

INTERNATIONAL JUSTICE AND DEVELOPING COUNTRIES (CONTINUED): A QUALITATIVE ANALYSIS

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This article is the second part of a study on the use of international judicial bodies by developing countries. The first part, presenting the rationale of the study, the methodology and quantitative aspects, has already been published in this journal.¹ The aim of the second part of this study is to explore with greater care the issue of the use by developing countries of international judicial bodies.

The choice of the term “use” over all other possible synonyms (apply, employ, access to, etc.) is deliberate. One of the meanings of *use* is “To put into service or apply for a purpose; employ. To avail oneself of.”² Thus, to *use* is especially appropriate in the narrower sense of making something profitable or of finding new and practical uses for it. It is a central tenet of this study that, when States resort to international judicial bodies, they do so with a particular aim in mind, be that settling the dispute, freezing the status quo, tilting the balance of power between the disputants by moving the dispute to a more favorable ground, or influencing the development of international law on a particular issue. Submitting a dispute to an international judicial body, or accepting the body’s jurisdiction, thus exposing oneself to future litigation, is eminently and, unlike resort to force, always a rational political act.³

Framed this way, the question of the “use of international judicial bodies” acquires three main dimensions: access, capacity, and willingness to utilize.

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¹ C. Romano, “International Justice and Developing Countries: A Quantitative Analysis”, *The Law and Practice of International Courts and Tribunals*, Vol. 1, 2002, pp. 367–399.

² “Utilize” and “Use”, *American Heritage Dictionary of the English Language*, (3rd Edition, 1992).

³ D. Bowett, “The Conduct of International Litigation”, in D. Bowett et al. (eds.), *The International Court of Justice: Process, Practice and Procedure*, (London, BIICL, 1997), pp. 1–20, at p. 1.

I. ACCESS

The first dimension of the issue of the use of international judicial bodies by developing countries is that of *access*.⁴ For international litigation to take place, both States involved must have given their consent. Consent to an international judicial body's jurisdiction can be either implicit in membership to the organization or legal system of which the international judicial body is an organ, or needs to be made explicit. The former is typically the case with judicial bodies of regional organizations.⁵ Indeed, acceptance *a priori* of the compulsory jurisdiction of the regional organization's judicial body is the *quid pro quo* for the participation of smaller or weaker States in the regime, and this is invariably the case with regional agreements. In the case of regional human rights agreements, however, the Inter-American Court of Human Rights (IACHR) is a notable exception. For the IACHR to exercise jurisdiction, States Members of the Organization of American States (OAS) must explicitly give their consent.⁶ Membership in the OAS is not enough.⁷

⁴ It should be stressed that in this study availability of judicial bodies is postulated. Of course, the question of use is *in primis* an issue of availability of fora. In the absence of pre-established and permanent international judicial bodies where disputes can be brought, either unilaterally or by agreement, the only alternative available is *ad hoc* justice through arbitral tribunals. Romano, *op. cit.*, at p. 374.

⁵ The exception is the Sistema de la Integración Centroamericana (SICA), where Costa Rica and Guatemala are not subject to the Central American Court of Justice's jurisdiction, since they have not yet ratified the Protocol of Tegucigalpa to the Charter of the Organization of Central American States, concluded on 13 December 1991; 34 *I.L.M.* 923. The Protocol of Tegucigalpa amended the Charter of the Organization of Central-American States, concluded at Panama, on 12 December 1962; 2 *I.L.M.* 235.

⁶ American Convention on Human Rights, signed in San José, Costa Rica, on 22 November 1969 (hereinafter American Convention). 1144 *U.N.T.S.* 123. Article 62.

⁷ Out of 25 signatories to the American Convention, only 18 have accepted the Court's jurisdiction (www.corteidh.or.cr/info_general/info_3.html). The issue of whether consent can be withdrawn is thorny. In 1999, Peru attempted to withdraw consent to jurisdiction of the Inter-American Court's jurisdiction, while two cases concerning that country were pending before the Court (*Ivcher Bronstein* and *Constitutional Court* cases). The Court found that: "The Inter-American Court, as with any court or tribunal, has the inherent authority to determine the scope of its own competence [...] The jurisdiction of the Court cannot be contingent upon events extraneous to its own activities [...] Interpreting the [American]

In the case of universal judicial bodies, the situation is more varied. In the case of the World Trade Organization (WTO), participation in the dispute settlement process is compulsory. Once the procedure has been initiated by the applicant, it cannot be stopped by the respondent. As will be explained in greater detail below, in the previous system under the GATT, to become binding the decision of a dispute settlement panel had to be adopted by a consensus of all contracting parties to the agreement.⁸ In the current WTO system, the principle has been reversed. For the decision of a dispute settlement panel or the Appellate Body to be rejected there must be a consensus of all Member States. Thus, the WTO dispute settlement system provides the only example of a legal regime not limited to a particular geographic area where acceptance of the binding third-party settlement of disputes is *conditio sine qua non* of membership to the organization.

The situation is quite different in the case of the International Court of Justice (ICJ). Indeed, although the ICJ is a principal organ of the UN, and *the* principal judicial organ,⁹ consent to its jurisdiction is not implicit in membership in the organization.¹⁰ Consent must be given expressly.¹¹ The

Convention in accordance with its objective and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62.1 of the Convention [i.e., optional declaration] [...] Recognition of the Court's binding jurisdiction is an ironclad clause where there can be no limitations except those expressly provided for in Article 62.1 [...] Because the clause is so fundamental to the operation of the Convention's system of protection it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for internal reasons [...] There is no provision in the Convention that expressly permits the States Parties to withdraw their declaration of recognition of the Court's binding jurisdiction. Nor does the instrument with which Peru recognizes the Court's jurisdiction [...] allow for that possibility [...] A State party to the American Convention can only release itself from obligations under the Convention by following the provisions that the Treaty itself stipulates. In the instant case [...] the only avenue [...] is to denounce the Convention as a whole." *Constitutional Court case, Competence, Judgment of 24 September 1999, IACHR, Series C, N. 55, paras. 31–39. Ivcher Bronstein, Competence, Judgment of 24 September 1999, IACHR, Series C, N. 54, paras. 32–40.*

⁸ *Infra*, at p. 603.

⁹ UN Charter, Article 92.1

¹⁰ It should be stressed that States that are not members of the UN can also become parties to the Statute of the ICJ (UN Charter, Article 93.2), and the Court can also be open to States that are not parties to the Statute of the ICJ (ICJ Statute, Article 35.2) on the basis of conditions to be determined respectively by the

World Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways: by the conclusion of an *ad hoc* agreement to submit the dispute to the Court;¹² by virtue of a jurisdictional clause contained in a treaty previously entered into by the parties;¹³ or through the reciprocal effect of declarations made under Article 36.2 of the Statute whereby each State has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State that has made a similar declaration (i.e., the optional clause).¹⁴ If consent has not been given, the Court will not exercise its jurisdiction.

Understandably, this can severely limit the capacity of all States, including developing countries, to access the World Court. Indeed, as a rough term of comparison, in the period 1946–2001 only 98 cases were submitted to the World Court (1.78 per year), while in the period 1995–2001 no less than 244 dispute settlement procedures were initiated in the WTO (34.8 per year on average). While ease of access by itself does not

General Assembly (upon the recommendation of the Security Council), and the Security Council. The same is not true in the case of the ICTY and ICTR, where consent to jurisdiction is implicit in the fact that those two bodies have been created by Security Council Resolutions (respectively, SC Resolution 827 (1993), and SC Resolution 955 (1994)) enacted under Chapter VII of the Charter. UN Charter, Article 25. For an interpretation of the scope of Article 25 of the UN Charter, see J. Delbrück, “Article 25”, in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), at pp. 407–418.

¹¹ To be precise, consent to jurisdiction can also be implicit in the *behavior* of the party once the case has been submitted to the Court. That is the case of the so-called *forum prorogatum*. *Forum prorogatum* is the name given to the situation where one State refers the case to the Court and the other State does some act which can be regarded as submission to the jurisdiction, such as appearing and arguing the case on its merits. Collier and Lowe, *op. cit.*, at p. 136. The ICJ seems to have relied, *inter alia*, on the doctrine of *forum prorogatum* in the *Corfu Channel* case, *I.C.J. Reports 1948*, p. 15, while it did not rely on it in the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952*, p. 93.

¹² Statute of the Court, Article 36.1.

¹³ “Whenever the treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.” Statute of the Court, Article 37.

¹⁴ Statute of the Court, Article 36.2–5.

explain differences in frequency of use of the two mechanisms, it surely plays a relevant role.

Of the Court's three sources of jurisdiction, in terms of number of cases submitted, *ad hoc* agreements are the least important. Indeed, out of the 98 contentious cases that have been submitted to the Court to date, only 15 were submitted by special agreement. However, interestingly enough, 11 of those agreements (73%) were concluded between developing countries,¹⁵ while at the same time we know that only slightly more than 33% of cases submitted (34 out of 98) took place between developing countries (including socialist countries and economies in transition).¹⁶

This anomaly could be explained in several ways. First, it might be due to the creation, in 1989, of the UN Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice.¹⁷ Indeed, six out of 15 disputes submitted by way of *ad hoc* agreement were filed in the last 12 years (1989–2001), while nine were filed in the 46 years from the creation of the ICJ to the establishment of the Trust Fund. However, this explanation is not completely convincing. The ICJ Trust Fund will be examined in greater detail below, but here it suffices to say that, before attributing to the Trust Fund the surge of cases

¹⁵ Colombia/Peru in *Asylum* case, Tunisia/Libya and Libya/Malta in the *Continental Shelf* cases; Burkina Faso/Mali in the *Frontier Dispute* case; El Salvador/Honduras (Nicaragua intervening) in the *Land, Island and Maritime Frontier* case; Libya/Chad in the *Territorial Dispute* case; Guinea-Bissau/Senegal in the *Land and Maritime Delimitation Dispute* case; Botswana/Namibia in the *Kasikili/Sedudu Island* case; Indonesia/Malaysia in the *Palau Litigan and Palau Sipadan* case. There are nine cases. However, if Hungary and Slovakia, currently OECD members, and Qatar and Bahrain (respectively high-income and middle-upper income countries), are added to the group of developing countries and economies in transition, the ratio rises to 11/15. *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 1–72. On the issue whether the *Territorial and Maritime Delimitation* dispute between Qatar and Bahrain should be considered as submitted by way of *ad hoc* agreement, see *infra*, note 61. The four cases between developed countries submitted by way of *ad hoc* agreement are: France/United Kingdom in *Minquiers and Ecrehos*, Belgium/Netherlands in *Sovereignty over Certain Frontier Land*, Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands in the *North Sea Continental Shelf* cases; and Canada/United States in the *Gulf of Maine* case.

¹⁶ Romano, *op. cit.*, p. 380. Table 1, Columns D, G, H and I.

¹⁷ UN Doc. A/44/PV.43 (1989). On the ICJ Trust Fund, see *infra*, at note 53.

submitted by *ad hoc* agreement by developing countries, one should determine whether those countries could also file the case unilaterally, by way of the optional clause or a compromissory clause. Only in the case of unilateral submission as an option could one argue that the ICJ Trust Fund swayed the parties to consider joint submission.

Another possible explanation is that, and this is an empirical observation, 14 cases out of 15 submitted by way of *ad hoc* agreement concerned territorial disputes and questions of boundary delimitation,¹⁸ the only exception being the *Asylum* case.¹⁹ One should recall that more than 50% of disputes between developing countries concern boundary and territorial issues (a percentage significantly higher than in the case of developed countries).²⁰ Thus, one could infer that, since boundary and territorial delimitation issues, because of their bilateral and symmetrical nature, befit consensual submission to adjudication, it should logically follow that the majority of disputes submitted by way of *ad hoc* agreement concern those issues. Nevertheless, it is also undeniable that there have been some such disputes between developing countries, which have not been submitted by way of *ad hoc* agreement.²¹

Aside from the straightforward case of disputes submitted by way of *ad hoc* agreement, it must be said that, as a caveat, it is not always possible to clearly distinguish between those cases submitted on the basis of the optional clause and those submitted on the basis of a compromissory clause. States may, and very often do, invoke multiple bases of jurisdiction. It is eventually for the Court to determine whether they are all valid, or only some, or even none and the case must, as a consequence, be rejected. Hence, any data in this field is slippery and must be taken with a

¹⁸ On 3 May 2002 Benin and Niger jointly seised the ICJ of a boundary dispute. www.icj-cij.org/icjwww/ipresscom/ipress2002/htm. If this case is added to the total, it means that, to date, 15 out of 16 cases submitted by way of *ad hoc* agreement concerned boundary and territorial issues.

¹⁹ *Asylum, Judgment, I.C.J. Reports 1950*, p. 266.

²⁰ Romano, *op. cit.*, p. 384. Table 2.

²¹ E.g. Cambodia v. Thailand in the *Temple* case; Cameroon v. Nigeria in the *Land and Maritime Boundary* case. Moreover, there have been a number of cases arising out of boundary delimitation cases, where one of the parties has unilaterally filed a request for interpretation or revision either of a judgment rendered by the ICJ or of an arbitral award (e.g. Honduras v. Nicaragua in the *Arbitral Award made by the King of Spain* case; Tunisia v. Libya in *Judgment of 24 February 1982* case; Guinea-Bissau v. Senegal in the *Arbitral Award of 31 July 1989* case; Cameroon v. Nigeria in the *Judgment of 11 June 1998* case).

pinch of salt. Be that as it may, it should be observed that, of the several thousand treaties in force, currently only 268 contain a clause conferring ICJ jurisdiction.²² Of these, 113 are multilateral and 155 bilateral. Of the bilateral treaties (usually the so-called treaties of “friendship, commerce and navigation”), 21 have been concluded between developing countries. In 73 cases, one of the parties is a developing country. Thus, in total, in 94 out of 155 bilateral treaties containing a clause conferring ICJ jurisdiction, at least one developing country is a party. This would seem to indicate that developing countries widely favor the idea of inserting in bilateral treaties compromissory clauses conferring ICJ jurisdiction. However, because several developing countries are party to more than one such treaty, the reality is much more disheartening. Indeed, only 39 developing countries are party to a treaty containing a clause conferring ICJ jurisdiction.²³

The situation concerning the optional declaration is not any brighter, as is detailed in Table 1. Only 63 out of 189 UN members²⁴ (one third) have made the optional declaration. That prompted one commentator to write that: “The optional clause, far from serving as a reference to new adventures, appears almost 80 years later as a defensive little fortress, even weakened by the discouragement of those who should be its most prominent servants.”²⁵ Of this minority group, 45 are developing countries (71.5%). Percentage-wise, developed countries seem to favor the idea of compulsory ICJ jurisdiction more than developing ones. But while

²² www.icj-cij.org/icjwww/basicdocuments/basictext/basic treaties and other docs.htm.

²³ The number of *bilateral* treaties containing a clause conferring jurisdiction on the ICJ to which the indicated countries are party are in brackets: Afghanistan (4), Algeria (1), Argentina (2), Benin (1), Brazil (2), Burma (2), Ceylon (3), China (3), Colombia (1), Costa Rica (1), Egypt (2), El Salvador (1), Ethiopia (2), Ghana (1), Guatemala (1), Guinea (3), Honduras (2), Iran (5), India (9), Indonesia (2), Israel (2), Jordan (2), Lebanon (10), Liberia (5), Libya (1), Paraguay (1), Pakistan (14), Philippines (11), Sudan (1), Saudi Arabia (1), Thailand (3), Turkey (3), Togo (1), Venezuela (2), Vietnam (Rep. of) (1), Uruguay (2), USSR (1), Yugoslavia (3). Figures about participation of developing countries in *multilateral* treaties containing a clause conferring jurisdiction on the ICJ are not immediately available.

²⁴ Switzerland, which until recently was not a UN member, had nonetheless accepted the jurisdiction of the ICJ by virtue of its optional declaration of acceptance of 28 July 1948.

²⁵ A. Remiro Brotóns, “Justice Among States”, in C.A. Armas Barea, et al. (ed.), *Liber Amicorum “In Memoriam” of Judge José María Ruda*, pp. 507–525 (The Hague, Kluwer, 2000), pp. 43–55, at p. 47.

developing countries make up 86% of the UN membership, only 71.5% of them have made an optional declaration. Thus, in relative terms, developed countries seem to be more inclined to accept the Court's compulsory jurisdiction than developing countries.

Table 1: Developing Country Membership in the UN and Acceptance of Compulsory Jurisdiction of the ICJ

Year	Total UN Membership*	Developing Country Membership		Number of States Making Optional Declarations *
		#	%	
1946	55	41	75	23
1955 *	76	56	74	33
1965 **	117	97	83	42
1975 ***	144	122	85	43
1985 ****	159	136	86	46
1995 *****	185	157	85	58
1999	188	160	85	62
2001	189	161	85	63

* Israel is counted as developing.

** Cyprus, Kuwait and Singapore are counted as developing.

*** Qatar and United Arab Emirates are counted as developing.

**** Brunei Darussalam is counted as developed.

***** Liechtenstein, San Marino, Andorra, Monaco and Slovenia are counted as developed.

Sources: UN Membership from UN website (www.un.org); Acceptance of ICJ compulsory jurisdiction from ICJ Yearbook, 1946–47, 1955–56, 1965–66, 1975–76, 1985–86, 1994–95; and ICJ Report to the General Assembly 1999 (www.icj-cij.org).

N.B.: On 3 March 2002, the Swiss voted to join the United Nations and Switzerland is expected to join the organization soon. While not a UN member, it has deposited an optional declaration nonetheless.

Optional declarations can be made unconditionally or, as it is unfortunately quite common, subject to reservations. Reservations and exclusions fall into several common patterns. For instance, States make reservations to exclude disputes within their domestic jurisdiction; disputes for which a solution is reached through diplomatic means; disputes arising before a given date; disputes for which the parties have agreed to have recourse to other dispute settlement means; and disputes in time of war or in time of compulsory action by the Security Council. Overall, reservations made by developing countries have no great peculiarities that might

differentiate them from those made by developed countries. However, it should be noted that some developing countries (i.e., Barbados, Gambia, India, Kenya, Malta, and Mauritius), that are former British colonies and members of the Commonwealth of British Nations, have excluded from the scope of their optional declarations disputes with other Commonwealth members.²⁶

Despite the fact that only a third of the member States of the UN have subscribed to the system of the optional clause (or 38% of the developing countries members of the UN), the declarations have been invoked (either exclusively or not) as a legal basis, in two out of three applications submitted to the Court. However, since three-fourths of the declarations have been made with reservations, it follows that in two out of three cases respondents argued that the Court did not have jurisdiction and that the application was inadmissible.²⁷

The International Tribunal for the Law of the Sea (ITLOS) departs partially from these trends on the issue of access, although its structure and procedure were modeled closely on that of the ICJ. Currently, 137 States, plus the EC, have ratified the UNCLOS. Of these ratifications, 111 are from developing countries (80.5%) and 27 are from developed countries (19.5%).²⁸ Thus, developing country participation in the UNCLOS regime is comparable, although slightly inferior, to that in the UN in general (where 85% of its members are developing countries), and slightly higher than developing country membership in the WTO (74% of its members).²⁹

The UNCLOS contains an intricate set of provisions mixing compulsory and voluntary jurisdiction. As a rule, disputes between States Parties arising under the UNCLOS are subject to compulsory procedures that entail binding decisions (with the exception of a few specific

²⁶ Declaration of Barbados, of 1 August 1980 (para. 2); Declaration of Gambia, of 22 June 1966 (2nd para., point b); Declaration of India, of 18 September 1974 (para. 2); Declaration of Kenya, of 19 April 1965 (para. 2); Declaration of Malta, of 6 December 1966 (para. 2); Declaration of Mauritius, of 23 September 1968 (para. 2). Canada and the United Kingdom have made optional declarations containing the same reservation. Declaration of Canada, of 10 May 1994 (para. 2.b); Declaration of the United Kingdom, of 1 January 1969 (para. 2) (www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm).

²⁷ Remiro Brotóns, *op. cit.*, at p. 47.

²⁸ Romano, *op. cit.*, at p. 399.

²⁹ *Ibid.*, at p. 396.

categories of disputes).³⁰ Additionally, the ITLOS also enjoys mandatory jurisdiction over all States Parties to the UNCLOS in some specific causes of action (prompt release of detained vessels and crews and requests for provisional measures in certain circumstances),³¹ and may receive cases on the basis of international agreements other than the UNCLOS.³²

Upon ratification of the UNCLOS or at any time thereafter, States Parties may select one or more dispute settlement mechanisms from a menu of four procedures enumerated in Article 287 of the UNCLOS

³⁰ UNCLOS, Article 298.1: “A State may declare that it does not accept any one or more of the procedures provided for in section 2 (Part XV) with respect to: (a)(i) disputes concerning the interpretation or application of articles 15, 74, 83 relating to sea boundary delimitations, or those involving historic bays or titles [...];

(b) disputes concerning military activities [...];

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.”

UNCLOS, Article 284.1: “A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under annex V, section 1, or another conciliation procedure.”

UNCLOS, Article 285: “This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this part. If an entity other than a State Party is a party to such a dispute, this section applies *mutatis mutandis*.”

³¹ UNCLOS, Article 292.1: “[T]he question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under article 287 or to the International Tribunal for the Law of the Sea, unless the parties agree otherwise.” UNCLOS, Article 290.5: “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article [...]”.

³² UNCLOS, Article 187. Moreover, the Sea-Bed Disputes Chamber has mandatory jurisdiction under Part XI of the UNCLOS and the Annexes relating thereto in disputes with respect to activities in the Area falling within certain categories.

(unless they agree otherwise).³³ The four alternatives are: the International Court of Justice, the ITLOS, arbitration or special arbitration. In the event two States have selected the same procedure, that procedure will apply in disputes between them.³⁴ In the absence of agreement concerning the adjudication forum, the disputes will be referred to arbitration in accordance with Annex VII.³⁵

Thus, the ITLOS is just one of the available dispute settlement procedures under the UNCLOS. Data on the declarations made under Article 287 of the UNCLOS sheds some interesting light. As of 1 March 2002, only 28 States out of 138 have made a choice on the applicable dispute settlement means.³⁶ Twelve high-income OECD members,³⁷ one high-income non-OECD member,³⁸ one upper-middle income OECD member,³⁹ five upper-middle income States,⁴⁰ six lower-middle income States,⁴¹ and three low-income States.⁴² Of these, 17 States selected the ITLOS (eight OECD members, including Hungary, and nine developing States (five upper-middle income; three lower-middle income and one low-income)), either exclusively or as an alternative to the ICJ;⁴³ 17

³³ UNCLOS, Article 282: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

³⁴ UNCLOS, Article 287.4.

³⁵ UNCLOS, Article 287.3, Article 287.5.

³⁶ www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm. On the issue of optional declarations of acceptance of jurisdiction in the UNCLOS, see T. Treves, "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice", *NYU Journal of International Law and Politics*, Vol. 31, 1999, pp. 809–822.

³⁷ Austria, Belgium, Finland, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom.

³⁸ Slovenia.

³⁹ Hungary.

⁴⁰ Argentina, Chile, Croatia, Oman and Uruguay.

⁴¹ Algeria, Cape Verde, Cuba, Egypt, Tunisia and Ukraine.

⁴² Guinea-Bissau, Nicaragua and Tanzania.

⁴³ Argentina, Austria, Belgium, Cape Verde, Chile, Croatia, Finland, Germany, Greece, Italy, Hungary, Oman, Portugal, Tanzania, Tunisia and Uruguay. Ukraine accepts the jurisdiction of the ITLOS only in respect of questions relating to the prompt release of detained vessels and crews. Note that the Captain of the *M/V*

selected the ICJ (12 OECD members, including Hungary, and five developing States (two upper-middle income; two lower-middle income and one low-income), either exclusively or as an alternative to the ITLOS;⁴⁴ two rejected the jurisdiction of the ICJ for any kind of dispute (two developing, one low-income and one lower-middle);⁴⁵ six selected arbitration under Annex VII (three high-income States, and three developed (lower-middle income));⁴⁶ and six chose special arbitration under Annex VIII as an alternative to the ITLOS or the ICJ (one lower-middle and two upper-middle income).⁴⁷ On the basis of this scarce quantitative data it seems that, *ceteris paribus*, developing countries have expressed a preference for standing judicial bodies over *ad hoc* arbitral tribunals, and are inclined slightly more towards the ITLOS than the ICJ. Possible reasons for this particular tilt will be discussed below.⁴⁸

In sum, whether implicit or given expressly, consent to jurisdiction is an inescapable element. It cannot be otherwise, given the anarchic and egalitarian structure of the international society. This is the cornerstone and also the main limit of the international judicial system. First, as has been explained, when consent must be given (in the case of the ICJ and partly in that of the ITLOS) it can drastically limit the number of cases reaching the judicial body. Second, as consent is given, it can be withdrawn at any time according to the procedure specified in the basic legal instruments (usually the Statute of the Court or Tribunal). Although in case of disagreement between the parties as to whether consent has been given or not, because of the so-called *competenz kompetenz* principle, it is the judicial body itself that decides the matter, and it has happened that States have refused to appear despite a finding by the body that it was indeed empowered to exercise its jurisdiction.⁴⁹ It should be noted that

Saiga (the vessel that was the object of the first case adjudicated by the ITLOS), Mickael Orlof Alexandrovich, was a Ukrainian national.

⁴⁴ Algeria (only with a prior agreement between the Parties concerned), Austria, Belgium, Cape Verde, Croatia, Finland, Germany, Hungary, Italy, Netherlands, Nicaragua, Norway, Oman, Portugal, Spain, Sweden and United Kingdom.

⁴⁵ Cuba and Guinea-Bissau.

⁴⁶ Egypt, Germany, Portugal, Slovenia, Tunisia and Ukraine.

⁴⁷ Argentina, Austria, Chile, Hungary, Portugal and Ukraine.

⁴⁸ See *infra*, pp.577-583.

⁴⁹ For instance, in the case of the International Court of Justice, States did not participate fully in the following cases, having decided not to present pleadings, oral or written, in one or another phase: Albania in the *Corfu Channel* case

non-appearance affects mostly those bodies whose jurisdiction must be explicitly accepted (such as the ICJ), as contrasted to those bodies where acceptance of jurisdiction is part and parcel of membership of the organization or legal system of which the international judicial body is an organ, (such as the WTO).

II. CAPACITY

The second aspect of the use by developing countries of international judicial bodies is that of the *capacity* to utilize them. The existence of fora and access, *per se*, might not be sufficient. To make effective use of these bodies requires resources, human, financial or other. A few examples of the issues in which shortages of human and financial resources might make a tremendous difference are: obtaining appropriate advice on procedural and substantive aspects of the law and weighing the prospects of success; obtaining necessary support on technical or evidentiary aspects; ensuring that all persons (or departments) involved in or affected by the litigation participate appropriately and that necessary approvals have been obtained; managing the team responsible for the conduct of litigation, and of course paying the costs involved; and implementing the judgment by taking all material and legislative steps necessary.

Yet, before venturing any further into this area, two points should be made clear. First, the decision of whether to litigate does not depend only on the material wherewithal to do so. That is undoubtedly a factor that is kept in mind by decision-makers, but it is not the only one. The decision whether to litigate or not in any given case is the result of a complex calculus, where human and financial resources play a role, but where they represent just some of the variables in the equation. Other factors might be the stakes (the higher the political stakes the less likely litigation is); the chances of success, based on the assessment of the law (which in turn

(United Kingdom v. Albania), *I.C.J. Reports 1949*, (compensation); Iran in the *Anglo-Iranian Oil Company* case (United Kingdom v. Iran), *I.C.J. Reports 1952*, (interim protection), Guatemala in the *Nottebohm* case (Liechtenstein v. Guatemala), *I.C.J. Reports 1953*, (preliminary objections); Iceland in the *Fisheries Jurisdiction* case (United Kingdom v. Iceland), *I.C.J. Reports 1972 and 1974*, (all phases); India in the *Trial of Pakistani Prisoners of War* case (Pakistan v. India), *I.C.J. Reports 1973*, (interim protection); Iran in the *United States Diplomatic and Consular Staff in Tehran* case (United States v. Iran), *I.C.J. Reports 1980*, (merits); and the United States in the *Nicaragua* case (Nicaragua v. United States), *I.C.J. Reports 1986*, (merits).

depends on the relative clarity/obscurity of the norms),⁵⁰ how long the judicial body will take to decide the case (and this in turn depends on the number of cases pending at any given time before the body, and the body's procedures and resources, material and financial); and availability of remedies and enforcement procedures. Obviously, some of these factors can work in favor or against litigation according to whether the State in question is plaintiff or defendant. Another set of factors, perhaps the most fundamental one, is analyzed in the next section concerning the willingness to utilize international judicial bodies.

There is, of course, bound to be an inverse relationship between the degree of experience and human and financial resources available, on the one hand, and the willingness to engage in litigation, on the other. Previous experience in a given forum, or even any international judicial fora, might also play an important role. Learning-by-doing processes might explain why there are certain countries which resort to some judicial bodies more often than others (for instance, Iran, Libya, Nicaragua, and, more recently, Yugoslavia, in the case of the International Court of Justice, or Brazil and India in the case of the GATT/WTO). However, there is no empirical evidence suggesting how much each of these factors counts in the decision whether to litigate. Costs and human resources needs will necessarily vary from forum to forum and from case to case. Moreover, the data is largely anecdotal. Of course, poor lawyering might make the difference between winning or losing a case, but gauging objectively how and why might be a daunting task. How much it costs in the end to litigate a case is usually not made public. The final figure might be hidden in the folds of the budget of a country's ministry of justice or foreign affairs, and, if private lawyers are retained, will remain hearsay. It seems that litigating an average international case that makes it to a final judgment might cost millions of US dollars. But even if the real figure were a multiple of that, that would not help answer the question of how much litigation costs count in the decision whether to go to court. There is no way of knowing in the abstract at which point the value the litigating State attributes to the issues at stake in the case is greater or less than the resources that litigating State will have to field. Nor is there any evidence that any case has not been litigated

⁵⁰ Oddly enough, some of the uncertainty about the outcome of international litigation can be attributed to the fact that the content of international law itself is disputed. And, paradoxically, this is so because so few cases are taken to court. L. Gross (ed.), *The Future of the International Court of Justice* (Dobbs Ferry, NY, Oceana, 1976), Vol. II, at p. 746.

before an international judicial body only because of cost-related considerations.

A. Financial Resources

Be that as it may, trying to determine how much it costs to litigate a case internationally might not be an idle exercise. Indeed, effective participation in international proceedings and the ability to take advantage of the possibilities presented by an increasing number of fora is generally in the interests of the international community as a whole. If the resources available to any given State were to be insufficient to utilize efficiently the available judicial bodies, then there would be a case for a public subsidy.⁵¹ Of course, litigation *per se* should not be encouraged. But if there is to be more international litigation (which does not imply more litigiousness), then it is in everyone's interest that it be conducted properly and that disadvantaged States be presented with every opportunity to participate fully and effectively. The optimal quantum of the international community's intervention inevitably depends on the capacity of calculating the gap to be filled.

There are several instances of "legal aid" in international judicial bodies.⁵² In the case of the ICJ, in 1989, on the assumption that "[...] there

⁵¹ As a general rule, in international judicial bodies each party bears its own litigation costs. However, the judicial body usually has the power to make an order in favor of one of the parties for the payment of costs. This is true, for instance, of the ICJ (ICJ Statute, Article 64; ICJ Rules, Article 97).

⁵² At the regional level, the ECHR, ECJ, and EFTA are endowed with financial assistance funds, but these funds are for the benefits of individuals only. Rules of Procedure, Article 76. The Rules have been amended several times: the current version of the Rules is No. 91/L176/7, O.J., of 4 July 1991, Vol. 37, p. 7 (as corrected by O.J., No. 92/L383/117 of 29 December 1992, Vol. 35, p. 117), and as amended by O.J., No. 95/L44/61 of 28 February 1997, Vol. 38, p. 61, O.J., No. 97/L103/1 of 19 April 1997, Vol. 40, p. 1, (as corrected by O.J., No. 97/L351/72 of 23 December 1997, Vol. 40, p. 72), as amended on 16 May 2000 (O.J. L. 122 of 24 May 2000, p. 43), and on 28 November 2000 (O.J. L. 322 of 19 December 2000, p. 1); EFTA Court Rules of Procedure, Article 72, adopted on 1 February 1994 (hereinafter: EFTA Court Rules), O.J., No. 94/L278/1 of 27 October 1994, Vol. 37, p. 1, as amended on 9 January 1995, O.J., No. 95/L47/31 of 2 March 1995, Vol. 38, p. 31 and on 22 August 1996, O.J., No. 97/L255/36 of 18 September 1997, Vol. 40, p. 36; ECHR Rules of Court, Rules 91–96, in force as of 1 November 1998 (www.echr.coe.int/eng/EDocs/RulesOfCourt.html), Chapter X. The possibility for the President of the ECHR to grant legal aid was created with Resolution 63.18, adopted on 25 October 1963 by the Committee of Ministers of

are occasions where the parties concerned [...] cannot proceed because of the lack of legal expertise or funds”,⁵³ the UN General Assembly created the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice.⁵⁴ The Fund is designed to encourage States to settle their disputes peacefully by submitting them to the Court, and to help them finance the costs associated with the execution of a judgment of the Court. To be eligible for funding, a State must be entitled to appear before the Court and demonstrate a need for financial assistance. The requests for financial assistance are reviewed by a three-person Panel of Experts, which makes a recommendation to the Secretary-General for a final decision.

Since 1989, the UN Secretary-General has received four applications. The first was in March 1991, from a developing country seeking to resolve a territorial dispute with its neighbor through the ICJ.⁵⁵ An award was made to defray the expenses partly incurred in reproduction (including maps), printing and translation of documents submitted to the Court.⁵⁶ In

the Council of Europe. The sum allocated for legal aid in the 1996 budget was 580,000 FRF (in 1998 1,200,000 FRF). In 1996, legal aid was granted in 77 cases. *Yearbook of the European Convention on Human Rights*, Vol. 39, 1996, p. 56. See also Rules of Court, Title III (Transitional Rules), Rule 109.

⁵³ 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, para. 3. UN Doc. A/44/PV.43 (1989), at pp. 7–11. For details of the terms of reference, guidelines and rules of the trust fund see *I.L.M.*, Vol. 28 (1989), at p. 1590.

⁵⁴ *Ibid.*, para. 4. This is a petition of principle as there is no proven instance of a State that could not proceed because of lack of legal expertise or funds. On the Trust Fund, see P. Bekker, “International Legal Aid in Practice: The ICJ Trust Fund”, *AJIL*, Vol. 87 (1993), pp. 659–668; “International Court of Justice: Trust Fund”, *Commonwealth Law Bulletin*, Vol. 16 (1990), pp. 302–303; “International Court of Justice: Trust Fund”, *Asian-African Legal Consultative Committee*, Vol. 14, No. 2–3 (1990), p. 54; T. Bien-Aimé, “A Pathway to The Hague and Beyond: the United Nations Trust Fund Proposal”, *New York University Journal of International Law and Politics*, Vol. 22 (1990), pp. 671–708; 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. Janis (ed.), *International Courts for the Twenty-First Century* (Dordrecht, 1992), pp. 235–244.

⁵⁵ 2001 Report on the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (UN Doc. A/56/456), para. 4.

⁵⁶ *Ibid.*, para. 7.

September 1991 a second application was filed by another developing country regarding a boundary dispute pending before the Court.⁵⁷ Again, a limited amount of assistance was provided to the applicant to defray expenses for cartography, transport and *per diem* incurred in connection with its submission of the case to the ICJ.⁵⁸ The third and the fourth were made respectively in September 1996 and January 1997 by two developing countries, seeking financial assistance in connection with the submission to the Court of a boundary dispute.⁵⁹

After a promising start, the ICJ Trust Fund has been bogged down by two problems, one hopefully ephemeral and the other structural. First, contributions to the ICJ Trust Fund are voluntary. States, intergovernmental organizations, national institutions, and NGOs, as well as natural and juridical persons, can make voluntary contributions to the Fund. In the ten years of functioning, the UN Secretary-General reported that 18 States had contributed a total of \$1,602,734.⁶⁰ Figures are not available on the money left in the Trust Fund after payments have been made to the four previous applicants. However, it is not unlikely that it is only a few hundreds of thousands of dollars, which is, in any event, insufficient to pay for litigation expenses, save some auxiliary activities, such as the translation of documents or preparation of maps. Of course, it might be argued that, should the need arise, the UN Secretary-General will be able to solicit *ad hoc* donors to provide resources to the Fund (as the Secretary-General regularly does with all other UN funds). However, and this leads to the essential problem, the conditions for applying for the funds are quite restrictive. The dispute must have been submitted to the Court by an *ad hoc* agreement. If the case has been initiated unilaterally on the basis either of an optional declaration or a compromissory clause contained in a treaty, funds cannot be granted. Since the establishment of the Fund in 1989, only five cases out of forty-one have been submitted by way of *ad hoc* agreement.⁶¹

⁵⁷ Ibid.

⁵⁸ Ibid., para. 8.

⁵⁹ Ibid., para. 5.

⁶⁰ Ibid., para 10.

⁶¹ See *supra* at p. 543 and note 15. Note that in the case of the Qatar v. Bahrain dispute, while Qatar claimed that Bahrain had accepted the Court's jurisdiction by way of the so-called Bahraini Formula, Bahrain contested the Court's jurisdiction and the interpretation given by Qatar of the formula. *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility*, Judgment of 1 July 1994, *I.C.J. Reports*

The rationale for such a restrictive proviso is to ensure that use of the Trust Fund is “limited to cases [...] in which the jurisdiction of the Court is not a contentious point”,⁶² and thus, to avoid political bickering over the operation of the Fund, which could also discourage potential contributors from supporting it.⁶³ Since international litigation is ultimately considered an unfriendly act, doing so unilaterally and with resources made available by the international community would be politically unacceptable. Arguably, there would also be the risk of encouraging frivolous litigation. But these considerations clash with empirical evidence. Legal aid is not only common in domestic jurisdictions but also among international judicial bodies.⁶⁴ There is no evidence that this has created an increase in unnecessary or frivolous litigation. Considering the caution with which States approach international litigation, similar concerns are misplaced. Moreover, the overwhelming majority of cases brought before the ICJ are filed unilaterally (83 out of 97), thus preventing the Fund from having its full effect.

Recently, on 2 May 2001, a similar Trust Fund was established for the ITLOS.⁶⁵ Resolution 55/7 requests the Secretary-General to establish and administer a Trust Fund to assist parties in the settlement of disputes through the Tribunal.⁶⁶ Much like the fund for the ICJ, the ITLOS Trust Fund will be financed by voluntary contributions by States, international

1994, p. 112, and Judgment of 15 February 1995, *I.C.J. Reports 1995*, p. 6. If the case between Benin and Niger is added (supra note 18), the ratio of cases submitted by way of *ad hoc* agreement increases to 6 out of 42.

⁶² Terms of Reference, supra note 53, para. 4.

⁶³ Bekker, op. cit.

⁶⁴ See, for instance, supra, note 52.

⁶⁵ UNGA Res. 55/7, of 2 May 2001. The rationale for the establishment of such a fund is, as Annex I of Resolution 55/7 recites, that both the ICJ and the Permanent Court of Arbitration are endowed with one such fund, and that “[...] the burden of costs should not be a factor in deciding whether a dispute should be submitted to the Tribunal or in deciding upon the response to an application made to the Tribunal by others”.

⁶⁶ Costs that can be defrayed include: preparation of the application and the written pleadings; professional fees of counsel and advocates for written and oral pleadings; travel and expenses of legal representation in Hamburg during the various phases of a case; execution of an order or judgment of the Tribunal. *Ibid.*, para. 9. Moreover, it is also provided that the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs maintains a “[...] list of offers of professional assistance which may be made on a reduced fee basis by suitably qualified persons or bodies”. *Ibid.*, para. 13.

organizations, non-governmental organizations and natural and juridical persons.⁶⁷ A panel of independent experts will review applications made by States Parties and make recommendations to the Secretary-General of the United Nations on the amount of financial assistance to be given.⁶⁸ However, unlike in the case of the ICJ, and reflecting criticism of that fund's flaws, in the case of the ITLOS Trust Fund, funds can be granted regardless of whether the case has been initiated unilaterally or by common agreement. Since in the case of the ITLOS there are several categories of disputes where the Tribunal can exercise compulsory jurisdiction,⁶⁹ it would only be fair to help less-endowed countries better prepare their cases and implement the judgment.

Finally, unlike the two previous instances, in the case of the WTO there are no financial assistance funds to help parties defray costs. The emphasis is put instead on technical aid, as will be explained in the next section.

B. Human Resources

Unfortunately, there is no systematic survey, both qualitative and quantitative, of the availability of international legal expertise in the foreign policy machinery of States in general, not to speak of developing countries.⁷⁰ However, it is not far-fetched to affirm that a lack of substantive legal expertise can have multiple negative consequences, both for the countries concerned and for the international judicial system as a whole. For instance, a government is unlikely to commence legal proceedings, or respond to proceedings initiated by others, if it is unaware

⁶⁷ Ibid., para. 6.

⁶⁸ Ibid., para. 8.

⁶⁹ Supra, at pp. 547–550.

⁷⁰ Among the few attempts at studies, two that should be mentioned include one carried out almost 40 years ago by the American Society of International Law (ASIL), and a more recent one by Antonio Cassese. In 1963, the ASIL sponsored a small conference of legal officials and scholars from twelve countries. The countries participating were Argentina, Canada, Colombia, Japan, Malaysia, Mexico, The Netherlands, Nigeria, the Philippines, the United Arab Republic, the United Kingdom, and the United States. H.C.L. Merillat, *Legal Advisers and Foreign Affairs*, (Dobbs Ferry, NY), Published for the American Society of International Law by Oceana Publications, 1964). The survey done by Cassese included Brazil, Bulgaria, Ireland, France, Hungary, Israel, Italy, The Netherlands, Switzerland, the United Kingdom and the United States, A. Cassese, "The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards", *Michigan Journal of International Law*, Vol. 14 (1992), pp. 139–170.

of its rights, or does not appreciate that its rights or interests are being threatened in some way. Moreover, lack of adequate expertise might cause cluttering of the international judicial system in two ways. First, in any society most international disputes are resolved out of court when parties exchange information and shape their case. Without adequate capacity to judge the relative strength or weakness of a case, cases that could be handled by plain diplomatic negotiations might end up locked in lengthy judicial proceedings. Second, States might file cases even when the judicial body manifestly lacks jurisdiction, thus unnecessarily taking up the limited time of the bench.⁷¹ Finally, all of the problems created by scarce international legal training are compounded, as increasingly is the case, by the choice of possible fora where cases can be brought. Selecting the right forum can have large implications both for the particular dispute at hand and for the development of international law as a whole.

The legal expertise available in-house to foreign affairs, justice and trade ministries of developed countries is simply not available in most

⁷¹ For instance, in 1999 the Democratic Republic of the Congo (DRC) instituted proceedings before the ICJ against Burundi, Uganda and Rwanda, respectively, for “acts of armed aggression perpetrated [...] in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity (OAU)” (i.e., the invasion of Congolese territory by Burundian, Ugandan and Rwandan troops on 2 August 1998). While the case against Uganda was based on the optional declaration, those against Rwanda and Burundi relied on a very flimsy legal basis: Article 36, paragraph 1, of the Statute of the Court (which provides that “the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force”), the New York Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971, as well as Article 38, paragraph 5, of the Rules of Court (this article concerns the situation where a State files an application against another State which has not accepted the jurisdiction of the Court). The cases against Rwanda and Burundi were removed from the list upon request by the DRC on 30 January 2001. *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Burundi), Order of 30 January 2001; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), Order of 30 January 2001. The case against Uganda is currently pending. Uganda has filed three counterclaims, two of which the Court has held admissible. *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Order of 29 November 2001 (www.icj-cij.org/icjwww/idecisions.htm).

countries in the developing world. Where it is available, it may relate only to limited parts of a broader set of legal matters. In small countries just one civil servant may be responsible for all aspects of a particular treaty or a particular subject matter of great importance to that country. That civil servant, however, might not necessarily be a lawyer but an economist or a scientist, who may be spending all the time available dealing with issues of domestic implementation and reporting requirements arising under multilateral treaties, leaving no time for dispute management. Moreover, the fact that a State has an office of the legal adviser does not mean that it uses the office effectively.⁷² There might not be a separate organization for legal advice or planning in matters pertaining to foreign policy, or experts might be located in a ministry other than the ministry of foreign affairs (such as the ministry of justice).

Undoubtedly, the evolution of a legal advisory service in foreign affairs, commanding respect and to which matters of highest importance can be entrusted, is related to the availability of highly competent, well-trained, and experienced lawyers within the country, and within the government of the country. However, figures relating to the teaching of international law around the world and in particular in developing countries are dismaying. Again, there is no systematic survey of the diffusion and level of teaching of international law around the world. An approximate estimate can be given by utilizing the UNESCO *World Directory of Research and Training Institutions in International Law*.⁷³ Although riddled with important methodological issues, even a simple browsing can provide useful insight.⁷⁴ In the 1994 World Directory, there

⁷² In the survey done by the ASIL there is a graphical example of the misuse of international legal expertise. In 1963, the Philippines had an Office of Legal Affairs within the Department of Foreign Affairs, but it was assigned not only with "providing legal assistance, as required by other offices and divisions of the Department" but also, among other things, with providing general research services to the other departments, collecting biographic information that could help in the formation and implementation of foreign policy, the translation of all communications received in foreign languages, the editing of all documents published by the Department, the enlargement and maintenance of the Department's library, and the compilation and maintenance of the official history of the Department and of the foreign affairs of the Philippines.

⁷³ UNESCO, *World Directory of Research and Training Institutions in International Law* (Oxford, Blackwell, 1994).

⁷⁴ The Directory lists any institution where international law not only is taught but also researched, such as, for example, the Institut de Droit International, or the Hague Academy of International Law. Moreover, the same institution might be

were 578 institutions listed, of which 25 labeled “International and Regional” (e.g., the European University Institute, or the International Development Law Institute). Of the 553 national institutions, 396 were located in the 30 OECD countries (a ratio of 13.6 institutions per country), and the remaining 157 were in the rest of the world (less than one per country).⁷⁵

Of course, scarcity of institutions where international law is taught does not account, by itself, for the lack of international legal expertise in developing countries. It is true that an increasing number of developing country government officials spend a year or more pursuing graduate studies in various universities around the world, and the diversity of the student body of institutions like the Graduate Institute of International Studies, Geneva, or the Law School of the New York University is evidence of this tendency. Besides, if developing countries cannot get in-house expertise, they can still secure it on the legal market, although the issue presents a number of difficulties and raises legitimate questions as to whether international law is really “international”.⁷⁶ Indeed, for smaller countries that are not frequently involved in international litigation, it might be more economical to retain lawyers on an *ad hoc* basis than to keep on the government payroll a battery of lawyers specialized in the various bodies and areas where disputes might arise.

That is what happens in practice. In the case of the ICJ, developing countries tend to have a much greater proportion of non-nationals in their legal teams pleading the case than developed countries.⁷⁷ The overwhelming representation of the “OECD bar” is illustrated by the fact that, in the whole history of the ICJ, lawyers from only six developing countries have pleaded before the Court,⁷⁸ as contrasted to 142 developed-country lawyers appearing a total of 265 times.⁷⁹

listed multiple times as the same university can have international law courses taught in different faculties.

⁷⁵ It should be stressed that South Africa has 15 institutions listed, Argentina and Nigeria nine, China and Russia eight, Indonesia, Brazil and India seven, and Colombia six. All other developing countries have two, one or none each.

⁷⁶ K. Gaubatz and M. MacArthur, “How International is International Law?”, *Michigan Journal of International Law*, Vol. 22, No. 2, Spring 2001, pp. 239–282.

⁷⁷ *Ibid.*, pp. 255–257.

⁷⁸ They are Uruguay (with 6 appearances), Czechoslovakia, India, Israel, Liberia and Madagascar with one appearance each. *Ibid.*, Table 5, at p. 259.

⁷⁹ Even the OECD group distribution is far from homogeneous, with lawyers from the United Kingdom, United States and France appearing the majority of

Of course, lawyers are advocates without underlying loyalties.⁸⁰ They might be hired regardless of their passport only because they are the best available in the field for the given court. But, as it has been noted, specialization itself cannot explain the domination of the practice by a handful of American and European lawyers. Even if we accept that States will seek specialized experts as their advocates before international tribunals, we would still expect to see a broader international distribution of these experts.⁸¹

Yet, retaining lawyers on the international market is not only expensive, taxing limited resources of developing countries, but might also be politically arduous. Governments may be unwilling to retain outside assistance where the issue is of great importance to the State or politically sensitive. They might feel more comfortable being represented by lawyers whose own beliefs they can more easily monitor and which they can relate to. Moreover, the use of national lawyers signals to the judicial body a positive commitment of the appearing State toward the case, and international law more generally.⁸²

The record of the ITLOS, albeit still quite limited, might shed further light on the issue of the representation of developing countries by lawyers not from developing countries. The disputes submitted so far to ITLOS are: *M/V "Saiga"*,⁸³ *Camouco*,⁸⁴ *Monte Confurco*,⁸⁵ *Grand Prince*,⁸⁶

times (200 appearances out of 265). Alain Pellet, one of the lawyers with the highest record of appearances before the World Court, wrote "[...] in the small world of public international law we may speak of the 'mafia' of the International Court of Justice". In A. Pellet, "The Role of the International Lawyer in International Litigation", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (London, BIICL, 2000).

⁸⁰ Gaubatz, op. cit., at p. 269.

⁸¹ Ibid., at pp. 271–273.

⁸² Ibid., at pp. 273–274. The point was made by D. Bowett, "The Conduct of International Litigation", in J.P. Gardner and C. Wickremasinghe (eds.), *The International Court of Justice: Process, Practice and Procedure* (London, BIICL, 1997), at p. 13.

⁸³ The *M/V "SAIGA"* case (Saint Vincent and the Grenadines v. Guinea), Case No. 1, Prompt Release, and Case No. 2, Merits. The documents pertaining to the case are available at www.itlos.org (Proceedings and Judgments, List of Cases).

⁸⁴ The *Camouco* case (Panama v. France), Prompt Release, Case No. 5.

⁸⁵ The *Monte Confurco* case (Seychelles v. France), Prompt Release, Case No. 6.

⁸⁶ The *Grand Prince* case (Belize v. France), Prompt Release, Case No. 8.

Chaisiri Reefer 2,⁸⁷ *Swordfish*,⁸⁸ *MOX Plant*⁸⁹ and the *Southern Bluefin Tuna*⁹⁰ cases. Of these eight disputes, oral pleadings were held in only six.⁹¹ To date, mostly nationals have appeared as agents and counsel for developed countries before the Tribunal.⁹² In particular, Australia, New Zealand and France were represented for the most part, if not exclusively, by nationals, and in the case of Japan, besides a battery of 24 nationals, three US lawyers and one South African expert appeared before the Tribunal. In the *MOX* case hearings, Ireland was represented by Irish and British lawyers and the United Kingdom mainly by nationals.

However, the case of developing countries is different. Saint Vincent was represented, in the Prompt Release phase, by one national, one Yugoslav, one Senegalese and two British lawyers; while in the Merits phase there were three British lawyers, together with one Senegalese and one national of Saint Vincent. Guinea was represented in the Prompt Release phase by one German lawyer alone and in the Merits phase by two German lawyers and three Guinean counsel and agents. Yet, what is more striking is the representation of Panama, the Seychelles and Belize. The teams of the three countries in three different cases were made up of lawyers of the bars of Brussels (Belgium), Burgos (Spain), Vigo (Spain), and of Saint-Denis, La Réunion (France). Moreover, the teams pleading for Panama and the Seychelles were virtually the same.

The reason for the even higher percentage of representation by non-nationals before the ITLOS, as compared to the already remarkable phenomenon regarding the ICJ, can be explained by observing that in all cases where vessels had been seized (five out of eight disputes), lawyers had been retained by the ship owner or charterer (from OECD countries), and not by the countries whose flag the vessels were flying. Because requests for prompt release of vessels can be filed by or on behalf of the

⁸⁷ *The Chaisiri Reefer 2* case (Panama v. Yemen), Prompt Release, Case No. 9.

⁸⁸ *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Community), Case No. 7.

⁸⁹ *The MOX Plant* case (Ireland v. United Kingdom), Provisional Measures, Case No. 10.

⁹⁰ *Southern Bluefin Tuna* cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Cases Nos. 3 and 4.

⁹¹ *The Chaisiri Reefer 2* case was withdrawn because the parties had reached an agreement, and the *Swordfish* case has been suspended for the same reason.

⁹² In the *Swordfish* and *Chaisiri Reefer* cases there have been no oral hearings.

flag State,⁹³ a run-in between fishermen of a developed country and the coast guard of another country, can turn into an international dispute where developing countries are called to honor the flag they liberally granted to merchant fleets that were rigged and chartered by developed countries.

Regarding representation of developing countries in the WTO dispute settlement system, due to the peculiarity of this third-party dispute settlement mechanism, the situation is quite different from that of the ICJ or ITLOS, at least because the dispute settlement system of the WTO, as laid out in the Dispute Settlement Understanding (DSU), explicitly provides for stronger guarantees for developing countries, and a special regime for least-developed countries.⁹⁴

Unlike the case of the ITLOS and of the ICJ, in the WTO system no financial assistance is offered to help defray litigation costs. Only technical assistance is available. Besides the fact that the DSU mandates the WTO Secretariat to carry out special training courses for interested members concerning the dispute settlement procedure and practice,⁹⁵ in cases involving developing countries, the Secretariat will provide, upon request, technical and legal assistance. Such assistance may include providing the services of a legal expert from the WTO Technical Cooperation Division of the Secretariat.⁹⁶ In 1999, there were two full-time legal officers in the Technical Cooperation Division, as well as two legal consultants, both of whom were former legal officers of the Legal Affairs Division, who could share their practical experience of the panel process with the developing country seeking the assistance.

However, because of the manifest insufficiency of the resources available within the WTO Secretariat, and also because the involvement of WTO staff in litigation before WTO bodies raised issues of impartiality, independence, and confidence,⁹⁷ in 1999, during the Seattle WTO meeting,

⁹³ The Rules of the Tribunal read “An application for the release of a vessel or its crew from detention may be made in accordance with Article 292 of the Convention by or on behalf of the flag State of the vessel [...] An application on behalf of a flag State shall be accompanied by an authorization [of the flag State]”. Article 110, paras. 1 and 3. See also UNCLOS, Article 292.2.

⁹⁴ See *infra*, at pp. 605–606.

⁹⁵ DSU, Article 27.3.

⁹⁶ DSU, Article 27.2.

⁹⁷ WTO officers can assist developing countries only by rendering advice and explanations about WTO law and procedure. The final sentence of Article 27.2 of the DSU prohibits them from acting as counsel or assisting in drafting submissions as this would be in violation of the neutrality obligation of the Secretariat stated

a group of developed and developing countries established the Advisory Centre on WTO Law (hereinafter: ACWL, or the Centre).⁹⁸ The ACWL is an intergovernmental organization, based in Geneva like the WTO, but separate from it. Its purpose is to provide legal training, support and advice on WTO law and dispute settlement to developing countries (including countries with economies in transition), in particular to the least developed. The ACWL was founded by thirty-two States: nine developed countries, twenty-two developing countries and one economy in transition.

The Centre functions essentially as a law office specializing in WTO law, providing legal services and training exclusively to developing and transitional economy countries that are members of the Centre and all least-developed countries. Its mandate and modest size (one Executive Director, four experienced lawyers and support staff) require the Centre to stay within its own niche, to avoid overlap and to complement the training and technical co-operation provided by the WTO Secretariat and other relevant institutions. The Centre organizes seminars on WTO jurisprudence and provides legal advice. Yet, more interestingly, the Centre will also provide support throughout dispute settlement proceedings.

Besides legal assistance, the ACWL will be endowed with a Technical Expertise Trust Fund. This Trust Fund will be available for developing and transitional economy members to (partly) finance technical expertise for the preparation of an underlying technical dossier in fact-intensive dispute settlement proceedings, both in the exploratory and panel phases. The Trust Fund is to be funded only by donor governments and intergovernmental organizations.

The ACWL will be financed by a mix of contributions and user-pays fees. For the first five years, members from developing countries and economies in transition pay a one-time financial contribution (in accordance with their capacity to pay) to an endowment fund that forms the financial core of the Centre. Least-developed countries are not required to make such payments in order to enjoy all the benefits and, furthermore, will be given priority in the provision of the Centre's services. Developed

there. The consultants are not inhibited in their actions, but are limited by the fact that they are normally available only one day a week for their WTO task. K. Van der Borcht, "The Advisory Centre on WTO Law: Advancing Fairness and Equality", *Journal of International Economic Law* (1999), pp. 723–728, at p. 724.

⁹⁸ Agreement Establishing the Advisory Centre on WTO Law, 30 November 1999 (www.austlii.edu.au/au/other/dfat/treaties/notinforce/1999/36.html) (site last visited 6 June 2001).

countries can become members by making a minimum contribution of US \$1,000,000 to the endowment fund and/or by donating multiyear funds of US \$1,250,000.⁹⁹ To finance its regular activities after the first five years, the Centre will draw on revenue generated by its endowment fund and user fees charged for the legal services in dispute settlement proceedings.¹⁰⁰ Moreover, the Centre will be able to raise voluntary contributions from governmental and non-governmental donors for specific purposes that are not related to actual dispute settlement cases, such as training and internship programs.

The ACWL was inaugurated on 5 October 2001.¹⁰¹ While it is too early to assess the effectiveness of the ACWL in buttressing developing countries' use of the WTO dispute settlement system, doubtlessly it has created a precedent that will be difficult to ignore for other international judicial bodies. First, unlike the trust funds created for the ICJ and the ITLOS, and other forms of legal aid, it concentrates on providing human resources, not cash, to defray litigation costs. Second, it is an independent organ, external to the organization and its judicial body, thus reinforcing its credibility as an impartial player. Third, it brings together developing and developed countries into a partnership, rather than leaving the financial support of the endeavor to gratuitous contributions by developed countries. Finally, it is partially sustained by user-pays fees, which help reduce waste and unnecessary litigation, and it reinforces the commitment of the parties to the case. The establishment of similar advisory centers for other international judicial bodies is surely possible (for it does not require modifications of the judicial bodies' statutes and rules), feasible, and desirable.¹⁰²

⁹⁹ The current thirty-two founding members have pledged a total of US\$ 9.8 million for the endowment fund and US\$ 6 million for the multiyear contributions.

¹⁰⁰ The fees are discounted for developing country members (from \$100 to \$200 per hour) and least-developed countries (\$25 per hour), and are at full rate for all other developing countries not members (from \$250 to \$350 per hour). Developed countries have no access to the legal services in dispute settlement proceedings.

¹⁰¹ The speech of the WTO Director General opening the ACWL can be found at www.wto.org/english/news_e/spmm_e/spmm71_e.htm.

¹⁰² Besides the assistance offered by the WTO Secretariat and the ACWL in the field of dispute settlement, one should also mention that some developed countries have also made available to developing countries resources and technical assistance to help them participate in the work of the WTO and the decision-making process. In January 2002, a brand new office to improve representation of the 77 African, Caribbean and Pacific (ACP) countries was inaugurated. The office was financed by an EU grant of 1.45 million Euros. "EU Backs Launch of

For what concerns actual representation throughout WTO dispute settlement procedures, it should be noted that it is only recently that lawyers who were not full-time governmental officials of the concerned country have been allowed to appear. Under the GATT system, private counsel were not permitted to represent WTO member governments in dispute settlement proceedings.¹⁰³ The absence of private lawyers among the agents and counsel was considered testimony to the diplomatic roots of the GATT system.¹⁰⁴ The same was valid also during the first years of the WTO, but the issue was raised in 1997 when a private lawyer was not admitted to represent Saint Lucia, which was appearing as a third-party in a dispute over the banana trade between the US and the EC.¹⁰⁵ The panel justified its decision by invoking not only GATT and WTO practice and its own working procedures, and the fact that they would have been unfair towards those parties that retained private lawyers to prepare the case but had not had them appear before the panel, but also more interestingly because “[...] private lawyers may not be subject to disciplinary rules such as those applied to member governments, their presence in panel meetings could give rise to concerns about breaches of confidentiality; [because] [...] it could [...] entail disproportionately large financial burdens for [...] smaller members; [and] the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings”.¹⁰⁶ The panel also stressed that this decision in no way affected the right and ability to consult with or receive advice from private lawyers outside panel proceedings.¹⁰⁷

Geneva-Based Office to Help African, Caribbean and Pacific Countries Boost World Trade Organization Presence”, *Commission of the European Communities - RAPID*, Press Release IP 02/07, available at LEXIS/NEXIS. Similarly, in November 2001, the UK created a £20 million aid package to train negotiators and help developing countries increase their influence in the WTO. “UK Gives Pounds 20m to Poorest Nations’ WTO Negotiators”, *The Guardian*, 8 November 2001, p. 26.

¹⁰³ G. Marceau, “NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison”, *Journal of World Trade*, Vol. 31 (1997), pp. 25–81, at p. 63.

¹⁰⁴ *Ibid.*

¹⁰⁵ WTO Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (22 May 1997).

¹⁰⁶ *Ibid.*, para. 7.11.

¹⁰⁷ *Ibid.*, para. 7.12.

In the same case, the Appellate Body decided differently.¹⁰⁸ In particular, it did not find anything “[...] in the [WTO Agreement], the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO member from determining the composition of its delegation in Appellate Body proceedings”.¹⁰⁹ The Appellate Body found that it is for each WTO member to decide who should represent it as a member of its delegation in an oral hearing of the Appellate Body.¹¹⁰

Although the Appellate Body’s decision was limited to Saint Lucia’s request regarding representation in a specific case, and thus does not have value as legal precedent, the reasoning that supports this decision applies just as easily to panels as to the Appellate Body’s future proceedings. It is easy to understand that, at least potentially, the Appellate Body decision might further ease developing countries’ use of the WTO dispute settlement procedures by allowing them to have hired lawyers represent them in proceedings, thus supplementing the scarce human resources many delegations have in Geneva.¹¹¹

¹⁰⁸ Legally speaking, the Appellate Body did not overturn the decision of the panel. Indeed, as a third-party in the *Bananas* case, Saint Lucia could not appeal. However, the issue of representation by private counsel was raised anew by Saint Lucia before the Appellate Body, when it asked to be represented by private counsel.

¹⁰⁹ WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 September 1997), para. 10.

¹¹⁰ The draft articles on [...] provide that “the freedom of choice by the sending State of the members of the mission is a principle basic to the effective performance of the functions of the mission”. Draft Articles on the Representation of States in their Relations with International Organizations, UN Doc. A/CONF.67/4 (1975). See the *Work of the International Law Commission*, 5th ed., 1996, pp. 70–71. The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (UN Doc. A/CONF.67/16), of 13 March 1975, does not place any major limitation on State’s missions, but for the size of the mission, which should be reasonable and proportionate (Article 14), and the case in which members of the mission are nationals of or permanent residents of the host state (Article 67).

¹¹¹ Unfortunately, the WTO Secretariat does not compile information or keep records about representation by private counsel in WTO proceedings. Information would have to be researched case by case through the various delegations in the various cases.

Be that as it may, the issue of representation of States in proceedings before WTO dispute settlement bodies remains a delicate one.¹¹² Indeed, developing countries might not necessarily, or not always, desire representation by private counsel. In the *Gasoline* case, Latin American countries declined to bring their private counsel into the room when invited to do so by the Appellate Body.¹¹³ Moreover, the fact that they are given the freedom to do so might not be unconditional progress. Allowing private counsel to represent WTO member governments in dispute settlement proceedings might open the floodgates of private representation by powerful multinational corporations when their interests are at stake. What if tomorrow Toyota, General Motors and Mercedes started lobbying governments to allow their own lawyers to “accompany” government legal teams? Where is the line to be drawn between a private case and a public one?

III. WILLINGNESS

The existence of international judicial bodies, the possibility of accessing them and the capacity to utilize them are not the only prerequisites for international disputes to be submitted to judicial perusal and, hopefully, to settlement. Even when all those elements are in place, States might simply not be willing to have third parties decide the dispute. While the three aforementioned elements relate to legal and procedural issues, the question of willingness to utilize is a quintessential political matter. The reasons might not be straightforward. Indeed, some might be transient, while others might be structural. At any given time, the general state of international relations, and those of a particular country, will ultimately determine whether a State is willing to activate judicial means to settle a given dispute.

The point that deciding to litigate or not is as much a technical as a political question is illustrated by the fact that throughout the Cold War no dispute was ever litigated before a judicial body between socialist

¹¹² On the issue, see also various articles in the *Journal of International Economic Law*, Vol. 2 (1999), pp. 155–184; R. Martha, “Representation of Parties in World Trade Disputes”, *Journal of World Trade*, Vol. 31 (1997), pp. 83–96.

¹¹³ WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (6 April 1996), 35 *I.L.M.* (1996) 603. Episode cited in J. Pearlman, “Participation by Private Counsel in WTO Dispute Settlement Proceedings”, *Law and Pol’y Int’l Bus.*, Vol. 30 (1999), pp. 399–415, at p. 410. See also, R. Martha, *op. cit.*, pp. 83–96.

countries, nor between socialist and developing countries.¹¹⁴ It is only with the demise of Marxist-Leninist theories of international relations that former socialist states have started resorting to international judicial bodies, both to settle disputes among themselves,¹¹⁵ and to settle disputes with developed and developing countries.¹¹⁶ Yet, besides these general

¹¹⁴ In the traditional Marxist view, law, including international law, together with States, is part of the social superstructure determined by the economic structure. Class relations, therefore, determine as much of States' structures as international relations. Hence, States and international law are instruments of class struggle. This view, coupled with the doctrine of "limited sovereignty" articulated in the 1970s by Brezhnev, made friendly relations among socialist countries dogma. In the socialist world, third-party adjudication was not an option because judicial bodies upheld class divisions. Accordingly, international disputes could happen only between socialist States and capitalist States, or among capitalist States themselves, in which case socialist States were better off letting the contradictions of capitalism break free so as to destroy them with endless squabbles. Because of such reasoning, the Soviet Union and the other socialist countries historically have opted for diplomatic consultations rather than judicial settlement. On Marxist and Soviet views on international law and relations in different historical ages, see generally T.A. Taracouzio, *The Soviet Union and International Law: A Study Based on the Legislation, Treaties and Foreign Relations of the Union of Socialist Soviet Republics* (1935). See also G.I. Tunkin, "Coexistence and International Law", in *Recueil des Cours* 5–79; V. Kubáľková and A.A. Cruickshank, *Marxism and International Relations* (1989), pp. 158–192; Light, *The Soviet Theory of International Relations* (1988). See generally A. Carty and G. Danilenko (eds.), *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law* (1990); S. Rosenne, *The Law and Practice of the International Court* (1997), pp. 187–194; L. Caflisch, "Le règlement pacifique des différends internationaux à la lumière des bouleversements intervenus en Europe centrale et en Europe de l'est", *Anuario de Derecho Internacional* (1993), pp. 17–39.

¹¹⁵ E.g. *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), *Judgment*, *I.C.J. Reports 1997*, pp. 1–72; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia); *Application for Revision of the Judgment of 11 July 1996 concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Yugoslavia v. Bosnia and Herzegovina); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Yugoslavia). These last three cases are still pending before the Court. Press communiqués and interim judgments can be found at www.icj-cij.org (Decisions).

¹¹⁶ E.g. *Legality of Use of Force* (Yugoslavia v. Belgium; Canada; France; Germany; Italy; Netherlands; Portugal; United Kingdom; Spain; United States), *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999*, pp. 124–916.

considerations, it is undeniable that each State and its attitude toward a particular judicial body is a story in itself. There might be political, historical, cultural and domestic political reasons for a State to favor or disfavor resort to a given judicial body, or judicial bodies in general, to settle disputes.

Are there factors that are peculiar only, or mostly, to developing countries? Some have suggested that, for instance, alleged African and Asian reluctance to engage in formal litigation is rooted in local cultures.¹¹⁷ It is argued that African and Asian traditions prefer negotiation and consensus as the ideal means of dispute resolution. Indeed, the Organization of African Unity conflict resolution and dispute settlement structures and the practice of its member States generally seem to favor informal means and diplomatic resolution as opposed to international adjudication.¹¹⁸ Moreover, South and East Asia have so far not developed any regional judicial bodies, with competence over sectoral issues (economic integration, human rights, etc.) as contrasted to Europe, the Americas and Africa.

¹¹⁷ E.g. Q. Wright, "The Strengthening of International Law", *Recueil des Cours*, Vol. 98, 1959-III, pp. 74-80; idem., "The Influence of New Nations of Asia and Africa upon International Law", *Foreign Affairs Reports*, Vol. 7 (1958), at p. 38; idem., "Asian Experience and International Law", *International Studies*, Vol. 1, 1959-1960, pp. 84-86; J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague, Nijhoff, 1961), at pp. 23-26; F.S.C. Northrop, *Taming of the Nations: A Study of the Cultural Basis of International Policy* (New York, MacMillan, 1952), Chapter 7; idem., *Philosophical Anthropology and Practical Politics* (New York, MacMillan, 1960), pp. 160-168. On Filmer Northrop's influence, see E. McWhinney, "Western and non Western Legal Cultures and the International Court of Justice: A Celebration of the Scholarship and Teaching of Gray L. Dorsey", *Washington University Law Quarterly*, Vol. 65 (1987), pp. 873-889, at p. 873 et seq.

¹¹⁸ The OAU Charter does not provide for the judicial resolution of disputes. The 1964 Protocol created a Commission of Mediation, Conciliation and Arbitration. The text of the 1964 Cairo Protocol can be found at 3 *I.L.M.* (1964), p. 1116. In practice, the OUA has relied on *ad hoc* mediation committees created by the Council of Ministers or the Assembly of Heads of State and Government. See in general H.A. Amanwah, "International Law, Dispute Settlement and Regional Organizations in the African Setting", in F.E. Snyder and S. Surakiart (eds.), *Third World Attitudes Toward International Law* (Dordrecht, Nijhoff, 1987), pp. 197-217, at p. 197.

Yet, this might be an oversimplification and unnecessary generalization of a complex situation.¹¹⁹ While it may be the case for some States in particular, it cannot hold true for all of them. Besides, this theory tends to overlook the diversity of approaches to international law and judicial settlement within developed countries themselves, and ignores the fact that being a developed country does not *ipso facto* entail enthusiastic adherence to the rule of law in international relations and third-party binding settlement of disputes, as the case of the United States troublingly illustrates.¹²⁰

Granted, due to geographical, political, social, cultural, historical and several other factors, developing countries are far from being an heterogeneous group. Having widely different interests in different areas, their attitudes in international relations can hardly be similar on all points. Even so, it is not difficult to discern certain common attitudes and resentments among most of these countries towards certain problems of

¹¹⁹ Munya, *op. cit.*, at pp. 164–165; R.P. Anand, “Attitudes of the ‘New’ Asian African Countries Towards the International Court of Justice” in F.E. Snyder and S. Surakiart (eds.), *Third World Attitudes Toward International Law* (Dordrecht, Nijhoff, 1987), pp. 162–177, at pp. 163–164; *idem*, “Attitude of Asian-African States toward Certain Problems of International Law”, *ibid.*, at pp. 16–18; K. Highet, “Reflections on Jurisprudence for the ‘Third World’: the World Court, the ‘Big Case’, and the Future”, *Virginia Journal of International Law*, Vol. 27 (1987), pp. 287–304, at p. 298. Writing about the contribution of African judges to the jurisprudence of the ICJ, Ajibola noted that “[...] African judges [are] fully attuned to the importance of legal-technical considerations, the kind of which African conceptions of dispute settlement have been observed to eschew”. Ajibola, *op. cit.*, at p. 363.

¹²⁰ On the U.S. approach to international law and international judicial settlement in the post-cold war era, see N. Krisch, “Weak as a Constraint, Strong as a Tool: The Place of International Law in U.S. Foreign Policy”, in D. Malone and Y. Foong Khong (eds.), *Unilateralism and U.S. Foreign Policy: International Perspectives* (Boulder, CO, Lynne Rienner), (forthcoming). Writing in 1963, Oliver Lissitzyn resorted to the extreme example of Nazi Germany to make the same point; that is to say that of a highly developed and educated country, hotbed of legal thought, that became the greatest challenge to the principle of international law and morality developed by Western civilization thus far. O.J. Lissitzyn, “International Law in a Divided World”, *International Conciliation*, No. 512, March 1963, p. 37.

international law, by and large arising from common experiences under colonization, and their economically undeveloped nature.¹²¹

¹²¹ For early discussions (1960) on developing countries' attitudes towards international law, but which constitute observations that are still valid today, see G. Abi-Saab, "The Newly Independent States and the Rules of International Law", *Howard Law Journal*, Vol. 8 (1962), pp. 95–121; J. Castaneda, "The Underdeveloped Nations and the Development of International Law", *International Organization*, Vol. 15 (1961), pp. 38–48, A.A. Faturos, "International Law and the Third World", *Virginia Law Review*, Vol. 50 (1964), pp. 783–823; R. Falk, "The New States and International Legal Order", *Recueil des Cours*, Vol. 118, 1966-II, pp. 1–104; F.C. Okoye, *International Law and the New African States* (London, Sweet and Maxwell, 1972). For an analysis of developing countries' attitudes during the late 1970s and 1980s, see Wang Tieya, "The Third World and International Law", in R.St.J. MacDonald and D.M. Johnston (eds.), *The Structure and Process of International Law* (1983); S.K. Agrawala, T.S. Rama Rao and J.N. Saxena (eds.), *New Horizons of International Law and Developing Countries* (Bombay, Tripathi Private Ltd., 1983); P. Buirette-Maurau, "La participation du tiers-monde à l'élaboration du droit international: essai de qualification" (Paris, Librairie générale de droit et de jurisprudence, 1983); S. Sathirathai, "An Understanding of the Relationship between International Legal Discourses and Third-World Countries", *Harvard International Law Journal*, Vol. 25 (1984), pp. 395–419; F.E. Snyder and S. Surakiart (eds.), *Third World Attitudes Toward International Law: An Introduction* (Dordrecht, Nijhoff, 1987); R.P. Anand, *International Law and Developing Countries: Confrontation or Cooperation?* (Dordrecht, Nijhoff, 1987); T.O. Elias, *Africa and the Development of International Law* (Dordrecht, Nijhoff, 1988). See also the bibliography prepared by the UN and covering the period 1955–1982: United Nations Library, *Third World and International Law: Selected Bibliography (1955–1982)* (Geneva, United Nations, 1983). For more recent analysis (in the post-Cold War era) of developing countries' views of international law and adjudication, see *Harvard International Law Journal*, "International Law and the Developing World: A Millennial Analysis", Symposium Issue, Vol. 41, Spring 2000; B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New Delhi, Newbury Park, Sage, 1993); P. Mutharika, "The Role of International Law in the Twenty-First Century: An African Perspective", *Fordham International Law Journal*, Vol. 18 (1995), pp. 1706–1724; K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", *Wisconsin International Law Forum*, Vol. 16 (1998), pp. 353–419; H. Sayed, "Beyond Old and New: Engaging the Muslim Cosmopolitan", *93rd Annual Meeting of the American Society of International Law*, 1999, pp. 362–365; J. Gathii, "International Law and Eurocentricity", *European Journal of International Law*, Vol. 9 (1998), pp. 184–211.

Empirical evidence indicates that there is an historical arc of growing opposition to international judicial bodies, which can be attributed to a real or perceived bias of international law and institutions,¹²² followed by a shift toward greater participation and integration into them.¹²³ This arc frames the growth in developing country use of dispute settlement procedures associated with the institutions and substantive law of the international system.

The end of the cold war and the triumph of the capitalist and market-based economic models have reshaped the international landscape and recently there has been a renewal of interest, research and publication in this area.¹²⁴ To briefly summarize a large and complex debate,¹²⁵ attitudes

¹²² David Kennedy's characteristic post-modern analysis refers to "disciplinary bias". D. Kennedy, "The Disciplines of International Law and Policy", *Leiden Journal of International Law*, Vol. 12 (1999), pp. 9–133. Kennedy's ideas are indebted to the work of Duncan Kennedy. See D. Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, MA, Harvard University Press, 1997). On the distinction between perceived and actual bias, see R. Falk, "The New States and International Legal Order", *Recueil des Cours*, Vol. 118, 1966-II, pp. 1–104, at pp. 40–43.

¹²³ On this point see the first part of this study, Romano, *op. cit.*

¹²⁴ In this regard, the most interesting and multifaceted strain of works is the one arising from the so-called Third World Approaches to International Law (TWAAIL), a network of international legal scholars from developing countries gravitating around the Harvard Law School. For a sample of the richness and sometimes perplexing work of TWAAIL, see the symposium issue of the *Harvard International Law Journal*, "International Law and the Developing World: A Millennial Analysis", Vol. 41, Spring 2000. For a summary of the distinctive features of TWAAIL, see Gathii's introduction to the symposium issue, at pp. 274–275.

¹²⁵ Mickelson finds that "There is no coherent and distinctive 'Third World approach' to international law; this appears to be the conventional view among international legal scholars. While no one would deny that particular issues have triggered similar responses from the so-called Third World countries, the standard view expressed is that these disparate strands do not weave together into any sort of pattern. While for convenience they might be lumped together under the "Third World" rubric, they constitute little more than a series of *ad hoc* responses to discrete issues. Even those who admit the existence of a pattern tend to deny its distinctiveness. To the extent that a broader Third World approach to international law is recognized at all, it is ordinarily characterized as essentially reactive in nature." K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", *Wisconsin International Law Forum*, Vol. 16 (1998), pp. 353–419.

of developing countries towards this or that particular judicial body, rather than being dictated by generic, socio-anthropological issues, seem to have more to do with the culture and composition of the given judicial body (issue of “institutional bias”), and the law and values upheld by it (issue of “doctrinal bias”).¹²⁶ Today, cries of foul play over international adjudication, seem to be neither as severe nor as consistent as they used to be in the 1970s, at the height of the developing countries’ call for a New International Economic Order.¹²⁷

Before getting into the specifics, it is first necessary to summarize briefly the shifting attitude of developing countries towards the International Court of Justice and the GATT/WTO dispute settlement system.

A. *International Court of Justice*

The most striking feature of the pattern of use by all countries of the World Court since the Court’s founding is its irregularity.¹²⁸ The history of the

¹²⁶ The “institutional/doctrinal bias” distinction is borrowed from A.A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism”, *Harvard International Law Journal*, Vol. 41 (2002), pp. 419–468. It should be noted, incidentally, that Shalakany finds that, at least in the limited domain of commercial arbitration, “neither doctrinal bias, nor institutional bias, in and of themselves, can account for the full spectrum of skewed decisions”. *Ibid.*, at p. 424.

¹²⁷ Writing about international commercial arbitration, Shalakany asked whether “Third-World perceptions of bias were simply the misguided product of a much-too-politicized debate, the expression of ideological schisms [...] or that they were merely the function of a lack of expertise in the professional cadres of the newly independent countries [That is to say, with time judicial settlement has proved its technical superiority over other forms of conflict management (note by the author)].” Shalakany does not opt for one solution over the other, but he also adds that the reason for changing attitudes must also be sought in “[...] a variety of factors, such as the Third World debt crisis of the 1980s, the debilitating effect of the Reagan-Thatcher years on the practical potentials of traditional modes of leftist opposition, and the hegemonic rise of neoliberalism as the institutionally sanctioned development theory of the 1990s”. Shalakany, *op. cit.*, at pp. 422–423.

¹²⁸ See Romano, *op. cit.*, Table 1. Several explanations exist for the ICJ’s docket ebb and flow, and most of them, by and large, can be traced back to parallel changes in international politics and relations. Of course, international politics does not explain it all. The persistent doctrinal dispute between justiciable and non-justiciable disputes might also have had a bearing, as more mundane issues like the Court’s location at The Hague (at least in the years before mass-transportation and intercontinental flights). On this latter point, see L. Gross,

ICJ, indeed, is rich with accounts of States that have given the institution a cold shoulder or left the courtroom slamming the door. In turns, all regions of the world or political groupings of States seem to have found in a decision of the Court a reason to shy away from it. The communist countries had the *Corfu Channel* case,¹²⁹ and the advisory opinions on the *Interpretation of Peace Treaties*¹³⁰ and the *Reservations to the Genocide Convention*,¹³¹ the Latin Americans the *Asylum*¹³² and *Haya de la Torre*¹³³ cases; the Asians the *Temple of Preah Vihear*¹³⁴ and *Right of Passage*¹³⁵ cases; the Africans the *South West Africa* cases;¹³⁶ the United States the *Nicaragua*¹³⁷ case, and France the *Nuclear Tests*¹³⁸ cases. Other decisions that were not persuasive and which were read as a reason to utilize the Court sparingly were the *Icelandic Fisheries Jurisdiction*¹³⁹ cases and, more recently, the advisory opinions on *Nuclear Weapons*.¹⁴⁰

Developing countries, as a group, are no exception. Over the decades, developing countries have significantly changed their attitudes toward the ICJ, to the point that while their participation accounted for 50% of the

“Underutilization of the International Court of Justice”, *Harvard International Law Journal*, Vol. 27 (1986), pp. 571–597, at pp. 580–581.

¹²⁹ *Corfu Channel* case, supra note 11.

¹³⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, I.C.J. Reports 1950, p. 65 (first phase) and p. 221 (second phase).

¹³¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 15.

¹³² *Asylum, Judgment*, I.C.J. Reports 1950, p. 266.

¹³³ *Haya de la Torre, Judgment*, I.C.J. Reports 1951, p. 71.

¹³⁴ *Temple of Preah Vihear, Merits, Judgment*, I.C.J. Reports 1962, p. 6.

¹³⁵ *Right of Passage over Indian Territory, Merits, Judgment*, I.C.J. Reports 1960, p. 6.

¹³⁶ *South West Africa* cases (Ethiopia v. South Africa; Liberia v. South Africa), *Preliminary Objections, Judgment of 21 December 1962*, I.C.J. Reports 1962, pp. 345–346; *South West Africa, Second Phase, Judgment*, I.C.J. Reports 1966, p. 6.

¹³⁷ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *Merits, Judgment*, I.C.J. Reports 1986, p. 14.

¹³⁸ *Nuclear Tests (Australia v. France), Judgment*, I.C.J. Reports 1974, p. 253; *Nuclear Tests (New Zealand v. France), Judgment*, I.C.J. Reports 1974, p. 457.

¹³⁹ *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment*, I.C.J. Reports 1974, p. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment*, I.C.J. Reports 1974, p. 175.

¹⁴⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, p. 66; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226.

contentious cases filed in the 1960s, in the 1990s they were the source of 86% of the cases.¹⁴¹ Admittedly, developing countries represent an object of study that is far too heterogeneous and diversified to lead to any straightforward conclusion. Latin American, African, Asian and former Communist countries each have their idiosyncrasies and reasons for favoring or disfavoring international adjudication as a whole, and the ICJ in particular. However, in general, it is safe to say that developing countries' criticism towards the ICJ has largely been aimed at two interrelated issues: the composition of the bench, predominantly Western European, and the law and values upheld by it.¹⁴²

¹⁴¹ For an assessment of historical and recent trends in developing countries, including economies in transition, towards the ICJ, see, for instance, R. Higgins, "The International Court of Justice and Africa", E. Yakpo (ed.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer, 1999), pp. 343–369; S. Bedi, "African Participation in the International Court of Justice: A Statistical Appraisal (1946–1998)", *African Yearbook of International Law*, Vol. 6 (1998), pp. 181–222; M. Mubiala, "La contribution des Etats Africains à la renaissance de la Cour internationale de justice", *African Yearbook of International Law*, Vol. 2 (1994), pp. 173–180; M. Bedjaoui, "L'Afrique et l'Asie face à la Cour internationale de justice", *African Yearbook of International Law*, Vol. 4 (1996), pp. 251–256; P.B.A. Ajibola, "Africa and the International Court of Justice", in *Liber Amicorum Judge José Maria Ruda*, pp. 353–366, at p. 362; M. Bedjaoui, "Présences latino-américaines à la Cour internationale de justice", in *Liber Amicorum Judge José Maria Ruda*, pp. 367–392; V. Lamm, "Quatre nouvelles déclarations d'acceptation de la juridiction obligatoire de la CIJ émanant d'Etats d'Europe centrale: Bulgarie, Estonie, Hongrie, Pologne", *Revue générale de droit international public*, Vol. 100 (1996), pp. 335–365.

¹⁴² Munya, *op. cit.*, at pp. 168–169; Gross, *op. cit.*, at pp. 596–597; Anand, "Enhancing [...]", *op. cit.*, at p. 8; A.O. Adede, "Judicial Settlement in Perspective", in A.S. Muller, D. Raic and J.M. Thuranszky (eds.), *International Court of Justice: Its Future Role after Fifty Years* (The Hague, Nijhoff, 1997), pp. 47–81, at p. 51. See also, in general, J. Kelly, "The Changing Process of International Law and the Role of the World Court", *Michigan Journal of International Law*, Vol. 11 (1989), pp. 129–166. As a third element, linked to these two, one might also consider that the law applied by the ICJ and the PCIJ had formerly been used to legitimate colonialism. Falk, *Reviving the World Court*, *op. cit.*, at p. 18; M. Munya, "The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects", *Journal of International Law and Practice*, Vol. 7 (1998), pp. 159–224, at p. 165; G. Abi-Saab, "The International Court of Justice as a World Court", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge, Cambridge University Press, 1996), pp. 3–16; S. Tiefenbrun, "The Role of the

1. Composition of the ICJ Bench

The composition of the ICJ bench has gradually changed over time to reflect the changing membership of the UN and changes in world politics.¹⁴³ At every election of Members of the Court, the General Assembly and the Security Council are required to bear in mind “that in

World Court in Settling International Disputes: A Recent Assessment”, *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 20 (1997), pp. 1–27, at pp. 2 and 12. Moreover, States emerging from decolonization found themselves cast in the role of “debtors” under the traditional legal order, insofar as they were subject to debts, concessions, commercial agreements, servitudes and the like created by their former colonial masters. J. Stone, “The Rule of Law in the Relations of States”, unpublished John Field Sear Memorial Lecture delivered at the University of New Mexico, April 1959, quoted in Anand, “Attitude of the ‘New’ [...]”, op. cit., at p. 165. Naturally, there was a strong desire to throw off this yoke in embarking upon independence (Anand, *Studies in International Adjudication*, op. cit., at p. 58), and the ICJ was suspected of preserving the *status quo* rather than helping developing countries in their emancipation. Moreover, acceptance of the Court’s jurisdiction might “[...] inhibit resort to the various methods of extra-legal pressure [...] ranging from demands for renegotiation, repudiation, hostile propaganda and boycott, to outright confiscation and the tactic instigation of popular violence [...]”. Stone, *ibid.*

¹⁴³ For a more detailed analysis of the history and impact of the composition of the ICJ, see S. Rosenne, “The Composition of the Court”, in L. Gross (ed.), *The Future of the International Court of Justice*, (Dobbs Ferry, NY, Oceana, 1976), pp. 377–441; C. Harland, “International Court of Justice Elections: a Report of the First Fifty Years”, *Canadian Yearbook of International Law*, Vol. 34 (1996), pp. 303–367; A. Oraison, “L’évolution de la composition de la Cour internationale de Justice siégeant en séance plénière de 1945 à nos jours”, *Revue de droit international de sciences diplomatiques et politiques*, Vol. 77 (1999), pp. 61–91. The size and composition of the UN International Law Commission has, likewise, changed considerably over the course of the ICJ’s existence: from fifteen to twenty-one in 1956, under General Assembly Resolution 1103 (XI) of 18 December 1956; to twenty-five in 1961, under General Assembly Resolution 1647 (XVI) of 6 November 1961; and to the present thirty-four in 1981, under General Assembly Resolution 36/39 of 18 November 1981. The current thirty-four members of the International Law Commission have been elected according to the pattern set up in paragraph 3 of Resolution 36/39 of 18 November 1981. Thus, the allocation of seats on the Commission for the five-year term beginning on 1 January 2002 was as follows: nine nationals from African States; eight nationals from Asian States; three nationals from Eastern European States; six nationals from Latin American and Caribbean States; eight nationals from Western European and other States (www.un.org/law/ilc/membefra.htm).

the body as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".¹⁴⁴ In practice this principle has found expression in a carefully drafted formula for the distribution of judges among the principal regions of the globe, which has closely shadowed that of the Security Council.¹⁴⁵

At the outset, in 1946, the distribution of seats on the Court was as follows: six judges from the "Western" countries (Western Europe, UK, "Old Commonwealth" and the US), four judges from Latin America, three judges from the socialist countries, and two judges from Africa and Asia (including China).¹⁴⁶ With the radical change in UN General Assembly membership in the 1950s and 1960s, and the expansion of the Security Council from 11 to 15 members, the composition of the Court in the 1964 elections shifted slightly in favor of developing countries as a whole, although Latin America lost two seats: five judges from the "Western" countries, two judges from Latin America, two judges from the socialist countries, and six judges from African and Asian countries (two Africans and four Asians). Four years later, probably as a result of the controversial 1966 *South West Africa, Second Phase* case, which will be discussed

¹⁴⁴ ICJ Statute, Article 9.

¹⁴⁵ Although there is no entitlement to membership on the part of any state, the ICJ has always included judges of the nationality of the permanent members of the Security Council, with the sole exception of China. There was, in fact, no Chinese Member of the Court from 1967 to 1984. This has restricted the number of slots for which Western European Countries can run to two and those for socialist countries, and now Eastern European countries, to one.

¹⁴⁶ By comparison, the first bench of the PCIJ (11 judges until the revision of the Statute in 1929) was made of nationals of: The Netherlands, France, Great Britain, Denmark, United States, Cuba, Spain, Japan, Italy, Switzerland and Brazil. Anand describes the make-up of the PCIJ as "[...] largely a 'European Court' with a majority of European judges (with the notable exception of post-revolutionary Russia) in addition to judges from the United States, some Latin American Republics, as well as from China and Japan". R.P. Anand, "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", *Max Planck UNYB*, Vol. 5 (2001), pp. 1–20. According to Abi-Saab, the PCIJ reflected in its pronouncements "[...] the legal outlook of the Eurocentric community, which was strongly imbued with nineteenth century positivism". G. Abi-Saab, "The International Court of Justice as a World Court", *op. cit.*, at p. 4.

below,¹⁴⁷ the distribution of judges between African and Asian countries was equalized to three and three.¹⁴⁸

With the end of the Cold War the composition of the ICJ bench has not changed significantly.¹⁴⁹ Currently, Africa has three judges (Egypt, Madagascar and Sierra Leone); Latin America two (Brazil and Venezuela); Asia three (China, Japan and Jordan); “Western Europe and other States” five (France, United States, Germany, United Kingdom, Netherlands); and Eastern Europe two (Russia and Hungary). In sum, eight developing country and seven OECD member judges currently sit on the ICJ bench. As a comparison, in March 2002, the twenty-one seats of the ITLOS were distributed as follows: four to the West (United Kingdom, Iceland, Italy and Germany); three to Eastern Europe (Russia, Croatia and Bulgaria); five to Asia (Lebanon, South Korea, India, Japan and China); five to Africa (Cameroon, Cape Verde, Tunisia, Ghana and Senegal); and four to Latin America and the Caribbean (Argentina, Belize, Grenada and Brazil). Thus, in the ITLOS, developing countries have proportionally greater representation than in the ICJ: only six judges out of twenty-one are from OECD countries.

Needless to say, the issue of the distribution of seats in the ICJ has always been highly contentious, notably among the Asian group, which is representative of such a large part of the world's population but relatively underrepresented on the bench. Besides matters of national pride and representation, the nationality of a judge seems to matter.¹⁵⁰ Be that as it may, it is not exactly clear in what way. To illustrate, and using examples concerning developing countries, in the 1970s Argentina and Chile submitted a heated territorial dispute concerning the Beagle Channel to a

¹⁴⁷ For the political reactions to that judgment, see *infra*, at pp. 584–587. A. Eyffinger, *The International Court of Justice* (The Hague, Kluwer, 1996), at pp. 153–154.

¹⁴⁸ In 1987, the Caribbean Community gained a seat at the expense of the Latin American representation, but the change in balance was only temporary.

¹⁴⁹ On this issue, see N. Blokker, “The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era?”, *International and Comparative Law Quarterly*, Vol. 47 (1998), pp. 211–223.

¹⁵⁰ On the issue of nationality of ICJ judges, see R. Lavalle, “Nationality as a Factor in the Election of Members of the International Court of Justice with Particular Reference to Occasional Elections”, *Revue belge de droit international*, Vol. 29 (1996), pp. 625–632.

panel of five non-Latin American arbitrators.¹⁵¹ The arbitral award failed to settle the dispute.¹⁵² In 1991, and perhaps as a reaction to the failure of the *Beagle Channel* arbitration, Argentina and Chile submitted a dispute concerning the *Laguna del Desierto* area to an arbitral tribunal which was composed solely of Latin American judges.¹⁵³ Again, in the 1990s, Yemen and Eritrea settled a territorial dispute by resorting to a five-arbitrator panel, of which only one arbitrator, Ahmed Sadek El-Kosheri, was from the region (Egypt).¹⁵⁴

In addition to the special case of arbitration, in the case of standing judicial bodies it is undeniable that perceptions matter when the decision is taken to submit a case to a given body. Understandably, States might prefer to submit cases to friendly courts composed of, for the most part, “familiar faces”. This might help explaining not only the phenomenon of judges *ad hoc*,¹⁵⁵ but also the proliferation of regional judicial bodies.¹⁵⁶

¹⁵¹ The arbitrators were Dillard, Fitzmaurice, Gros, Oneyama, and Petré, all judges of the ICJ. The text of the *compromis* of July 1971, and the award of 18 February 1977, can be found in 52 *I.L.R.* 93.

¹⁵² On the *Beagle Channel* arbitration, and its failure, see E. Lauterpacht, “Whatever happened to the Beagle Channel Award?”, in M. Virally, *Le droit international en devenir: Essais écrits au fil des ans* (Paris, Presses universitaires de France, 1990), pp. 359–371.

¹⁵³ They were: Rafael Nieto Navia, Reynaldo Galindo Pohl, Santiago Benadava, Julio Barberis and Pedro Nikken. On the *Laguna del Desierto* arbitration, see L.I. Sanchez Rodriguez, “Un arbitrage territorial strictement latino-américain dans l’affaire de la ‘Laguna del Desierto’”, *AFDI*, Vol. 40 (1994), p. 465 et seq. The arbitral agreement was signed in Santiago del Chile on 31 October 1991. The award (in French) can be found at *RGDIP*, Vol. 100 (1996), p. 520 et seq.

¹⁵⁴ *Yemen – Eritrea, First Stage (Territorial Sovereignty and Scope of the Dispute)*, Award of 9 October 1998; *Second Stage (Maritime Delimitation)*, Award of 17 December 1999 (www.pca-cpa.org/RPC/#Eritrea). C. Johnson, “Eritrea-Yemen Arbitration”, *Leiden Journal of International Law*, Vol. 13 (2000), pp. 427–446.

¹⁵⁵ When the ICJ or the ITLOS does not include a judge of the nationality of a State party to a case, that State may appoint a judge *ad hoc* for the purpose of the case, although the *ad hoc* judge does not need to be a national of the appointing State. Statute of the Court, Article 31; Rules of the Court, Articles 7–8, 17.2, 35–37, 91.2 and 102.3. ITLOS Statute, Article 17.2 and 3. Then again, in the case of the WTO dispute settlement system, citizens of members whose governments are parties to the dispute or third parties cannot serve on a panel concerned with that dispute unless the parties agree otherwise. In the case of customs unions, or common markets, the provision applies to citizens of all member countries of the union or common market. DSU, Article 8.3. However, at the Appellate level,

Then again, States do have the possibility of influencing the composition of the bench by referring cases to a Chamber rather than to the full Court.¹⁵⁷ It is true that this can be done only for those cases that have been jointly submitted by the parties, but the scarce number of cases submitted to Chambers of the Court shows that States are not so interested in this option. To date, only four cases have been submitted to *ad hoc* Chambers of the Court, and all of them in the 1980s.¹⁵⁸ Two of those cases were

members can have the nationality of one of the parties. Working procedures for Appellate Review, 28 February 1997 (WT/AB/WP/3), Rule 6.2. “The Appellate Body is of the view that to deal with the issue of nationality in any other way would be unnecessary and undesirable: unnecessary in view of the qualifications required for membership in the Appellate Body; undesirable as casting doubts on the capacity of members of the Appellate Body for independence and impartiality in decision-making. There are also some practical considerations that are highly relevant. Were the rules to be cast in a manner that required a Member of the Appellate Body to stand aside in an appeal involving his/her country of origin exclusively for reasons of nationality, this would be likely, in practice, to lead to distortions in the work of the Appellate Body Members. Moreover, appeals involving many parties could arise where it would be impossible to constitute a division.” Letter of Appellate Body Chairman to the Dispute Settlement Body Chairman (7 February 1996) (www.wto.org/english/news_e/pres96_e/ab2.htm).

¹⁵⁶ For a comprehensive list of past and present regional judicial bodies, see www.pict-pecti.org/publications/PICT.Synoptic.Chart.2.0.pdf. On this point, see E. Valencia-Ospina, “The Role of the International Court of Justice in the Pact of Bogotá”, *Liber Amicorum Judge José María Ruda*, op. cit., pp. 291–329, at pp. 322–323.

¹⁵⁷ Article 26.2 of the Statute and Articles 15–18 and 90–93 of the Rules of Court.

¹⁵⁸ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States): constituted on 20 January 1981; Judges Ago (President) (Italy), Gros (France), Mosler (Federal Republic of Germany), Schwebel (United States), Judge *ad hoc* Cohen (Canada); *Frontier Dispute* (Burkina Faso/Mali): constituted on 3 April 1985; Judges Bedjaoui (President) (Algeria), Lachs (Poland), Ruda (Argentina), Judges *ad hoc* Luchaire (France) and Abi-Saab (Egypt); *Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy): constituted on 2 March 1987; Judges Nagendra Singh (President) (India) (upon his death replaced by Judge Ruda), Oda (Japan), Ago (Italy), Schwebel (United States), Jennings (United Kingdom); *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua Intervening): constituted on 8 May 1987; Judges Sette-Camara (President) (Brazil), Oda (Japan), Jennings (United Kingdom); Judges *ad hoc* Valticos (Greece) and Virally (France) (upon his death replaced by Judge Torres Bernárdez). It should also be noted that, in 1998–1999, an *ad hoc*

disputes between developed countries, while the other two concerned developing countries.¹⁵⁹ If so, because of the greater share of seats occupied by developing country judges in the ITLOS, the Hamburg Tribunal might have a strategic advantage over The Hague Court as, all things being equal, in cases which could be submitted to both, developing countries might show a preference for the former over the latter.

However, it might also be argued that similar concerns are ultimately unfounded. Examinations of decisions by the ICJ have demonstrated that the reduction of judicial outcomes to nationality is not justified (or at least it is more justified in the case of *ad hoc* judges than in that of permanent judges).¹⁶⁰ McWhinney points out the large range of jurisprudential “styles”, escaping regional classifications, as evidenced even among judges from the United States.¹⁶¹ More convincingly, Brown Weiss’ statistical analysis of judge nationality and ICJ decisions has shown that there is no evidence of factional voting or significant ideological or regional voting alignments. There is no evidence of an East-West split

arbitral tribunal settled the maritime delimitation between Yemen and Eritrea and a dispute regarding sovereignty over certain islands in the Red Sea. *Supra* note 154. Four out of the five arbitrators were either a former ICJ judge (Jennings, former President) or current judges (Schwebel, at that time President of the ICJ, Higgins, and El Koshi, presently judge *ad hoc* for Libya in the *Lockerbie* case). The fifth arbitrator was Keith Highet, one of the practitioners with the largest number of cases litigated before the ICJ. One could wonder why the two countries did not opt instead to refer their case to a Chamber of the ICJ.

¹⁵⁹ Incidentally, in the *Gulf of Maine* case, only developed country judges were selected: Judges Ago (Italy), Gros (France), Mosler (Federal Republic of Germany), Schwebel (United States), and Cohen (judge *ad hoc* for Canada). Again, this is further evidence that the nationality of judges seems to matter. *Supra*, at p. 579. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States), *Judgment, I.C.J. Reports 1984*, p. 246.

¹⁶⁰ On this issue, see W. Samore, “National Origin v. Impartial Decisions: A Study of World Court Holdings”, *Chicago-Kent Law Review* Vol. 34 (1956), p. 193; T. Hensley, “National Bias in the International Court of Justice”, *Midwest Journal of Political Science*, Vol. 12 (1966), pp. 568–586; I.R. Suh, “Voting Behavior of National Judges in International Courts”, *AJIL*, Vol. 63 (1969), pp. 224–236; E. Brown Weiss, “Judicial Independence and Impartiality: a Preliminary Inquiry”, L. Damrosch (ed.), *The International Court of Justice at a Crossroads* (Dobbs Ferry, NY, Transnational Publ., 1987), pp. 123–155.

¹⁶¹ E. McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Dordrecht, Nijhoff, 1991), at pp. 65–66.

during the Cold War years, nor is there evidence that Latin American or African judges form a regional voting bloc, nor do developing countries as a whole.¹⁶² This study concludes that the “review of the voting record of the ICJ does not indicate that the judges of the Court persistently vote in a predetermined way. Rather it lends strong support to the proposition that the Court has generally functioned as an independent and impartial international judicial body”.¹⁶³

2. The Law and Values Upheld by the Court

Perhaps even more important than the nationality of the judges sitting on the World Court is the question of which law and values they uphold. Although it is extremely difficult and misleading to attempt to schematize approaches by developed and developing countries towards international adjudication in general, and the International Court of Justice in particular, historically developed and developing countries have looked at international justice from two different, but not irreconcilable, perspectives. While Western States have generally construed international judicial bodies mainly as instruments to effect *corrective justice*, sanctioning violations of the law and compensating losses with some gains, material or immaterial, or *transactional justice*, to strike a fair balance between legitimate competing claims, developing countries, at least initially, have looked at international judicial bodies principally as agents of *distributive justice*, hoping international judicial bodies could effectively contribute to fostering and upholding a real equality of benefits and burdens in the international society.¹⁶⁴ The dialectic between these two variants of the concept of justice, polymorphous in itself and labeled in different ways,¹⁶⁵ has underlain much of the history of the World Court,

¹⁶² Brown Weiss, *op. cit.*, at p. 131.

¹⁶³ *Ibid.*, at p. 133.

¹⁶⁴ Retributive justice has appeared in the international legal vocabulary only with the advent of international criminal law. Besides, the concept of retribution applies only to individuals who have breached certain norms of international law (humanitarian law, etc.), but never to States. On the various concepts of justice, see D.D. Raphael, *Concepts of Justice* (Oxford, Clarendon Press, 2001); T. Campbell, *Justice* (2nd Edition, New York, St. Martin's Press, 2001); S.C. Kolm *Modern Theories of Justice* (Cambridge, MA, MIT Press, 1996).

¹⁶⁵ For instance, variations of the same debate are those between the positivist school and the sociological school, or that between the textual and the teleological interpretation of international law.

and, arguably, might have influenced the frequency with which developed and developing countries have turned to it.

Beginning as early as the 1950s, a movement began to emerge among developing country jurists and progressives from the West arguing that the ICJ should address changes occurring in the international community by integrating the political, social and economic context and outcomes in international law.¹⁶⁶ The vanguard of this movement was perhaps best represented by Judge Alejandro Alvarez of Chile and his numerous opinions during the course of his tenure from 1946 to 1955.¹⁶⁷ However, the movement represented by Judge Alvarez and other like-minded scholars did not ripen into a comprehensive developing country critique of the Court nor into practical steps toward greater judicial activism until the 1970s.

Indeed, the real turning point was the outcry caused by the 1966 judgment in the *South West Africa* cases.¹⁶⁸ The shock of the decision

¹⁶⁶ Hight, "Reflections [...]", op. cit., at p. 289.

¹⁶⁷ In his concurring opinion in the 1948 *Conditions of Admissions* case, he stated the principles of the "new international law" as follows: "[...] This law of social interdependence has certain characteristics of which the following are the most essential: (a) it is concerned not only with the delimitation of the rights of States, but also with harmonizing them; (b) in every question it takes into account all its various aspects; (c) it takes the general interest fully into account; (d) it emphasizes the notion of the duties of States, not only towards each other but also towards the international society; (e) it condemns the abuse of right; (f) it adjusts itself to the necessities of international life and evolves together with it; accordingly, it is in harmony with policy; (g) to the rights conferred by strictly juridical law it adds that which States possess to belong to the international organization which is being set up [...] Far therefore from being in opposition to each other, law and policy are to-day closely linked together [...]". *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947–1948, p. 57, at pp. 69–70. T.J. Bodie, *Politics and the Emergence of an Activist International Court of Justice* (Westport, Praeger Publishers, 1995), pp. 61–62. See also his dissenting opinion in the 1950 Advisory Opinion on South West Africa. *International Status of South West Africa*, Advisory Opinion, I.C.J. Reports 1950, p. 128, at pp. 174–177.

¹⁶⁸ Supra note 136. After having issued two advisory opinions in the 1950s on the status of South Africa's mandate over South West Africa (*International Status of South West Africa*, supra note 167, and *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, I.C.J. Reports 1955, p. 67), a contentious case regarding the mandate was brought by Liberia and Ethiopia in 1962. These States were delegated by the

reverberated throughout the structure and jurisprudence of the Court, and beyond.¹⁶⁹ The first concrete result was a rearrangement of the regional distribution of the seats on the Court.¹⁷⁰ Much more importantly, however, the cases brought greater attention among developing country governments to the election process, which, by virtue of the majority position of those governments in the General Assembly and the Security Council, were now

Second African States Conference in 1960 to bring a case in the ICJ against South Africa for the imposition of apartheid in South West Africa (Namibia). In the first phase of the case on jurisdiction, the Court ruled 8–7 that the parties bringing the case did have *locus standi* and that the Court could therefore exercise jurisdiction. *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319. In the interim between this decision and the second phase decision on the merits, the Court's composition changed significantly. One member of the majority died, a member of the minority was too ill to sit through the merits phase, and a new judge, Mohammed Zafrullah Khan of Pakistan, was required to recuse himself because of his previous participation in UN General Assembly discussions of South West Africa. As a result, only 14 judges sat during the hearings of the second phase. The Court's President, Sir Percy Spender of Australia, cast his rightful tie-breaking vote in an 7–7 decision to dismiss the case on the grounds that, while Ethiopia and Liberia had the right to bring the case against South Africa, they had neither rights nor interests as to the subject matter of their claim. *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6. For a recent reassessment of the 1966 judgment, in connection with another thorny case of decolonization, see J. Dugard, "1966 and All That: The South West Africa Judgment Revised in the East Timor Case", *African Journal of International and Comparative Law*, Vol. 8 (1996), pp. 549–563.

¹⁶⁹ At the 1966 United Nations Special Conference on Friendly Relations and Cooperation Among States, no agreement was reached on the potential for use of the ICJ as a forum for the settlement of international disputes because of socialist and new state opposition to the perceived bias of the forum's composition and application of substantive law. E. McWhinney, "New Countries and the New International Law: the UN Special Conference on Friendly Relations and Cooperation Among States", *AJIL*, Vol. 60 (1966), pp. 1–33. Conversely, according to Ajibola "[...] the significance of the South-West Africa saga cannot be over-estimated". P.B.A. Ajibola, "Africa and the International Court of Justice", in *Liber Amicorum Judge José Maria Ruda*, pp. 353–366, at p. 362.

¹⁷⁰ *Supra*, at p. 578. However, McWhinney argues that "[...] in the long-run, in fact, no revolution occurred in the ethno-cultural composition or political-ideological make-up of the Court. The shift was one of degree only, and a modest shift at that". McWhinney, "Western and non-Western legal cultures", *op. cit.*, at p. 880.

in a position to assert significant influence.¹⁷¹ As a result, it was a much different court which emerged from the 1967 and 1970 elections than that which had decided the *South West Africa* cases. The new judges in the post-1966 phase were increasingly to be drawn from the ranks of those who had represented developing countries in the UN General Assembly, and who had considerable diplomatic experience.

The Court was given a second chance by the Security Council in 1970 when it was requested to render an advisory opinion concerning the legal consequences of South Africa's non-compliance with Resolution 264, calling for South Africa's immediate withdrawal from the territory, and Resolution 276, condemning its failure to do so.¹⁷² Few judges from the 1966 Court remained.¹⁷³ The advisory opinion issued by the Court in 1971 represented a dramatic shift, both with respect to the question of South West Africa, but more importantly concerning the whole of the Court's jurisprudence. In a decidedly non-textualist opinion, the Court declared South Africa's continued presence in Namibia illegal, appealing to the general principles of an international community implicit in the UN Charter.

The shift from the positivism of the pre-1966 Court toward a more teleological, natural law-style of interpretation was to take root in the ICJ thereafter.¹⁷⁴ In the following years, the Court was to undergo a shift away from the role of mere "international law custodian" towards one of greater commitment to the furtherance of the UN Charter, tapping new and more varied sources of customary international law.¹⁷⁵ While the earlier Court

¹⁷¹ As McWhinney wrote "[...] there was, henceforth, a new political sophistication and attention to the regular elections of the Court judges; and this brought, in its turn, a new interest in judicial philosophy and competing theories of law and the legal process. More attention was paid to the legal values and value-preferences of the candidates for judicial election". McWhinney, *op. cit.*, at p. 880.

¹⁷² To be precise, the advisory opinion was requested only with regard to Resolution 276. Resolution 264 was, however, the logical prerequisite, as was the UN General Assembly Resolution 2145 terminating South Africa's mandate over South West Africa and transferring control to the UN.

¹⁷³ They are Judges Fitzmaurice, Gros, Padilla Nervo, Forster, Ammoun and Zafrulla Khan. Padilla Nervo and Forster appended to the 1966 judgment dissenting opinions and Ammoun and Zafrulla Khan did not participate in deliberations.

¹⁷⁴ Elias, *op. cit.*, at p. 91.

¹⁷⁵ Developing country concerns regarding the inadequacy of the positivist bias in the ICJ's jurisprudence were poignantly expressed by Judge Fouad Ammoun of Lebanon in his separate opinion in the 1970 *Barcelona Traction* case: "[...]

was reserved in its relations with the UN, after the crisis it avoided missing any opportunity to emphasize that it was part of the United Nations and its principal judicial organ, and to promote the law and principles of the UN Charter.¹⁷⁶ This shift was evidenced in several decisions, including the Court's *Western Sahara* advisory opinion, which affirmed the much cherished right to self-determination of developing countries.¹⁷⁷ Moreover, taking advantage of the lean docket of the 1970s, the Court also revised its rules of procedure twice to make itself more efficient and win back confidence.

In 1982, Judge Elias, from Nigeria, became the first African President of the World Court.¹⁷⁸ By the late 1970s and early 1980s, the Court's labor to win back developing countries started showing its results, particularly in the case of Africa. Three cases of boundary delimitation (between Libya and Tunisia; Libya and Malta; and Burkina Faso and Mali) were submitted

Among the treaties which have been in question, it is necessary to go back to those which organized international society in the eighteenth and nineteenth centuries, and at the beginning of the twentieth century. It is well known that they were concluded at the instigation of certain great Powers which were considered by the law of the time to be sufficiently representative of the community of nations, or of its collective interests. Moreover, the same was the case in customary law; certain customs of wide scope became incorporated into positive law when in fact they were the work of five or six Powers [...] It thus becomes easier to understand the fears of a broad range of new States in three continents, who dispute the legitimacy of certain rules of international law, not only because they were adopted without them, but also because they do not seem to them to correspond to their legitimate interests, to their essential needs on emerging from the colonialist epoch, nor finally, to that ideal of justice and equity to which the international community, to which they have at last been admitted, aspires. What the Third World wishes to substitute for certain legal norms now in force are other norms profoundly imbued with the sense of natural justice, morality and human ideals." *Barcelona Traction Light and Power Company Ltd., Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 308 and 310. Quoted in Elias, op. cit., at p. 78.

¹⁷⁶ Abi-Saab, op. cit., at p. 6.

¹⁷⁷ Munya, op. cit., at p. 186.

¹⁷⁸ After Elias, Africa (Arab Africa) gave another President to the ICJ, Judge Bedjaoui (1994–1996), from Algeria. In the history of the World Court there have been two Asian Presidents, Judge Singh (1985–1988), from India, and Judge Adatci, from Japan, (1931–1933). Latin American presence at the Court in presidential or vice-presidential capacity has, proportionately, been higher. On this point, see M. Bedjaoui, "Présences latino-américaines à la Cour internationale de justice", in *Liber Amicorum Judge José Maria Ruda*, pp. 367–392, at p. 372.

by way of *ad hoc* agreement by African States to the Court.¹⁷⁹ Yet, as the World Court had attracted the ire of developing countries in 1966, in 1986 it was the United States' turn to cry foul in the *Nicaragua* case when, by a large majority, the bench found the United States had violated international law by violating Nicaragua's sovereignty, using force against it and intervening in its internal affairs.¹⁸⁰ The decision instigated a flurry of comments equal, if not even larger, than the one unleashed by the *South West Africa* cases. The Court, its detractors claimed, had become highly politicized as a result of the changes in the bench in the post-*South West Africa* cases period, and hostage to the agenda of developing countries.¹⁸¹ As such, it had ceased to be an impartial judicial body and had become a representative forum equivalent to the UN General Assembly.

Yet, the *Nicaragua* case did not have an impact comparable to that of the *South West Africa* cases on the pattern of use of the Court. Indeed, while in the period between the latter and the former (1966–1986) the Court received only 17 contentious cases (an average of less than one per year), in the 15 years following the *Nicaragua* case, it was submitted no less than 46 cases (more than three new cases each year). First of all, Western countries did not abandon the Court. Even the United States, which should have led the exodus, did not do so.¹⁸² Although it did

¹⁷⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 6; *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 554. In addition, the territorial dispute submitted by way of *ad hoc* agreement between Libya and Chad in the 1990s should be added to this group. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6.

¹⁸⁰ *Military and Paramilitary Activities*, supra note 137.

¹⁸¹ Reisman argues that the changing composition of the Court in the *South West Africa* cases aftermath led to a bias against the West, and the United States in particular. M. Reisman, "Termination of the United States declaration under Article 36(2) of the Statute of the International Court", in A. Arend (ed.), *The United States and the Compulsory Jurisdiction of the International Court of Justice*, (Lanham, University Press of America, 1986), pp. 71–103, at p. 73.

¹⁸² In the aftermath of the *Nicaragua* case, in 1987, McWhinney anticipated that "[...] the principle of international adjudication has, by now, acquired its own substantial non-Western legal base and support, in significant non-Western legal cultures. This support has reached the point where the principle of international adjudication is likely to survive any self-imposed retreat, temporary or long-range as the case may be, adopted by the U.S. Administration or other Western states in

withdraw its optional declaration less than one year after the decision in the *Nicaragua* case, it was back in The Hague to file a case against Italy to protect the interests of an American company operating in that country (the *ELSI* case). Since then, the United States has been involved in no less than six cases, although always as respondent.¹⁸³ Second, arguably as a result of the *Nicaragua* case, where the Court upheld the rights of a small developing country against a superpower, developing countries started looking to The Hague as the right forum for resolving their disputes.¹⁸⁴ Of the 46 cases filed in the post-*Nicaragua* age, only eight are between developed countries, while the remaining 38 have at least a developing country present. To be precise, there are no instances of cases filed by a developed country against a developing country, 17 have been filed by developing countries against developed countries (only eight cases, if the NATO cluster is counted as one), and 21 cases are between developing countries.

The end of the Cold War might be one of the possible explanations for this surge in activity. In particular, that event might have influenced the pattern of activity of the Court in two ways.¹⁸⁵ First, by ending within a few years of the *Nicaragua* judgment, it has forestalled any attempts to

the first unhappy reaction to the international court's ruling in *Nicaragua v. United States*." McWhinney, op. cit., at p. 888.

¹⁸³ *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order of 22 February 1996 (discontinuance), *I.C.J. Reports 1996*, p. 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 114; *Oil Platforms (Islamic Republic of Iran v. United States of America)*. The case is currently pending. The case was filed on 2 November 1992. On 10 March 1998, the ICJ decided to declare admissible a counter-claim made by the U.S., *Counter-Claim*, Order of 10 March 1998, *I.C.J. Reports 1998*, p. 190; *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *I.C.J. Reports 1998*, p. 426; *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, *I.C.J. Reports 1999*, p. 916; *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001.

¹⁸⁴ Munya, op. cit., at pp. 221–222.

¹⁸⁵ Moreover, one must also consider that the cold war might have "[...] disinclined States to conceptualize disputes as legal disputes". G. Scott, H.M. Bothwell and J. Pennell, "Recent Activity before the International Court of Justice: Trend or Cycle?", *ILSA Journal of International and Comparative Law*, Vol. 3 (1997), pp. 1–29, at p. 7; Munya, op. cit., at p. 176.

transform the World Court into an arena of bipolar confrontation, lessening any loss of Western patrons. Second, by giving way to a more fluid and multi-polar international system, it has helped enlarge the constituency of the World Court. Browsing through the list of parties in cases since 1986, one can find several developing countries which were absent before: 13 African States (Republic of Guinea, Guinea-Bissau, Senegal, Democratic Republic of Congo, Uganda, Rwanda, Burundi, Namibia, Nigeria, Chad, Botswana, Benin and Niger), two from the Persian Gulf (Qatar and Bahrain), four former communist countries (Bosnia Herzegovina, Yugoslavia, Croatia and Slovakia), three from Latin America (Paraguay, El Salvador and Costa Rica), one from the Pacific (Nauru), and two from South-East Asia (Indonesia and Malaysia). This brings the total number of States involved in litigation before the ICJ at least once to 76. In Africa, mostly, esteem for the Court seems to be at its record high. Yet, most countries, in particular in the Caribbean, Pacific and Central and South-East Asia, still remain foreign to the World Court.

B. The GATT/WTO Dispute Settlement System

As in the case of the ICJ, arguably developed countries' use of the GATT/WTO dispute settlement system has been influenced in the first place by the law and values that that system has been called to implement and interpret, and secondly, changes in international trade politics have shaped the nature of dispute settlement mechanisms and institutions, thus affecting patterns of use.¹⁸⁶

¹⁸⁶ On developing countries and the GATT/WTO, see R. Hudec, *Developing Countries in the GATT Legal System* (London, Trade Policy Research Centre, 1987); R. Hudec, "GATT and the Developing Countries", *Columbia Business Law Review* (1992), No. 1, pp. 67-77; P. Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism", *Journal of World Trade*, Vol. 31 (1997), pp. 171-205; T. Brewer and S. Young, "WTO Disputes and Developing Countries", *Journal of World Trade*, Vol. 33, No. 5 (1999), pp. 169-182; B. Chaytor, "Dispute Settlement under the GATT/WTO: The Experience of Developing Countries", in J. Cameron and K. Campbell (eds.), *Dispute Resolution in the World Trade Organization* (London, Cameron May, 1998), pp. 250-269. On the GATT dispute settlement system, see R. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (London, Butterworths, 1991); J. Jackson, *Restructuring the GATT System* (New York, Council on Foreign Relations Press, 1990); E.U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, (Dordrecht, Kluwer, 1997).

The relationship between developing countries and the international trading regime governed by the GATT/WTO has been contentious, to say the least, and has changed dramatically over the course of the past five decades. The history of developing countries' participation in the GATT is, in essence, the history of opposition to the principle of equality and demands for exception and special status.

A quick review of its history shows a progression from early domination of developing countries within the multilateral trading system in the immediate post-war years, to the rise of developing country solidarity and assertion of development issues in international trade during the course of the 1960s and 1970s. The inward-looking development strategies, such as those of import-substitutions, favored during the latter period, gave way to more outward-looking strategies and trade liberalization in the 1980s and 1990s, resulting in significant changes in developing country perceptions of and participation in the GATT/WTO.¹⁸⁷ There is an historical arc of growing opposition to the GATT/WTO, followed by a shift toward greater participation and integration. This arc frames the growth in developing country use of the dispute settlement procedures associated with the institutions and substantive law of the international trade system.

On the WTO dispute settlement system, see J. Cameron and K. Campbell (eds.), *Dispute Resolution in the World Trade Organization* (London, Cameron May, 1998); F. Feliciano and P. Van den Bossche, "The Dispute Settlement System of the World Trade Organization: Institution, Process and Practice", in N. Blokker, and H. Schermers (eds.), *Proliferation of International Organizations* (Dordrecht, Kluwer), pp. 297–350; WTO Secretariat, *The WTO Dispute Settlement Procedures*, (2nd Edition, Cambridge, Cambridge University Press, 2001); WTO, *Guide to GATT Law and Practice: Analytical Index* (Geneva, WTO, 1995); J. Jackson, *The Jurisprudence of the GATT and the WTO* (Cambridge, Cambridge University Press, 2000); J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London, Royal Institute for International Affairs, 1998).

¹⁸⁷ On developing countries and international trade, see R. Porter (ed.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, (Washington D.C., Brookings Institution Press, 2001); R. Bhala and K. Kennedy (eds.), *World Trade Law: The GATT-WTO System, Regional Arrangements, and U.S. Law* (Charlottesville, VA, LEXIS Law Pub., 1998); T.N. Srinivasan, *Developing Countries and the Multilateral Trading System* (Boulder CO, Westview, 1998); B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: From GATT to the WTO* (Oxford, Oxford University Press, 1995).

1. The Substantive Law of the International Trade Regime

Although it is impossible to summarize in a few paragraphs the history of international trade since the end of World War II, it is necessary at least to try to sketch the background against which the GATT developed and the WTO came into being to shed some light on the pattern of use of the GATT/WTO dispute settlement systems.

The design of international trade policy in the aftermath of World War II was laid down in a series of multilateral negotiations (at the instigation of the US and the UK) conducted between 1946 and 1948. These negotiations led to the adoption of the never-ratified Charter of the International Trade Organization (ITO),¹⁸⁸ and the supposedly provisional General Agreement on Tariffs and Trade (GATT).¹⁸⁹

In short, the gist of the GATT was three principles. First, while States would not be prohibited from protecting domestic industries against foreign competition, all protection would be in the form of tariffs. Second, while there would be no *a priori* limit on tariff levels, governments were to participate in periodic negotiations aimed at gradually reducing existing levels (the so-called Rounds). Finally, States accepted to treat trade with all other GATT countries equally, granting each other the most-favored nation clause.

Starting from the morally appealing, but ultimately economically unsound, postulate that equal treatment of unequals is unfair, developing countries in practice opposed the substance of the new international trade regime. During negotiations leading to the GATT/ITO, they requested to protect infant industries with measures not otherwise permitted, to be allowed to receive new tariff preferences from other developed and developing countries; to benefit from developed-country tariff concessions without having to offer equal treatment of their own; and to accept cartel-type and commodity agreements to sustain prices. In other words, they were against anything the GATT/ITO should have stood for. Yet, they were asking for nothing different from what had been the world-wide trade policy before World War II. Most developing countries had been colonies,

¹⁸⁸ United Nations Conference on Trade and Employment, held at Havana, Cuba, from 12 November 1947, to 24 March 1948, Final Act and Related Documents (UN Doc. E/Conf. 2/78 (24 March 1948)). All States waited for the United States to ratify the ITO Charter, but the agreement never made it through the US Congress.

¹⁸⁹ General Agreement on Tariffs and Trade, opened for signature on 30 October 1947, 55 *U.N.T.S.* 194.

and their leadership had been taught by the colonizing countries (especially the UK) that economic benefits were maximized by controlling trade and suppressing competition from alternative suppliers.

Despite this opposition to the merits, developing countries could not afford the risk of being cut out from the emerging international trade regime and, reluctantly, some joined. Of the original 23 contracting parties to the GATT, ten were developing countries: Brazil, Burma, China, Ceylon, Chile, Cuba, India, Pakistan, Syria and Lebanon. Within a few years China (by then the Taiwan government), Lebanon and Syria withdrew, to be replaced by four more developing countries in 1949: the Dominican Republic, Haiti, Nicaragua and Uruguay. Indonesia joined in 1950, and Peru and Turkey the following year. By 1951 the total of developing country membership stood at fourteen, while developed country membership had risen to twenty (basically, all nations, but Japan and Switzerland, developed by then standards). Developing country membership remained virtually unchanged during the remainder of the 1950s.

In the first seven years of GATT operations, the policy towards developing countries adhered fairly closely to the policy defined in the GATT/ITO negotiations.¹⁹⁰ Four of the first five legal complaints in the GATT were filed by developed countries against violations of the rules by developing countries.¹⁹¹ But this early rush did not last.

The 1950s brought increasing realization among developing countries that their terms of trade were worsening. While world trade doubled from 1950 to the early 1960s, developing country exports increased by only about 50%.¹⁹² Developing countries perceived the GATT as perpetuating this tendency by promoting liberalization of manufactured goods exported by developed countries, while retaining tariffs on processed commodities, textiles, and agricultural goods.

Legal discipline in the GATT began to wither, as developing countries were increasingly invoking seriously deteriorating balance-of-payments to restrict trade, and tariff reductions negotiations proceeded

¹⁹⁰ R. Hudec, *Developing Countries in the GATT Legal System* (London, Trade Policy Research Centre, 1987), at p. 24.

¹⁹¹ *Cuban Consular Taxes* (filed by The Netherlands), BISD, Vol. II (1948), p. 12; *Brazilian Internal Taxes* (by France), BISD, 7th Supplement (1958), p. 68; *Cuban Restrictions on Textile Imports* (by the US). GATT Doc. CP.3/SR.42 (1949).

¹⁹² UNCTAD, *Handbook of International Trade and Development Statistics (1996–1997)* (Geneva, UNCTAD, 1999), Tables 1.1 and 1.2.

sluggishly. After the four initial complaints in 1948–1949 just mentioned, there were eight developed-country complaints against developing countries in the years 1950–1956, but no complaint was filed against developing countries between 1957 and 1969.¹⁹³

In the years following the 1954 Review Session of the GATT, the question of developing countries' attitudes towards the GATT continued to grow in importance, as the Cold War competition for the heart of developing countries had begun. The Soviet Union began to press for the creation of a global trade organization, within the United Nations, that would provide an alternative to the Western-dominated GATT. The proposal eventually materialized in 1964 with the creation of the United Nations Conference on Trade and Development (UNCTAD).¹⁹⁴ Although its direct and tangible accomplishments were minimal, during the second half of the 1960s and the 1970s, UNCTAD provided a forum for discussion and consensus building among developing countries.

In 1958, the "Haberler Report" was issued by the GATT, confirming the general perception that the export earnings of most developed countries were unsatisfactory in terms of the resources needed for economic development, and acknowledging barriers to developing country goods in

¹⁹³ Hudec attributes the relaxing legal discipline in the GATT in the late 1950s to "[...] slowly growing sense of hopelessness and frustration [of developed countries vis-à-vis developing countries], more an attitude than a consciously articulated policy". Hudec, *op. cit.*, pp. 29 and 30. The consequence of this was that "substance withered, but the form remained. Developing countries continued to observe the formalities, especially in seeking formal waivers for actions not in conformity with the rules". *Ibid.*, p. 30. Hudec has two explanations for this phenomenon. First, part of the compliance with formalities is self-induced. For developing countries and small countries it is prudent to avoid giving larger countries a legal right to use economic pressure. Second, developed countries find it difficult to accept pragmatic stances once a matter of developing country legal compliance is raised. This is because of a paradox. Among developed countries a general commitment to a sort of "best-efforts" compliance with GATT legal disciplines is assumed, thus nothing is surrendered by waiving compliance with formalities. Commitment with GATT objectives is never in question. However, with developing countries, where there is no common underlying discipline, legal form is all. Setting aside formalities would leave the parties in a vacuum, without anything else to tell each other. Hudec, *op. cit.*, at p. 32.

¹⁹⁴ The conference, held in Geneva in 1964, voted to transform itself into an organization; UNCTAD, Final Act, E/CONF.46/141 (1964). The organization itself was established by a subsequent resolution of the General Assembly (UNGA Res. 1995 (1965)).

developed-country markets.¹⁹⁵ This led to the formation of a GATT special working group, called “Committee III”, to deal with these issues, but no dramatic results were forthcoming.¹⁹⁶

By the end of the 1950s the total membership of GATT stood at 37 and developed countries still held a 21–16 majority. Of course, as of 1960, decolonization led to a boom of developing country membership. In the 1960s developed country membership rose by three (Iceland, Ireland and Switzerland. Four if Poland is counted in the group), while developing countries’ membership increased by 36. By May 1970 there were 77 contracting parties to the GATT (25 developed and 52 developing), and thenceforth the number of developing countries continued to grow, while that of developed countries remained basically unchanged.

In the 1950s there was relatively little litigation involving developing countries on either side. By the early 1960s a consensus was emerging among developing and socialist countries that the GATT was incapable of responding to development issues posed by the international system. In 1961, Uruguay filed a celebrated complaint against 15 developed countries (virtually the entire developed-country membership of the GATT), listing 576 restrictions on Uruguayan export products in the fifteen markets,¹⁹⁷ alleging that those restrictions were seriously reducing Uruguayan exports, that Uruguay was thus not getting the overall level of benefits contemplated by the General Agreement, and that this situation constituted a nullification and impairment of benefits.¹⁹⁸

The case was targeted especially at the European common agricultural policy, and was meant to highlight the problems faced by developing country governments in trading with developed countries organized in powerful regional organizations. In short, the complaint was trying to make two points.¹⁹⁹ First, by drawing attention to the commercial barriers facing exports from developing countries and the fact that, regardless of the lawfulness of these barriers, the GATT was not working if it could not do better than this. Second, the fact that many restrictions were patently illegal would dramatize GATT’s ineffectiveness.

¹⁹⁵ G. Harbeler, et al., *Trends in International Trade: Report by a Panel of Experts* (Geneva, GATT Secretariat, 1958).

¹⁹⁶ C. Thomas, *In Search of Security: The Third World in International Relations* (Boulder, CO, Lynne Rienner, 1987), at p. 73.

¹⁹⁷ *Uruguayan Recourse to Art. XXIII*, BISD 11S/95.

¹⁹⁸ GATT, Article XXIII. On this point, see Romano, *op. cit.*, at p. 386.

¹⁹⁹ Hudec, *op. cit.*, at p. 47.

The complaint was primarily a symbolic gesture. Uruguay carefully avoided any claim of illegality of any measures, even when they were patently so. It did not press the claims. When a panel was appointed to consider the case, Uruguay refused to take any position about the legality of the 576 measures. Neither the panel, nor the GATT Secretariat, would accept the role as plaintiffs in Uruguay's place. Accordingly, the panel took the legalistic approach of accepting as uncontested those claims by defendants that a measure conformed to GATT, while making a finding of nullifications, and issuing formal recommendations, for those measures that had not been defended. At the conclusion of the proceedings, Uruguay noted the removal of certain restrictions, but the implementation of new restrictions in the meantime made Uruguay's position no better than it had been before the proceedings had been initiated.

The lesson drawn from the case by many developing countries was that GATT law did not protect developing countries.²⁰⁰ In the same year, Brazil brought a complaint against the United Kingdom regarding banana tariffs. The United States sided with the European Community in its successful opposition to this attack on the British preferential treatment of former colonies.²⁰¹ Here, again, the dispute settlement mechanism had proved itself inadequate for the expression and resolution of developing countries' interests and problems.²⁰²

During the remainder of the 1960s, the Group of 77 non-aligned countries began to emerge within the UN General Assembly as a relatively coherent bloc in favor of developing country interests. This, together with the establishment of UNCTAD, which threatened GATT by rejecting the most favored nation principle, and supporting commodity-price stabilization schemes, import substitution policies, and increased market access in developed countries by developing countries, provided developing countries with increased leverage in negotiating preferential treatment in trade agreements. Led by Uruguay and Brazil, developing countries asked for a major reform of the GATT dispute settlement procedures, in particular, asking for new sanctions for violations of legal obligations, including both monetary compensation and retaliation by the

²⁰⁰ Ibid., at p. 49. B. Chaytor, "Dispute Settlement under the GATT/WTO: The Experience of Developing Countries", in J. Cameron and K. Campbell (eds.), *Dispute Resolution in the World Trade Organization*, (London, Cameron May, 1998), pp. 250–269, at p. 255.

²⁰¹ *United Kingdom – Increase in Margin of Preferences on Bananas*. Report of 11 April 1962 (L/1749).

²⁰² Chaytor, op. cit., at p. 257.

Contracting Parties as a whole. They also asked that the GATT Secretariat assume a prosecutorial role in GATT claims to relieve small countries of the political onus that befalls a plaintiff.²⁰³

These requests, canvassed in the GATT Trade and Development Committee, did not win the support of developed countries, not only because they were perceived by developed countries as a weapon pointed at them, but also because, in general, the 1960s had been a decade of relaxed legal discipline and lack of interest in adjudicatory procedures. Between 1963 and 1970, there were only a few legal initiatives, none of which led to a formal ruling.

Developing country pressure, however, did produce some results, in the form of the Generalized System of Preferences, under which developed countries would grant tariff preferences to most developing countries, without reciprocity, on most products, and a new adjudication procedure, which will be described below.²⁰⁴

The 1970s saw a split between the continuing growth of development-oriented agreements, and the reassertion of the dispute settlement mechanism and increased enforcement of GATT provisions against developing countries. On the one hand, in 1974–1975, the New International Economic Order and the Charter on the Economic Rights and

²⁰³ Hudec, *op. cit.*, at p. 58. The proposal had four elements: (i) the present arrangement for action under paragraph 2 of Article XXIII should be elaborated in a way which would give developing countries invoking the Article the option of employing certain additional measures; (ii) where it has been established that measures complained of have adversely affected the trade and economic prospects of developing countries and it has not been possible to eliminate the measure or obtain adequate commercial remedy, compensation in the form of an indemnity of a financial character would be in order; (iii) in cases where the import capacity of a developing country has been impaired by the maintenance of measures by a developed country contrary to the provisions of the GATT, the developing country concerned shall be automatically released from its obligations under the General Agreement towards the developed country complained of, pending examination of the matter in GATT; and (iv) in the event that a recommendation by the Contracting Parties to a developed country is not carried out within a given time-limit, the Contracting Parties shall consider what collective action they could take to obtain compliance with their recommendation. BISD, 14th Supplement (1966), p. 139.

²⁰⁴ Decision of 5 April 1966 on Procedures under Article XXIII Applying to Disputes between a Developing Contracting Party and a Developed Contracting Party. BISD, 14th Supplement (1966), p. 18. The text can be found at: GATT, *Analytical Index: Guide to GATT Law and Practice* (6th Edition, 1994).

Duties of States were both approved in the UN General Assembly.²⁰⁵ On the other hand, at the very same time, the United States started modifying its international trade policy. Whereas during the 1960s the economic strengthening and integration of Europe and the stability of Japan had taken precedence over strict enforcement of GATT obligations, in the 1970s this situation was reversed.²⁰⁶ The 1974 Trade Policy Act called for the use of the GATT for settlement of trade disputes, and the United States brought several cases in preparation for the tabling of proposals for the strengthening of the dispute settlement mechanism in the 1973 Tokyo Round.²⁰⁷

During the 1960s and the 1970s developing countries' trade performance remained dismaying. While their share of world exports in primary products increased one-third during the fifteen years from 1965 to 1980 (from 40 to 54 percent), their share of world exports in manufactured goods at the end of the 1980s was less than 10 percent of the world total, even though it nearly doubled during the same period from 5.5 percent to 9.7 percent.²⁰⁸ Developing country reliance on the inward-looking approaches to development, including import substitution and related policies, fell out of favor.

The developing country solidarity expressed through the ascendancy of the Group of 77 and the UNCTAD during the previous two decades quickly eroded. The decline of communist and socialist doctrines, the confluence of the debt crisis, the preponderance of IMF-sponsored neo-liberal structural adjustment policies, and the example provided by the East Asian newly industrialized countries and Chile, led to a shift toward outward-looking policies including trade liberalization strategies. This shift was accompanied by a greater reliance on the increasingly liberalized international trading system and the potential comparative advantages present in certain products and services. Developing countries started realizing that their full participation in multilateral trade negotiations, and dispute settlement and safeguards issues in particular, was the only way to

²⁰⁵ Declaration on the Establishment of a New International Economic Order, UN GA Res. 3201 (S-VI), 13 *I.L.M.* (1974), 715; Charter on Economic Rights and Duties of States, UN GA Res. 3281 (XXIX), 14 *I.L.M.* (1975) 251.

²⁰⁶ Hudec, *op. cit.*, at pp. 71–73.

²⁰⁷ Hudec, *op. cit.*, at p. 77 et seq. On this point, see *infra*, at p. 603.

²⁰⁸ G.C. Hufbauer and J.J. Schott, *Trading For Growth: The Next Round Of Trade Negotiations* (Washington, D.C., Institute For International Economics, 1985), p. 34.

check the growth of aggressive unilateralism on the part of developed countries.²⁰⁹

The Uruguay Round started in 1985. By its conclusion at the end of 1993 with the Marrakech Agreement, developing countries accounted for about 30 percent of world trade in merchandise.²¹⁰ Trade terms improved even more for some developing countries, particularly for some in Latin America. Least-developing countries saw their export trade volumes expand more rapidly than the world average in 1996.²¹¹ This is the backdrop against which the WTO started operating.

The achievements of this round in terms of advancing and extending the reach of trade agreements are too numerous to be listed here. What is more pertinent to this study, however, is that the Uruguay Round led to the strengthening and greater legalization of the dispute settlement procedure.²¹² Developing countries did not fail to take advantage of the new means available to ensure implementation of agreements by developed and developing countries alike.²¹³

Yet, even though the WTO, both in its preambular language and in its official discourse, commits itself to the goal of sustainable economic development, persistent questions about its ability to address the concerns of developing countries have plagued the organization from the moment of its founding. These questions can be roughly categorized into procedural

²⁰⁹ T.N. Srinivasan, *Developing Countries and the Multilateral Trading System* (Boulder, CO, Westview, 1998), at p. 34.

²¹⁰ In 1993, the share of world exports for developing countries plus economies in transition was 30.1 percent, and imports 32 percent. UNCTAD, *Handbook of International Trade and Development Statistics (1996–97)* (Geneva, UNCTAD, 1999), Tables 1.9 and 1.10.

²¹¹ WTO Committee on Trade and Development, Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors, WT/COMTD/W/15 (1996); www.wto.org/english/tratop_e/devel_e/.htm.

²¹² See *infra*, at pp. 605–606.

²¹³ Romano, *op. cit.*, at pp. 385–397. A paper by the National Bureau of Economic Research points out also that developing countries are now resorting more to anti-dumping procedures than developed countries. The paper analyzed all anti-dumping cases reported to the GATT/WTO, under the Agreement on the Implementation of Article VI of the GATT 1994, between 1980 and 1998. J. Prusa and S. Skeath, “The Economic and Strategic Motives for Antidumping Filings”, *NBER, Working Paper 8424*, August 2001 (www.nber.org/papers/w8424). The text of the Article VI Agreement can be found at: GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva, GATT Secretariat, 1994), pp. 147–171.

and substantive concerns about the WTO's ability to integrate development into its strategies and objectives, unfairness towards developing countries, and perceived bias in favor of developed countries, who are the only ones to reap benefits from liberalization.

In 1999 a new round of negotiations was to be launched in Seattle, but it failed spectacularly, both because of a rift between the US and the EC, who could not agree on a clear agenda, and as a result of the pressure of a new political phenomenon: anti-globalization. Developing countries, concerned by the burdens they faced to implement the current WTO agreements, and their *de facto* exclusion from the decision-making process, found valuable, but problematic, allies in NGOs, which, for the first time, started focusing on multilateral trade negotiations to stage massive and widely publicized protests.²¹⁴

As a result of Seattle, and the rising threats to multilateral trading systems (from regional preferential trading arrangements, to anti-globalization movements), a new round was launched in 2001, in Doha, Qatar, in essence to seek a new balance between the needs of developed and developing countries. Significantly, the agenda of the new round of negotiations was named "The Doha Development Agenda".²¹⁵ The Doha Conference established a working group on Trade, Debt and Finance and issued declarations on the problems of small economies, least-developed countries and technical cooperation. The Doha Declaration also incorporated special and differential treatment and capacity building clauses into most of the major issue areas, reflecting developing country concerns about the burdens associated with new and comprehensive negotiations. Though many remain skeptical about the credibility of the WTO's development commitments, the Doha Development Agenda does reflect increased awareness of and concern for the needs of developing countries.

2. Dispute Settlement Procedures under the GATT and in the WTO

Just as the nature of the trading system and the substantive law applied to developing country participants has changed over the past five decades, so has the nature of dispute settlement mechanisms and institutions. The original GATT dispute settlement system grew out of scant provisions contained in Articles XXII and XXIII, which did not even mention

²¹⁴ On Seattle and the anti-globalization movement, and its impact on the WTO, see, in general, Porter, *op. cit.*

²¹⁵ The text of the Doha Development Agenda is available at: www.wto.org/english/tratop_e/dda_e/dda_e.htm (site last visited 15 August 2002).

explicitly the words “dispute settlement”. Article XXII provided for bilateral consultations on any matter affecting the operation of the GATT, and, at the request of a contracting party, for subsequent multilateral consultations on any matter which could not be settled bilaterally. Article XXIII concerned remedies for “nullification and impairment” of negotiated liberalization commitments.²¹⁶ From that provision, a dispute settlement procedure grew by way of creative interpretations, practice, and resourcefulness of diplomats involved.

²¹⁶ GATT 1947, Article XXIII: “1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.”

During the GATT's first nine years, disputes were settled primarily through diplomatic means (1947–1955). At the outset, disputes were ruled on by the Chairman of the Contracting Parties at the Contracting Parties' semi-annual meetings, or at "intersessional committee" meetings. However, these matters soon came to be referred to as bilateral or multilateral "working parties", composed of country delegates, including the parties to the dispute, who met to negotiate a resolution in an *ad hoc* fashion. As of 1952, "panels", customarily composed of three to five independent experts from third GATT contracting parties had become the usual dispute settlement procedure.²¹⁷ This first significant transformation represented the first step from a strictly diplomatic approach to dispute settlement towards a more judicial mechanism.²¹⁸ Moreover, this change initiated a steady increase in the role of the GATT Secretariat in the dispute settlement process.

The GATT's panel procedure went through several periods of reform between its institution in the 1950s and its succession by the WTO Dispute Settlement Body in 1995. In 1966 alternate provisions were established for least-developed country contracting parties (LDC) to bring complaints against developed country parties in four dispute settlement-related articles (the 1966 Decision).²¹⁹ Most importantly, the 1966 Decision allowed developing country complainants to refer matters to the Director General if consultations with a developed country member were unsuccessful. The Director General was authorized to use good offices to facilitate a resolution.²²⁰ If good offices failed to yield settlement, the Director General could bring the matter to the attention of the contracting parties or the Council.²²¹ Disputants were required to produce relevant information at the request of the Director General, and more rapid procedures for establishing panels and the submission of findings were introduced.²²² The 1966 Decision further required panels to "take into due account all the circumstances and considerations relating to the application of the

²¹⁷ Petersmann, *GATT/WTO Dispute Settlement System*, op. cit., at p. 71.

²¹⁸ Jackson, *The World Trade Organization*, op. cit., at p. 168.

²¹⁹ Procedures Under Article XXIII – Decision of 5 April 1966 (BISD 14S/98). Text is available in WTO Secretariat, *The WTO Dispute Settlement Procedures* (2nd Edition, Cambridge, Cambridge University Press, 2001), at p. 60.

²²⁰ *Ibid.*, Para. 1.

²²¹ *Ibid.*, Para. 4.

²²² *Ibid.*, Paras. 2, 5, 7, 8 and 10.

measures complained of, and their impact on the trade and economic development of affected contracting parties”.²²³

The most significant elements of the 1966 Decision were that developing country complaints would be automatically referred to a panel if mediation failed, and time limits would be imposed to prevent the use of delaying tactics by the defendant. The special procedure was adopted to address the criticism that large developed countries had the political and economic clout to slow down the process (usually when the plaintiff was a developing country). Yet, the new procedure still required a State to initiate proceedings. The proposal to assign this role to the GATT Secretariat was rejected. This was a major obstacle as the reluctance of developing countries to initiate complaints was evident.

The 1966 Decision had little influence on developing countries' participation in the dispute settlement system. It was not invoked until 1972 and, after that, not again until 1977, when Chile invoked it in a dispute with the EC which was later withdrawn.²²⁴ The first dispute in which it was used to its full extent was in 1980, when India successfully brought a case against Japan.²²⁵ In 1986, Mexico sought to invoke it against the United States, but the case was subsequently consolidated with identical complaints from the EC and Canada.²²⁶ In short, there is essentially only one instance in the entire history of the GATT in which the 1966 Decision was successfully employed.²²⁷

Besides the particular concerns of developing countries, by the 1973 Tokyo Round, several flaws in the dispute settlement procedure were evident. The most blatant, but also the most intractable, was the issue of the “consensus requirement”. Indeed, panel reports did not become binding unless unanimously approved by the GATT contracting parties who would be forced to succumb, thus providing an easy opportunity for the disputant to block the action. The “Group Framework Committee” of the Tokyo Round, although unable to address the consensus requirement *per se* because of EC objections, produced the “Understanding Regarding

²²³ Ibid., Para. 6.

²²⁴ Israel invoked the procedure in 1972 against the UK (BISD, 20th Supplement (1974), p. 237). In 1977, Chile invoked it against the EC (GATT Doc. C/M/123 (1977)).

²²⁵ *Japan's Measures on Imports of Leather*, Panel Report adopted on 10 November 1980, BISD 27S/118.

²²⁶ *U.S. – Taxes on Petroleum and Certain Imported Substances*, Panel Report adopted on 17 June 1987, BISD 34S/136.

²²⁷ Chaytor, *op. cit.*, at p. 258.

Notification, Consultation, Dispute Settlement and Surveillance".²²⁸ This document served to outline the consultation and panel process and provided the basis for the subsequent reform.²²⁹

In 1983, the GATT Legal Office was created in an attempt to provide greater professionalism to GATT jurisprudence, which had been of consistently poor quality during the prior decade.²³⁰ In 1984, a number of other improvements were made in order to eliminate certain of the obstacles to a speedier and more efficient functioning of the dispute settlement mechanism. Non-governmental experts were included among panelists;²³¹ the Director General was permitted to select and approve panelists in the event of disputant disagreement over panel selection;²³² and the panels were directed to establish strict deadlines for the submission of documents from disputants.²³³ Further upgrading was achieved in 1989, introducing, *inter alia*, standard terms of reference for panels, guidelines on timelines, procedures for multiple complainants, and third-party participation in proceedings, further rules on the adoption of panel reports and tighter measures on the surveillance of the implementation of rulings.²³⁴

Yet, most of these changes were placebos, eschewing the central issue of the ultimately non-binding nature of a panel's findings. The consensus-based nature of the GATT dispute settlement system, which ultimately made settlement of disputes depend on diplomatic negotiations, hence leaving developing countries, with weak bargaining power, to become

²²⁸ Understanding Regarding Notification, Conciliation, Dispute Settlement and Surveillance (BISD, 26th Supplement (1980)), p. 210. See also, GATT, *Analytical Index*, op. cit.

²²⁹ The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was further fine-tuned by the Ministerial Declaration of 29 November 1982 on Dispute Settlement (BISD, 29th Supplement (1983)), p. 13. See also, GATT, *Analytical Index*, op. cit.

²³⁰ E. Petersmann, *The GATT/WTO Dispute Settlement System*, op. cit., at p. 87.

²³¹ Decision on Dispute Settlement of 30 November 1984 (BISD 31S/9). Formation of Panels, Paras. 1 and 2.

²³² *Ibid.*, Para. 3.

²³³ *Ibid.*, Completion of Panel Work, Para. 2

²³⁴ Decision of 12 April 1989 on Improvements to GATT Dispute Settlement Rules and Procedures (BISD, 36th Supplement (1989)), p. 61. See also, GATT, *Analytical Index*, op. cit. Paragraph 4 of the section on Surveillance of Implementation of Recommendations and Rulings provided that "[...] in cases brought by developing contracting parties, the Council shall consider what further action it might take which would be appropriate to the circumstances [...]".

hostages of developed countries, explains why developing countries were participants in only 25% or less of the disputes submitted to the GATT in the period 1947–1994.²³⁵

Largely at the insistence of the United States, the reform of the existing dispute settlement mechanism was made a central element of the Uruguay Round talks held between 1986 and 1994. Not surprisingly, developing countries were allied with the US in favor of strengthening the dispute settlement process, with opposition coming primarily from the EC.²³⁶ These negotiations resulted in the adoption of the Dispute Settlement Understanding (DSU) which was implemented with the advent of the WTO in 1995. The DSU established a unified dispute settlement system, eliminating some of the fragmentation that had arisen from the implementation of sequential adjustments.

It created the Dispute Settlement Body, consisting of representatives of every WTO Member State, as well as an Appellate Body, composed of seven independent Members. The right of a complainant government to a panel process is established, thus preventing its blocking by a respondent at the close of consultations. Strict time limits for the formation of panels and the issuing of panel and appellate reports have been instituted. Most importantly, the consensus requirement is reversed. Now, a panel report is adopted unless there is a consensus in opposition, thus removing the respondent's opportunity to unilaterally block the panel's binding decision. An appellate process has been instituted, whereby disputants have the opportunity to petition review of the panel report by the Appellate Body. In sum, these changes in the dispute settlement process significantly strengthened its judicial character, a result generally favorable to developing countries.

The DSU preserves many of the elements of preferential treatment for developing countries under the 1966 Decision.²³⁷ During the consultation phase of the dispute settlement procedure, WTO Members shall give "special attention to the particular problems and interests of developing country Members",²³⁸ and timelines for consultations may be extended by

²³⁵ Romano, *op. cit.*, at pp. 389–390.

²³⁶ J. Jackson, *Restructuring the GATT System* (New York, Council on Foreign Relations Press), p. 66.

²³⁷ Actually, if a complaint is brought by a developing country against a developed country, the complaining party has the option to invoke, as an alternative to the provisions of the DSU, the corresponding provisions of the 1966 decision. DSU, Article 3.12.

²³⁸ DSU, Article 4.10.

agreement.²³⁹ In disputes between developed and developing countries, developing countries can request that the panel include at least one panelist from a developing country.²⁴⁰ The panel “shall accord sufficient time for the developing country member to prepare and present its argumentation”,²⁴¹ and the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more favorable treatment for developing countries.²⁴² Finally, regarding the implementation of the panel report, particular attention should be paid to matters affecting the interests of developing countries.²⁴³ The DSB shall consider what further action it might take which would be appropriate to the circumstances, taking into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.²⁴⁴ Additional legal advice and assistance in respect of disputes involving developing countries is made available by the WTO Secretariat, in the form of a qualified legal expert from the WTO Technical Cooperation Services.²⁴⁵

The DSU provides also for a special procedure involving least-developed countries, which is not significantly different from the one provided for in the 1966 Decision. Article 24 requires the Members to give “particular consideration [...] to the special situation of least-developed country members”.²⁴⁶ Specifically, Members shall “[...] exercise due restraint [...]” in bringing cases against least-developed countries, and in asking for compensation, or seeking authorization for retaliatory measures. Article 24 further requires the Director General and the Chairman of the Dispute Settlement Body to offer good offices, conciliation or mediation at the request of least-developed country disputants.²⁴⁷

²³⁹ DSU, Article 12.10.

²⁴⁰ DSU, Article 8.10. Actually, two cases, one involving a developing country as plaintiff (*United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, Complaint by India (WT/DS33)*), and one as defendant (*Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Complaint by the United States (WT/DS56)*), were heard by developing countries panelists only.

²⁴¹ DSU, Article 12.10.

²⁴² DSU, Article 12.11.

²⁴³ DSU, Article 21.2.

²⁴⁴ DSU, Article 21.8.

²⁴⁵ DSU, Article 27.2. *Supra* note 97.

²⁴⁶ DSU, Article 24.1.

²⁴⁷ DSU, Article 24.2.

Records show that, to date, all of these provisions have had little or no impact on developing countries.²⁴⁸ On the one hand, there is no way to assess the level of compliance by WTO developed countries with the requirement to give special attention to the particular problems of developing countries, both during the consultation and implementation phases, and the language of the relevant provisions is rather hortatory. On the other hand, many developing countries involved in disputes under the WTO have not had recourse to the special and differential treatment they have been granted. As it has been explained, under the GATT there was limited resort to the 1966 Decision, and no such instance has occurred in the practice of the WTO.²⁴⁹ Moreover, the impact of the special procedure for least-developed countries of Article 24 of the DSU cannot be assessed because, to date, no least-developed country has been involved in litigation. The continuing non-recourse to preferential provisions suggests there may be “systemic” reasons for this which should be investigated.

The GATT/WTO dispute settlement system is still evolving. Despite the DSU representing a significant step away from a diplomatic system towards a quasi-judicial one, it can still be greatly improved.²⁵⁰ The 1994 Marrakech Ministerial Conference mandated a review of the WTO dispute settlement system within four years of the entry into force of the WTO Agreement (i.e. by 1 January 1999). Despite the Dispute Settlement Body having started the review in late 1997, and its having held a series of informal discussions on the basis of proposals and issues that Members

²⁴⁸ South Centre, “Issues Regarding the Review of the WTO Dispute Settlement Mechanism”, *T.R.A.D.E. (Trade-Related Agenda, Development and Equity) Working Paper No. 1*, February 1999 (www.southcentre.org/publications/trade/toc.htm).

²⁴⁹ *Supra*, at pp. 602–603.

²⁵⁰ For an assessment of the early years of the WTO dispute settlement system, see R. Hudec, “The New WTO Dispute Settlement Procedure: an Overview of the First Three Years”, *Minnesota Journal of Global Trade*, 1999, Vol. 8, pp. 1–53; J. Jackson, “Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects”, in A. Krueger (ed.), *The WTO as an International Organization* (Chicago, University of Chicago Press, 1998), pp. 161–180; K. Van der Borgh, “The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate”, *American University International Law Review*, Vol. 14, pp. 1223–1243; F. Weiss (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Perspective of other International Courts and Tribunals* (London, Cameron May, 2000). For developing countries’ perspective, see South Centre, *op. cit.*; Van der Borgh, “The Review”, *op. cit.*, at pp. 1229–1232.

identified, a consensus could not be reached. Discussions in Seattle focused on the need for clarification of certain DSU provisions (in particular, the mechanism for handling disputes over compliance with decisions of the BSB), the pace of panel rulings, and retaliation lists. The failure of the Seattle meeting, despite the DSU review being, in principle, separate from the launching of the new round, prevented finalizing changes to the DSU. The process of revision was restarted in Doha, with the aim of concluding an agreement by May 2003.²⁵¹

IV. CONCLUSIONS

This study has attempted to map out developing countries' use of international judicial bodies. The first part of the study has laid out the quantitative data and illustrated trends and developments. The second part has tried to make sense of the data by analyzing it along three main axes: access; capacity; and willingness to utilize. Of course, this study could not aspire to exhaust all possible aspects of such a complex matter. It has focused only on certain issues that are commonly taken into consideration in the decision to litigate or not by developing countries only.

Overall, the picture that emerges from the quantitative analysis is comforting, but there remain significant challenges ahead to make international justice machinery equally usable and accessible by all. Developing countries' participation in international litigation has greatly grown during the last twenty years. Nowadays, it can be affirmed that developing countries' participation is, by and large, proportional to their numbers. The percentage of cases involving a developing country litigated in the world judicial fora is in line with the corresponding share of seats developing countries occupy in the organizations to which the fora belong. About three-fourths of the cases litigated currently involve a developing country, either as plaintiff, or as defendant, or both. Among developing countries there seems to be a growing sense that third party adjudication offers a playing field more leveled, and thus more advantageous, than that afforded by the ordinary international political processes. Moreover, litigation between developing countries themselves is on the rise indicating greater confidence in the process. Greater enforceability of decisions of international judicial bodies in domestic courts might also have played a role.

²⁵¹ The Doha Declaration clearly states that the negotiations on the DSU will not be tied to the overall success or failure of the other negotiations on the Doha Development Agenda, thus making a revision of the DSU more likely. Doha Declaration, *supra* note 215, paras. 30 and 47.

Historically, this was not so, and it has taken a few decades to reach this point. Developing countries seem to have overcome the deep-seated diffidence towards international adjudication. As it has been discussed, their reluctance was mainly the result of criticism towards the law and the values judicial bodies were called to apply (which were the legacy of colonial powers and which had no regard for developing countries' particular problems), a certain mistrust in the composition of the benches, and a tottery grasp of the procedures.

The issue with the law has been largely overcome. With time, and through the United Nations, developing countries have been integrated into the international decision-making process and have had the chance to influence its development. Advances have been made towards addressing the lack of confidence that may have contributed to the view of many States that they would be subject to substantive law the creation of which they had not participated in. Of course, progress has not been devoid of set backs, as concerns of developing countries on the development of the international trade regime prove, and much remains to be done. Still, currently hardly anyone claims that international law is colonial law, crafted and used by developed countries to oppress developing countries.

The question of the composition of the bench has also become less critical. As the international judiciary has expanded, and international judges have developed a "class consciousness", becoming more self-reliant, assertive and aware of their role, their actual and perceived independence has equally increased. Equitable geographical representation on the bench is still a crucial issue, but it does not seem to be the decisive factor in the decision on whether to litigate or not, as at the nadir of the World Court as in the post-*South West Africa* cases days. There have been enough successes in recent years, particularly at the ICJ, to restore a degree of confidence in independent adjudication.

Finally, developing countries have made great strides in understanding and mastering dispute settlement procedures, and the procedures themselves have developed and evolved, meeting some of the developing countries' expectations. In general, developing countries have favored compulsory jurisdiction, as it affords them the chance to level the playing field with developed countries. True, the World Court is still stuck on the models drafted almost a century ago, and the issue of compulsory jurisdiction remains thorny and not easy to resolve. Yet, the dispute settlement system of the WTO, which has been much more dynamic, has evolved towards quasi-compulsory status. Still, requests by developing countries for monetary compensation, the possibility for the WTO

Secretariat to file claims, and group retaliation, which was advanced forty years ago, remain on the table.

Be that as it may, despite undeniable progress, such progress has been far from homogeneous. Only a minority of developing countries are actively engaged in international litigation, while another substantial part, especially the least-developed countries, remains at the margin. The list of countries which, for one reason or another, have never entered an international courtroom remains disturbingly long. In over almost half a century, less than twenty developing countries have been involved in disputes before the GATT.²⁵² Of the 107 developing country Members of the WTO, only 52 have participated in proceedings.²⁵³ Finally, only 76 States have ever entered the courtroom of the World Court, either as plaintiffs or defendants.²⁵⁴ Most countries in the Caribbean, Pacific, Central and South East Asia, Middle East, and large parts of Africa have never had first-hand experience of international adjudication. Even more disturbingly, these are the countries ranking at the bottom of the social and economic development scale.

What can be done to further increase use of the international judiciary by developing countries and make it really universal? The quantitative and qualitative analysis carried out in this study suggests that experience is a significant factor. Once a State has engaged in international litigation, there are substantially fewer obstacles (both psychological, political and material) in being involved in litigation another time.²⁵⁵ Of course, it might happen that a State which has suffered a stinging defeat in a forum, or has been persuaded that its rights were not adequately vindicated, will decide to stay away from international adjudication. But that is the exception and not the rule. Both at the WTO and the ICJ there are certain developing countries which are recurrent participants (e.g., in the case of the ICJ, Iran, Libya and Nicaragua, and, more recently, the Congo and Yugoslavia; and in the case of the WTO, Brazil, Chile, India, and South Korea, to name a few). The fact that several States, which had never appeared during the past decade, have now entered an international court room leaves room for hope, but more should and could be done.

In particular, there should be a conscious effort in cajoling states towards international judicial bodies. That could be done both as part of a

²⁵² Romano, *op. cit.*, at pp. 389–390.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*, at pp. 379–385.

²⁵⁵ However, there is no evidence that experience of one forum leads to use of another forum.

broad political campaign, at both governmental and non-governmental levels, and by creating institutions that would help developing countries overcome the practical hurdles and that would engage in *pro bono* lawyering.

Although it is still an endeavor that is too new to judge its success, the ACWL is headed in the right direction. State and non-governmental donors could team up to create a mixed (governmental-private) institution to provide *pro bono* legal services and training exclusively to developing and transitional economy countries. To be members, developing countries should pay a fee, minimal enough not to be an obstacle, but substantial enough to show genuine commitment, and, for the same reasons, services should be available only to members, and on a user-pays basis. Considering that there is already one such institution in the field of WTO Law, this new center could be focused on litigation before the ICJ and the ITLOS, as focusing on only one of those fora is not likely to generate enough cases to justify the enterprise. Preference should be given to countries that have never before (or only exceptionally) engaged in litigation, possibly in the form of priority and waiver of fees.

Legal aid in the form of funds made available to defray litigation costs has proven to be a failure. Back-of-envelope economics suggest that the key to increasing use is overcoming the problem of inadequate human resources and legal know-how that characterize many developing countries, and that is best done by increasing the offer of legal expertise, through training or *pro bono* legal centers. The increase in the number of law firms specialized in the field should have beneficial effects also. Trust funds like the ones for the ICJ and ITLOS are an inefficient form of public subsidy that does not have the effect it is supposed to have.

The rapidly improving attitudes of developing countries towards international justice indicate that the time is ripe for such an initiative, and the precedent of the ACWL should pave the way for replication in other areas.