,976,662
Total fees	US\$35,298,643.10
Average fees per case (:12)	US\$2,941,553.59

Source: own research, based on data published on the ICSID website and www.italaw.com.

Table 4: calculation of average number of hours per case

(Average total fees per case divided by flat fee)

Estimate flat fee of US\$300:	9,805 hours per case
Estimate flat fee of US\$350:	8,404 hours per case
Estimate flat fee of US\$375:	7,844 hours per case
Estimate flat fee of US\$400:	7,354 hours per case
Estimate flat fee of US\$450:	6,537 hours per case
Estimate flat fee of US\$500:	5,883 hours per case
Estimate flat fee of US\$600:	4,903 hours per case

Source: own research based on data in tables 1-3 and interviews with practitioners on flat fees.

Table 5: calculation of average duration (time span)
(Based on the time period between the request for arbitration and the last hearing)

Name	Registration	Last hearings	Duration
Lotus	22.8.17	17.9.19	2 y 1 m
CMC	14.7.17	1.5.19	1 y 10 m
Itisulana	13.4.17	3.10.18	1 y 6 m
Stauer	6.12.16	14.3.19	2 y 4 m
Gosling	27.9.16	25.6.19	2 y 9 m
Standard Chartered	30.9.15	23.7.18	2 y 10 m
Belenergia	22.9.15	29.3.18	2 y 6 m
Capital Financial	20.5.15	7.10.16	1 y 5 m
Eurogas	10.7.14	16.9.16	2 y 2 m
Oded	3.7.14	16.3.18	3 y 8 m
Fouad	24.12.13	22.6.16	3 y 6 m
Teinver	30.1.09	13.3.14	5 y 2 m
Total			31 y 9 m
Average (:12)			2,6 years per case (2 years and 8 months)

Source: own research based on data published on the ICSID website and www.italaw.com.

Table 6: yearly number of hours per case and capacity of 13 lawyers

a. Yearly number of hours per case

In order to determine the yearly workload on an average case, the average number of hours per case is divided by the average duration of cases.

The calculation is again made with varying flat fees, which determine the average number of hours per case.

Estimate flat fee of US\$300: 9,805 h. : 2.65 y = 3,700.00 hours per case per year

Estimate flat fee of US\$400: 7,354 h. : 2.65 y = 2,775.09 hours per case per year

Estimate flat fee of US\$450: 6,537 h. : 2.65 y = 2,466.79 hours per case per year

Estimate flat fee of US\$500: 5,883 h. : 2.65 y = 2,262.69 hours per case per year

Estimate flat fee of US\$600: 4,903 h. : 2.65 y = 1,850.19 hours per case per year.

b. Capacity of thirteen lawyers

In order to estimate the capacity of a group of 13 ACIIL lawyers (ten regular staff members and three secondees), an estimate is needed of the yearly working hours of each lawyer.

Approach based on the working hours for UN civil servants, namely 1,729 a year (39.3 hours a week with 10 UN holidays and 30 days annual leave): a team of 13 lawyers can handle the following number of cases on a permanent basis:

- Flat fee of US\$300: 13 lawyers handle 6.07 cases.
- Flat fee of US\$400: 13 lawyers handle 8.10 cases.
- Flat fee of US\$450: 13 lawyers handle 9.11 cases.
- Flat fee of US\$500: 13 lawyers handle 9.93 cases.
- Flat fee of US\$600: 13 lawyers handle 12.15 cases.

Approach based on 1,500 ‘billable hours’ a year: a team of 10 lawyers could handle the following number of cases on a permanent basis:

- Flat fee of US\$300: 13 lawyers handle 5.27 cases.
- Flat fee of US\$400: 13 lawyers handle 7.03 cases.
- Flat fee of US\$450: 13 lawyers handle 7.91 cases.
- Flat fee of US\$500: 13 lawyers handle 8.62 cases.
- Flat fee of US\$600: 13 lawyers handle 10.54 cases.

Approach based on 1,400 ‘billable hours’ a year: a team of 10 lawyers could handle the following number of cases on a permanent basis:

- Flat fee of US\$300: 13 lawyers handle 4.91 cases.
- Flat fee of US\$400: 13 lawyers handle 6.56 cases.
- Flat fee of US\$450: 13 lawyers handle 7.38 cases.
- Flat fee of US\$500: 13 lawyers handle 8.04 cases.
- Flat fee of US\$600: 13 lawyers handle 9.84 cases.

Source: own research based on data in tables 1-5.

Annex 3

Estimated Basic Budgets

A. Scenario 1: 15 lawyers

Budget for an Advisory Centre on International Investment Law (US\$)

Budget class	S q m	Uni t	Tota l sq m	Cost per unit	Sub-total	Total
INSTALLATION COSTS						\$274,336
a) ICT equipment¹					\$74,885	
Laptops w. docking stations and monitors		19		\$1,547	\$29,393	
Fixed telephone		19		\$308	\$5,852	
Personal printer		15		\$300	\$4,500	
Mobile telephone		19		\$1,060	\$20,140	
Videoconferencing equipment		3		\$5,000	\$15,000	
b) Furniture					\$101,951	
. Individual office ¹					\$41,251	
Management office furniture set (D1/D2 level)		1		\$6,117	\$6,117	
Standard office furniture set (P5 level)		3		\$2,280	\$6,840	
Standard office furniture set (G6-P4 level)		14		\$2,021	\$28,294	
. Conference room					<u>\$28,200</u>	
Conference table		1		\$12,000	\$12,000	
Conference/visitor chairs		36		\$450	\$16,200	
. Other furniture					<u>\$32,500</u>	
Bookcases, filing cabinets		10		\$2,500	\$25,000	
Coffee table, 4 armchairs		1		\$7,500	\$7,500	
c) Materials and supplies					\$17,500	
Library books		1		\$17,500	\$17,500	
d) Services					\$80,000	
Website development (multilingual)		1		\$80,000	\$80,000	
RECURRING COSTS (per annum)						\$3,070,466
a) Rent						
Rental costs depending on location						
b) Buildings maintenance, utilities (including security)¹			347		\$129,366	
Management office	27	1	27	\$10,080	\$10,080.45	
Standard office ²	14	15	203	\$5,040	\$75,603.38	
Conference room	45	1	45	\$16,801	\$16,800.75	

Library	45	1	45	\$16,801	\$16,800.75	
Administrative booth/reception	27	1	27	\$10,080	\$10,080.45	
c) Staff costs ³					\$2,557,100	
Executive Director (D2 level)		1		\$231,400	\$231,400	
Lawyers, senior level (P5) ⁴		3		\$195,800	\$587,400	
Lawyers, upper medium level (P4)		3		\$166,600	\$499,800	
Lawyers, medium level (P3) ⁴		3		\$136,700	\$410,100	
Lawyers, junior level (P2) (including 2 secondment trainees)		5		\$112,700	\$563,500	
Administrative staff (G4-G6)		3		\$88,300	\$264,900	
d) Services and supplies					\$344,000	
ICT hardware and software support, server hosting		12		\$3,500	\$42,000	
Software licenses/digital subscriptions (library, electronic communication)		1		\$80,000	\$80,000	
Telephone costs ⁵		12		\$9,500	\$114,000	
Translation costs ⁵		100		\$230	\$23,000	
Stationery and supplies		12		\$2,500	\$30,000	
Photocopying/printing equipment rental and maintenance		12		\$2,500	\$30,000	
Website hosting and maintenance		1		\$25,000	\$25,000	
d) Travel					\$40,000	
Travel costs		1		40,000	\$40,000	
Total costs ⁶					\$3,344,802	
Contingency reserve (7.5%)					\$250,860	
TOTAL REQUIREMENTS					\$3,595,662	

1 Based on 2019 UNOV/UNODC Standard Cost Manual.

2 Includes workspace for 2 Government officials on secondment/interns.

3 Based on 2020 Revised UNODC Standard Salary Cost Manual (including base salary, post adjustment, social security, pension, medical insurance, rental subsidies, dependency benefits, education grant, mobility and hardship if any, home leave, after-service health insurance, compensation for service-related injuries, illness or death).

4 One staff foreseen to provide support in mediation proceedings.

5 Provisions take into account that Advisory Centre is operating on a worldwide basis.

6 Costs have been calculated on the basis of tax exemption.

B. Scenario 2: 8 lawyers

Budget for an Advisory Centre on International Investment Law (US\$)

Budget class	Sq m	Unit	Total sq m	Cost per unit	Sub-total	Total
INSTALLATION COSTS						\$232,489
a) ICT equipment¹					\$49,465	
Laptops w. docking stations and monitors		11		\$1,547	\$17,017	
Fixed telephone		11		\$308	\$3,388	
Personal printer		8		\$300	\$2,400	
Mobile telephone		11		\$1,060	\$11,660	
Videoconferencing equipment		3		\$5,000	\$15,000	
b) Furniture					\$85,524	
. Individual office ¹					\$24,824	
Management office furniture set (D1/D2 level)		1		\$6,117	\$6,117	
Standard office furniture set (P5 level)		2		\$2,280	\$4,560	
Standard office furniture set (G6-P4 level)		7		\$2,021	\$14,147	
. Conference room					<u>\$28,200</u>	
Conference table		1		\$12,000	\$12,000	
Conference/visitor chairs		36		\$450	\$16,200	
. Other furniture					<u>\$32,500</u>	
Bookcases, filing cabinets		10		\$2,500	\$25,000	
Coffee table, 4 armchairs		1		\$7,500	\$7,500	
c) Materials and supplies					\$17,500	
Library books		1		\$17,500	\$17,500	
d) Services					\$80,000	
Website development (multilingual)		1		\$80,000	\$80,000	
RECURRING COSTS (per annum)						\$1,924,124
a) Rent						
Rental costs depending on location						
b) Buildings maintenance, utilities (including security)¹			266		\$99,124	
Management office	27	1	27	\$10,080	\$10,080	
Standard office ²	14	9	122	\$5,040	\$45,362	
Conference room	45	1	45	\$16,801	\$16,801	
Library	45	1	45	\$16,801	\$16,801	
Administrative booth/reception	27	1	27	\$10,080	\$10,080	

c) Staff costs ³					\$1,441,000	
Executive Director (D2 level)		1	\$231,400	\$231,400		
Lawyers, senior level (P5) ⁴		2	\$195,800	\$391,600		
Lawyers, upper medium level (P4)		1	\$166,600	\$166,600		
Lawyers, medium level (P3)		1	\$136,700	\$136,700		
Lawyers, junior level (P2) (including 2 secondment trainees)		3	\$112,700	\$338,100		
Administrative staff (G4-G6)		2	\$88,300	\$176,600		
d) Services and supplies					\$344,000	
ICT hardware and software support, server hosting		12	\$3,500	\$42,000		
Software licenses/digital subscriptions (library, electronic communication)		1	\$80,000	\$80,000		
Telephone costs ⁵		12	\$9,500	\$114,000		
Translation costs ⁵		100	\$230	\$23,000		
Stationery and supplies		12	\$2,500	\$30,000		
Photocopying/printing equipment rental and maintenance		12	\$2,500	\$30,000		
Website hosting and maintenance		1	\$25,000	\$25,000		
d) Travel					\$40,000	
Travel costs		1	40,000	\$40,000		
Total costs ⁶					\$2,156,613	
Contingency reserve (7.5%)					\$161,746	
TOTAL REQUIREMENTS					\$2,318,359	

1 Based on 2019 UNOV/UNODC Standard Cost Manual.

2 Includes workspace for 2 Government officials on secondment/interns.

3 Based on 2020 Revised UNODC Standard Salary Cost Manual.

4 One staff foreseen to provide support in mediation proceedings.

5 Provisions take into account that Advisory Centre is operating on a worldwide basis.

6 Costs have been calculated on the basis of tax exemption.

Annex 4

Fees Charged for Services Rendered by the Centre

b. Fee structure aimed at self-sustainability

1. Fees can be based on hourly rates, on capped hourly rates, on lump sums (albeit for various phases in the proceedings), or on a combination of these approaches.
2. One possible approach consists in setting the fees so as to theoretically make the Centre self-sustainable, i.e., achieve a break-even in the budget. This amounts to according priority to the objective of financial autonomy for the Centre, but it is compatible with the other objectives, such as cost predictability for States.
3. Assuming that the recurring yearly cost of running the Centre in scenario 1 is of US\$3,070,466 (see Annex 3) and that a team of 15 lawyers works a total of 22,500 ‘billable hours’ (see Annex 2, table 6.b), break-even is achieved with an average hourly rate of US\$136, without any cap.
4. Several variants can be envisaged to achieve (theoretical) break-even with different hourly rates for various categories of States. Member States could be subdivided in four categories, with the LDCs as one category and three further categories based on the World Bank’s income-related classification:
 - Category A: high-income developing countries
 - Category B: upper-middle income developing countries
 - Category C: non-LDC lower-middle and low-income developing countries
 - Category D: LDCs.²⁹
5. High-income developing countries would have access to the Centre at market rates or slightly discounted market rates, not below US\$400 per hour. The Centre would however prioritize the other categories of States which would each pay different hourly rates.

²⁹ The classification of countries used here follows that of the World Bank, except that three countries classified as “low income developing countries” are included here in category C; at the same time, one country classified by the World Bank as “low income developing country” is included in the LDC group..

6. For reference only: the hourly rate for arbitrators paid by ICSID is US\$375.

7. In one scenario, each of the four categories of States would use the Centre's 'billable services' to the same extent – each using 5,625 hours a year. In that scenario, break-even could be achieved, for example, by charging the following hourly rates – the identification of which is based on trial and error:³⁰

- States in category A pay US\$400 per hour = US\$2,250,000
- States in category B pay US\$90 per hour = US\$506,250
- States in category C pay US\$40 per hour = US\$225,000
- LDCs pay US\$20 per hour = US\$112,500

8. This scenario is however merely theoretical. In practice, the Centre might want to give priority to States in category D, and then to States in category C. It will therefore not achieve break-even on the basis of the above hourly rates.

9. In addition, it may not be desirable to pursue break-even on these bases, because developing countries would then contribute to the financing of the defence of developing countries in the categories below (by paying a higher rate, A finances B, C and D; B finances C and D; C finances D) while developed countries would not contribute to the financing of the Centre.

10. This leads to two possible conclusions (apart from discarding the above option altogether). The first one consists of applying the above rates for no other reason than that they would theoretically achieve break-even under the theoretical circumstances identified above. The second one, which is discussed hereafter, consists of pursuing partial self-financing.

³⁰ On the basis of the discounts applied by the ACWL (albeit to different hourly rates and with low caps), the fee structure would be as follows:

- Cat. A pays US\$400 per hour (market rate of US\$500 – 20%) = US\$2,250,000
- Cat. B pays (-40%) US\$300 per hour = US\$1,687,500
- Cat. C pays (-60%) US\$200 per hour = US\$1,125,000
- LDCs pay (-90%) US\$50 per hour = US\$281,250
- Total = US\$5,343,750

c. *Fee structure aimed at partial self-financing*

11. An alternative approach consists in pursuing financial autonomy to a lesser degree. This might be, for example, for half, one third or a quarter of the total recurring costs. The choice between these possibilities may determine, but may also be determined by, other available sources of financing.

12. A quarter of break-even is achieved if all of the 22,500 working hours are charged at US\$36, which is only slightly more than the amount of US\$35 envisaged above for low-income developing countries and LDCs. Working exclusively for LDCs at a rate of US\$36, the Centre would achieve a quarter of break-even.

13. A third of break-even is achieved if all of the 22,500 working hours are charged at US\$48.

14. A half of break-even is achieved if all of the 22,500 working hours are charged at an average rate of US\$73. In other words, working exclusively for States in Category C at a rate of US\$73, the Centre would meet half of its recurring costs.

15. These fee structures can be adapted indefinitely. What is important is that some degree of financial autonomy could be achieved if the Centre were to work essentially for the poorer categories of countries at hourly rates that are extremely advantageous as compared to market conditions. *A fortiori*, working for developing countries in the categories A and B at favourable conditions will generate income that may be transferred to the Endowment Fund and allow for the expansion of the Centre's activities.

d. *Capped hourly fees*

16. In the practice of law firms, and at the ACWL, hourly fees are combined with a cap, that is, a ceiling above which no hourly fees will be charged any further. This raises the question of what is to be preferred: low hourly rates with high caps or high hourly rates with low caps?

17. High hourly rates with low caps offer the following advantages:

- They can bring in money more rapidly. However, this should not be relevant, let alone determining for the ACIIL. In addition, the cash-flow will also depend on the Centre’s policy with respect to advances.
- They offer more cost predictability to States.

18. Conversely, the combination of low hourly rates with high caps offers the following advantages:

- From the States’ perspective, it is the most economical approach for small cases (or limited work other than cases) which remain below the cap.
- It allows States to spread the payments over a longer period of time.
- The State remains financially committed / retains ownership over a longer period of time.

19. It follows that there is no decisive argument in favour of either approach. Accordingly, a cap may be set at the average number of hours per case, as identified in Annex 3, table 4, depending on the estimate flat fee:

Estimate flat fee of US\$300:	9,805 hours per case
Estimate flat fee of US\$400:	7,354 hours per case
Estimate flat fee of US\$600:	4,903 hours per case

20. Applying, for example, an hourly rate of US\$35 with a cap of 7,500 hours, an LDC would never pay more than US\$262,500 per case. Again, this finding may cause decision-makers to adapt the hourly rates and/or the cap, keeping in mind the pros and cons mentioned here above.

e. Fixed amounts

21. Even with a cap, hourly fees account for significant unpredictability in costs. This is why law firms often agree on a lump sum – a fixed amount for all the services to be rendered in a given case, or a predefined category of such services (e.g., preliminary objections).

22. Similarly, an argument can be made for a combination of a lump sum with (even more) limited hourly fees, which may further be combined with a cap. The payment of the lump sum could be spread over a number of years (e.g., three reflecting the average duration of arbitral proceedings) and it could be refundable if the work performed does not account for the amount of the lump sum.

f. Varying fees for different services

23. Discounted rates may apply for services the Centre seeks to promote in the general interest, such as mediation and assistance during cooling-off periods (see Annex 1). A discount of 25% or more could apply as compared to the fees charged in arbitration.

24. Another question is if and how the Centre should charge for drafting opinions, if this were a service to be provided by the Centre. At the ACWL, opinions are rendered free of charge. This may be less appropriate in international investment law, which is often very fact-sensitive with the consequence that it is often difficult to render a meaningful opinion in the abstract. This argues in favour of charging opinions in a non-contentious context at the full rate. At the same time, the fees should not become an obstacle to consulting the Centre early on when a problem arises. This can be achieved by having a “first 15 minutes (or first 30 minutes) for free” policy.

g. Conclusions

25. It follows from the above that:

- Charging fees with a purpose of achieving break-even for the Centre is difficult. If break-even is achieved or exceeded, the surplus could be deposited into the Endowment Fund.
- Even very low hourly fees as compared to market rates may significantly contribute to the Centre’s budget. Some degree of financial autonomy could be achieved even if the Centre were to work essentially for the poorer categories of countries at hourly rates that are extremely advantageous as compared to market conditions. *A fortiori*, greater autonomy could be achieved if the Centre were to charge higher amounts.
- Predictability of costs for States can be pursued by capping the hourly fees and by combining hourly fees with one or more lump sum amounts.

- Counselling in mediation and during cooling-off periods could be charged at lower rates so as to incentivize States to use these services to the optimal extent depending on the nature of the case.