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Achieving Greater Access to Justice through Cost-Efficiency:
A Comparative Assessment Across State-to-State Dispute Settlement Institutions

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Achieving Greater Access to Justice through Cost-Efficiency: A Comparative Assessment Across State-to-State Dispute Settlement Institutions

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Abstract: The cost of international dispute settlement is inseparable from the question of access to justice. Cost-saving measures have taken on systemic importance to parties and institutions in international dispute settlement across a range of party dynamics, and have surfaced through an especially wide range of means in state-to-state proceedings. The present study identifies three broad pathways toward cost-efficiency in state-to-state adjudication and arbitration, before assessing potential improvements to promote efficiency and assist developing states in commencing or defending against claims in the international arena. In particular, the author outlines six key possibilities for reforming the practices of the Trust Fund of the International Court of Justice, which would potentially influence the efficiency and utilization of other institutional funds addressed in this chapter. Such developments may benefit not only states requesting financial assistance, but also the institution and the context in which the international community views its vital work.

1 Introduction

THE HAGUE, 11 December 2019. The crowd filling the UN's highest court fell silent, as for the first time in history a leader approached the lectern to plead that she had not presided over genocide. Beginning her statement as Agent of Myanmar, State Counsellor Daw Aung San Suu Kyi observed that '[f]or materially less resourceful

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countries like Myanmar, the World Court is a vital refuge of international justice'.[1] Yet within ninety minutes Myanmar's legal team would open a line of defense by arguing that the state raising this accusation, The Gambia, lacked standing because it was acting at the behest of the Organisation of Islamic Cooperation—and specifically because 'the proceedings are financed by a fund supervised by the OIC'.[2]

The prominence of an esoteric question of litigation finance in the context of the gravest humanitarian violations is not as surprising as it may seem. Indeed, the cost of international dispute settlement is inseparable from the question of access to justice.[3] Economic, environmental, and military crises may disproportionately impact developing states, which are thus rendered more vulnerable to higher volumes of claims in both state-to-state and mixed proceedings. A limitation of funding may in this manner correlate to the relative strengths of the state's ability to plead its case in each instance. Cost-saving measures have taken on systemic importance to parties and institutions in international dispute settlement across a range of party dynamics,[4] and surface through a particularly wide range of means in state-to-state proceedings.

In respect of state-to-state disputes involving at least one developing state, costs may factor into decisions to resolve such disputes through third-party mediation or conciliation, rather than through lengthy proceedings in international jurisdictions.[5]

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, CR 2019/19, 11 December 2019, 12, para. 1 [Aung San Suu Kyi].

[2] Ibid. 41, Para. 4 [Staker]. See further A. Kanji, 'Myanmar: Defending genocide at the ICJ', Al Jazeera (22 December 2019) https://www.aljazeera.com/indepth/opinion/myanmar-defending-genocide-icj-191219113440939.html ('Even the paradigmatically non-violent effort to seek justice through the UN's judicial organ, the ICJ, was depicted by Myanmar as a shadowy Islamic plot, with The Gambia accused of acting as a front for the Organisation of Islamic Cooperation (OIC)'); P. Pillai, 'The Gambia v Myanmar Provisional Measures ICJ hearings: It's a wrap…for now!', Opinio Juris (13 December 2019), https://opiniojuris.org/2019/12/13/the-gambia-v-myanmar-provisional-measures-icj-hearings-its-a-wrapfor-now/ ('The insistence on interrogating the source of funds for The Gambia was clearly part of the strategy to throw doubt as to the legitimacy of The Gambia …').

[3] See B. Daly and S. Melikian, 'Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration', in K.N. Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor* (Cambridge: Cambridge University Press, 2013) 211. See further T. Ingadottir, 'The Financing of International Adjudication', in C.P.R. Romano, K.J. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 594-615; M.K. Kamga, 'L'assistance judiciaire aux fins du règlement pacifi que des différends internationaux devant la Cour internationale de Justice et le Tribunal international du droit de la mer', in M.K. Kamga and M.M. Mbengue (eds.), *L'Afrique et le droit international : variations sur l'organisation internationale / Africa and International Law: Reflections on the International Organization: Liber Amicorum Raymond Ranjeva* (2013) 519.

[4] For example, regional development organizations have underscored the significance of financially practicable access to justice in investor-state dispute settlement, observing that 'the most important provision in [bilateral investment treaties] is access to international arbitration'. Asian Development Bank, 'Asian Economic Integration Report 2016' (2016), https://www.adb.org/sites/default/files/publication/214136/aeir-2016.pdf, 163 (citing Prof. Thomas Wälde and others to assert that this 'finding [is] in line with the sentiment of many legal scholars').

[5] See I. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden: Martinus Nijhoff, 2012) 337-338. Yet as of December 2019, the International Court of Justice's robust docket of 17 pending cases includes no fewer than 14 involving at least one party that appears on the Development Assistance Committee List of Official Development Assistance Recipients, produced by the Organisation for Economic Co-operation and Development. Among the three remaining cases, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States)* would also meet this threshold if Palestine were formally recognized by the OECD for this purpose. See further See OECD, 'DAC List of ODA Recipients Effective for reporting on aid in 2018 and 2019', http://www.oecd.org/dac/financing-

Certain forms of state-to-state disputes, such as territorial conflicts, may be adaptable to resolution on the basis of geopolitical interests rather than strictly according to legal norms. Such efforts may ultimately falter and pave the way for a *compromis* (i.e., special agreement) to submit the dispute to adjudication or arbitration. Examples include France's mediation efforts prior to the *Eritrea-Yemen Arbitration*,[6] the long-term UN mediation of the dispute between Equatorial Guinea and Gabon over the Corisco Bay,[7] and *Guatemala's Territorial, Insular and Maritime Claim*, which in 2019 became the first case jointly submitted to the International Court of Justice (ICJ) by *compromis* in nearly a decade,[8] following extensive attempts to resolve this dispute through the good offices of the Organization of American States.[9]

Against this context, the present chapter identifies three broad pathways toward cost-efficiency in state-to-state adjudication and arbitration. Section 2 of this study examines institutional paths, wherein the cost of state-to-state adjudication or arbitration is subsidized on a case-by-case basis through one of the major funds established for this purpose: the ICJ Trust Fund, the International Tribunal for the Law of the Sea (ITLOS) Trust Fund, or the Permanent Court of Arbitration (PCA) Financial Assistance Fund. Section 3 examines independent paths, wherein parties reduce the cost of proceedings through other third-party sources or internal means. Section 4 examines mutual paths, wherein costs are reduced by agreement of the parties. These pathways are comparatively assessed in Section 5 with particular reference to the frequency and manner in which states have sought assistance from the respective trust funds discussed, leading to the author's proposal of six reforms to improve the efficacy and utilization of institutional funding in state-to-state practice. Section 6 concludes with brief observations on promoting the capacity of developing states to commence or defend against claims in the international arena.

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sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2018-and-2019-flows.pdf; ICJ, 'The State of Palestine institutes proceedings against the United States of America', Press Release No. 2018/47, 28 September 2018, https://www.icj-cij.org/files/case-related/176/176-20180928-PRE-01-00-EN.pdf.

[6] See *Award of the Arbitral Tribunal in the First Stage of Proceedings (Territorial Sovereignty and the Scope of the Dispute) (Eritrea v. Yemen)*, 22 RIAA 225 (1996), para. 77.

[7] As of July 2019, both states had ratified a special agreement providing the International Court of Justice with jurisdiction to adjudicate their border dispute, but the case had not yet been submitted to the Court by December 2019. Cf. UN Security Council, 'The situation in Central Africa and the activities of the United Nations Regional Office for Central Africa: Report of the Secretary-General', S/2019/913 (29 November 2019), para. 14; UN Department of Political and Peacebuilding Affairs, 'Update: Talking Peace Away from the Spotlight', DPPA Politically Speaking (30 January 2018), https://dppa-ps.atavist.com/update-talking-peace-away-from-the-spotlight; UN General Assembly, 'Secretary-General's opening statement at Signing Ceremony on the Border Dispute between the Republic of Equatorial Guinea and the Gabonese Republic [as delivered]', Press release (15 November 2016), https://www.un.org/sg/en/content/sg/statement/2016-11-15/secretary-generals-opening-statement-signing-ceremony-border-dispute. See further S. Murphy, 'International Law Relating to Islands', 386 RCADI (2017) 227.

[8] The last such case was the Special Agreement of 21 July 2010 underlying *Frontier Dispute (Burkina Faso/Niger), Judgment*, [2013] ICJ Rep 44. Cases filed in the years since had all been unilaterally submitted to the ICJ on the basis of treaty compromissory clauses or else declarations pursuant to Art. 36(2) of the Statute of the Court.

[9] Although Belize and Guatemala concluded a *compromis* providing the ICJ with jurisdiction over the case in 2008, this pending dispute was not submitted to the Court until 7 June 2019. See ICJ, 'The Court seised of a dispute between Guatemala and Belize', Press release no. 2019/25 (12 June 2019), https://www.icj-cij.org/files/case-related/177/177-20190612-PRE-01-00-EN.pdf.

2 Reducing Costs through Institutional Pathways

2.1 ICJ Trust Fund Regulations and Activity

The UN-administered institutional fund of the ICJ—officially known as the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes before the International Court of Justice—was created on an initiative of the Non-Aligned Movement in 1989 to encourage and enable states to submit their disputes to the Court.[10] The legal basis for the Trust Fund is Articles 1(1) and 33 of the UN Charter.[11]

As the operating expenses and salaries of the Court and its Registry are paid through the UN Regular Budget, the finances covered through the Trust Fund are essentially restricted to the party's or parties' case preparation costs.[12] These may nevertheless be quite substantial, including the fees of counsel and experts, the production of documentary evidence, and logistical expenses associated with oral hearings in The Hague.[13] The Trust Fund is available to parties upon submission of required documents in all circumstances where the jurisdiction of the Court (or the admissibility of the case) is not or is no longer in dispute.[14]

The Trust Fund is additionally available to assist states in complying with the Court's Judgments in cases to which they were parties.[15] This practice finds its roots

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[10] See further M. Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Leiden: Nijhoff, 2009) 26. See generally T. Bien-Aime, 'A Pathway to The Hague and Beyond: The United Nations Trust Fund Proposal' (1990) 22 *New York University Journal of International Law & Politics* 671-708, 671; M. O'Connell, 'International Legal Aid: The Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice', in M Janis (ed.), *International Courts in the Twenty-First Century* (Dordrecht: Martinus Nijhoff, 1992) 238.

[11] See P. Bekker, 'International Legal Aid in Practice: The ICJ Trust Fund', (1993) 87 *American Journal of International Law* 659, 661. See further United Nations, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice', 28(6) ILM 1589 (November 1989).

[12] Recent apportionments to the Court have decreased from a revised 2014-2015 appropriation of over USD 51 million to a 2016-2017 appropriation of less than USD 46 million and an estimated 2018-2019 appropriation of less than USD 47 million. Cf. UN General Assembly, 'Programme budget for the biennium 2016-2017', UN Doc A/70/6/Add.1 (15 June 2016) 137; UN General Assembly, 'Proposed programme budget for the biennium 2018-2019. Part III International justice and law. Section 7 International Court of Justice', UN Doc A/72/6, Sect. 7 (5 April 2017) 2.

[13] See G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerpen: Intersentia, 2008) 442.

[14] See Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General, UN Doc A/59/372 (21 September 2004), Ann. ('Revised Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice'). According to Art. 8 of the Revised Terms of Reference, Guidelines and Rules, the application for funding must include an attestation that the applicant does not contest the Court's jurisdiction, an itemized statement of the estimated costs for which assistance is requested, an undertaking to provide an audited final account of expenditures and refund any unused advance, and an indication of the amount of the requested funds that it wishes to receive in the form of an advance.

[15] Ibid. This innovation reflects the fact that implementation of a State-to-State judicial decision can entail significant financial burdens. See D. Vignes, 'Aide au développement et assistance judiciaire pour le règlement des différends devant la Cour internationale de Justice' (1989) 35 *Annuaire français de droit international* 321, 321-322.

the use of the Secretary-General's good offices following a request from the parties in *Burkina Faso/Mali* to defray the costs of demarcating the Chamber of the Court's 1986 delimitation in that case. This request was satisfied through ad hoc funding from Switzerland, which appears to have inspired the establishment of the Trust Fund.[16]

While the Trust Fund operates on a purely voluntary basis—and accepts funding from states, state entities, non-governmental organizations, and legal and natural persons[17]—its accounting has been at least partly opaque. For example, the Trust Fund had less than USD 1 million in reserves in 2011.[18] Yet when the Secretary-General's 2012 Report listed USD 3 million in reserves, it identified only USD 40,000 in contributions received over the course of the year.[19] Several of the Court's recent annual reports have made little or no reference to the Trust Fund.

The Trust Fund's Terms of Reference require applicant states to provide both an itemized statement of estimated costs and an undertaking to provide a final audit of actual costs.[20] For each funding application, the Secretary-General appoints an ad hoc Panel of Experts, which 'shall be guided solely by the financial needs of the requesting State and availability of funds'.[21]

The original 1989 Terms of Reference restricted funding to cases jointly instituted pursuant to a *compromis* between the parties.[22] The apparent rationale of this restriction was to avoid a situation where a respondent state contested the jurisdiction of the Court but at the same time, through its participation in the Fund, was contributing to the financing of that case.[23] This approach—which would not bar jurisdictional objections in *compromis*-based cases—has been criticized as creating a preferential hierarchy among the Court's sources of jurisdiction,[24] and as establishing an inequality of arms that might deter developing states from making declarations under Article 36(2)

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[16] See *Frontier Dispute (Burkina Faso/Mali), Judgment*, [1986] ICJ Rep 554. See further S. Rosenne, *The Law and Practice of the International Court, 1920-2005* (2006) 501-502, n. 103; M.E. O'Connell, 'International Legal Aid: The Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice', in M.W. Janis (ed.), *International Courts for the Twenty-first Century* (Dordrecht: Martinus Nijhoff, 1992) 235.

[17] See H. Corell, 'The International Court of Justice at Fifty: Presentation (Read by Dr. Roy Lee)', in C. Peck and R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997) 7-8.

[18] See Latest Reports of the Secretary-General, http://www.un.org/law/trustfund/trustfund.htm.

[19] Ibid.

[20] See Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General, UN Doc A/59/372 (21 September 2004), Ann. ('Revised Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice').

[21] See further P. Bekker, *An Overview of the Work of the World Court (1987-1996). Commentaries on World Court Decisions (1987-1996)* (Brill Nijhoff, 1998) 27; J. Merills, *International Dispute Settlement* (New York: Cambridge University Press, 2005) 328-329.

[22] See UN Secretariat, 'Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice' (1989), http://www.un.org/es/icj/pdf/eterms.pdf.

[23] See A. Eyffinger, *The International Court of Justice 1946-1996* (The Hague: Kluwer Law International, 1996) 365.

[24] See S. Rosenne, *The Law and Practice of the International Court 1920-1996* (The Hague: Nijhoff, 1997) 515.

of the ICJ Statute.[25] This provision was nevertheless applied mutatis mutandis in the *Arbitral Award of 31 July 1989* case, after the respondent state dropped its objections to the Court's jurisdiction.[26] A Trust Fund grant was provided to one of the parties to reduce printing and translation costs in document preparation for that case.[27]

In another early application of the Trust Fund, Chad received a grant to defray the costs of document preparation and the fees of counsel and technical experts in *Libya/Chad*.[28] A 2004 joint application in *Benin/Niger* resulted in a grant of USD 350,000 to each party—the greatest sum awarded at that time.[29] Yet the Trust Fund remained underutilized, and its operational procedures were considered excessively laborious. At a 1997 forum convened by the Project on International Courts and Tribunals, participants with first-hand experience in the practice of the Trust Fund recalled significant delay in the administration of applications.[30] During his 2000-2003 tenure as President of the Court, Judge Guillaume asked that the UN General Assembly streamline the Trust Fund's operation, citing one instance in which a state had failed to take granted funds due to 'the complexity of the procedures involved'.[31]

Owing to these concerns, the 2004 revision of the Terms of Reference broadened eligibility for applicants by permitting grants in unilaterally instituted cases[32] which had proceeded to the merits, or in cases in which the parties undertook not to object to the Court's jurisdiction. This enabled Djibouti to receive nearly USD 300,000

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[25] See G. Oduntan, 'Access to justice in international courts for indigent states, persons and peoples' (2018) 58(3) *Indian Journal of International Law* 265, 308. On the broader application of the principle of equality of arms in this context, see further M. Bedjaoui, 'L'égalité des États dans le procès international, un mythe?', in *Liber amicorum Jean-Pierre Cot: Le procès international* (Bruxelles: Bruylant, 2009) 25-27; R.T. Treves, 'Equality of Arms and Inequality of Resources', in A. Sarvarian, F. Fontanelli, R. Baker, and V. Tsevelekos (eds.), *Procedural Fairness in International Courts and Tribunals* (London: BIICL, 2015) 158-159.

[26] See further *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment*, [1991] ICJ Rep 53.

[27] See D. Anderson, 'Trust Funds in International Litigation', in N. Ando, E. McWhinney & R. Wolfrum (eds.) *Liber Amicorum Judge Shigeru Oda.* (Leiden: Martinus Nijhoff, 2002), 793, 799, n. 20.)

[28] This was disclosed by the Agent of Chad during oral hearings before the Court. See International Law Association (American Branch) Committee on Transnational Dispute Resolution, 'A Study and Evaluation of the UN Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice' (2002) 1(1) *Chinese Journal of International Law* 234, 248, n. 28. See further *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, [1994] ICJ Rep 6.

[29] See UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. Report of the Secretary-General', Un Doc A/59/372 (21 September 2004) 2; UN News and Media Division, 'Secretary-General Awards $700,000.00 from Trust Fund to Assist States in Settlement of Disputes through International Court of Justice', SG/2087-L/3070 (4 June 2004), https://www.un.org/press/en/2004/sg2087.doc.htm. See further *Frontier Dispute (Benin/Niger), Judgment*, [2005] ICJ Rep 90.

[30] See Project on International Courts and Tribunals, 'Funding of and Access to International Courts and Dispute Settlement Bodies: Report of Meeting, 31 January-1 February 1997' (1997), http://www.pict-pcti.org/activities/meetings/London_02-97/London1_97_Rep.htm.

[31] See Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations (29 October 2002), http://www.icj-cij.org/court/index.php?pr=80&pt=3&p1=1&p2=3&p3=1.

[32] In other words, these are cases in which jurisdiction is alleged to derive from a previously concluded treaty, or from the parties' respective declarations pursuant to Art. 36(2) of the Statute of the Court.

in 2008 for legal fees and other costs in *Mutual Assistance in Criminal Matters*, a case in which the jurisdictional basis was *forum prorogatum*.[33]

However, the 2004 revision did not include specific efforts to expedite operational procedures. Notably, the only other application received in the years since—a joint request by the parties in *Burkina Faso/Niger* to defray the costs of demarcating the Court's 2013 delimitation in that case—was not reviewed by a Panel of Experts and approved by the Secretary-General until 2016.[34] Despite having (both then and now)[35] over USD 3 million in reserves, only USD 62,500 of the USD 125,000 awarded to each party was paid out prior to a final accounting of the demarcation costs. The 2004 revision of the Trust Fund's Terms of Reference enabled the Trust Fund to disburse advances on awarded funds prior to submission of a full accounting of actual costs, but limited such advances to 50 per cent of the total award.[36] When funds are awarded on the basis of projected demarcation costs, the recipient state thus remains responsible for resourcing 50 per cent of the cost of implementing the Court's Judgment, which will not be reimbursed through the Trust Fund until the states have achieved the boundary delimited by the Court.[37]

Regardless of the manner of disbursement, the question remains as to why the seldom-used ICJ Trust Fund has tended to award grants that are in some instances significantly less than what applicants requested.[38] This exercise of discretion may suggest awareness (and encouragement) of the range of complementary, independent means available to parties in funding case preparation costs, as discussed below. It could also suggest concerns over the risks of using a voluntary fund to substantially subsidize all applicants, particularly in light of the historically brisk pace of new cases filed before the Court over the last two decades.[39] Indeed, in awarding only 'limited

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[33] See UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. Report of the Secretary-General', UN Doc A/63/229 (8 August 2008) 2. See further *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment*, [2008] ICJ Rep 177.

[34] See UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. Report of the Secretary-General', UN Doc A/71/339 (16 August 2016). See further *Frontier Dispute (Burkina Faso/Niger), Judgment*, [2013] ICJ Rep 44.

[35] The Trust Fund held USD 3,226,164 as of 30 June 2019. See Report of the Secretary-General, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice', UN Doc A/74/316 (16 August 2019), para. 7. The Fund has successfully maintained this general level of reserves. See Sixty-seventh session, Agenda item 71 Report of the International Court of Justice Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice Report of the Secretary-General, UN Doc A/67/494 (showing a balance on 30 June 2012 of USD 2,959,966.39).

[36] See Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General, UN Doc A/59/372, 21 September 2004, Ann. ('Revised Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice').

[37] See further J. Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff, 2015) 229.

[38] See further G. Oduntan, 'Access to justice in international courts for indigent states, persons and peoples' (2018) 58(3) *Indian Journal of International Law* 265, 309.

[39] As of December 2019, the Court has 17 cases on its docket. See further at n. 5 above. While these include two formally pending cases instituted in the 20th century, the institution of 15 still-pending cases between September 2013 and November 2019 is certainly a brisk pace. See https://www.icj-cij.org/en/pending-cases. This is partly reflected in the annual address of the President of the Court in October 2018, in which he announced that the Court had decided to adopt new restrictions on its sitting

financial assistance' to Botswana and Namibia in connection with *Kasikili/Sedudu Island*, the Panel of Experts in 1997 considered it necessary 'to strike a balance between encouraging recourse to the Court and the need to be in a position to accommodate future applications'.[40]

Nevertheless, it may be worth considering whether the limited utilization and output of the ICJ Trust Fund is partly a consequence of the ad hoc nature of its Panel of Experts system. Such models may appear susceptible to a more conservative bias than panels constituted through term-based appointments, owing to a comparative lack of experience and narrowness of perspective in this position.[41] As discussed below, this is one of the modalities of the ICJ Trust Fund that is treated quite differently in certain other institutions, such as the PCA Financial Assistance Fund.[42]

2.2 ITLOS Trust Fund Regulations and Activity

The International Tribunal for the Law of the Sea Trust Fund was established by the UN Secretary-General in 2000 upon the request of the General Assembly,[43] based in part on a proposal raised the prior year by the UK.[44] It remains available to all parties in ITLOS proceedings upon submission of required documentation.[45] The General

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Members acting as arbitrators in state-to-state and mixed arbitrations. See Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly (25 October 2018), https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf.

[40] UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. Report of the Secretary-General', UN Doc A/56/456 (10 October 2001) 2. See further *Kasikili/Sedudu Island (Botswana/Namibia), Judgment*, [1999] ICJ Rep 1045.

[41] Even the high monetary damages attributed to civil court juries in the US arguably constitute the occasional exception to a generally predictable tendency to deliver more conservative awards. See US Department of Justice, Bureau of Justice Statistics, 'Tort, Contract And Real Property Trials', https://www.bjs.gov/index.cfm?ty=tp&tid=451 (listing the most recently calculated median award across jury trials in all state civil cases as $30,500, and finding that in only 6.3 percent of cases was a winning plaintiff awarded $1 million or more in compensatory and punitive damages). On the punitive aspects of this data, see in particular T.H. Cohen and K. Harbacek, 'Punitive Damage Awards in State Courts, 2005', US Department of Justice, Special Report No. NCJ 233094 (March 2011); T. Eisenberg, M. Heise, N.L. Waters and M.T. Wells, 'The Decision to Award Punitive Damages: An Empirical Study' (2010) 2(2) *Journal of Legal Analysis* 577; N. Vidmar and M. Holman, 'The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in States Courts in 2005: A New Audit' (2010) 43 *Suffolk University Law Review* 855.

[42] See further Permanent Court of Arbitration, 'Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), para. 10 (granting the Fund's Board of Trustees with broad discretion in the determination of financial assistance awards).

[43] See L. Lijnzaad, 'Formal and Informal Processes in the Contemporary Law of the Sea at the United Nations, a Practitioner's View' (2014) 57 *German Yearbook of International Law* 111, 121-126. See further L. Boisson de Chazournes, 'Technical and Financial Assistance and Compliance: The Interplay', in U. Beyerlin, P.-T. Stoll, R. Wolfrum (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff, 2006) 291-292; P. Gautier, 'Two Aspects of ITLOS Proceedings: Non-State Parties and Costs of Bringing Claims', in H. Scheiber, J. Paik (eds.), *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Leiden: Martinus Nijhoff, 2013) 82-85.

[44] See further F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports & Conclusions* (The Hague: Kluwer Law International, 2000).

[45] See UN General Assembly, 'Oceans and the Law of the Sea', UN Doc A/RES/55/7 (27 February 2001), Ann. I ('International Tribunal for the Law of the Sea Trust Fund: Terms of Reference').

Assembly additionally requested the UN Secretariat's Division of Ocean Affairs and the Law of the Sea to keep a list of offers of professional assistance which may be made on a reduced fee basis by qualified persons or organizations, which is available to member states upon request.[46] Other trust funds have been established for various matters relating to another body established by the UN Convention on the Law of the Sea (UNCLOS), the Commission on the Limits of the Continental Shelf.[47]

The establishment of the ITLOS Trust Fund may be viewed as a direct consequence of the choice-of-forum provisions of UNCLOS, and thus reflects an institutional interest in ensuring comparable affordability as between ICJ and ITLOS disputes settlement.[48] The Terms of Reference of the ITLOS Trust Fund expressly recall the mandate of the ICJ Trust Fund, and utilize the same ad hoc approach discussed above by establishing a new Panel of Experts to review each application.[49] However, the ITLOS Trust Fund allows 'in exceptional circumstances' for funding to defray the costs of jurisdictional phases[50]—a conscious relaxation of the restrictions found in its ICJ counterpart.[51] More notably, it also permits funding to defray the preparatory costs

According to Art. 7 of the Terms of Reference, the application for funding must include a description of the nature of the case before ITLOS, a statement of the estimated costs for which assistance is requested, and an undertaking to provide an audited final account of expenditures.

[46] See UN Division for Ocean Affairs and the Law of the Sea, 'International Tribunal for the Law of the Sea Trust Fund: List of offers of professional assistance pursuant to General Assembly Res. 55/7', http://www.un.org/depts/los/itlos_new/itlostrusfundoffersassistance.pdf. On the relevant functions of the Division in this context, see further UN Division for Ocean Affairs and the Law of the Sea, Office & International Maritime Organization International Maritime Law Institute, 'The United Nations Division for Ocean Affairs and the Law of the Sea' in D.J. Attard, M. Fitzmaurice, and N.A. Martínez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law*, Vol. I (Oxford: Oxford University Press, 2014) 606-607.

[47] See, e.g., UN Division for Ocean Affairs and the Law of the Sea, 'Trust fund for the Purpose of Facilitating the Preparation of Submissions to the Commission on the Limits of the Continental Shelf for Developing States, in particular the Least Developed Countries and Small Island Developing States, and Compliance with article 76 of the United Nations Convention on the Law of the Sea', http://www.un.org/depts/los/clcs_new/trust_fund_article76.htm; UN Division for Ocean Affairs and the Law of the Sea, 'Establishment of a Trust Fund to Assist in Financing the Participation of Members of the Commission on the Limits of the Continental Shelf from Developing Countries: Note by the Secretariat', CLCS/16 (19 August 1999). The General Assembly has more recently established trust funds to support participation in complementary treaty frameworks concerning the law of the sea. See, e.g., UN General Assembly, 'Development of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', UN Doc A/RES/69/292 (6 July 2015).

[48] See M. Forteau, 'Le système de règlement des différends de la Convention des Nations Unies sur le droit de la mer', in M. Forteau and J.-M. Thouvenin (eds.), *Traité de droit international de la mer* (Pedone: Paris, 2017) 1007-1009 (referring to Art. 287 of UNCLOS). On the slightly more permissive eligibility for accession to UNCLOS than to the ICJ Statute—encompassing not only states but also some non-self-governing territories and international organizations—see further E. Franckx and M. Benatar, 'Article 305. Signature', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Oxford: Hart, 2017) 1968.

[49] See UN General Assembly, 'Oceans and the Law of the Sea', UN Doc A/RES/55/7 (27 February 2001), Ann. I ('International Tribunal for the Law of the Sea Trust Fund: Terms of Reference').

[50] Ibid.

[51] This decision appears to have been influenced by the recommendations of Judge Chandrasekhara Rao, who was President of the Tribunal at the time. See Report of the tenth Meeting of States Parties to the United Nations Convention on the Law of the Sea, SPLOS/60 (22 June 2000), para. 44.

of cases that have not yet been instituted (but which are 'to be submitted').[52] Particularly in cases where neighbouring states cannot agree upon a maritime boundary (and thus cannot fully utilize fisheries or seabed resources), the Trust Fund serves in principle to make dispute settlement economically attractive.[53]

However, this rationale behind the ITLOS Trust Fund has not been fully realized in practice. The first application submitted to the ITLOS Trust Fund was by the respondent in the *Juno Trader* case.[54] A grant of USD 20,000 was approved in 2005, but it appears that the recipient state did not file the subsequent documentation to obtain those funds.[55] In both the *M/V Louisa*[56] and *M/V Norstar*[57] cases, it was the state instituting ITLOS proceedings which applied for and received relatively limited aid from the Trust Fund. At present, the Trust Fund has received no other requests.

2.3 PCA Financial Assistance Fund Regulations and Activity

The PCA Administrative Council approved in 1994 a fund which operates on the same voluntary donation basis as the ICJ and ITLOS Trust Funds,[58] and for which applicants must submit similar documentation.[59] However, there are six unique facets of the PCA Financial Assistance Fund's Terms of Reference which deserve mention.

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[52] See UN General Assembly, 'Oceans and the Law of the Sea', A/RES/55/7 (27 February 2001), Ann. I ('International Tribunal for the Law of the Sea Trust Fund: Terms of Reference').

[53] On the advantages of litigation vis-à-vis other forms of dispute settlement in the context of maritime boundary delimitation, see further C.G. Lathrop, 'Why Litigate a Maritime Boundary? Some Contributing Factors', in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (Cambridge: Cambridge University Press, 2014) 255-258.

[54] See Reports of the International Tribunal for the Law of the Sea, http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm. See further *"Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment* [2004] ITLOS Rep 17.

[55] See further C. Claypoole, 'Access to International Justice: A Review of the Trust Funds Available for Law of the Sea-Related Disputes', (2008) 23 *International Journal of Marine and Coastal Law* 77, at 91-92.

[56] See UN General Assembly, 'Oceans and the law of the sea: Report of the Secretary-General', A/69/71/Add.1 (1 September 2014), Ann. ('Status of Voluntary Trust Funds Administered by the Division for Ocean Affairs and the Law of the Sea (1 August 2013 – 31 July 2014)'), 43. See further *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment* [2013] ITLOS Rep 4.

[57] See UN General Assembly, 'Status of Voluntary Trust Funds Administered by the Division for Ocean Affairs and the Law of the Sea (1 August 2017 – 31 July 2018)' (20 March 2018), https://www.un.org/Depts/los/general_assembly/SG_Report_2018_Annex_Trust_Funds.pdf; Report of the twenty-eighth Meeting of States Parties, SPLOS/324 (9 July 2018) para. 103. See further *The M/V "Norstar" Case (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Case No. 25, https://www.itlos.org/en/cases/list-of-cases/case-no-25/.

[58] See PCA, 'Financial Assistance Fund', https://pca-cpa.org/en/about/structure/faf/.

[59] See PCA, 'Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf. According to Art. 6 of the Terms of Reference and Guidelines, the application for funding must include a copy of the parties' dispute settlement agreement (and, in some instances, a description of the nature of the case), an itemized statement of the estimated costs for which assistance is requested, and an undertaking to provide an audited final account of expenditures.

Firstly, and most strikingly, the Terms of Reference do not expressly establish any bar against funding in jurisdictional disputes.[60] Thus a Financial Assistance Fund grant was awarded in 1996 to an African state to meet the costs of jurisdictional hearings in an investor-state arbitration.[61] This is perhaps unsurprising in light of the criticism of the jurisdictional bar in the ICJ Trust Fund (which would be somewhat relaxed in 2004, as discussed above). More cynically, it could be noted that in 1994 the PCA was approaching the end of a relatively dormant half-century—during which some viewed it as the 'sleeping beauty of the Peace Palace'[62]—and may thus have been keen not to place any unnecessary restrictions on recourse to arbitration.

Secondly, the Financial Assistance Fund permits funding to defray not only costs of the parties' representation and the implementation of the arbitral award, but also the fees and expenses of the tribunal and the registry services of the PCA International Bureau.[63] The need to pay for the tribunal and registry in arbitration may be seen as a key tactical difference from adjudication.[64] Were the PCA Financial Assistance Fund to not permit the use of funds for such fees and expenses, it would stand to lose more state-to-state cases to the aforementioned institutions, such as through mutual agreements to transfer UNCLOS disputes from the default selection of arbitration to ITLOS proceedings.[65]

Thirdly, the funding applicant must be a contracting party (or state entity of a contracting party) to either the 1899 or 1907 Hague Convention on the Pacific Settlement of Disputes, and must appear on the Development Assistance Committee List of Official Development Assistance Recipients, produced by the Organisation for Economic Co-operation and Development. (OECD DAC List).[66] The requirement of

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[60] See PCA, 'Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf.

[61] See P. Jonkman, 'Permanent Court of Arbitration: Work in 1996' (1997) 10 *Hague Yearbook of International Law* 229, 230.

[62] See S. Muller and W. Mijs, 'The Flame Rekindled' (1994) 6(2) *Leiden Journal of International Law* 5, 6 (crediting this metaphor to Prof. Pieter Sanders). See further J.G. Wetter, *The International Arbitral Process*, Vol. V (New York: Oceana, 1979), 187; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (Oxford: Oxford University Press, 1999), 58, 170.

[63] See PCA, 'Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf.

[64] See further, in the context of disputes in the law of the sea, S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford: Oxford University Press, 2016) 127-132.

[65] See, e.g., *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment* [2012] ITLOS Rep 4; *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, ITLOS Case No. 23; ITLOS, 'The Swiss Confederation and the Federal Republic of Nigeria Transfer their Dispute Concerning the *M/T "San Padre Pio"* to the Tribunal', Press Release No. 298, 17 December 2019, https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_298_en_20edit_20PTG_2017-12-19_br_2017.12.19.pdf.

[66] See PCA, 'Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf.

membership in the Hague Conventions aligns with the aforementioned institutional funds, which would only be available to members of the ICJ Statute or UNCLOS, respectively. In the PCA context, the innovative reference to the OECD DAC List serves not only to prohibit grants to developed states but more generally to prohibit grants to companies engaged in investor-state or state contract disputes.

Fourthly, the Financial Assistance Fund is applicable not only to arbitration but also to other proceedings administered by the PCA.[67] This reflects the PCA's history of administering non-binding proceedings such as commissions of inquiry and conciliations,[68] with the latter of these recently reemerging in PCA practice.[69]

Fifthly, unlike the ICJ Trust Fund—but bearing some resemblance to the ITLOS Trust Fund—the PCA Financial Assistance Fund may award preparatory costs to states that have previously concluded an arbitration agreement and which are preparing to submit a dispute to the PCA on this basis.[70] As noted above, the need to pay for the tribunal and registry may render the preliminary stages of arbitration more resource-intensive than adjudication, and as such this distinction in the PCA Financial Assistance Fund's Terms of Reference seems quite logical.

Finally, each application is reviewed not by an ad hoc panel, but rather by an established Board of Trustees with a rotating membership.[71] As such, whereas litigation funding in the standing courts discussed above requires the constitution of a new panel with each request, arbitration funding at the PCA inverts this equilibrium, such that a standing board grants funds to support the constitution of a new tribunal.

Many of the PCA Financial Assistance Fund's modalities can thus be explained by fundamental distinctions between adjudication and arbitration or the historical contexts of the PCA's early case diversity and long (but temporary) decline. The relative effectiveness of the somewhat counterintuitive sixth modality, however, requires a closer examination of the Financial Assistance Fund in practice.

Based on currently available statistics, Financial Assistance Fund grants have been awarded to three African states, two Asian states, a Central American state, an Eastern European state, and a South American state.[72] In some cases, the funds awarded covered the recipient's entire share of tribunal and registry fees and expenses.[73] Individual grants have varied widely, including a substantial grant defraying 20 per cent of the overall costs of the landmark *Abyei* arbitration between the Government of Sudan

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[67] Ibid.

[68] The last time the PCA administered a commission of inquiry was the *'Red Crusader' Incident* commission established in 1961 by agreement between Denmark and the UK.

[69] See *Conciliation between The Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case No. 2016-10 (9 May 2018).

[70] See PCA, 'Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes: Terms of Reference and Guidelines' (11 December 1995), https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf.

[71] Ibid. The current members of the Board are current ICJ President Abdulqawi Ahmed Yusuf, Sir Kenneth Keith and the Honorable Bernardo Sepúlveda-Amor (both former Members of the ICJ), Prof. Ahmed El Kosheri (former ICJ Judge ad hoc), and the Honorable L. Yves Fortier (former Ambassador to the United Nations). See PCA, 'Financial Assistance Fund', https://pca-cpa.org/en/about/faf/.

[72] See PCA, '2018 PCA Annual Report', https://pca-cpa.org/en/about/annual-reports/, 17.

[73] See B. Daly and S. Melikian, 'Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration', in K.N. Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor* (Cambridge: Cambridge University Press, 2013) 221-222.

and the Sudan People's Liberation Movement/Army that presaged the founding of South Sudan.[74]

While *Abyei* was not a state-to-state proceeding, that case may be worth particular mention due to potential resource similarities between developing and emerging states. The arbitration agreement between the parties was notable for its reference to complementary sources of dispute settlement funding: it provided that a 'Unity Fund' derived from Sudanese oil revenue would form the primary funding source for the arbitration, and that the parties would request additional financing from the PCA Financial Assistance Fund.[75] The EUR 752,939 awarded by the Financial Assistance Fund was applied toward millions in legal fees, tribunal and registry fees, expert cartographers, interpretation in Dinka and Arabic at the hearings in The Hague, and Arabic translation of the arbitral award.[76] These funds were ad hoc donations by France and Norway that were earmarked for this case, with additional contributions from the Netherlands.[77] These case-specific donations were not unprecedented in proceedings administered by the PCA; indeed, in an interesting example of cross-institutional collaboration between UN mechanisms and PCA dispute settlement, Japan had contributed over USD 1 million to an ad hoc fund established in 2000 by the UN Security Council for the *Eritrea-Ethiopia Boundary Commission*.[78]

3 Reducing Costs through Independent Pathways

In both state-to-state adjudication and arbitration, states defray costs through internal means and unilateral recourse to third-party support. Examples include reliance on pro bono or significantly discounted legal representation.[79] In *Abyei*, the Sudan People's Liberation Movement/Army obtained free representation from the non-governmental Public International Law and Policy Group and the law firm WilmerHale.[80]

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[74] See F. Baetens and R. Yotova, 'The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?' (2011) 3(1) *Goettingen Journal of International Law* 417, 436. See further *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award, PCA Case No. 2008-07 (22 July 2009).

[75] See B. Daly and S. Melikian, 'Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration', in K.N. Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor* (2013) 223.

[76] Ibid.

[77] See PCA, '2008 PCA Annual Report', https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-annual-report-2008.pdf, para.. 32; PCA, '2009 PCA Annual Report', https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-annual-report-2009.pdf, Para. 27.

[78] See Ministry of Foreign Affairs of Japan, 'Statement by the Press Secretary/Director-General for Press and Public Relations, Ministry of Foreign Affairs, on the Eritrea-Ethiopia Boundary Commission Decision' (17 April 2002), http://www.mofa.go.jp/announce/announce/2002/4/0417-2.html. See further *Eritrea-Ethiopia Boundary Commission*, Dec. Regarding Delimitation of the Border, PCA Case No. 2001-01 (13 April 2002).

[79] On ethical considerations that may arise when performing pro bono legal services for sovereign clients, see A. Miron, 'Le coût de la justice internationale: enquête sur les aspects financiers du contentieux interétatique' (2014) 60 *Annuaire français de droit international* 241, 257 and 266.

[80] See further F. Baetens and R. Yotova, 'The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?' (2011) 3(1) *Goettingen Journal of International Law* 417, 436-437.

This theme of externally funded representation arises as well in the Advisory Centre on WTO Law (ACWL), an organization established in 1999 by 32 states (most of which are developing states).[81] Instead of subsidizing litigation, the ACWL focuses on building human resources and improving lawyering capacity. Its legal services are primarily directed toward least developed countries, but developing states and transitional economies are also eligible to receive support. Its financial model is based on both contributions and fees. As to contributions, each developed member state contributed over USD 1 million in the ACWL's first five years of operation.[82] Each developing member state made a one-time contribution of USD 50,000 to 300,000; least developed countries within the organization remain exempted from contributions.[83] As to fees for case-based legal services, these may range from USD 25 to 200 per billable hour.[84]

Nevertheless, purely financial assistance in individual cases remains the most predominant form of third-party support in state-to-state practice.[85] These may be charities that take an interest in cases with significant public policy dimensions, as seen in the support of Bloomberg Philanthropies and the Bill and Melinda Gates Foundation for the respondent in *Philip Morris v. Uruguay*.[86] Alternatively, they may be industrial actors with a direct interest in the proceedings, such as an energy company financing a maritime delimitation case in order to expand, preserve, or resume offshore drilling operations in a disputed area.[87] In some instances, such financial support may

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[81] See further C. Romano, 'International Courts and Tribunals: Price, Financing, and Output', in S. Voigt, M. Albert, D. Schmidtchen (eds.), *International Conflict Resolution* (Tubingen: Mohr Siebeck, 2006) 199. As a separate means of assistance through internal WTO mechanisms, the WTO Secretariat will furnish upon request a qualified legal expert from its technical co-operation services to any developing country member, pursuant to Art. 27.2 of the WTO Dispute Settlement Understanding. See further K. van der Borght, 'The Advisory Center on WTO Law: Advancing Fairness and Equality' (1999) 2(4) *Journal of International Economic Law* 723.

[82] C. Romano, 'International Courts and Tribunals: Price, Financing, and Output', in S. Voigt, M. Albert, D. Schmidtchen (eds.), *International Conflict Resolution* (2006) 199.

[83] Ibid.

[84] Ibid. See further J. Bohanes and F. Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' (2012) 4 *Trade, Law and Development* 45; L. Johanneson, 'Supporting Developing Countries in WTO Dispute Settlement', IFN Working Paper No. 1120 (1 February 2016), https://www.oru.se/contentassets/09c82ced6a484d5b83c8da28223a0967/johannesson_louise_licuppsats_01022016.pdf.

[85] As observed by Sir Arthur Watts, the most effective form of dispute settlement support for developing states 'is not just words of support and encouragement, it is money'. UN General Assembly, Meeting Record, UN Doc A/44/PV.43 (1 November 1989) 13.

[86] See Bloomberg Philanthropies, 'Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund', Press Release (18 March 2015), https://www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/. See further *Philip Morris Brands SARL, et al. v. Oriental Republic of Uruguay*, Award, ICSID Case No. ARB/10/7 (8 July 2016).

[87] Evaluating this possibility in the context of the *Guyana v. Suriname* and *Barbados v. Trinidad and Tobago* arbitrations, see K.O. Hall and M. Chuck-A-Sang, *Intervention, Border and Maritime Issues in CARICOM* (Miami: Ian Randle, 2007), xix. See further *Guyana v. Suriname*, Award, PCA Case No. 2004-04 (17 September 2007); *Barbados v. Trinidad and Tobago*, Award, PCA Case No. 2004-02 (11 April 2006).

complement existing geopolitical alignments, as some have alleged regarding support for Guyana's pending ICJ case with Venezuela.[88]

The most independent path toward minimizing the costs of state-to-state dispute settlement remains strengthening internal reliance on government lawyers[89]—a consideration which may arise even for developed states.[90] This 'in-house counsel' approach bears some links to previously mentioned channels, however. The ACWL, World Bank, and WTO Secretariat each administer training workshops for government officials. The ITLOS Registrar referenced a similar objective when he established a trust fund in 2010 'to promote human resource development in developing countries in the law of the sea and maritime affairs in general'; this has been primarily supported by

[88] *Arbitral Award of 3 October 1899 (Guyana v. Venzuela)*, 'Guyana files an application against Venezuela', ICJ Press Release No. 2018/17 (4 April 2018). Guyana's application was filed with the Court in the waning days of Rex Tillerson's tenure as US Secretary of State. Key contracts between Guyana and ExxonMobil concerning disputed waters were concluded during his final years as the company's chief executive officer. See Office of the Prime Minister of Guyana, Department of Public Information, 'Contracts: Oil & Gas', https://dpi.gov.gy/contracts/; Office of the Prime Minister of Guyana, Department of Public Information, 'Supplementary requested to meet costs of ICJ case' (28 April 2018) (stating that most of the USD 18 million signing bonus received from ExxonMobil in 2016 would be paid to law firms representing Guyana in the pending case). On unverified reports of ExxonMobil's direct and continued funding of this case, see Venezuelanalysis, 'ExxonMobil to Fund Guyana Lawsuit Against Venezuela' (4 December 2017), https://venezuelanalysis.com/News/13528; Kaieteur News, 'Guyana denies use of 'special funds' from Exxon to settle border issue with Venezuela' (2 December 2017), https://www.kaieteurnewsonline.com/2017/12/02/guyana-denies-use-of-special-funds-from-exxon-to-settle-border-issue-with-venezuela/; Demerara Waves, 'ExxonMobil helping Guyana pay legal fees in World Court Guyana-Venezuela border case – sources, but Harmon says 'no'' (30 November 2017), http://demerarawaves.com/2017/11/30/exxonmobil-helping-guyana-pay-legal-fees-in-world-court-guyana-venezuela-border-case-sources-but-harmon-says-no/. On relevant US interests, see US Secretary of State, 'Guyana's Independence Day', Press Release (25 May 2018), https://www.state.gov/guyanas-independence-day/ ('look[ing] forward to advancing prosperity by helping Guyana develop its emerging oil sector in partnership with U.S. business'); Derecho Internacional Publio Costa Rica, 'La ordenanza de la Corte Internacional de Justicia (CIJ) con relación a la súbita demanda de Guyana contra Venezuela: apuntes' (2 July 2018) (citing WikiLeaks, 'Venezuela-Guyana Border Dispute Overshadows Economic Development, Regional Cooperation' (16 June 2006) (internal US cable stating that '[d]evelopment of the region's oil resources is also held up by the border situation', with specific reference to ExxonMobil)). ExxonMobil's assessment of its Venezuelan holdings might take account of the volatile fate of its recent arbitration against the state: a USD 1.6 billion award reduced to USD 188 million upon partial annulment, followed by blocked enforcement in US courts. See *Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venzuela*, Award, ICSID Case No. ARB/07/27 (9 October 2014); Lexology, 'Second Circuit Upends Enforcement of ICSID Awards in New York, Eliminates Circuit Split' (17 July 2017), https://www.lexology.com/library/detail.aspx?g=396c616e-fcb9-457f-8a97-8efaaba83c7f.

[89] See K. Gaubatz and M. MacArthur, 'How International is International Law' (2001) 22 *Michigan Journal of International Law* 239, 251-254 (contrasting the trend among OECD countries to draw from their ministries when staffing legal teams in ICJ litigation, and a tendency among developing states to hire foreign counsel in such proceedings). See further S. Kumar and C. Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999-2012' (2014) 25 *European Journal of International Law* 893.

[90] See, e.g., Australian Department of Foreign Affairs and Trade, 'Australia's Relationship with the World Trade Organization (WTO): Submission to the Joint Standing Committee on Treaties by the Department of Foreign Affairs and Trade' (September 2000), http://www.dfat.gov.au/trade/negotiations/wto/aust_wto.pdf, at 58 (discussing Australia's use of U.S.-based law firms to prepare for the *US – Lamb* case at the WTO). See further *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R (AB-2001-1) (1 May 2001).

Korean entities, including a Korean corporation based in Hamburg.[91] ITLOS is also affiliated with trust funds established by the China Institute of International Studies and the Nippon Foundation.[92] Additionally, the Hamilton Shirley Amerasinghe Memorial Fellowship of the Law of the Sea aims to build the legal and technical capacity of developing state governments, in co-operation with the UN Division for Ocean Affairs and the Law of the Sea and within a framework trust fund known as the UN Programme of Assistance in the Teaching, Study and Wider Dissemination of International Law.[93]

4 Reducing Costs through Mutual Pathways

A number of methods have been jointly utilized by agreement of the parties in state-to-state proceedings to limit tribunal fees and operational expenses, raising tactical considerations for each party. These methods include those borrowed from arbitration between private parties, as well as uniquely state-to-state approaches.

Among those cost controls found in commercial and investor-state arbitration models, the UN Commission on International Trade law (UNCITRAL) Arbitration Rules and the PCA Arbitration Rules empower the designated appointing authority to review the reasonableness of the fees and other costs which tribunals bill to parties.[94] As such, incorporating these default procedural rules into state-to-state arbitration agreements offers the parties an institutional safeguard against excessive arbitration costs. The most visible example of party-based control, however, is the simplification of terms of reference in individual arbitrations, which rewards co-operation between parties once the arbitration has commenced. This may include the reduction of tribunal fees (on a fixed or hourly basis) when a case raises concerns over access to justice.[95] Simplification may also entail reducing the number or scope of written submissions, or expediting the timeline of proceedings. These terms might also render more efficient or eliminate a wide range of cost-intensive logistics for hearings.[96]

Among those cost controls with nuances unique to state-to-state dispute settlement, the trend in such arbitrations is for each party to bear the costs of its own representation and half the costs of the tribunal and any administrative institution.[97]

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[91] See ITLOS, '2015 Annual report of the International Tribunal for the Law of the Sea', SPLOS/294 (30 March 2016).

[92] Ibid.

[93] See UN Division for Ocean Affairs and the Law of the Sea, 'Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea: Information Note', http://www.un.org/depts/los/technical_assistance/hsa_fellowship/amerasinghe_fellowship.htm.

[94] Cf. UNCITRAL Arbitration Rules 2010 and PCA Arbitration Rules 2012, Art. 41. Both sets of rules provide for the reimbursement of certain expenses to the PCA, given the PCA Secretary-General's role as designating authority in UNCITRAL arbitrations. Cf. Art. 40(2)(f); UNCITRAL Arbitration Rules 2010, Art. 6(2).

[95] In one case, an arbitrator in PCA-administered proceedings agreed to work for USD 80 per hour. See B. Daly and S. Melikian, 'Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration', in K. Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor* (2013) 220.

[96] These include the number of hearing days, number of attendees, size and cost of the venue, class permitted for travel and lodging reservations, use of court reporter tools such as LiveNote, interpreters for witnesses, audio/visual equipment for evidentiary exhibits, printing, teleconferencing, and catering.

[97] See R. Kolb, *The International Court of Justice* (Oxford: Hart Publishing, 2013) 1002. Among contemporary state-to-state arbitrations adhering to this general principle, see e.g. *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, PCA Case No. 2010-16 (7 July 2014);

However, such practice suggests multiple means to reduce these costs. A particularly blunt approach is to reduce the size of the tribunal, which may be possible as a mutatis mutandis deviation from treaty rules, such as the three-member *Duzgit Integrity* tribunal established under UNCLOS (which instead prescribes a five-member tribunal).[98] Putting aside for present purposes the transparency concerns raised by Judges Al-Khasawneh and Simma in *Pulp Mills* regarding the ICJ's use of 'experts fantômes',[99] it is also clear that parties' agreement to a tribunal-appointed expert saves costs and tribunal hours in comparison to a 'battle of the experts'.

The specific urgency of threats to international peace and security may provide sensible opportunities to reduce dispute settlement costs. For example, the special agreement underlying the *Abyei* proceedings required the arbitral award to be rendered within nine months of the constitution of the tribunal.[100] Intense interest in the hearings was accommodated in part through webcast proceedings, enhancing both cost-efficiency and transparency. Arrangements were made with the UN Mission in Sudan to address anticipated security concerns in the disputed territory, and peacekeepers were stationed there following the announcement of the award.[101]

5 Assessment of the Pathways to Cost-Efficiency

5.1 General Appraisal

As the mutual paths discussed above are based on the parties' control over arbitral procedures, there appears to be little room to expand these channels in state-to-state dispute settlement, other than by importing this procedural autonomy to standing international courts such as the ICJ and ITLOS—a fundamentally problematic proposition. Indeed, scholars of the ICJ have referred to the immutability of its Rules of Court as a necessary bulwark against the 'arbitralization' of the World Court.[102] While states may choose to have cases resolved by chambers of the Court, questions of

Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, PCA Case No. 2011-03 (18 March 2015); *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, PCA Case No. 2011-01 (20 December 2013); *Railway Land Arbitration (Malaysia/Singapore)*, Award, PCA Case No. 2012-01 (30 October 2014).

[98] UNCLOS, Ann. VII, Art. 3(a). See PCA, 'Hearing held at the Peace Palace, in The Hague', Press Release (2 March 2016). Available at http://www.pcacases.com/web/sendAttach/1593.

[99] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, [2010] ICJ Rep 108, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para. 14.

[100] See Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area (7 July 2008), https://pcacases.com/web/sendAttach/675.

[101] See further N.A. Garang, 'Peacekeepers start patrolling in Abyei', Sudan Tribune (23 July 2009), http://www.sudantribune.com/spip.php?article31910.

[102] See G. Abi-Saab, 'The International Court as a World Court', in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 10 (referring to certain incidental powers of the Court as 'a well-established institution in all judicial systems' that nevertheless 'is unknown in arbitration, whose ambit is totally determined by the parties and is usually confined to them').

procedure are decided in either forum according to the same Statute and Rules of Court,[103] despite notable attempts to use chambers in a more transactional fashion.[104]

As to the independent paths discussed above, there may be opportunities to develop the forms of third-party support available to states. While importing the investment fund model from investor-state and commercial arbitration would seem to be a bit ill-suited to state-to-state dispute settlement, 'crowdfunding' can arise in international litigation[105] through the involvement of non-governmental organizations. Such instances include ICJ proceedings concerning issues of broad public interest like nuclear proliferation. For example, non-governmental consortium Nuclear Zero provided material support for the Marshall Islands in the *Nuclear Disarmament* cases,[106] and a campaign by the International Association of Lawyers Against Nuclear Arms played a key role in mobilizing the General Assembly to request the Court's opinion in the *Nuclear Weapons* advisory proceedings.[107] It is also possible to envisage expanded third-party funding of state-to-state proceedings at the intergovernmental level, such as by importing the ACWL model of direct legal assistance to some of the larger regional integration organizations in order to settle disputes between member states.

The institutional paths discussed above provide the broadest room for improvement. Each of the three trust funds mentioned would benefit from a more systemic approach.[108] Beyond the potential for cash shortfalls, the most problematic aspect of the current ad hoc approach is that it may create instances of apparent bias. For example, between 2003 and 2004—a period coinciding with the full breadth of the *Avena* case—the claimant state's contributions to the ICJ Trust Fund jumped from zero to USD 10,000.[109] When the case was revived in 2008 through a request for interpretation of the earlier Judgment, the claimant state's contribution rose from USD

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[103] See e.g. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990*, [1990] ICJ Rep 3, 4-5 (illustrating this point as regards incidental powers conferred through Art. 62 of the Statute and Art. 83(1) of the Rules of Court).

[104] In the first request to the Court to establish a chamber to decide a specific dispute, the parties' joint request indicated that they would remove the case to arbitration if they were unsatisfied with the Court's appointment of specific Members to the chamber. See H. Thirlway, 'The International Court of Justice', in M.D. Evans (ed.), *International Law*, 4th ed. (Oxford: Oxford University Press, 2014) 590 at n. 6. See further *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment*, [1984] ICJ Rep 246.

[105] See further 'Crowdfunding sites aim to make the law accessible to all', Financial Times (9 August 2015), https://www.ft.com/content/89df9038-3e80-11e5-9abe-5b335da3a90e.

[106] Among the three closely related cases, see further *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment*, [2016] ICJ Rep 833.

[107] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Rep 266, Separate Opinion of Judge Guillaume, 288 ('I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible'). On the prohibitive nature of litigation costs in both ICJ contentious and advisory proceedings, see further Max Planck Institute, *Judicial Settlement of International Disputes: An International Symposium* (1974) 30.

[108] On the importance of dispute settlement financing to the UN's systemic functions, see further R. Higgins, P. Webb, D. Akande, S. Sivakumaran, J. Sloan, *Oppenheim's International Law: United Nations*, Vol. I (Oxford: Oxford University Press, 2017) 471-477.

[109] See Latest Reports of the Secretary-General, http://www.un.org/law/trustfund/trustfund.htm. See further *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, [2004] ICJ Rep 12.

5,000 to USD 20,000.[110] Regardless of the intent behind these variations in contribution levels (and certainly irrespective of any influence they might actually yield), the appearance that economic support for the ICJ's work may be intertwined with direct interests in pending proceedings is a result of the current ad hoc approach to institutional funding, and a self-inflicted wound for perceptions of the Court.[111]

Other preferential issues may appear to arise as a result of the limited number of states that contribute to institutional funds with regularity. This might reasonably lead to cross-institutional 'poaching' among the three institutions addressed above, through outreach efforts to sway the favour of donor states. Politics may appear to play a significant role in instances of case-specific, contemporaneous donations, such as the contribution of France to the *Abyei* arbitration[112] coinciding with the appointment of one of its nationals as presiding arbitrator in that case. While Prof. Pierre-Marie Dupuy's acumen and integrity ensured that his appointment and presidency were well-received, it is not difficult to envisage this financial model producing problematic optics, particularly in cases where the donor state (of which the chair of the tribunal is a national) maintains a specific policy interest in the outcome of the case.

5.2 Proposals for Institutional Reform

Returning to the specific institutional funds discussed above, it may be tempting to infer from ICJ practice that cost concerns do not deter developing states from utilizing the Court.[113] Additionally, some of the recurring problems of the ICJ Trust Fund—such as the size of grants allotted, which have been generally too small to substantially defray costs[114]—may be resolved only after first pressing other reforms. Yet the Trust Fund presents six key possibilities for such reforms, which would potentially influence the efficiency and utilization of other institutional funds.

Firstly, and most strikingly, shifting from a purely voluntary system of contributions to a pro rata share of the UN regular budget would assure the availability and fairness of funding. Whilst voluntary contributions have been lauded as a way for

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[110] See Latest Reports of the Secretary-General, http://www.un.org/law/trustfund/trustfund.htm. See further *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America), Judgment*, [2009] ICJ Rep 3.

[111] On the attention paid by the Court to the General Assembly's influence on the financial health of its operations, see ICJ, 'Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations' (26 October 2000), https://www.icj-cij.org/files/press-releases/9/2999.pdf ('It is for you to decide whether the Court, the principal judicial organ of the United Nations, is to die a slow death or whether you will give it the wherewithal to live').

[112] See PCA, '2009 PCA Annual Report', https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-annual-report-2009.pdf, para. 27.

[113] See further C.P.R. Romano, 'International Justice and Developing Countries (Continued): A Qualitative Analysis' (2002) 1 *The Law and Practice of International Courts and Tribunals* 536, 554, n. 54 ('[T]here is no proven instance of a State that could not proceed because of lack of legal expertise or funds'). But see C.E. Massicci, 'Article 64', in A. Zimmermann, K. Oellers-Frahm, C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012) 1604 (considering that the ICJ Trust Fund suffers from 'under-utilization').

[114] An exception must be drawn here in respect of the 2004 joint application of the parties in *Frontier Dispute (Benin/Niger)*, discussed at Sec. 2.1 above. See UN News and Media Division, 'Secretary-General Awards $700,000.00 from Trust Fund to Assist States in Settlement of Disputes through International Court of Justice', SG/2087-L/3070 (4 June 2004), https://www.un.org/press/en/2004/sg2087.doc.htm.

states to demonstrate their commitment to the practice of peaceful dispute settlement,[115] states with expansive foreign policy interests can less altruistically justify supporting such reform as a cost-effective means to encourage the stabilization of regional conflicts to their own benefit. This approach could be accompanied by financial incentives, such as exempting states from mandatory contributions if they have 'clean' declarations in force recognizing the compulsory jurisdiction of the Court.[116] The ACWL financial model discussed above demonstrates one way in which mandatory contributions could be formulated, and would improve problems of apparent bias as well as transparency issues arising from unreported non-state submissions to the ICJ Trust Fund. This aspect of the ACWL's operations would be far easier to adapt than its function as a legal services provider, which would require the establishment of a satellite organization to effectively maintain independence between the international bar and the UN's principal judicial organ.

Secondly, there do not appear to be distinctive reasons why the ICJ Trust Fund could not encourage dispute settlement by granting funds to states that are preparing for or contemplating cases not yet instituted (such as found in the Terms of Reference of the ITLOS and PCA funds discussed above).

Thirdly, and drawing inspiration from the same collegial institutional sources, the General Assembly might consider lifting the ban on applying funds towards jurisdictional disputes. This ban appears to threaten the procedural equality of parties before the Court (since only the party requesting funds need undertake not to raise preliminary objections),[117] and altogether blocks a funding request if the Court defers an objection to the merits phase for lack of an 'exclusively preliminary character'.[118]

Fourthly, the PCA model of a standing review body should be adopted because the process of establishing a new Panel of Experts in response to each ICJ Trust Fund application unnecessarily hinders or jeopardizes utilization of the Court and implementation of its Judgments.

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[115] See, e.g., F. Berman, 'Commentary', in C. Peck and R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniverary of the Court* (1997) 223.

[116] A 'clean' declaration might be said to restrict itself to the express terms of Art. 36(2) of the ICJ Statute, such as found in the January 1921 declaration of Uruguay (the oldest declaration currently in force). The trend in drafting such declarations has decidedly favoured the opposite approach, as seen in the September 2019 declaration of India (the most recently revised declaration currently in force). As of December 2019, 74 States have deposited such declarations, including a fairly balanced mix of developed and developing states. The UK remains the last permanent member of the Security Council with a declaration in force. See further ICJ, 'Declarations recognizing the jurisdiction of the Court as compulsory', https://www.icj-cij.org/en/declarations.

[117] See UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General', UN Doc A/59/372 (21 September 2004), Ann. ('Revised Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice'), Art. 6(a)(ii)(b). See further ICJ, 'Financial Assistance to Parties', http://www.icj-cij.org/court/index.php?p1=1&p2=7 ('The fund is today open to States in all circumstances where the jurisdiction of the Court (or the admissibility of the application) is not or is no longer the subject of dispute on their part').

[118] See ICJ Rules of Court (1978), Art. 79(9).

Fifthly, the Trust Fund's Terms of Reference could be effectively rephrased to more clearly extend eligibility to intervening third states (or, at a minimum, those that have intervened as a full party to the dispute).[119]

Finally, procedures concerning grants to implement Judgments should be amended to encourage prospective applications before the delivery of the Judgment.[120] It is also worth considering the possibility of permitting applications by non-party developing states that believe they should align their policies with the pronouncements of a particular ICJ Judgment, irrespective of the formal *res inter alios acta* protections of Article 59 of the Court's Statute.

Several such proposals could also be extended to the ITLOS Trust Fund. Yet it would appear that the primary hurdle to this Trust Fund's effectiveness is the intended prevalence of requests for provisional measures[121] and prompt release[122] in the Tribunal's docket. Of course, such proceedings move quickly by necessity—perhaps too quickly to be substantially supported by a funding mechanism, irrespective of any such reforms.[123] Viewed in this light, it may be easier to deduce why the limited funds approved for the respondent in *Juno Trader* lay dormant after the conclusion of the case, whilst the state had likely turned its attention to more pressing matters.[124]

Whilst the PCA Financial Assistance Fund could benefit as well by shifting from voluntary contributions to a pro rata share of PCA contracting parties' annual

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[119] Any UN member state may request to intervene in a pending case in which it considers that it has 'an interest of a legal nature which may be affected by the decision in the case'. See the Statute of the Court, Art. 62. States may request to intervene in the case either as a non-party or as a party, the latter requiring a relevant jurisdictional link to the parties and resulting in, *inter alia*, a multilaterally binding Judgment as regards the scope of the intervention. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment*, [1990] ICJ Rep 92, 134-135, para. 99. While the 2004 Terms of Reference for the ICJ Trust Fund refer to 'financial assistance to States for expenses incurred in connection with … a dispute submitted', the spirit of the Terms of Reference and the relevance of certain aspects thereof arguably limit their application to the parties, rather than non-party participants.

[120] It appears that such reform would have somewhat expedited the approved joint request for demarcation financing in *Frontier Dispute (Burkina Faso/Niger)* (discussed at Sec. 2.1 above), in which the request for funds was made after the rendering of the 2013 Judgment of the Court. See UN General Assembly, 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General', UN Doc A/69/337 (21 August 2014), para. 4.

[121] See UNCLOS, Art. 290. See further G. Le Floch, 'Le Tribunal international du droit de la mer : bilan et perspectives', in G. Le Floch (ed.), *Les 20 ans du Tribunal international du droit de la mer* (Paris : A. Pedone, 2018) 29-31.

[122] See UNCLOS, Art. 292. In practice, ITLOS completes prompt release cases within one month from the date of application. See J.-P. Cot, 'In Praise of Urgency: Reflections on the Practice of ITLOS', in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Asser Press, 2013) 271.

[123] For scholarship taking this position after the *M/V Norstar* case (discussed at Sec. 2.2 above), which was not a prompt release case and did not apply funding to a provisional measures phase, see M. Benatar, 'Trust Fund: International Tribunal for the Law of the Sea (ITLOS)', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, forthcoming), para. 26 (finding the ITLOS Trust Fund to be 'underfinanced and underutilized', and querying 'whether the Tribunal's scheme holds sufficient funds to make a real impact on the financial predicament of parties fact-laden, complex cases', such as maritime delimitation or marine environmental disputes).

[124] See further C. Claypoole, 'Access to International Justice: A Review of the Trust Funds Available for Law of the Sea-Related Disputes' (2008) 23 *International Journal of Marine and Coastal Law* 77, 91-92.

budgetary dues,[125] the most unique question that arises in this institutional context is whether a distinction should be drawn between funding applicants in state-to-state disputes and those in other PCA-administered cases, such as investor-state or state contract arbitrations. The purpose of such a distinction would be to ensure that funds contributed by contracting parties as a public service to international peace and security are not awarded to states which might be said to have assumed the risk of arbitration upon entering into arrangements for economic gains. It may be possible to justify this distinction by analogy to the law of sovereign immunities, where *jure gestionis* exceptions to state immunity from adjudicative jurisdiction have been framed to encompass a wide range of the state's financial or industrial ventures.[126] Encouraging the earmarking of funds for specific subject matter in future state-to-state disputes, however, may well prove contentious and unwieldy in practice.

6 Conclusion

The three broad pathways discussed herein—institutional, independent, and mutual—illustrate the varied procedural dynamics applicable to dispute settlement between sovereigns, and the abiding need to preserve international peace and security by innovating a fair and practicable system of access to adjudication and arbitration. In particular, certain reforms to the effectiveness and efficiency of existing institutional pathways appear well-suited to helping developing states to protect and advance their interests before bodies such as the ICJ. Such developments may benefit not only states requesting financial assistance, but also the institution and the context in which the international community views its vital work.

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[125] According to Art. 50 of the 1907 Hague Convention on the Pacific Settlement of Disputes, PCA contracting parties bear the expenses of the organization's International Bureau 'in the proportion fixed for the International Bureau of the Universal Postal Union'. See further International Bureau of the Universal Postal Union, 'Constitution and General Regulations Manual. Rules of Procedure, Legal Status of the UPU, List of resolutions and decisions' (2005), http://www.upu.int/uploads/tx_sbdownloader/actInThreeVolumesConstitutionAndGeneralRegulationsEn.pdf.

[126] See, e.g., 2004 UN Convention on Jurisdictional Immunities of States and Their Property, adopted 2 December 2004, (2005) 44 ILM 803, Art. 2(1)(c) (defining 'commercial transaction' for this purpose as 'any commercial contract or transaction for the sale of goods or supply of services; any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; [and] any other contract or transaction of a commercial, industrial, trading or professional nature [other than employment contracts]'). See further H. Fox, *The Law of State Immunity*, 2nd ed. (Oxford: Oxford University Press, 2008) 502-532; X. Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012) 75-132.