



COSTS

From present-day investment arbitration to a multilateral court system

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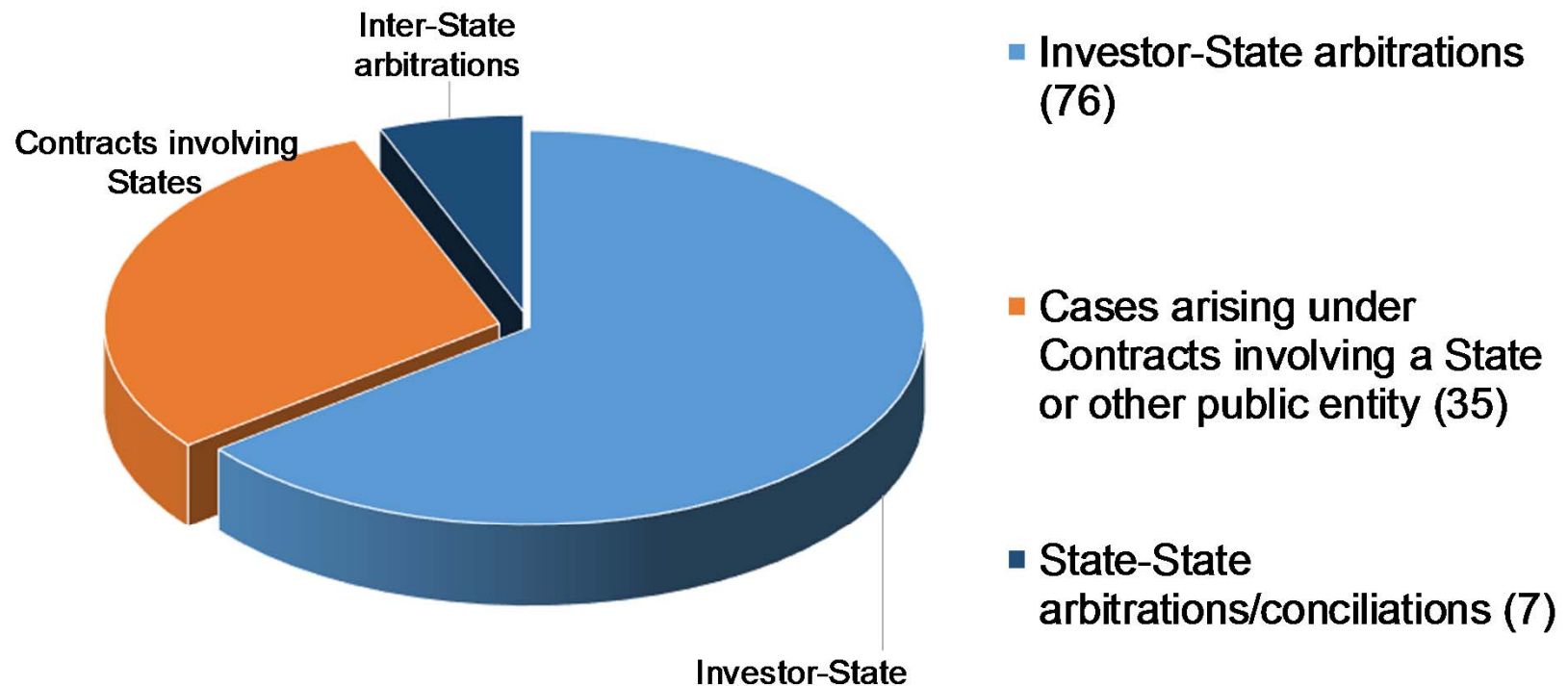
The Permanent Court of Arbitration



- Intergovernmental organization with global membership, founded in 1899, headquartered in the Peace Palace
- Has acted as secretariat:
 - For investor-State tribunals (in, so far, around 150 cases)
 - For State-State tribunals (in, so far, around 40 cases)
 - For standing tribunals established under international treaties
 - For several conciliation proceedings
- Pending: around 120 cases, involving over 50 different Governments or State-controlled entities
- Has acted as, or designated an, “appointing authority” in over 600 arbitrations



Current PCA Docket: 118 registry cases





Overview

1. Types and typical amounts of costs in ISDS
2. Allocation of costs in ISDS
3. Costs in a multilateral court system
4. Who pays “in the end”?

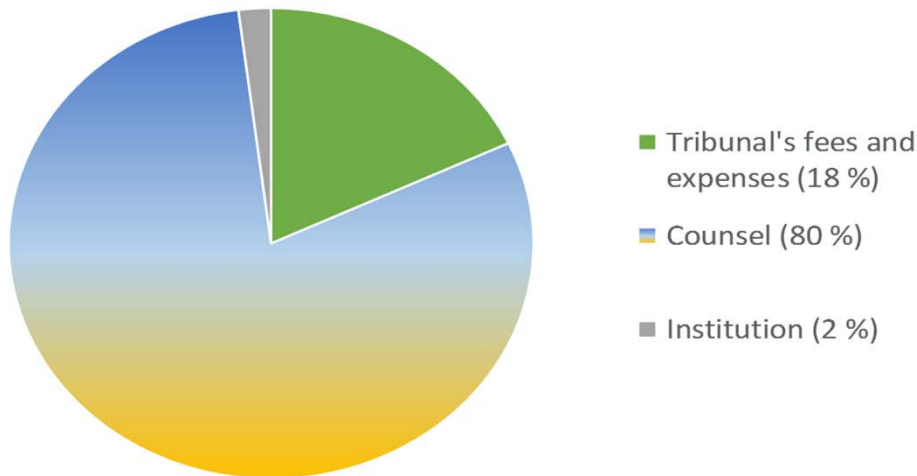


1. TYPES AND TYPICAL AMOUNTS OF COSTS IN ISDS



a. Types of costs: statistical distribution

- In commercial arbitration, counsel and expert fees account for ca. 80% of the costs of arbitration, and tribunal and institutional fees for around 20%



Sources: Joya Raha, 'Institutional Involvement and Costs in 10 Years of Swiss Rules of International Arbitration', in N. Voser (ed.), *10 Years of Swiss Rules of International Arbitration* (Juris Publishing, 2014) at 130; Brooks W. Daly, 'The Permanent Court of Arbitration', in C. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers 2012) at 49.

- In large investment cases, counsel and expert fees often account for ca. 90% of the costs of arbitration, and tribunal and institutional fees for less than 10%



b. Chemtura Corporation v. Canada (2010)

Amount in dispute: ca. \$79 million
Length: 2-3 years

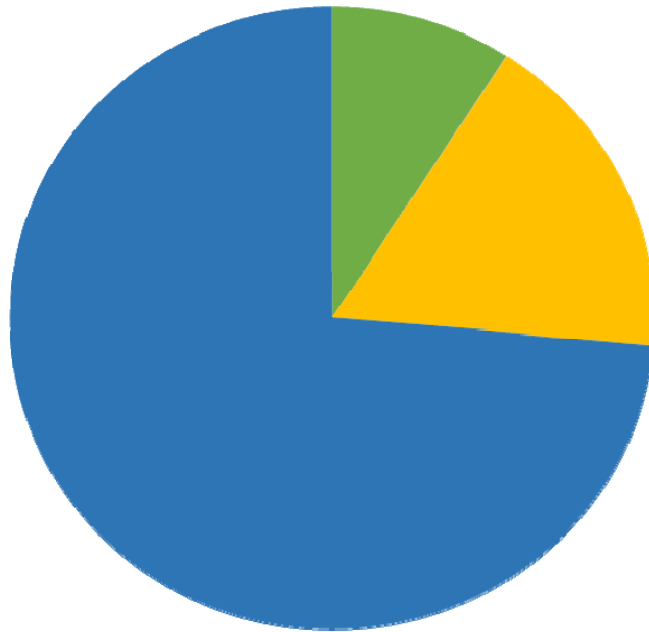
Total costs: \$7,538,977.85

■ Tribunal's costs and expenses
(9.1 %)

■ PCA (0.03 %)

■ Claimants' legal costs (17.17 %)

■ Respondents' legal costs (73.7 %)

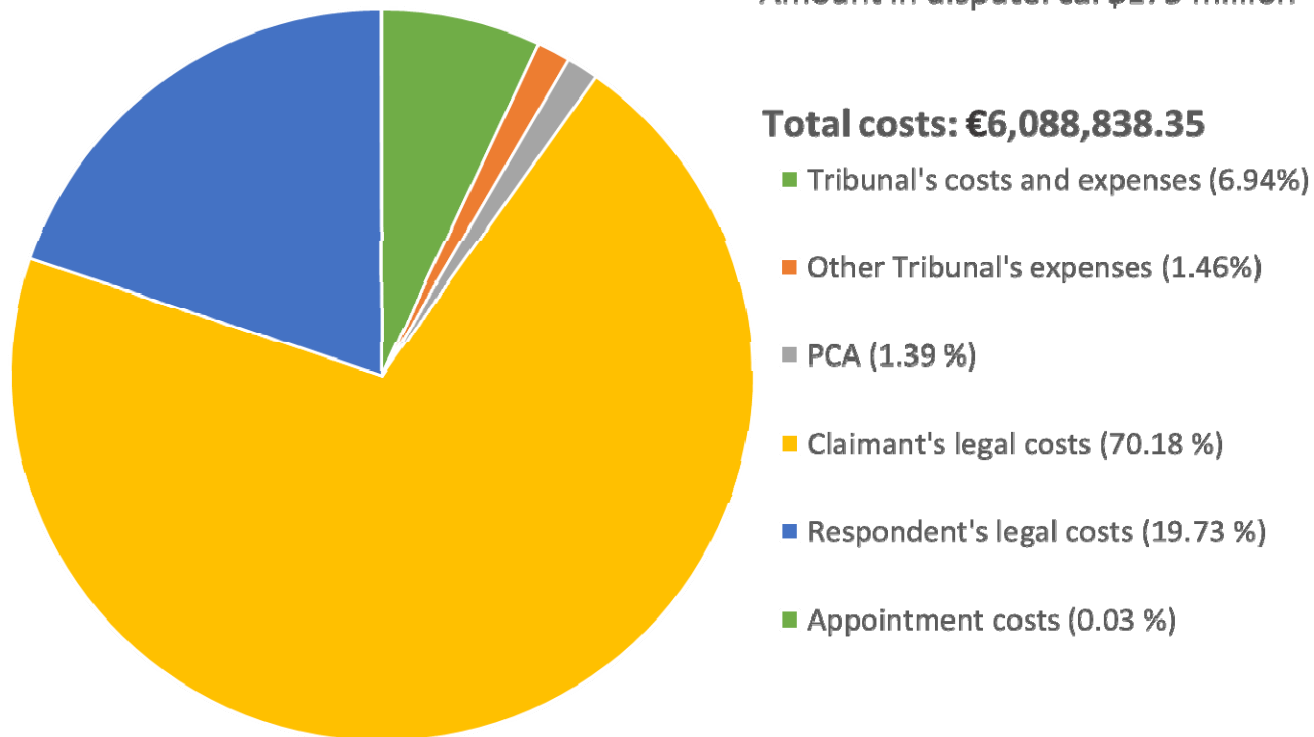


c. Dunkeld International Invest. Ltd. v. Belize (2016)



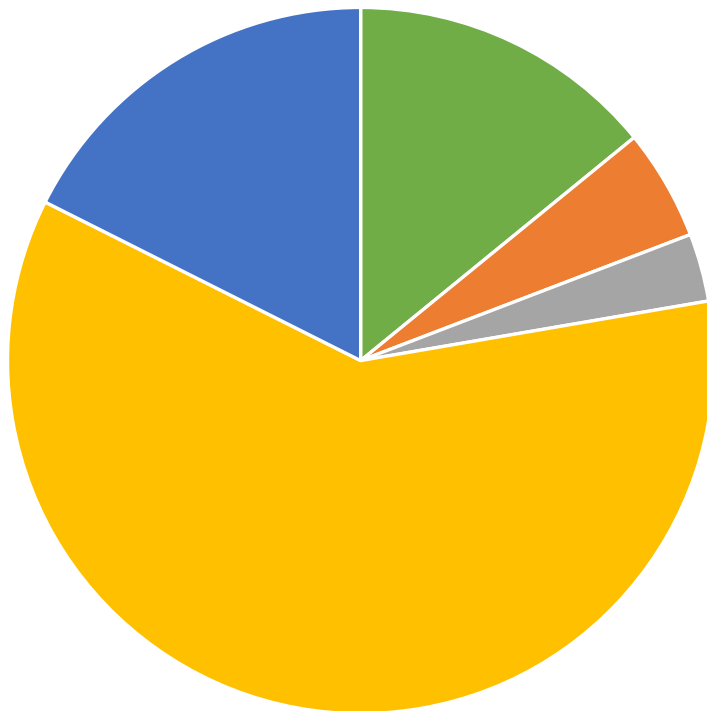
Length: 6 years
Amount in dispute: ca. \$175 million

Total costs: €6,088,838.35





d. Almas v. Poland (2016)



Amount in dispute: €23 Mio

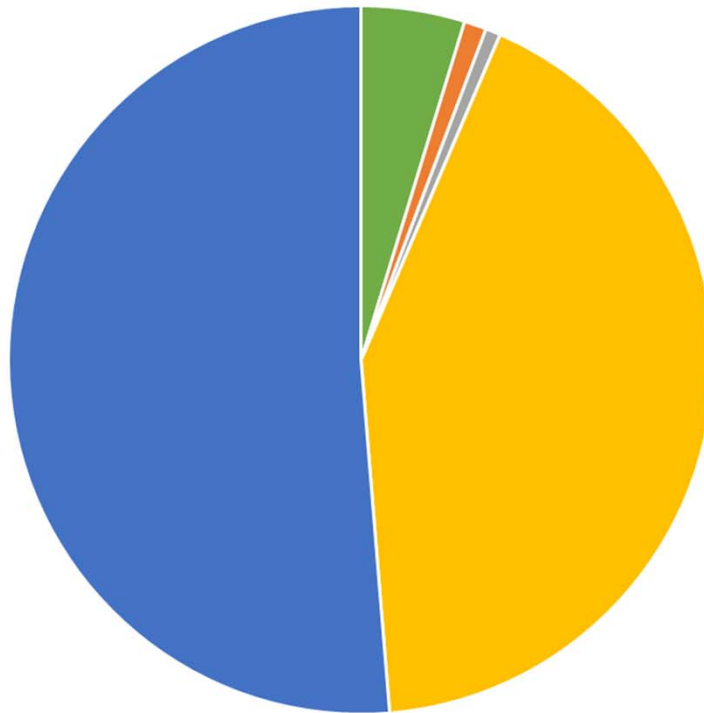
Length: 2-3 years

Total costs: €1.089.097.42

- Tribunal's costs and expenses (14.11 %)
- Other Tribunal's expenses (5.07 %)
- PCA (3.11 %)
- Claimant's legal costs (60.11 %)
- Respondent's legal costs (17.59 %)



e. [Confidential Case] (2009)



Amount in dispute: ca. \$57 million

Length: 3 years

Total costs: €11,160,553

- Tribunal's costs and expenses (4.76 %)
- Other Tribunal's expenses (1.02 %)
- PCA (0.68 %)
- Claimant's legal costs (42.42.11 %)
- Respondent's legal costs (51.30 %)



f. What drives costs?

- Complexity
 - Evidence-based case or case focused on legal questions?
 - Quality of the factual record?
 - Number of problematic legal questions (jurisdictional objections raised; unusual claims or defences...)?
- Party conduct
- Ineffective case management
- Lack of cohesion within Tribunal

=> Time as a function of complexity; not an independent cost driver



2. ALLOCATION OF COSTS IN ISDS



a. Arbitral rules on cost allocation

UNCITRAL Rules 2010

“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case..”

- Costs follow the event or “loser pays”
- However, considerable discretion of arbitral tribunals

ICSID Convention 1965

- ICSID Convention is silent on the matter
- Traditionally: each party bears its own costs
- Recently: increasing recourse to costs follow the event or “loser pays”



b. Examples in PCA proceedings

1. *Chemtura Corporation v. Canada (2010)* [**Respondent wins**]
 - Claimant bears all arbitration costs
 - Claimant bears one half of Respondent's legal costs

2. *Dunkeld International Invest. Ltd. v. Belize (2016)* [**Settlement**]
 - Both parties equally share arbitration costs
 - Each party bears its legal costs

3. *Almas v. Poland (2016)* [**Respondent wins**]
 - Claimant bears arbitration costs
 - Each party bears its legal costs



4. *[Confidential case] (2009) [Respondent wins]*
 - Parties share costs of the arbitration
 - Claimant bears \$2 million of Respondent's legal costs

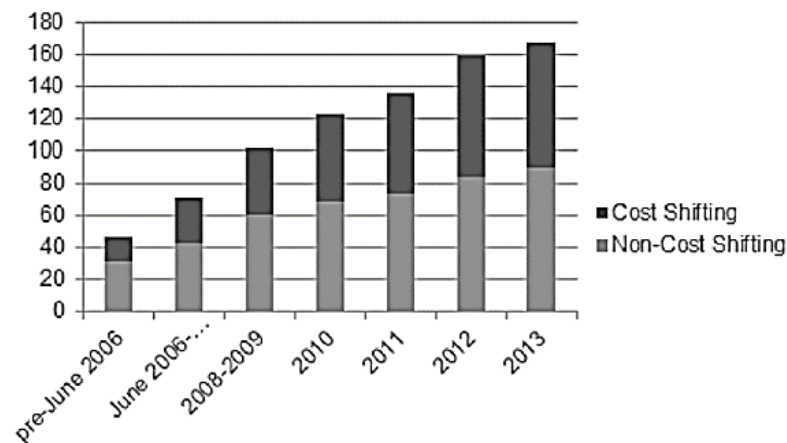
5. *Peter Allard (Canada) v. Barbados (2009) [Respondent wins]*
 - Claimant bears costs of arbitration
 - Claimant bears Respondent's legal costs



c. Statistics

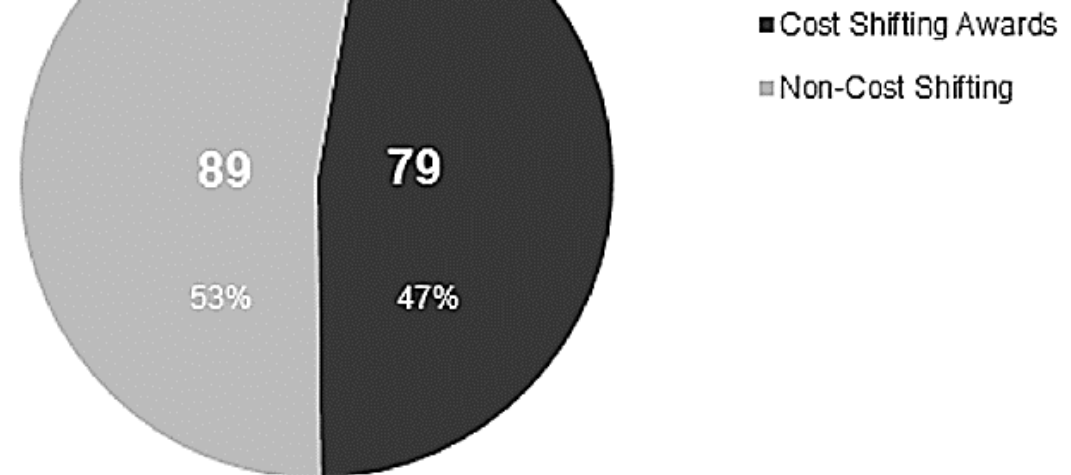
Awards Reveal No Presumption

Total Reported Final Awards up to 2013 – Cumulative



Awards Reveal No Presumption

168 Total Reported Final Awards



Source: Wendy J. Miles, 'Costs Allocation in Investor-State Arbitration', The International Journal of Arbitration, Mediation and Dispute Management, Volume 80, Issue 4 (2014) at 417.

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3. COSTS IN A MULTILATERAL INVESTMENT COURT

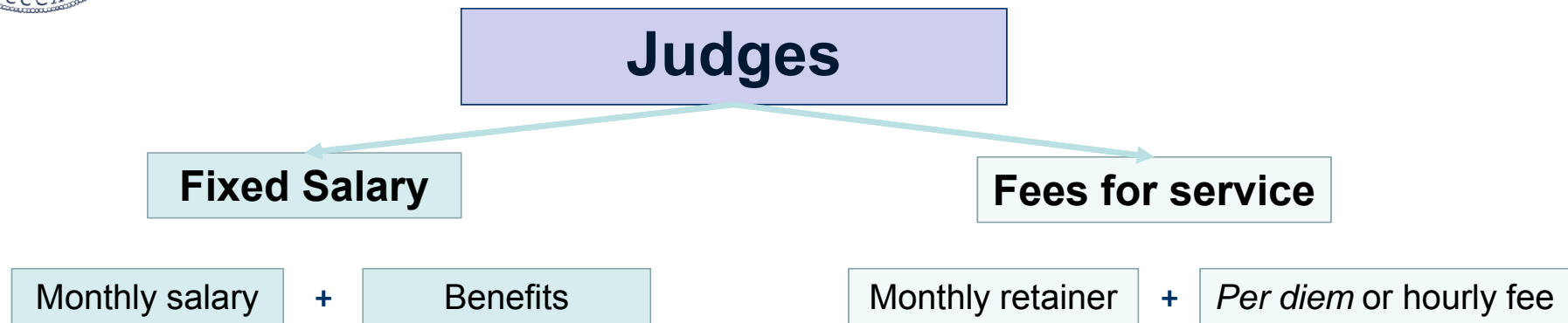


Questions

- Will the Parties' legal costs largely remain the same?
- How will arbitrators (judges) be paid?
 - On the assumption of a fee-based system;
 - On the assumption of a salary-based system
- How will the registry be paid?
 - On the assumption of a fee-based system;
 - On the assumption of a salary-based system



a. Options: remuneration of judges



- Judges are in an employment relationship
- Judges are entitled to benefits (health insurance, childcare, pensions...)
- Greater administrative burden

- Judges are self-employed
- Judges are themselves responsible for their social security
- No administrative burden on Court



b. Employed judges: examples

International Court of Justice

- For 2016-2017 the ICJ budgeted for its 15 judges:
 - \$7,848,800 for judges' salaries or \$523,253 per judge
 - \$4,889,800 for pensions and \$1,238,500 for expenses and allowances



International Criminal Court

- For 2015 the ICC budgeted for its 18 judges:
 - €3,186,000 for the judges' salaries or €177,000 per judge
 - €1,408,000 for pensions and €888,600 for expenses and allowances





c. Fee-based remuneration: examples

WTO Appellate Body

- Retainer CHF 7,000 per month
- Daily fee CHF 600 plus CHF 435 allowance for meals and accommodation
- CHF 300 per month allowance for administrative expenses

(Set in 1995; current figures not public)





Eritrea-Ethiopia Claims Commission

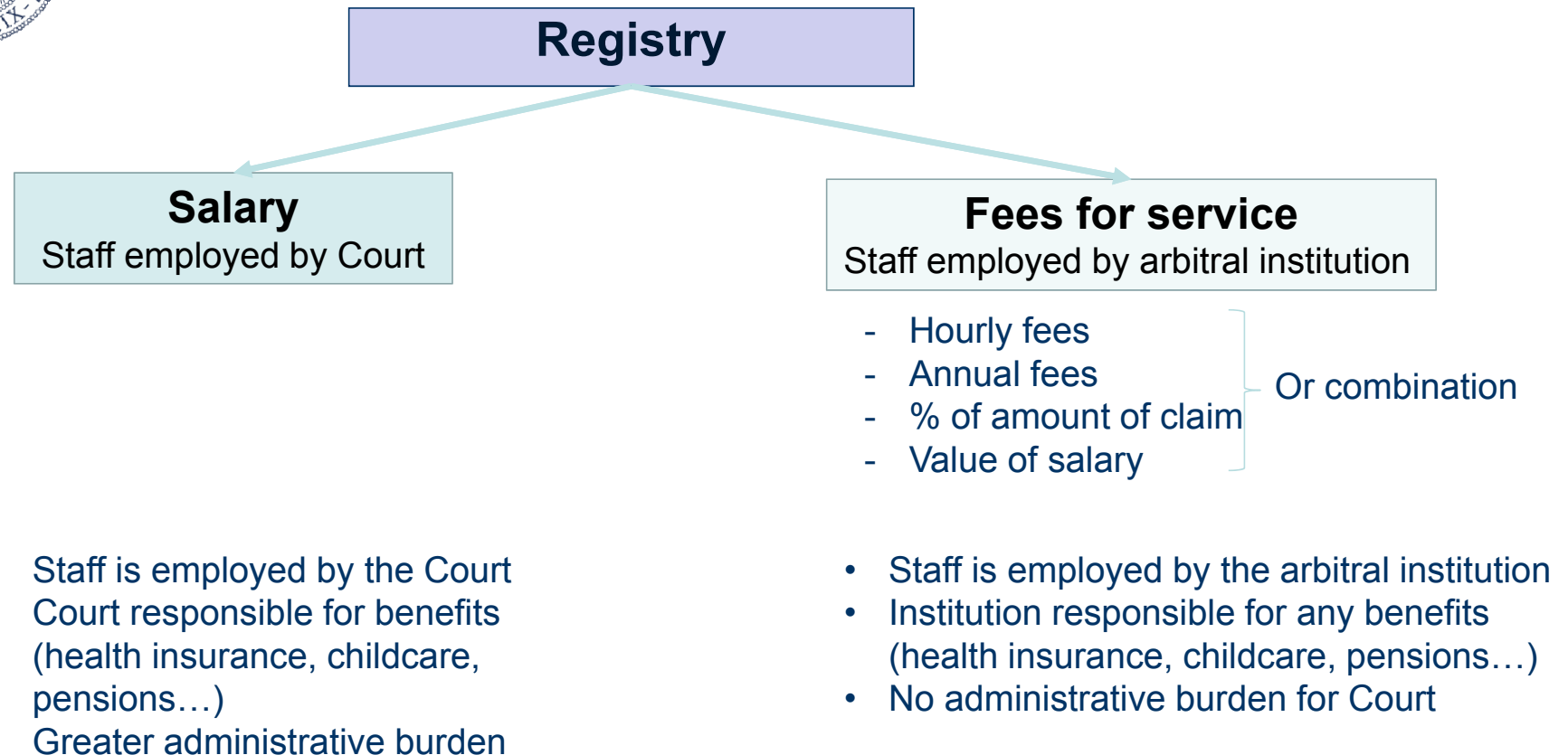
- Commissioners entitled to fee calculated on monthly basis
- As well as reimbursement of expenses actually incurred



- Five-member tribunal addressed claims for violations of international law during the Eritrea-Ethiopia war
- No time limit or other constraint on the duration of its constitution
- Over 10 years issued a series of 17 awards



d. Options: costs of secretariat/registry





- Court legally independent
- Court provides full registry services

**All functions
by Court staff**

- Court legally independent
- Court provides some registry services
- Supported by institution

**Judges
+
Core staff
+
Registry oversight**

**Legal and
logistical support**

- Court legally independent
- Court employs core admin. staff
- Registry services by institution

**Judges
+ Core staff**

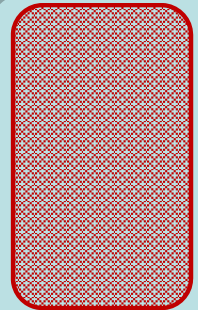
Registry

- Court legally independent but employs no staff
- Administrative & registry services by institution

Judges

**Administrative
staff
+
Registry**

- Court legally part of institution
- Administrative & registry services by dedicated unit of institution



**All functions
by institutional
staff**

e. Salary-based registry: examples



International Court of Justice

- Registrar and 101 staff assisting 15 judges
 - Serve as channel of communications to and from the Court
 - Maintain the list of cases
 - Present at and assist during Court's meeting; prepare minutes
 - Responsible for translations, publications, all administrative work including finance administration and security
 - Deal with inquiries concerning the Court and other external affairs
- Salary and benefits: \$23,978,000
(Registrar, legal matters, linguistic matters, information, documents, finance, publication, IT, archives, text processing, security, administration)





International Criminal Court

- 288 staff
- Salary and benefits: €22,672,800
(Registrar, legal advisory, safety and security, HR, finance, general services and IT)



WTO Secretariat

- Legal Affairs division + divisions of the Secretariat responsible for the covered agreement invoked
(Assists in appointment panels; serves as the channel of communication; provides legal and procedural support)
- Appellate Body: own Secretariat that comprises 18 staff for 7 Appellate Body members





h. Fee-based registry: examples

Eritrea-Ethiopia Claims Commission

- PCA appointed permanent registrar, who organized the proceedings during the entire period of the Commission's work
- PCA fees consistent with amount of registry support in a given year



- Five-member tribunal addressed claims for violations of international law during the Eritrea-Ethiopia war
- No time limit or other constraint on the duration of its constitution
- Over 10 years issued a series of 17 awards



Standing Arbitral Tribunal for The Bank for International Settlements

- PCA organizes the ongoing administration of the tribunal (appointment of new arbitrators, finances...)
- PCA provides registry support in the event a claim is filed
- Combination of (small) annual retainer fee for ongoing support and hourly remuneration for registry support

- Established in 1930 under auspices of the PCA
- Resolved claims from the Bank's private shareholders of over US\$ 1 billion in awards issued in 2002 and 2003



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4. WHO PAYS “IN THE END”?



a. Principle of mixed financing

Spectrum

**100% financed by
Member State contributions**

**Partly financed by
Member State contributions**

- General administration
- Travel and representation
- Premises

Partly financed by users

- Registry services

**100% financed
by users**

b. Weighted Member State contributions



World Trade Organization

- Contributions range between CHF 29,325-CHF 22,114,960
- Based on share of world trade



United Nations

- Contributions range between \$27,136-\$654,778,938
- Based (mostly) on estimates of Gross National Income



Permanent Court of Arbitration

- Contributions range between €535-€53,550
- Based on the Universal Postal Union contribution class system ranging from ½ to 50 units (1 unit = €1,071)





c. User contributions

- Should **claimants** pay a court fee?
 - Inter-State dispute settlement mechanisms do not require a filing fee (ICJ, WTO, Iran-US Claims Tribunal...)
 - Dispute settlement mechanisms set up by States for claims by individuals do not require a filing fee (ECtHR, ECJ, IACHR)
 - However, typically, individuals *may* have paid a court fee in preceding domestic court proceedings
 - However, claimants must pay their share in current ISDS system
- Should **respondents** who use the investment court pay their share?
- Should the court **allocate costs** against the losing party?



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