

This is an outline prepared by the UNCITRAL secretariat for the sixth intersessional meeting of Working Group III (Singapore, 7 and 8 September 2023). The outline has been prepared to facilitate the informal discussions at the meeting and reflects work in progress. It does not pertain to reflect the views of the Working Group or the secretariat. Any comments on this draft should be communicated to the secretariat (jaesung.lee@un.org; corentin.basle@un.org) by 30 September 2023.

## Financing of a standing mechanism – An outline

1. The following provides an outline of a working paper to be prepared by the Secretariat with regard to the cost and financing structure of a standing mechanism to handle international investment disputes. Considering that the Working Group has yet to discuss the establishment and operation of such a standing mechanism, the working paper is being developed based on traditional international court models and some underlying assumptions, which will be adjusted as the Working Group makes progress.
2. The figures provided in this outline are only estimates, as there are a number of variances depending on how a standing mechanism would operate. As an outline, the intention is to illustrate possible components of the budget and possible options for financing. The objectives for establishing the standing mechanism, its scope of jurisdiction, legal bases of disputes to be handled, functions to be carried out (first instance, appellate mechanism, state-to-state dispute and ADR services), its relationship with existing mechanisms, its caseload, the working language(s) and interpretation as well as library services could all have an impact on the budget. While the operational structure will determine the financial resources required, it may also be the case that the available financial resources will determine the operational structure of the standing mechanism.
3. This outline does not envisage the establishment of an advisory centre in connection with the standing mechanism for the sake of simplicity and as a working paper on the cost and financing of an advisory centre is available (A/CN.9/WG.III/WP.212/Add.1).
4. The figures provided with regard to other permanent bodies in this outline are for reference only and would be further verified and updated. For that purpose, the Secretariat circulated a questionnaire (see Annex) to 24 bodies on 20 September 2021 that handle international disputes.<sup>1</sup> As of 30 November 2021, the Secretariat has received 3 responses from the ICJ, the ECtHR and the CJEU.

### I. Assumptions

A standing mechanism with a First Instance Tribunal and an Appeal Tribunal is established under the auspices of the United Nations without any link to an existing body. This body

<sup>1</sup> The African Court on Human and Peoples' Rights; Inter-American Court of Human Rights (IACHR or IACtHR); World Trade Organization (WTO), Dispute Settlement Body (DSB) and the Appellate Body (AB); United Nations Compensation Commission (UNCC); Union of South American Nations (UNASUR dispute settlement body); United Nations International Criminal Tribunal for Rwanda (ICTR); International Criminal Tribunal for the former Yugoslavia (ICTY); The Extraordinary Chambers in the Courts of Cambodia (ECCC); Residual Special Court for Sierra Leone (RSCSL); The International Residual Mechanism for Criminal Tribunals (IRMCT); Permanent Court of Arbitration (PCA); The Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law (CCJA-OHADA); Arab Investment Court; International Court of Justice (ICJ); International Criminal Court (ICC); G.C.C Commercial Arbitration Centre (GCCCAC); European Court of Human Rights (ECtHR); Court of Justice of the European Union (CJEU); Court of Arbitration for Sport (CAS); Tribunal Permanente de Revisión del Mercosur (MERCOSUR); Iran-United States Claims Tribunal (IUSCT); International Tribunal for the Law of the Sea (ITLOS); International Centre for Settlement of Investment Disputes (ICSID); Economic Court of the Commonwealth of Independent States (Economic Court of the CIS).

becomes operational as of 2028, after a treaty conference to establish the standing mechanism in 2027.

*Assumptions*

- Expected workload: 10 first instance cases + 3 appellate cases per year (2028-2032)
- Number of Appeal Tribunal members: 7 (full-time, ASG level)
- Number of First Instance Tribunal members: 15 (part-time, D-2 level)
- Secretariat: 12 professional staff & 10 general staff
- Governance structure: Meeting of the Conference of the Contracting Parties and meetings of the Tribunals supported by the Secretariat
- Income structure: Annual contribution from Contracting States and payment of fees by disputing parties

## II. Cost structure

5. The three broad categories of the costs of the standing mechanism are:

- Remuneration of the members of the First Instance Tribunal and the Appeal Tribunal;
- Remuneration of the staff of the Secretariat; and
- Annual operating expenses.

### 1. Remuneration of the members of the First Instance Tribunal and the Appeal Tribunal

6. The remuneration of the members of the First Instance Tribunal and the Appeal Tribunal could vary depending on a number of variables, such as their employment status (full-time, part-time or on-call), level of payment, privileges and immunities including tax benefits, pension as well as health insurance schemes. This outline takes the approach that the members would be remunerated with monthly salary plus benefits based on a UN salary scale and benefits.

7. The estimate total cost of remuneration of the members of First Instance Tribunal and the Appeal Tribunal is 4,017,319 USD.

7 Appeal Tribunal members (ASG level)	301,117 USD <sup>2</sup> x 7	2,107,819 USD
15 First Instance Tribunal members (D2 level, 50% part-time <sup>3</sup> )	(254,600 USD x 50%) x 15	1,909,500 USD

8. For the annual 2019-2020 budget cycle, the ICJ had a budget of 7,381,400 USD for its 15 permanent judges (emolument, allowance, pension, duty allowance and travel), of which 2,519,400 USD is allotted for pension purposes. Considering only the salary portion (3,821,700 USD), this amounts to an average of 254,780 USD per judge.<sup>4</sup>

<sup>2</sup> To be verified and updated.

<sup>3</sup> UNODC Revised Standard Salary Costs 2021-2024, D2 level. The “part-time” assumption is to provide a comparison with the full-time costing as provided for appellate body members. The figure does not take into account travel costs of part-time judges to and from the Tribunal.

<sup>4</sup> See Report of the International Court of Justice (1 August 2019–31 July 2020) (A/75/4). There were 28 instances where States parties chose judges ad hoc during the period under review, with these functions being carried out by 15 individuals (the same person may sit as judge ad hoc in more than one case). The budget for 2020 has allotted 582,800 USD for judge ad hoc (A/75/4, para. 63). For the 2020-2021, the ICJ has budgeted 8,134,600 USD for its 15 permanent judges.

9. According to the proposed budget for 2021-2022, ITLOS has estimated 7,033,800 EUR for its 21 judges, of which 2,226,600 EUR is allotted for pension purposes.<sup>5</sup> Under case-related costs, a total of 1,509,600 EUR of special allowance is allocated to full-time judges and 177,700 EUR for judges ad hoc. Considering only the salary portion (annual and special allowance but not the case-related special allowance, 4,431,600 EUR), this amounts to an average of 211,028 EUR (approximately 238,883 USD) per judge.

10. For 2021, ICC budgeted a total of 4,711,000 EUR for its 14 full-time judges (salary, pensions, expenses and allowance), of which 921,900 EUR was for pension purposes. Considering only the salary portion (2,661,900 EUR), this amounts to an average of 190,135 EUR (approximately 214,500 USD) per judge.<sup>6</sup>

11. According to the response received, the ECtHR has 47 full-time judges and has allocated a budget of 12,155,328 EUR. Annual costs per judge amount to 258,624 EUR but this includes private medical & social insurance and pension.

12. While the working paper will be prepared on the basis of a salary-based system, it may be possible to envisage a monthly retainer combined with fee-based remuneration (per diem or hourly rates). Under this approach, the members may be responsible for their own social security (health insurance and pension).<sup>7</sup>

13. For example, the WTO Appellate Body members receive a retainer fee of 9,085 CHF per month with a fee of 783 CHF per each day of work along with a per diem of 374 CHF or a monthly rental subsidy. They also receive 330 CHF per month for administrative expenses. The remuneration of panellists (apart from travel expenses) is 900 CHF per each day of work along with a per diem of 374 CHF. The annual

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The President has a special allowance of 25,000 USD per annum. Other entitlements depend upon the status opted by the judges, between resident and non-resident. See Report of the International Court of Justice (1 August 2020–31 July 2021) (A/76/4).

<sup>5</sup> Draft budget proposals of the International Tribunal for the Law of the Sea for the budget period 2021–2022 (SPLOS/30/5). In determining the level of remuneration of the members of the Tribunal, in 1996, the fourth Meeting of States Parties adopted the principle of maintaining equivalence with the remuneration levels of judges of the ICJ. The fourth Meeting of States Parties also decided that the annual remuneration of judges other than the President would consist of three elements (see SPLOS/8 and SPLOS/WP.3/Rev.1):

(a) An annual allowance, payable monthly, which is one third of the maximum annual net base salary (based on the current level of remuneration);

(b) A special allowance payable for each day that a judge is engaged in the business of the Tribunal. The maximum special allowance is one third of the annual net base salary divided into 220 working days;

(c) A subsistence allowance for each day that a judge is required to be present at the seat of the Tribunal. The level of subsistence allowance is determined by the International Civil Service Commission and is paid up to a maximum of one third of the annual net base salary.

In accordance with article 18, paragraph 2, of the Statute of ITLOS, the President is required to reside at the seat of the Tribunal and receives an annual remuneration of \$181,840. The annual allowance of the other members of the Tribunal amounts to one third of the maximum annual remuneration (\$60,613). In addition, the President is paid an allowance of \$25,000 per annum in line with the practice at the ICJ, whose President has been entitled to this amount since 1 January 2011, in keeping with the decision adopted by the General Assembly on 24 December 2010 (see resolution 65/258, para. 6). The President is not entitled to a special allowance or subsistence allowance for attending meetings of the Tribunal (SPLOS/30/5, paras. 39-40).

<sup>6</sup> In addition to its 14 full-time judges, the ICC budgeted an annual allowance for 4 non-full-time judges in an amount of 240,000 EUR (approximately 270,703 USD). See Report of the Committee on Budget and Finance on the work of its thirty-fifth session, Document ICC-ASP/19/15, paras. 40-42, and Proposed Programme Budget for 2021 of the International Criminal Court, Document ICC-ASP/19/10, Annex VI(a).

<sup>7</sup> The EU-Vietnam FTA takes this approach but further provides that upon a decision by the Trade Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary and that in such an event, the Members shall serve on a full-time basis and the Trade Committee shall fix their remuneration (Articles 12.17 and 13.17, EU-Vietnam FTA). The CETA provides in Article 8.27 that the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee. The fees are to be paid equally by both Parties into an account managed by the ICSID Secretariat. The CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions. As regards the Appellate Tribunal, CETA Article 8.28.7 provides that the CETA Joint Committee shall set the remuneration of the Members of the Appellate Tribunal and provisions related to the costs of appeals.

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budget for the members of the Appellate Body was 791,000 CHF in 2019 but reduced to 0 EUR in 2021 due to cessation of active proceedings (a lower amount is included instead in temporary assistance). The 2021 budget for panellist's fees was 1,300,000 CHF.<sup>8</sup>

14. As regards ICSID, each member of an ICSID tribunal is entitled to receive a fee of 3,000 USD per day of meetings or other work performed in connection with the proceedings (corresponding to US\$375 per hour) and the reimbursement of any expenses reasonably incurred in connection with travel and otherwise, including a per diem.

## 2. Remuneration of the staff of the Secretariat

15. The staffing requirements of the Secretariat have been calculated based on the anticipated caseload and the total number of tribunal members (22). The remuneration of the staff of the Secretariat, who will provide services to the members of the Tribunals and the Contracting Parties of the Standing Mechanism will vary depending on the number of staff, their employment status and their salary structure as well as the services to be provided. The estimate cost below has been calculated based on the assumption that the staff members would be employed by the Standing Mechanism and paid a salary. An alternative approach would be to remunerate staff members by a system of fees for services. Under this approach, the staff would be remunerated by hourly fees, annual fees, a percentage of the amount of the claim, a value of salary or a combination of these elements.

16. According to that assumption, the estimate total cost of remuneration of the staff members (including all benefits) of the Secretariat is **3,398,717 USD**:

12 professional staff (1 ASG, 1 D-2, 1 D-1, 2 P-5, 4 P-4, 3 P-3)	2,411,717 USD
10 general staff (4 G-6, 4 G-5, 2 G-4)	987,000 USD

17. This is substantially lower than other bodies that are fully operational. For example, the response provided by the ICJ indicated that it has a registrar<sup>9</sup> and 117 staff members<sup>10</sup> assisting 15 judges. The registry component of the ICJ budget amount to 18,446,500 USD.

18. According to the proposed budget for 2021-2022, ITLOS has estimated 8,748,600 EUR for staff costs and 685,200 EUR for case-related staff costs.

19. The ICC has 288 staff members with a total cost of 22,672,800 EUR.<sup>11</sup> WTO DB is supported by the Legal Affairs Division and relevant divisions of the WTO secretariat responsible for the invoked agreement and the Appellate Body (7

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<sup>8</sup> See 2021 WTO Budget Proposal (9 November 2020) ([WT/BFA/W/523/Rev.1](#)).

<sup>9</sup> The Registrar has diplomatic, administrative and judicial functions. He/she directs the work of the Registry, which is the international secretariat providing support to the Court (composed of 15 judges) in the discharge of its functions. The activities of the Registry are mainly of administrative nature (personnel matters, budget, building, security, IT, information, linguistics). The Legal Office of the Registry also assists the Court in its judicial functions.

<sup>10</sup> 1 ASG, 1 D-2, 1 D-1, 4 P-5, 17 P-4, 17 P-3, 20 P-2/P-1, 6 GS (Principal Level), 50 GS (Other Level). The staff members are responsible for among others, assisting during the Court's meetings, responsible for research, translations, publications, administrative work including finance and security. See Report of the International Court of Justice 1 August 2020–31 July 2021 ([A/76/4](#)).

<sup>11</sup> [figures of the registry to be verified] Overall, the ICC has around 900 staff members (see <https://www.icc-cpi.int/about>) with a total cost of 105,334,500 EUR (see Report of the Committee on Budget and Finance on the work of its thirty-fifth session, Document [ICC-ASP/19/15](#), Table 10, p. 34).

members) has its own Secretariat with 18 staff members.<sup>12</sup> The annual budget of the Appellate Body and its secretariat was 7,579,900 EUR in 2019.<sup>13</sup>

20. According to the response received, the ECtHR’s registry has budgeted 58,682,968 EUR to carry out its functions in 2021. This includes, among others, remuneration of permanent staff (45,421,961 EUR) and temporary staff (1,112,255 EUR). Pension scheme for the staff amounts to 7,751,200 EUR.

21. According to the ICSID 2021 Annual Report, cost for staff services (including benefits) amounted to 11,554,039 USD in 2021 and 11,363,199 USD in 2020.<sup>14</sup>

### 3. Annual operating expenses

22. The third element relates to both the initial installation costs (furniture, material and supplies and basic services) as well as annual recurring operating costs, which would cover any rental of the premises,<sup>15</sup> costs of building maintenance (including utilities and security), services and supplies (including ICT services) and travel.

23. Based on the figures prepared for the advisory centre (scenario A, available [here](#)), the annual recurring operating cost of the registry is estimated at **2,352,164 USD**.

Recurring costs	Sq m	Unit	Cost per unit	Sub-Total
				<b>\$2,352,164</b>
<b>a) Buildings maintenance, utilities (including security)</b>				<b>\$440,164</b>
Management office	27	24	\$10,080	\$241,920.00
Standard Office	13.5	24	\$5,040	\$120,960.00
Conference room	45	3	\$16,801	\$50,403.00
Library	45	1	\$16,801	\$16,801.00
Administrative booth/reception	27	1	\$10,080	\$10,080.00
<b>b) Services and supplies</b>				<b>\$1,512,000</b>
ICT hardware and software support, server hosting		44	\$3,500	\$154,000
Software licenses/digital subscriptions (library, electronic communication)		2	\$80,000	\$160,000
Telephone costs <sup>5</sup>		44	\$9,500	\$418,000
Translation costs <sup>5</sup>		2,000	\$230	\$460,000
Stationery and supplies		44	\$2,500	\$110,000
Photocopying/printing equipment rental and maintenance		44	\$2,500	\$110,000
Website hosting and maintenance		1	\$25,000	\$25,000
Database development (case law)		3	\$25,000	\$75,000
<b>c) Travel</b>				<b>\$400,000</b>
Travel costs		1	400,000	\$400,000

<sup>12</sup> Due to the increase in dispute settlement activity, 30 posts had been redeployed to the legal divisions. At the end of 2018, the number of permanent positions in the legal divisions stood at 25 in the Appellate Body, 34 in the Legal Affairs Division and 31 in the Rules Division, up from 17, 23 and 20, respectively, in 2014, when the period of reallocation began. (WTO Annual Report 2019, pp. 172)

<sup>13</sup> WTO Annual Report 2019, pp. 179.

<sup>14</sup> Available at <https://icsid.worldbank.org/resources/publications/icsid-annual-report>.

<sup>15</sup> For example, the ICJ costs related to the rental of premises amount 1.7 million USD.

24. According to the ICJ budget of 2020, the programme support expenses amount to 3,997,400 USD. This includes 966,000 USD for data processing services and 375,000 USD for maintenance and rental costs of equipment.

25. According to the proposed budget of 2021-2022 of ITLOS, the operating expenditure amounts to 3,405,700 EUR, which includes the library and related costs of 336,400 EUR.

26. According to the response received, ECtHR's annual operational expenditure amount 2,797,781 EUR, among which 254,449 EUR are allocated for interpretation and translation costs, 1,807,800 EUR for IT-related costs, and 85,700 EUR for library costs.<sup>16</sup>

27. According to the ICSID 2021 Annual Report, its expenditure amounted to 50,774,088 USD with expenses relating to arbitration/conciliation proceedings amounting to 36,277,763 USD and administrative expenses amounting to 14,328,623 USD. Most of the administrative expenses related to staff services with the annual operational cost being approximately 2,774,585 USD.

#### 4. Summary

28. In sum, the estimate total cost for operation of the standing mechanism would amount to approximately **9.8 million USD per year**.

Remuneration of the First Instance Tribunal and the Appeal Tribunal members	4,017,319 USD
Remuneration of the staff of the Secretariat	3,398,717 USD
Annual operating expenses	2,352,164 USD
Total	9,768,200 USD

29. The 2020 budget of the ICJ as adopted by the General Assembly was 28,145,500 USD.

30. The proposed 2021-2022 budget of ITLOS is 24,412,400 EUR.

31. The 2021 total budget of the ICC is 144,917,200 EUR.<sup>17</sup>

32. The 2021 budget of the CJEU was 444,049,000 EUR with 75% of the budget dedicated to expenditures of judges and staff members and 25% to infrastructure expenditure.

33. The 2021 budget of the ECtHR was 73,994,300 EUR, which covers judges' remuneration, staff salaries and operational expenditure (information technology, official journeys, translation, interpretation, publications, representational expenditure, legal aid, fact-finding missions etc.) but not expenditure on the building and infrastructure (telephone, cabling etc.). Such services are provided by the Council of Europe's central services.

#### 5. Other issues

##### *Establishment cost*

34. There are also other expenses that should be taken into account: (i) Establishment cost (including the cost for holding the treaty conference<sup>18</sup>); (ii) venue and premises (in one location or to be located in different regions).

<sup>16</sup> Other operational costs include printings and email, official journey of registry staff, telecommunication equipment, representational expenses, central office, staff training, visibility and experts' consultants.

<sup>17</sup> See Report of the Committee on Budget and Finance on the work of its thirty-fifth session, Document [ICC-ASP/19/15](#), page 4.

<sup>18</sup> According to recent figures for holding one additional week of Working Group session, the total amount was 356,800 USD including interpretation (83,000 USD) and documentation/translation (273,800) services.



35. For example, based on the figures prepared for the advisory centre (scenario A, available [here](#)), the initial installation cost of the standing mechanism would be approximately **669,106 USD**.

#### *Phased operation*

36. The working paper will be prepared with the assumption that the expected workload of the standing mechanism would be an average of 10 first instance cases and 3 appellate cases per year for the first five years of operation (2028-2032).<sup>19</sup> If the workload is less, the cost of the standing mechanism during the first few years may be reduced, both with regard to members of the Tribunals as well as the staff members of the Secretariat.<sup>20</sup> The required number of ratifications in the constituting treaty as well as the process for selection and appointment of the members of the First Instance Tribunal and the Appeal Tribunal (which may be delayed) could also impact the phased operation of the standing mechanism.

#### *Legal costs of disputing parties*

37. The working paper does not intend to address the legal costs of disputing parties (such as the costs of agents, counsels, experts, witnesses), which, however, constitute a significant portion of the overall cost of ISDS cases. It is envisaged that the advisory centre may assist in reducing legal costs, but whether and how such costs can be absorbed in the standing mechanism would need to be further analysed.

### **III. Income structure**

#### **1. Contributions from UN member States established as a United Nations body**

38. If the standing mechanism is established under the auspices of the United Nations similar to the ICJ (subject to the approval by the General Assembly),<sup>21</sup> it may be possible to incorporate the budget of the standing mechanism into the budget of the United Nations. This would mean that UN member States would be responsible for the financing the standing mechanism in the same proportion and in accordance with the scale of assessments decided by the General Assembly.<sup>22</sup> Contributions range between 27,136 USD to 654,778,938 USD and are based mostly on estimates of gross national income. This could ensure stability of the income structure.

39. Similarly, the expenditure of the ECtHR is borne by the Council of Europe and the Court's budget is part of the ordinary budget of the Council of Europe.<sup>23</sup> The contributions of Member States to the Council of Europe are fixed according to scales taking into account population and gross national product.

#### **2. Contracting Parties' contribution-based income structure**

40. Another income structure would be that Contracting Parties to the Statute establishing the standing mechanism would be responsible for the expenditures of the standing mechanism. This would be in line with the general approach that the expenses of international courts are borne by contracting states of that court.

41. However, this may pose burden on the first few Contracting Parties as they would need to be responsible for the installation cost of the standing mechanism. One way to reduce this burden is to require a substantive number of ratifications for the Statute

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<sup>19</sup> See for example, UNCTAD, Investor-State dispute settlement cases: facts and figures 2020 available at. [https://unctad.org/system/files/official-document/diaepcbinf2021d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf).

<sup>20</sup> The United Nations Convention on the Law of the Sea (which includes the Statutes of ITLOS in Annex VI), which was negotiated from 1973 to 1982, opened for signature in 1982, entered into force in 1994 (after 60 ratifications), judges were elected in August 1996, with the first case submitted in November 1997. The WTO Appellate Body was established in 1995 with four cases the year after.

<sup>21</sup> Article 33 of the ICJ Statute.

<sup>22</sup> UN Charter 17(2), Statute 33. Article 33 of the ICJ's Statute provides that, '[t]he expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

<sup>23</sup> ECHR Art 50.

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to enter into force, making it possible for those Contracting Parties to share the burden.

42. Once operational, how to distribute the expenses of the standing mechanism to its Contracting Parties would need to be considered. For example, by equal allocation or according to a scale of assessment based on the economic level (national income, per capita income), the number of investment treaties subject to the standing mechanism or the use of standing mechanism services (either as the State of the claimant investor or as the respondent State).

43. With respect to the WTO, DSU Article 8:11 provides that panellists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration. Similarly, DSU Article 17:8 provides that the expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget. The budgets of the WTO Secretariat and the Appellate Body Secretariat are part of the WTO budget, which is paid by the WTO Members according to the scale of contributions apportioning the expenses of the WTO. In the WTO, contributions range between CHF 29,325 to CHF 22,939,714,960 and are based on the share of world trade.<sup>24</sup>

44. In the PCA, contributions range between 535 EUR to 53,550 EUR and are based on the Universal Postal Union contribution class system.

45. As regards ITLOS<sup>25</sup>, contributions of States Parties to the budget for 2021-2022 are based upon the scale of assessments of the regular budget of the United Nations for the preceding financial year, adjusted to take account of participation in the Convention. The meeting of States Parties decided that a floor rate of 0.01 per cent and a ceiling rate of 22 per cent would be used in establishing the rate of assessment for States Parties for the budget for 2021-2022. Contribution of the European Union to the budget would amount to 110,000 EUR for each year.

46. It would also be necessary to address concerns that under this approach, States would not only provide protection under their respective investment treaties to investors but also fund the mechanism for investors to raise claims against those States.

47. Furthermore, in this income structure, the rights and obligations of the Contracting Parties, including its investors would need to be clarified, for example, on which States can nominate candidates, nationality restrictions on tribunal members and more importantly, on who can access the standing mechanism (whether only claims against Contracting Parties raised by investors of Contracting Parties would be allowed or whether non- Contracting Parties as well as their investors could access the standing mechanism).

### **3. Voluntary contribution-based income structure**

48. Another possibility would be to operate the standing mechanism based on voluntary contributions, which, however, poses challenges on the sustainability of its operation. Nonetheless, some of the establishment costs (including the premises of the Standing Mechanism and installation cost) as well as the recurring operation cost could be borne by, for example, the host State. It may also be possible to envisage voluntary contribution from other entities, such as private donors or development assistant agencies.

49. Article 116 of the Rome Statute of the ICC provides that the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities. The ECtHR's

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<sup>24</sup> WTO Annual Report 2021, pp. 202-203.

<sup>25</sup> Information available at <https://www.itlos.org/en/main/general-information/finances>



2021 budget, in turn, includes 2,100,000 EUR of voluntary contributions from States, in addition to the national contributions.

#### 4. Users' fee-based income structure

50. Inter-State dispute settlement mechanisms usually do not require a filing fee (ICJ, WTO, Iran-US Claims Tribunal) and dispute settlement mechanisms set up by States for claims by individuals also generally do not require fees (ECtHR, ECJ, IACHR).

51. However, in the case of ISDS, one possible income structure would be for the users of the standing mechanism (both investors and respondent States) to be charged a fee, which would contribute to the financing of the standing mechanism. The fee to be charged could vary, from covering the minimal cost of administration of a case to an amount which will contribute significantly to the standing mechanism budget. However, the latter approach could raise questions about the integrity of the system, as it would lead to a profit-driven approach with the standing mechanism attracting more ISDS cases to ensure the continuity and sustainability of its operations.

52. While the fee-based income structure could reduce the burden of Contracting Parties and encourage them to take part, the fees to be charged should generally be limited to recovery of operational costs of the registry and not to remunerate the members of the First Instance Tribunal and the Appeal Tribunal. It should also not result in the increase of costs for disputing parties, which has been identified as a concern under the existing mechanism.

53. Similar to member contributions, fees to be charged may be on a sliding scale, depending on the member State's contribution, level of development and other factors.

54. ICSID generated revenue/fees from arbitration/conciliation proceedings of 51,280,009 USD in 2021 and 49,995,672 USD in 2020. It should be noted that the Memorandum of Administrative Arrangements (between ICSID and IBRD) provides that, except to the extent that ICSID, pursuant to its Administrative and Financial Regulations (the Regulations), collects funds from the parties to proceedings to cover its administrative expenses, IBRD shall provide reasonable facilities and services to ICSID without charge. Therefore, ICSID's administrative expenditures are covered by fee income and by the IBRD if that is not enough, pursuant to Article 17 of the Convention.

55. Similarly, the expenditures of the PCA are paid by the requesting party/parties of the service. A schedule of fees & costs applies to the PCA services.<sup>26</sup>

#### 5. Summary

56. As illustrated above, there is a wide spectrum of ways to finance the standing mechanism. The working paper will be developed to reflect an income structure that derives mainly from annual contribution from Contracting Parties to be supplemented by payment of fees by disputing parties. Whether and to the extent that other entities (trade associations, bar associations, third-party funders and law firms) can contribute financially to the standing mechanism will also be considered. Ways to ensure stability of income and sustainability of the operation would also be sought.

57. While the scenario foresees that the standing mechanism will be established without any link to an existing body, it is likely that the setting up of an entirely new, independent body would be more costly and could take longer. A different approach would be to design the standing mechanism as an add-on to an existing system or under the auspices of an existing institution, which could reduce the burden. However, such an approach would require the approval by the existing system or institution.

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<sup>26</sup> See *Schedule of Fees and Costs* <https://pca-cpa.org/en/fees-and-costs/>