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INTERNATIONAL JUSTICE AND DEVELOPING COUNTRIES: A QUANTITATIVE ANALYSIS

CESARE P.R. ROMANO*

I. INTRODUCTION

More than one hundred years ago, in 1899, The Hague Peace Conference adopted the Convention on the Pacific Settlement of International Disputes establishing the Permanent Court of Arbitration.[1] This was the first standing institution intended to settle disputes between sovereign States through binding decisions based on international law. At that time, most of the world, with the exception of the greater part of the American continent that was shielded by the Monroe Doctrine, was under European colonial domination. The First Hague Conference was attended by 26 nations. Of these, 19 were European States,[2] while the rest of the non-colonized world was represented by only seven States, including the United States, the Ottoman Empire, Mexico, China, Japan, Persia, and Siam. Besides Mexico, no Latin American country was invited.[3]

* Cesare P. R. Romano received the "Laurea" from the Università degli Studi di Milano; Diplôme d'études supérieures (D.E.S.) and Ph.D. from the Graduate Institute of International Studies (IUHEI), Geneva; LL.M. from the New York University, School of Law. He is Assistant Director of the Project on International Courts and Tribunals (PICT) for the Center on International Cooperation, New York University.
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1 Convention for the Pacific Settlement of International Disputes, 29 July 1899, text reproduced in J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (2nd ed., New York, Oxford University Press, 1915), p. 41.

2 Germany, Austria, Belgium, Denmark, Spain, France, United Kingdom, Greece, Italy, Luxembourg, Montenegro, The Netherlands, Portugal, Romania, Russia, Serbia, Sweden and Norway, Switzerland and Bulgaria.

3 Another notable absence was that of the young South African Republic. Only nations accredited to the Russian Court, the convener of the conference, were invited, with the addition of Luxembourg, Montenegro and Siam. However, Latin

Since then, the world has changed significantly. Colonization is a vestige of a bygone era. Currently, 189 sovereign and equal States are members of the United Nations.[4] The constituents of the international community are no longer limited to the small club of European and American States. Rather, they now include more than 160 developing countries, comprising the vast majority both of the world's population and of the United Nations and WTO membership. These States, many of them born in the 1960s and 1970s, have now effectively come to maturity in the international system. In the process, several "newly industrialized countries" (e.g., South Korea, Singapore, Taiwan, and Thailand) and so-called "Big Emerging Market" countries (e.g., Brazil, India, Indonesia, Nigeria, Mexico, and Argentina) have asserted an increasingly important role in the international system in general and the functioning of international dispute settlement fora in particular.

Moreover, since those days the international rule of law has advanced significantly. The last decade has seen a remarkable increase in the number of international judicial bodies, at both the regional and global levels.[5] No

American countries were invited to and participated in the second Hague Conference in 1907.

[4] <http://www.un.org/Overview/unmember.html> (site last visited 1 March 2002).

[5] On the issue of the proliferation of international judicial bodies, see, in general, the special issue of the *NYU Journal of International Law and Politics* (1999), Vol. 31, N. 4, containing the findings of a symposium convened in New York in October 1998 by the NYU School of Law and the Project on International Courts and Tribunals entitled "The Proliferation of International Tribunals: Piecing Together the Puzzle". For an overview of the state of development of the international judicial system, see <http://www.pict-pcti.org/publications/PICT.Synoptic.Chart.2.0.pdf>. For some commentary on the rapid growth of the international judicial sector, see, J. Charney, "Is International Law Threatened by Multiple International Tribunals?", 271 *Recueil des Cours* (1998), pp. 101–382; G. Hafner, "Should one Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?", in L. Caflisch (ed.), *Règlement pacifique des différends entre Etats* (The Hague, Kluwer, 1998), pp. 25–41; A. Boyle, "The Proliferation of International Jurisdictions and Its Implications for the Court", in D. Bowett et al. (eds.), *The International Court of Justice: Process, Practice and Procedure* (London, British Institute for International and Comparative Law, 1997), pp. 124–130; H. Thirlway, "The Proliferation of International Judicial Organs and the Formation of International Law", in W. Heere (ed.), *International Law and the Hague's 750th Anniversary* (The Hague, 1999), pp. 433–441; T. Treves, *Le controversie internazionali: Nuove tendenze, nuovi tribunali* (Milano, Giuffrè, 1999); M.C.W. Pinto, "Judicial Settlement of International Disputes: One Forum or Many?", in A. Anghie (ed.), *Legal Visions of the 21st Century* (The Hague, 1998), pp. 465–475; L. Boisson de Chazournes (ed.), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-Sponsored by the*

less than 16 such bodies are currently active in fields ranging from general international law to human rights, trade, law of the sea, and international criminal law, to name a few. They generate a ponderous and steady flow of judgments, advisory opinions, orders, and warrants. Aside from these international judicial bodies, there are at least seventy other international institutions that exercise judicial or quasi-judicial functions.[6]

The changes witnessed during the last decade have also been accompanied by a significant increase in the use by developing countries of already existing international dispute settlement bodies. The dispute settlement procedures of the International Court of Justice (ICJ) and the World Trade Organization (WTO), in particular, have seen a surge in activity generated primarily by Southern governments. This development has generally been greeted positively as evidence of an improvement in the perceived usefulness of these bodies by a more diverse constituency.[7]

Nonetheless, despite the significance of these developments, there has been relatively sparse attention paid to developing countries' perspectives on international justice and the factors determining their resort to international judicial bodies.[8] While there is some literature pertaining to

American Society of International Law and the Graduate Institute of International Studies, Geneva, Switzerland, May 13, 1995 (Washington D.C., ASIL Bulletin No. 9.); E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge, Grotius, 1991), at pp. 9–22; C. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", 31 *NYU Journal of International Law and Politics* (1999), N. 4, pp. 709–752. For a definition of "international judicial body", ibid., pp. 711–723.

6 PICT Synoptic Chart, op. cit. (supra note 5).

7 R. Jennings, "The United Nations at Fifty: The International Court of Justice after Fifty Years", 89 AJIL (1995), pp. 493–505; S. Tiefenbrun, "The Role of the World Court in Settling International Disputes: a Recent Assessment", 20 *Loyola of Los Angeles International & Comparative Law Journal* (1997), pp. 1–27; K. Highet, "The Peace Palace Heats Up: The World Court in Business Again?", 85 AJIL (1991), pp. 646–654; K. Van der Borght, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate", 14 *American University International Law Review*, pp. 1223–1243; 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.

8 Notable exceptions include R.P. Anand's work on Asian and developing country perceptions of international law and the ICJ (R.P. Anand, *Studies in International Adjudication* (Dobbs Ferry, New York, Oceana Press, 1969)). Richard Falk focuses extensively on the need for a reorientation of the ICJ's role toward the service of developing world clients (R. Falk, *Reviving the World Court* (Charlottesville, University of Virginia Press, 1986)) and Bodie, likewise, gives insight into the relationship between developing countries and the evolution of ICJ

the political stances of developing countries towards this or that body, so far there are no comprehensive, systematic studies of the factors determining the resort by developing countries to international judicial fora. Largely, this is because both the multiplication of international judicial bodies and the greater use made of them by developing countries are recent phenomena. The subject in itself is also multifaceted and politically sensitive, making an exhaustive study arduous.

This study attempts to contribute to the debate by analyzing the use by developing countries of international judicial bodies. The analysis is based mainly on a thorough review and synthesis of the scant literature, complemented by the categorization and analysis of the incidence in each of these fora of disputes involving developing countries, as well as some of the most significant cases. Data and empirical evidence will be taken mainly from the history of the use by developing countries of the ICJ, and of the dispute settlement procedures of the General Agreement on Tariffs and Trade (GATT)[9] and the WTO (hereinafter generically referred to as "GATT/WTO dispute settlement procedures", or "GATT/WTO dispute

jurisprudence (T. Bodie, *Politics and the Emergence of an Activist International Court of Justice* (Westport, Praeger Publishers, 1995)). Judge Elias offers an excellent portrayal of the African experience in the ICJ in the 1970s and 1980s (T.O. Elias, *Africa and the Development of International Law* (Dordrecht, Nijhoff, 1988)) and Munya provides an update of more recent experiences on this front (M. Munya, "The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects", 7 *Journal of International Law and Practice* (1998), pp. 159–224). With respect to the GATT/WTO, Hudec's classic treatment of developing countries in the GATT system (R. Hudec, *Developing Countries in the GATT Legal System* (London, Trade Policy Research Centre, 1987)) and his more recent look at WTO dispute settlement procedures (R. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years", 8 *Minnesota Journal of Global Trade* (1999), pp. 1–53)) represent major contributions. John Jackson (J. Jackson, *The World Trade_Organization: Constitution and Jurisprudence* (London, Royal Institute for International Affairs, 1998), and 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) has provided excellent insights into the relationship between GATT/WTO jurisprudence and developing countries, as has Chaytor (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).

[9] General Agreement on Tariffs and Trade (hereinafter referred to as "GATT"). The text of the GATT as it stood immediately prior to the entry into force of the WTO Agreement (the so-called GATT 1947) is reproduced in GATT, *Basic Instruments and Selected Documents (BISD)*, Vol. IV, 1969.

settlement system" or, just plainly, "the GATT/WTO"[10]), since the creation of these institutions.

There are several reasons for the choice of these particular fora. First, they represent the only two international fora open to all States and only to States.[11] Second, while the current WTO Dispute Settlement Body was established only in 1995, it is in effect the successor to the GATT dispute settlement mechanisms developed in the period 1947–1995. While dispute settlement procedures under the GATT, and subsequently the WTO, have mutated considerably, the fact that together the GATT/WTO dispute settlement procedures have a lifespan almost identical to that of the ICJ, which was created in 1945, permits a significant comparison. To these factors we can also add the relatively abundant case-law and availability of literature and data as compared to that available from other judicial bodies.

However, this article will not be limited to these two dispute settlement mechanisms. There will be brief references to other bodies such as the International Tribunal for the Law of the Sea (ITLOS), established under the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[12] which entered into force only in 1996. ITLOS, however, due to novelty, and its still limited docket, can not offer insight comparable to that of the ICJ and the GATT/WTO, and therefore it will be touched upon only briefly. In addition, there will be a passing reference to regional international judicial bodies, several of which have been created by developing countries and which represent the majority of existing international judicial fora. Nonetheless, since this study focuses on developing countries rather than on individuals in developing countries, and since in regional judicial bodies litigation between States is extremely rare, this study will not peruse the law and practice of regional judicial bodies. The topics of regional courts, and of the use by private persons of regional and domestic fora to litigate international and transnational issues, are crucial enough to deserve studies of their own.

[10] The WTO dispute settlement procedure is codified in the so-called Dispute Settlement Understanding Established by the General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 *I.L.M.* (1994), 1125 (Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes), at 1226–1247 (hereinafter "DSU").

[11] UN agencies also have access to the ICJ via the Court's advisory function, but contentious cases are limited to State parties. The WTO procedures are open to regional economic integration organizations, but currently the EU is the only such organization.

[12] United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), concluded on 10 December 1982 and entered into force on 16 November 1994. UN Doc. A/CONF.62/121 (1982), 21 *I.L.M.* (1982), 1261.

Before venturing into the details of the issue, it is necessary to recall that, as in domestic systems, international litigation is only one of many possibilities available to settle a dispute, and, of all options, it is usually the last resort. States, much like individuals, tend to go before courts and tribunals when all other means, short of unfriendly or even openly hostile acts, have failed.[13] Moreover, States can simply decide not to settle a dispute, or that settlement through any of the possible options is not worth pursuing, therefore leaving it open and waiting for a change in circumstances to extinguish it or make it irrelevant.[14] The use of force to settle international disputes is not an option under international law, since

[13] There does not seem to be a rule of general international law requiring States, before turning to adjudication, to try to settle disputes by diplomatic means (negotiation, mediation, conciliation, inquiry etc.). However, such a condition may be, and often is, explicitly or implicitly contained in the title of jurisdiction. On this issue, see S. Rosenne, *The Law and Practice of the International Court (1920–1996)* (3rd ed., The Hague, Nijhoff, 1997), Vol. II. See also Ph. Cahier, "Les négociations diplomatiques comme préalable à l'action judiciaire", in V.Y. Ghebali (ed.), *Les multiples aspects des relations internationales : études à la mémoire du Professeur Jean Siotis* (Bruxelles, Bruylant, 1995), pp. 327–336; M. Rogoff, "The Obligation to Negotiate in International Law: Rules and Realities", 16 *Michigan Journal of International Law* (1994), pp. 141–185. Torres Bernárdez reaches substantially the same conclusion as Rosenne: S. Torres Bernárdez, "Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?", in C.A. Armas Barea et al. (eds.), *Liber Amicorum "In Memoriam" of Judge José Maria Ruda* (The Hague, Kluwer, 2000), pp. 507–525. Even so, it looks like that even when prior diplomatic negotiations are required, the length of the diplomatic talks "… is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise". *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, *I.C.J. Reports 1971*, p. 44, para. 85. On this point, see also *South West Africa* cases (Ethiopia v. South Africa; Liberia v. South Africa), *Preliminary Objections, Judgment*, *I.C.J. Reports 1962*, pp. 345–346; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion*, *I.C.J. Reports 1988*, pp. 33–34, para. 55; *Southern Bluefin Tuna* cases (New Zealand v. Japan; Australia v. Japan), ITLOS Cases Nos. 3 and 4, Provisional Measures, Order of 27 August 1999, paras. 56–61; *Southern Bluefin Tuna* case (Australia and New Zealand v. Japan), Arbitral Award on Jurisdiction and Admissibility of 4 August 2002, paras. 39(b) and 41(g). Such an interpretation seems to void the principle of prior diplomatic negotiations of any practical meaning, turning it into a formalism.

[14] R.Y. Jennings, "The Judiciary, International and National, and the Development of International Law", 45 ICLQ (1996), 1 et seq., at p. 31.

it has been banned by several international legal instruments,[15] and is explicitly forbidden by the UN Charter,[16] but it occurs in practice.

In the event States opt for arbitration, rather than bringing a case before an international judicial body, they can make use of *ad hoc* arbitration by way of an arbitral tribunal. Arbitration has a long and successful record. In the past two centuries hundreds of disputes have been adjudicated through this means,[17] and developed countries have a solid record of participation in international arbitrations. The last two most notable instances of this are the *Yemen-Eritrea* arbitration, where a five-judge tribunal decided a dispute over certain islands in the Red Sea as well as the maritime delimitation,[18] and the *Ethiopia-Eritrea* arbitration, which settled the disputed boundary and hopefully will help to restore peace in the region.[19] Yet, because arbitral tribunals are *ad hoc* institutions created, almost invariably, by an agreement between the parties, they constitute a sort of private justice which sets them substantially apart from permanent international judicial bodies.

Thus, when confronted with an international dispute, some or all of these options, including referral to an international judicial body, might be available to the decision-makers in a State. But, one may wonder whether developing countries have an additional, or slightly different, set of factors to take into account when deciding how to handle a dispute with another State, whether it be with a developing or developed country. If justice should be available and applied to everyone in the same way, developing countries, which make up slightly more than four-fifths of all States, should be either plaintiffs or respondents in a comparable share of all international cases. Historically, this has not been the case; although during the last decade, in an increasing number of cases, a developing

[15] The 1899 and 1907 Hague Peace Conferences marked the start of the attempt to restrict freedom to resort to war. See supra note 1. The League of Nations was a further step towards the adoption of a more comprehensive ban on war, and the establishment of an institutional framework to prevent it. Yet, it is only with the 1928 Kellogg-Briand Pact that a universal and general prohibition of war was adopted (94 *L.N.T.S.*, at 57).

[16] UN Charter, Article 2.4. See also the corollary principle of the peaceful settlement of disputes contained in Articles 2.3 and 33.

[17] For a comprehensive compilation of arbitrations since 1794, see A. M. Stuyt, *Survey of International Arbitrations, 1794–1989* (3rd ed., Dordrecht, Nijhoff, 1990).

[18] *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, at <http://www.pca-cpa.org >.

[19] Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border*, 13 April 2002, at <http://pca-cpa.org >.

country has been one of the parties. These are the issues at the core of this analysis.

This study is articulated in two parts. Because of its length and structure, the first part is published in the present issue of *The Law and Practice of International Courts and Tribunals*, while a second part will appear in the next issue. The first half of this study contains its methodological and quantitative aspects. Particular attention will be given to laying out what is meant by "developing countries", for there is no consensus on the exact meaning of the term. Quantitative data about the number of cases that have been brought before international judicial fora other than regional courts and the countries and types of disputes involved will also be presented.

The second half of this study will explore three key aspects of the resort to international judicial bodies by developing countries: access to judicial bodies; capacity to use them; and willingness to use them. It should be stressed that in this study the availability of judicial bodies is postulated, as the question of their use is *in primis* an issue of the 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* adjudication through arbitral tribunals. While arbitration has played, and by and large still plays, a prominent role in the building of the international legal system, since World War II it has gradually left the center and front of the stage to international judicial bodies.

The reasons behind the growth of the international judiciary, at both regional and universal levels, and the problems such growth raises, have been analyzed elsewhere.[20] Questions like: Why create an expensive standing court or tribunal to settle future disputes when it is possible to submit the issue to an *ad hoc* arbitral body? What factors account for the multiplication of permanent bodies? What is the perspective of developing countries on this? To what extent did developing countries contribute to the multiplication of international judicial and quasi-judicial bodies? will not be addressed in this study.

The first dimension of the use by developing countries of international judicial bodies is that of *access*. Even when a standing international judicial body is available, both States involved must give their consent before the judges can hear the case. Consent can be implicit in a State's membership in the organization of which the judicial body is an organ (i.e., the WTO dispute settlement system), or consent can be given expressly. This can be done by way of an *ad hoc* agreement, through a compromissory clause contained in a treaty, or through an optional declaration. By either means consent is an inescapable element in

[20] See supra note 5.

international law and relations. When consent must be given expressly, it can severely limit use.

A second aspect is that of the *capacity* to resort to these bodies. The existence of fora and the possibility of having access to them, *per se*, might not be sufficient. Making effective use of these bodies requires both human and financial resources. In general, developing countries are short of both. During the last decade trust funds have been created to help parties with insufficient resources defray the costs of litigation. Yet, the success of these initiatives has been mixed at best. More than scarce financial resources, it is the lack of human resources that is most likely to be the principal difficulty facing developing countries. Indeed, if human resources are inadequate or non-existent, the only alternative might be to retain private international lawyers, which will easily magnify litigation costs. This section will analyze the issue of insufficient international legal knowledge in developing countries and the correlated issue of legal representation of developing countries by lawyers from developed countries.

Third, the existence of international judicial bodies, the possibility of having access to them, and the capacity of States to resort to them are not the only prerequisites for international disputes to be submitted to judicial review and, hopefully, settlement. Even when all those material elements are in place, States might simply not be *willing* to have third parties decide their dispute. While the three aforementioned elements relate to legal and procedural issues, the question of willingness to resort to a tribunal is a quintessential political matter.[21] Again, the examples of the dispute settlement procedures of the ICJ and the GATT/WTO will provide most of the empirical evidence. In both cases, the skepticism of developing countries towards the law, as well as the principles and values applied in these two fora, has led over the decades to adjustments in the structure, procedure and jurisprudence of these bodies. Those changes might have accounted for the increased participation of developing countries in international judicial proceedings in the last decade.

Finally, the last section will wrap up the lessons to be learned, systematize the factors favouring or disfavouring resort to international judicial bodies by developing countries, and provide some policy-making suggestions.

[21] D.W. Bowett, "The Conduct of International Litigation", in D.W. Bowett et al. (eds.), *The International Court of Justice: Process Practice and Procedure* (London, British Institute for International and Comparative Law, 1997), pp. 1–20, at p. 1.

II. DELIMITING THE FIELD OF INVESTIGATION

Before moving on to an analysis of the use by developing countries of international judicial bodies, it is necessary to clarify the meaning of the term "developing countries" as employed in this study. Indeed, the issue of how to categorize those States that lag behind highly industrialized countries in terms of economic and social development is as scientific as it is political.[22] Since the beginning of the de-colonization process, during the 1950s and early 1960s, the resulting new States have been called, for instance, "Third World", "developing countries", "less developed countries" ("LDCs"), "underdeveloped countries", or have been referred to by the geographic metaphor "South". This large group of States has also been divided into various sub-groups. Thus, a spin-off, or, even better, the vanguard, has been dubbed "newly industrialized countries" or "NICs", comprising South Korea, Hong Kong, Taiwan and Singapore. Another sub-group comprises the so-called "least-developed developing countries".

Each of these terms is historicized and assumes a different meaning and connotation according to who uses it. The choice of terms might reflect social claims, allegedly scientifically objective evaluations, historical judgments, political correctness, civility or even expediency. Nonetheless, although highly unsatisfactory, and ultimately non-descriptive, since all economies are usually developing, unless they have been caught in a recession, of all of these terms, "developing country" seems to be the most commonly used term in the present era.

Nevertheless, the contours of the notion are far from clear and a consensus does not exist as to which States are "developing" and which are "developed". In practice, the inclusion of a State in one group or the other is more a matter of self-identification and political bargain rather than an objective process. Hence, it should not be surprising that different international organizations resort to different classifications. In the GATT/WTO context, "developing countries" are defined as those States whose economies "… can only support low standards of living and are in the early stage of development".[23] States previously acceded to the GATT, or today join the WTO, as a "developing country member" simply by declaring themselves as such[24]. That declaration generally goes

[22] On this issue, see K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", 16 *Wisconsin International Law Journal* (1998), pp. 353–419, at pp. 335–362.

[23] GATT, Article XVIII: 1.

[24] This has led to anomalies in certain cases, such as the fact that Spain was considered a developing country until its accession to the European Community in 1986. Again, one of the points of contention in the negotiation for China's accession to the WTO was that China claimed to be a developing country, while other members, especially the United States, objected to that. Challenges have

unchallenged, and it does not automatically imply particular rights under tariff preference schemes. A sub-set of "developing countries" comprises the so-called "least developed countries" ("LDCs"), that is to say, those States that are designated as such by the United Nations Economic and Social Council (ECOSOC).[25] There are currently 49 LDCs on the ECOSOC list, 30 of which to date have become WTO members. Nine additional LDCs are in the process of joining the WTO, and two are observers.[26] Finally, in the WTO the former socialist States of Central and Eastern Europe are referred to as "transitional economies" and are excluded from the list of developing countries. With the exception of Romania, the transitional economies of all other Eastern and Central European countries have not and will not accede to the WTO with developing country status.[27]

Be that as it may, these classifications have ultimately little or no impact on dispute settlement *per se*. The rationale for classifying members in separate groups in the GATT/WTO is that of the principle of equality of treatment in trade among States. The gist of the GATT/WTO system is considered unachievable in practice when States do not have comparable economic strength. Therefore, developing and least developed countries are given preferential treatment, but, as will be explained below, these allowances do not significantly affect the ultimate equality of the parties during litigation. Outside the particular GATT/WTO context, the general principle is that States are equal, and therefore also "equal before the law", thus no distinctions are usually made between developing and developed countries.

The search for a consistent taxonomy is further complicated by the fact that any classification over a long period of time is inherently problematic, as the composition of the group might change. That makes it impossible to find any useful or consistent scheme of categorization that covers the entire period between the end of World War II and today. Indeed, during the first decade or so of existence of the ICJ and the GATT, there were no sovereign States dubbed "developing countries" (or rather, there were some but the notion itself did not exist yet). As the number of sovereign States has gradually increased as a result of de-colonization,

usually been brought in specific areas, such as intellectual property (<http://www.wto.org>). See K. Kennedy, "Preferential Treatment of Developing Countries", in B. Raj and K. Kennedy (eds.), *World Trade Law: 1999 Supplement* (Charlottesville, Virginia, Lexis Law Publishing), at p. 400.

25 The list of LDCs is reviewed every three years by the UN Economic and Social Council. The criteria underlying the current list are, inter alia, a low GDP per capita, weak human resources, and a low level of economic diversification (<http://www.unctad.org/en/subsites/ldcs>).

26 <http://www.wto.org>.

27 K. Kennedy, op. cit. (supra note 24).

almost quadrupling during the last half century, almost all of them have entered the family of nations with "developing country" status. Some have managed eventually to reach per capita income levels comparable, or even superior, to those of the former colonizing powers.

Because it is not possible to provide an absolutely consistent designation which can be applied to all international judicial bodies throughout the period 1945–2001, this study will resort to two main classifications. For the period 1945–1994, a "political classification" will be used. States will be divided into three groups. The first group is that of "developed countries", comprising those States that were members of the Organization for Economic Cooperation and Development (OECD) before 1994.[28] Ideologically counterpoised to the OECD group were the socialist countries (in practice the Warsaw Pact members[29]). With the end of the cold war, these States have abandoned socialist economies to move towards capitalism and market-based economies, and are generally called "transitional economies" or "countries in transition". Finally, all States that did not want to or could not overtly join either group, including most

[28] Protocol on the Revision of the Organization for European Economic Cooperation and Convention on the Organization for Economic Co-operation and Development, 14 December 1960. 888 *U.N.T.S.* 180. The pre-1994 OECD members are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Liechtenstein and Israel, while not being OECD members, will be considered as "developed countries" in this article.

The OECD was created in 1961 and was the successor of the Organization for European Economic Cooperation (OEEC), which had been created mainly to coordinate the economic reconstruction of Western Europe through the Marshall Plan in the aftermath of World War II. The original 20 members were Western European and North American States. In the 1960s and 1970s they were joined by Australia, New Zealand, Japan and Finland. Until the end of the Cold War the organization was thus the quintessential club of western countries, sharing principles of free-market economics, high per capita income, and pluralist democracy. With the end of the Cold War, starting in 1994, the OECD has gradually started enlarging its membership to include States that were either former socialist or non-aligned and with income levels fairly lower than those of the previous members: Mexico, the Czech Republic, Hungary, Poland, South Korea and the Slovak Republic.

[29] These were: Albania, Bulgaria, Czechoslovakia (now the Czech Republic and Slovakia), East Germany (now part of the united Federal Republic of Germany), Hungary, Poland, Romania, and the Union of Soviet Socialist Republics (which in 1991 broke up into its constituent republics). Presumably, the former Yugoslavia, the People's Republic of China, Vietnam, North Korea, Mongolia, and Cuba would also fall under this category.

States emerging from colonialism, are classified in this article in the general "developing countries" category.

To compensate for the distortion that could be caused by using the OECD/Warsaw Pact membership as the critical divide between developing, developed and transitional economy countries, this article will resort to a finer categorization for the period 1995 onwards. Beginning in 1985, the World Bank has produced an annual *World Development Report* (WDR), indexing States by several criteria.[30] One of the criteria employed is, of course, income (i.e., GNP per capita). States are divided into three income categories (low, middle, and high-income).[31] Middle-income States are further subdivided into lower and upper-middle income, and high-income States are divided into OECD and non-OECD members. This categorization according to income will be used on top of the general political categorization detailed above for the period 1995–2001. The rationale for the choice of 1995 as the starting date for this finer classification is two-fold. First, by limiting income classification to the last six years only, variations in income for each country are limited. Second, the WTO dispute settlement system, which is the object of analysis of a considerable part of this article, started operation only on that date. Thus, for the period 1995–2001, countries listed as high-income in the *World Development Report, 2000–2001* will be considered "developed", and all other countries will be considered "developing". In some instances reference will be made to the specific income categories where a more nuanced breakdown appears helpful.

III. QUANTITATIVE DATA

Before moving on to discuss the various dimensions that the question of the use of international judicial bodies can acquire, it is necessary to put forth some raw data about the number of cases that have been brought before international judicial fora other than regional courts, that is to say the International Court of Justice and the GATT/WTO dispute settlement system; and, where appropriate, the International Tribunal for the Law of the Sea.

A. International Court of Justice

When examining the chronological pattern of activity before the ICJ since its establishment (see Table 1, below), the first aspect that becomes noticeable is its irregularity.

[30] World Bank, *Entering the 21st Century: World Development Report, 1999/2000* (New York, Oxford University Press, 2000).
[31] Ibid., pp. 290–291.

Table 1: ICJ Categories of Contentious Cases by Decade

Categories: A = Developed Developed; B = Developed Developing; C = Developing Developed; D = Developing Developing; E = Developed Socialist; F = Socialist Developed; G = Socialist Socialist; H = Socialist Developing; I = Developing Socialist.

After 1990, the term "socialist" indicates countries with economies in transition.

Decade	Total #	A		B		C		D		E		F		G		H		I	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1940s	4	1	25	1	25	0	0	1	25	1	25	0	0	0	0	0	0	0	0
1950s	29	9	31	7	24	0	0	4	14	9	28	0	0	0	0	0	0	0	0
1960s	4	2	50	0	0	1	25	1	25	0	0	0	0	0	0	0	0	0	0
1970s	9	4	44	2	22	0	0	3	33	0	0	0	0	0	0	0	0	0	0
1980s	13	3	23	0	0	3	23	7	54	0	0	0	0	0	0	0	0	0	0
1990s	35	5	14	0	0	4	11	13	37	0	0	10	29	3	9	0	0	0	0
*(1990s)**	*(26)*	*5*	*19*	*0*	*0*	*4*	*15*	*13*	*50*	*0*	*0*	*1*	*4*	*3*	*12*	*0*	*0*	*0*	*0*
2000 –	4	1	25	0	0	1	25	1	25	0	0	0	0	1	25	0	0	0	0
TOTAL 1945–2001	98	25	26	10	10	9	9	30	31	10	10	10	10	4	4	0	0	0	0

** Note: In this line the ten cases filed by Yugoslavia concern a single dispute against ten NATO member countries over the bombings carried out by the alliance in 1999 and are counted as one.*[32]

Since the International Court of Justice started operating in 1946, 98 contentious cases have been submitted to it.[33] The Court received about one third of its cases in the 15 years after its founding (33 to be precise). Over the course of the following two decades; however, this number dropped to only 13, with the 1960s being the lowest point. The Court's activity level increased slowly through the 1970s to nine cases and 13 during the 1980s, while the 1990s was a record decade with 35 cases (26 if the Yugoslavia/NATO cluster is counted as a single case), representing the most crowded docket ever.

Focusing more closely on developing countries, the picture becomes more complex when we examine who were the parties involved in these

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

[33] Of course, the ICJ also has an advisory jurisdiction (UN Charter, Article 96; ICJ Statute, Articles 65–68). To date the ICJ has rendered 23 advisory opinions. Note that applications for revision and/or interpretation of judgments are counted as individual cases.

cases. In its first 15 years of existence (1946–1960), the Court was used almost exclusively by Western European applicants and the United States (the United States filed seven cases; France and the United Kingdom six each; Belgium two; Greece, Israel, Liechtenstein, Italy, Portugal, The Netherlands and Switzerland one each) who brought claims between themselves, or against developing and socialist countries. Despite making up about three-fourths of the UN's membership during that period, developing countries appeared in only 13 of a total of 33 contentious cases, and, even more significantly, developing countries were applicants in only five cases, all of which were brought against other developing countries.[34] During the same period, socialist countries appeared in 10 cases (all relating to aerial incidents), and always as respondents. Subsequently, socialist countries became completely foreign to the ICJ. Neither did they file cases, nor were cases filed against them by Western countries. It is only with the end of the cold war that former socialist countries have come back to the Court.

This imbalance shifted somewhat during the ebb of the decolonization years, through the 1960s and 1970s. During those twenty years, developing countries were parties to seven of thirteen cases before the Court, and as applicants in five of these disputes. One of those was the (in)famous *South West Africa* cases, where Ethiopia and Liberia tried to challenge, in the name of all African countries, the occupation of the future Namibia by South Africa.[35] Two cases were related to the tensions between India and Pakistan.[36] One was about maritime boundary delimitation in the southern Mediterranean,[37] and another was between an African developing country and its former colonizing power[38].

[34] *Asylum* (Colombia/Peru), Judgment, *I.C.J. Reports 1950*, p. 264; *Request for an Interpretation of the Judgment of 20 November 1950 in the Asylum Case* (Colombia v. Peru), *Judgment, I.C.J. Reports 1950*, p. 395; *Haya de La Torre* (Colombia v. Peru), *Judgment, I.C.J. Reports 1951*, p. 71; *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), *Judgment, I.C.J. Reports 1960*, p. 192; *Temple of Preah Vihear* (Cambodia v. Thailand), *Merits, Judgment, I.C.J. Reports 1962*, p. 6.

[35] *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), *Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345–346; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6. The import of the *South West Africa* cases on the history of the ICJ will be analyzed in detail in the second part of this study.

[36] *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), *Judgment, I.C.J. Reports 1972*, p. 46; *Trial of Pakistani Prisoners of War* (Pakistan v. India), *Order of 15 December 1973, I.C.J. Reports 1973*, p. 347.

[37] *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), *Judgment, I.C.J. Reports 1982*, p. 18.

[38] *Northern Cameroons* (Cameroon v. United Kingdom), *Judgment, I.C.J. Reports 1963*, p. 15.

However, it was only in the 1980s that the balance tipped dramatically towards the South. During this decade, nearly 80% of the cases before the Court were brought by developing country governments (10 out of 13). Of these, over half were between developing countries and an additional 23% were brought by developing countries against developed countries, of which perhaps the *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*) is the most famous.[39] In the 1980s no cases were filed by developed countries against developing countries, which has remained a constant ever since. Indeed, the last instance of a dispute brought by a developed country against a developing one dates back to 1979 with the *United States Diplomatic Consular Staff in Tehran* (*United States of America v. Iran*).[40] As contrasted with the period 1945–1969, trends have been completely reversed.

The 1990s was characterized by an eroding number of cases involving developed countries and the appearance before the Court of former socialist countries. First, in that decade, developed countries were involved in only 14% of the cases (19% if the Yugoslavia/NATO cluster is counted as a single case). During the same decade developed countries made up only about 15% of all UN members. Second, thirteen cases (38%) involved economies in transition (four, or 16%, if the Yugoslavia/NATO cluster is counted as a single case). Approximately half of these cases were brought against other developing countries, and half against developed countries (but, excluding the Yugoslavia/NATO cluster, only 19% of these cases were brought against developed countries, while 62% were brought against, or submitted by agreement with, other developing countries).

In sum, at least numerically, and using as a basis of comparison membership in the UN, during the same period, one can state that, since the 1980s, there have been no major imbalances in the participation in proceedings before the World Court. The various groupings (developed countries, developing countries, and economies in transition) play a role proportionate to the number of seats occupied in the UN General Assembly. In particular, since the 1980s, the participation of developing countries has been adequate and proportional. There is no question that developing countries and economies in transition are the force behind the surge in the ICJ case load and its renaissance.

Some further observations can be made regarding the types of disputes brought by different categories of applicants before the ICJ (see Table 2).

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

[40] *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), *Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7; Ibid., *Judgment, I.C.J. Reports 1980*, p. 3; Ibid., *Order of 12 May 1981, I.C.J. Reports 1981*, p. 45.

Of course, it must immediately be said that it is impossible to pigeonhole complex international disputes into simple categories. Every dispute has multiple facets and the questions submitted by the applicant, or the applicants, to the Court might be quite different in nature from the larger political dispute from which the particular case originated, or it may simply constitute a selected aspect of it. Having said that, if a large degree of generalization is accepted, one could break down the cases submitted to the ICJ in its history into a dozen or so groups.

Table 2: ICJ Categories of Cases by Type

Case Type	Total #		A		B		C		D		E		F		G		H		I	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Territorial Delimitation	23	22.54	5	20.00	1	9.09	0	0.00	17	56.67	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Use of Force	23	22.54	0	0	1	9.09	3	33.33	5	16.67	1	10.00	10	100.00	3	75.00	0	0.00	0	0
*Use of Force **	14	*13.72*	*0*	*0*	*1*	*9.09*	*3*	33.33	*5*	16.67	*1*	10.00	*1*	10.00	*3*	75.00	*0*	0.00	*0*	*0*
Foreign Nationals (Diplomatic Protection of)	17	16.66	5	20	3	27.27	4	44.44	5	16.67	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Air-Space and Aerial Incidents	11	10.78	0	0	0	0.00	0	0.00	2	6.67	9	90.00	0	0.00	0	0.00	0	0.00	0	0
Foreign Corporations (Diplomatic Protection of)	7	6.86	4	16	3	27.27	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Natural Resources	6	5.88	4	16	0	0.00	1	11.11	0	0.00	0	0.00	0	0.00	1	25.00	0	0.00	0	0
Sovereignty/ De-colonization	4	3.92	1	4	1	9.09	1	11.11	1	3.33	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Nuclear Tests	3	2.94	3	12	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Financial Obligations and Debts	2	1.96	2	8	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Global Commons (Antarctica)	2	1.96	0	0	2	18.18	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0
Straits	1	0.98	1	4	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0
TOTAL	98	100	25	100	11	100	9	100	30	100	10	100	10	100	4	100	0	100	0	0

** Note: In this line the ten cases filed by Yugoslavia concern a single dispute against ten NATO member countries over the bombings carried out by the alliance in 1999 and are counted as one. Figures outside the Yugoslavia/NATO cluster are in round brackets.*

Grosso modo, disputes on the use of force and territorial delimitation comprise about half of all cases submitted to the Court. Issues arising out of diplomatic protection, both of individuals and corporations, represent a quarter, and the remaining quarter is made up of various kind of disputes (on natural resources, decolonization, financial obligations and debts, Antarctica and passage through straits).

When breaking down these data into something more specific, it can be noted, for instance, that cases brought by developing countries against other developing countries (including socialist countries, or economies in transition) (Columns D, G, H and I) by and large arise out of boundary issues (57%). Indeed, in Africa and Central America, the ICJ has been the primary forum for dispute resolution regarding border disputes – perhaps only rivaled by arbitration.[41] Second to that come the use of force and diplomatic protection of foreign nationals (16% each). For what concerns North-South relations, statistics confirm the *topoi*. Cases brought by developing country governments against developed countries (Columns C and F) have focused primarily on the use of force (though the number of cases in this category is rather inflated by the Yugoslavia/NATO cluster of cases), followed by far by issues of decolonization and natural resources. The majority of the cases brought by developed countries against developing countries (Columns B and E) have dealt with the treatment of foreign nationals and corporations (including the various cases on aerial incidents filed in the 1950s by Western Countries against Communist countries). Finally, disputes among developed country governments are the most diversified group including those on natural resources (mainly fisheries), nuclear tests, financial obligations and debts and diplomatic protection.

B. GATT/WTO dispute settlement procedures

To properly understand quantitative data about resort to the GATT/WTO dispute settlement procedures, it is necessary to highlight a few of the features of those systems at the outset. Of course, these are generalizations, for, unlike the case of the ICJ, which has not substantially changed its procedure since 1945, and arguably not since 1919,[42] the GATT/WTO dispute settlement system has gone through several adjustments and a radical metamorphosis.[43]

[41] On two recent territorial delimitations effected by way of *ad hoc* arbitration, see supra note 18.

[42] As a matter of fact, by and large, the Statute and the Rules of Procedure of the ICJ are those of the Permanent Court of International Justice, of which the ICJ is regarded as the successor. See Articles 36 (6) and 37 of the Statute of the ICJ.

[43] The evolution of the GATT/WTO dispute settlement system will be expounded in greater detail in the second part of this study. For a comprehensive and exhaustive description of the evolution of the system, see, for the GATT

First of all, unlike the case of the ICJ or ITLOS, or any other international judicial body, in the GATT/WTO system the objective is not to determine whether the rights of a party have been violated, but rather whether the benefits that the parties expected to derive from the substantive rules of the GATT/WTO have been nullified or impaired, or whether the achievement of any objective of the agreement is being impaired. In theory, a breach might be found not to have led to a nullification or impairment, and a nullification or impairment might be proved, on the basis of a very convincing justification by the complainant, even in the absence of a breach.[44] Thus, while in the case of orthodox international judicial bodies one can say that they essentially carry out a "retrospective analysis of the rights and duties of the parties at the time that the dispute arose",[45] in the case of the GATT/WTO system it is a "perspective analysis of what measures might produce a workable solution to the dispute for the future".[46]

As a consequence, in the GATT/WTO system a great emphasis has been placed on the avoidance of formal disputes altogether. It is true that also in the case of the ICJ, States should have first tried to settle the dispute by any diplomatic means of their choice, in any forum they might select, but in the case of the GATT/WTO, diplomatic negotiations are part and parcel of the dispute settlement process and are not an elective preamble.[47] In the GATT/WTO system, notification and consultation are the basis of the system. First, a party announces the adoption of trade measures affecting the operation of the GATT/WTO substantive rules. If a party thinks its benefits, or the achievement of any objective of the agreement, have been nullified or impaired, it can request one, or more, members to start consultations on the disputed matter. If, as result of the consultations, or the use of good offices, conciliation or mediation, the dispute is settled, the case is disposed of. If consultations do not lead to settlement, then the member that requested consultations can demand the establishment of a panel to examine the matter.

years, R. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (London, Butterworths, 1991). For the GATT/WTO period, see E.U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Dordrecht, Kluwer, 1997).

44 See *1950 Report on the Australian Subsidy on Ammonium Sulphate*, *GATT Basic Instruments and Selected Documents*, Vol. 2 (1952), at p. 188.

45 J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford, Oxford University Press, 1999), at p. 97.

46 Ibid., at p. 97.

47 Unless, of course, the exhaustion of negotiations or other diplomatic means is mandated by the title of jurisdiction. See supra note 13.

It follows that, in the WTO dispute settlement system, the request for consultations can be considered the moment at which the dispute settlement process is triggered. Indeed, while in the case of the GATT, a panel could be established only if the CONTRACTING PARTIES[48] decided to do so, in the case of the WTO the right of a complainant government to a panel process is established, preventing 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 introduced.

Second, and perhaps most importantly, another difference between the old GATT dispute settlement system and the new WTO system is the procedure through which panel reports are adopted. In the GATT system, a dispute settlement panel report became binding only if adopted unanimously by the plenary organ of the agreement, referred to as the CONTRACTING PARTIES, including the vote of the party found by the panel to be in violation of the applicable agreements. In the case of the WTO, the adoption of panel reports is, as before, entrusted to an organ composed of representatives from all of the organization's members[49] (i.e., the Dispute Settlement Body). However, now reports are automatically adopted, unless they are rejected by consensus, thus making the panel's findings *de facto* binding.

In addition to these procedural changes, built upon the GATT panel-based system, the Uruguay Round introduced some substantial structural modifications. Instead of a single process a two-tier process was created. The lower tier of the WTO dispute settlement system recalls, with the substantial changes explained above, the GATT settlement system. As in the case of the GATT, disputes between WTO members, if not settled within a specific time-frame, are to be submitted to an *ad hoc* panel, composed of three experts chosen by the parties. The report of the panel is adopted by the Dispute Settlement Body, unless it has been appealed to the Appellate Body.[50]

In contrast to the *ad hoc* panel, the Appellate Body has more pronounced judicial features. It is a standing organ, composed of seven individuals, three of whom sit on any one case in rotation.[51] The Appellate Body can hear only appeals relating to points of law covered in the report and legal interpretations developed by the panel.[52] Like panel reports, Appellate Body reports must be adopted by the Dispute Settlement Body

[48] In GATT practice, the capitalized term signified the GATT Contracting Parties acting jointly.

[49] Agreement Establishing the World Trade Organization, 33 *I.L.M.* (1994) 1263, Article IV.3. DSU, Article 2 (supra note 10).

[50] Ibid., Articles 17–19.

[51] Ibid., Article 17.1.

[52] Ibid., Article 17.6.

before they become binding,[53] but in this instance as well the reverse consensus rule applies.

These features of the GATT and WTO dispute settlement systems should help in the understanding of the quantitative data on their utilization. A shift has occurred from a dispute settlement system where the establishment of a panel could be blocked by the respondent to a system where it cannot be blocked, and where the progression of a case is automatic and subject to a strict time-table. This explains the huge difference between the number of cases submitted to the GATT system and the number of cases submitted to the WTO dispute settlement system.

In the period 1948–1995 (i.e., the "GATT years"), only 112 panel reports were issued, and of those 112, only 20 were before 1970.[54] During the same period, at least double that number of complaints were made.[55] That is an average of 2.3 reports per year (or about 5 complaints per year), a figure which is remarkably low. Although that puts the GATT dispute settlement procedures in the league of the ICJ and the ITLOS, it is significantly lower than the mass of cases submitted to and processed by the WTO dispute settlement system. Indeed, as of 1 January 2002, 244 requests for consultation have been made, and 57 panel and Appellate Body reports have been made and adopted. That is an average of 34.8 requests of consultation and 8.1 panel and Appellate Body reports per year.

Before moving on to the issue of the use of the GATT/WTO system by developing countries in particular, it should be stressed that socialist countries were absent throughout the history of the GATT.[56] The GATT was an agreement between market-based economies to cut tariffs and, thus, increase trade amongst the signatories. Socialist countries had a similar trade agreement, managed by the Council for Mutual Economic

[53] Ibid., Article 17.14.

[54] The data in this section is taken from E.U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Dordrecht, Kluwer, 1997), Annexes A and B. It includes reports issued under Article XXIII of the GATT (1947) and Panel Reports under the Tokyo Round Codes of 1979.

[55] Hudec lists 207 complaints for the period 1948 through 1989. See Hudec, op. cit., pp. 417–585.

[56] Czechoslovakia was one of the original contracting parties of the GATT. However, after the Coup of Prague of 25 February 1948, it became part of the Eastern block and moved away from the GATT. Before doing so, however, it resorted twice to GATT dispute settlement mechanisms to settle disputes with the United States (*US Restrictions to Exports to Czechoslovakia*, Decision of 8 June 1949, published in BISD II/28; and *Withdrawal of Tariff Concessions under Art. XIX*, Complaint of 7 November 1950 (GATT/CP.5/22)).

Aid (COMECON),[57] and a series of bilateral agreements, but they were not based on market principles. More specifically, COMECON had no judicial mechanism to settle disputes. This explains the absence of columns for socialist countries among the number of cases submitted to the GATT dispute settlement procedures and the number and nature of State signatories of the GATT in Tables 3 and 4.

Table 3: GATT Reports Issued by Decade

Categories: A = Developed Developed; B = Developed Developing; C = Developing Developed; D = Developing Developing; E = Developing & Developed Developed; F = Developing Multiple parties.

		A		B		C		D		E		F	
Decade	**Total #**	**#**	%	#	%	#	%	#	%	#	%	#	%
1949	3	0	0	1	33	2	67	0	0	0	0	0	0
1950s	12	12	100	0	0	0	0	0	0	0	0	0	0
1960s	5	3	60	0	0	1	20	0	0	0	0	1	20
1970s	20	17	85	1	5	2	10	0	0	0	0	0	0
1980s	51	39	76	4	8	7	14	0	0	1	2	0	0
1990–94	21	13	62	2	10	5	24	0	0	1	5	0	0
TOTAL	112	84	75	8	7	17	15	0	0	2	2	1	1

SOURCE: E. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (The Hague, Kluwer, 1997).

During the "GATT years", developing countries were not significant participants in the GATT's dispute settlement procedures. Developing countries participated in only 28 disputes out of 112 (20 times as requesting State and 8 times as requested State) (Table 4).[58] Of the cases in which developing countries requested the establishment of a panel, only six took place before 1980. Moreover, throughout GATT's history, only a handful of developing countries participated in dispute settlement procedures (Brazil in 7 cases; Chile in 4; Nicaragua in 4; Republic of Korea in 4; Mexico 3; Colombia in 3; Venezuela in 3; Thailand in 2; Costa Rica in 2; Guatemala in 2; Uruguay in 1; Jamaica in 1; India in 1; Argentina in 1; El Salvador in 1; Zimbabwe in 1; and South Africa in 1). In three cases (concerning two different matters), developing countries teamed together to activate the dispute settlement system.[59] In one case, a

[57] COMECON apparently existed for eleven years (1949–1960) without a constitutive instrument. Its formation was announced by a communiqué in January 1949, but the first constitutive instrument on public record is the Charter of COMECON, of 14 December 1959 (Vol. 368, p. 253).

[58] Both Israel and Czechoslovakia are considered developed countries for purposes of this calculation (see supra note 56).

[59] *EEC – Members States' Import Regimes for Bananas* (DS32/R) *EEC – Import Regime for Bananas* (DS38/R), and *US Measures Affecting the*

developing country challenged 15 other States (all developed countries plus Czechoslovakia) at one time.[60] All other disputes (76%) took place between the United States, the European Economic Community (and/or its member States), Canada, Australia and Japan. Remarkably, there is no instance of any dispute between developing countries in the GATT years (Table 4, Column D).

Table 4: GATT Reports Involving at Least One Developing Country

Categories: B = Developed Developing; C = Developing Developed; D = Developing Developing; E = Developing & Developed Developed; F = Developing Multiple parties.

Decade	Total #	B #	C #	D #	E #	F #
1949	3	1	2	0	0	0
1950s	0	0	0	0	0	0
1960s	2	0	1	0	0	1
1970s	3	1	2	0	0	0
1980s	12	4	7	0	1	0
1990–94	8	2	5	0	1	0
TOTAL	28	8	17	0	2	1

SOURCE: E. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (The Hague, Kluwer, 1997).

Does the WTO dispute settlement system distinguish itself from its predecessor only because of considerable structural and procedural differences, or does it distinguish itself also because developing countries have finally started resorting to it? The answer is not straightforward.

Table 5 contains data about requests for consultations made from 1 January 1995, when the WTO started operating, through 1 January 2002 (244 requests). Requests for consultations have been gauged instead of panel reports (as was the case for the data on the GATT years) because, as already explained, in the WTO system this is when the dispute settlement process is activated. Once a request for consultations has been made, a dispute will be eventually referred to a panel unless agreement is reached (as occurred in 48 cases[61]), or the requesting member decides not to pursue the case (10 cases[62]). Conversely, in the GATT system a request for

Importation and Internal Sale of Tobacco, Panel Report of 4 October 1994, BISD-S- (GATT Doc. DS44/R, 12 August 1994).

60 *Uruguayan Recourse to Article XXIII*, BISD 11S/95.

61 This figure includes 38 cases officially settled and 10 cases where the dispute settlement panel is either inactive, or its authority has lapsed, or the case seems to have been settled without formal notification to the WTO (<http://www.wto.org>).

62 Ibid. Ten cases have been withdrawn.

consultations only might (and in more than half of the cases did not) lead to the establishment of a panel.

Table 5 breaks down cases by requesting and requested party and by income level. "H" represents high-income (and includes both OECD and non-OECD members), "UM" represents upper-middle, "LM" lower-middle, and "L" lower-income countries. For present purposes, all States, other than high-income States, may be considered as "developing".

Table 5: WTO Dispute Settlement System: Cases According to Income Categories by Year

Requesting Requested; H = high-income (HO + HN); UM = upper-middle income; LM = low-middle income; L = low-income.

	1995		1996		1997		1998		1999		2000		2001		Total	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Consultations Requested	25	10	39	16	50	20	41	17	30	12	34	14	25	10	244	100
Requesting																
H	14	56	28	72	40	80	33	80	22	73	16	47	5	20	158	65
UM	5	20	3	8	8	16	4	10	4	13	10	29	10	40	44	18
LM	4	16	1	3	2	4	1	2	2	7	5	15	6	24	21	9
L	1	4	4	10	0	0	3	7	1	3	2	6	3	12	14	6
Multiple	1	4	3	8	0	0	0	0	1	3	1	3	1	4	7	3
Requested																
H	17	68	19	49	29	58	27	66	16	53	14	41	12	48	134	55
UM	7	28	10	26	10	20	9	22	9	30	11	32	11	44	67	27
LM	1	4	8	21	3	6	1	2	4	13	7	21	2	8	26	11
L	0	0	2	5	8	16	4	10	1	3	2	6	0	0	17	7
Couplets																
H H	10	40	13	33	20	40	23	56	14	47	7	21	5	20	92	38
H UM	2	8	7	18	10	20	6	15	7	23	7	21	0	0	39	16
H LM	0	0	6	15	2	4	0	0	0	0	2	6	0	0	10	4
H L	0	0	2	5	8	16	4	10	1	3	0	0	0	0	15	6
UM H	5	20	1	3	7	14	1	2	1	3	4	12	3	12	22	9
UM UM	1	4	1	3	0	0	2	5	1	3	3	9	5	20	13	5
UM LM	0	0	1	3	1	2	1	2	2	7	3	9	2	8	10	4
UM L	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LM H	3	12	1	3	2	4	1	2	0	0	0	0	2	8	9	4
LM UM	1	4	0	0	0	0	0	0	1	3	1	3	4	16	7	3
LM LM	0	0	0	0	0	0	0	0	1	3	2	6	0	0	3	1
LM L	0	0	0	0	0	0	0	0	0	0	2	6	0	0	2	1
L H	0	0	2	5	0	0	3	7	0	0	2	6	1	4	8	3
L UM	0	0	1	3	0	0	0	0	0	0	0	0	2	8	3	1
L LM	1	4	1	3	0	0	0	0	1	3	0	0	0	0	3	1
L L	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Multiple H	1	4	2	5	0	0	0	0	1	3	1	3	1	4	6	2
Multiple UM	0	0	1	3	0	0	0	0	0	0	0	0	0	0	1	0

SOURCES: WTO, *Overview of the State-of-play of WTO Disputes*, <http://www.wto.org> (Site last visited 10 August 2001); World Bank, *World Development Reports, 1995–1999*; World Bank, *Entering the 21st Century: World Development Report, 1999/2000* (New York, Oxford University Press, 2000).

The relative majority of all disputes submitted to the WTO dispute settlement system have taken place between developed countries (38%). Of these, the greatest portion comprises disputes between the super-powers of international trade: the United States, the European Community and, to a lesser extent, Canada and Japan. Developed countries (36 out of 143

WTO members) have filed requests for consultations in 65% of the cases and have been requested in about half (55%). The United States is the most frequent user of the dispute settlement process: it filed the highest number of requests (69), and was the most frequently requested member (57) (the figures for the EC are respectively 53 and 49, including those involving EC individual member States). The United States and the EC combined together made 122 requests (52% of 244 requests), and were on the receiving end 106 times (45% of 244 requests).

Thus, for the almost seven years during which the WTO Dispute Settlement Body has been in place, as compared to the GATT years, the preponderance of developed countries has been significantly reduced. So far, no less than 62% of all disputes saw at least one developing country involved, as contrasted to 24% during the GATT years. Yet, more significantly, unlike the GATT years, developing countries have started resorting to this dispute settlement procedure to settle disputes among themselves.[63] Indeed, there are 41 cases (16.8%) in which developed countries are neither the requesting nor the requested party.[64] Moreover, in 2001, developing countries made 19 out of the 25 requests for consultations, and were requested 13 times out of 25. Only 5 consultations out of 25 were between developed countries. In all other cases a developed country was involved.

Despite these encouraging figures, participation in dispute settlement procedures remains the monopoly of a minority of WTO members. Of the 36 high-income WTO members, 26 participated, either as a party or as a third-party, in WTO dispute settlement procedures. Of the ten non-participating high-income States, eight were non-European States, and two were European (Liechtenstein and Slovenia). However, of the 107 developing countries (i.e., not high-income), only 52 have participated.[65] Among developing countries, the most frequent participants are Latin-American States (Brazil foremost, but also Argentina, Chile, Colombia, Venezuela, Guatemala, Peru, Mexico, and Ecuador), some Asian States (India, Pakistan, and South Korea chiefly, but also Indonesia, Thailand, and the Philippines), a few States whose economies are in transition (the Czech Republic, Slovakia, Hungary, Poland, and Romania), and a few

63 Jackson, "Designing", op. cit., at p. 165.

64 This includes the following categories of disputes: UM→UM; UM→LM; UM→L; LM→UM; LM→LM; LM→L; L→UM; L→LM; L→L; Multiple→UM.

65 For a detailed analysis, see Y. Duk Park and G.C. Umbricht, "WTO Dispute Settlement 1995–2000: A Statistical Analysis", *Journal of International and Economic Law* (2001), pp. 213–230. Note that Duk Park and Umbricht classify developing countries as: Newly Industrialized Countries; Least-Developed Countries; Transitional Economic Countries; and Traditional Developing Countries (i.e., all developing countries that do not belong to any of the other three groups).

middle-eastern countries (Turkey and Egypt). A few African States have also participated, never as requesting or requested State, but only as third-parties claiming an interest in the dispute (e.g., Cameroon, Ghana, Nigeria, Senegal, South Africa, Swaziland, and Zimbabwe). Significantly, none of the least developed countries has ever participated, either as a party or as a third-party.

With regard to the outcome of the process, of the 244 requests for consultations (about 180 of which involve distinct matters), in 10 cases the request was withdrawn, in 48 the dispute was settled or the panel became inactive, and in 57 cases a panel or Appellate Body report was adopted. Interestingly, developing countries have a remarkably high share of cases withdrawn but not an equally high share of cases that are settled or become inactive. In particular, a developing country was party to 9 out of 10 cases withdrawn (and in 7 of those it was the requesting State), and a developing country was party to 26 out of 48 cases that were settled or became inactive.

Data on the use by developing countries of the GATT/WTO dispute settlement mechanisms can be correlated with other data. First, data on the frequency of use can be correlated with the proportional membership of developing countries in the GATT and WTO, as compared to the membership of developed countries. This is shown in Tables 6.1 and 6.2.

Table 6.1: Developing Country Contracting Parties of the GATT

Year	Total Number of Contracting Parties	Developing Country Parties	
		#	%
1948–1950	28	12	43
1951–1959	36	17	47
1960–1969 *	75	51	68
1970–1979 **	84	60	71
1980–1989	95	71	75
1990–1994 ***	128	99	77

SOURCE: <http://www.wto.org/>.

* Israel, Kuwait, Yugoslavia and Poland are counted as developed; ** Romania, Hungary and Singapore (which joined in 1973) are counted as developing; *** This includes the Czech Republic and the Slovak Republic. Conversely, Brunei Darussalam, Qatar, Slovenia and the United Arab Emirates, which joined in 1993–1994, are high-income countries, hence they are counted as developed.

Table 6.2: Developing Country Members of the WTO

Year	Total Number of Members	Developing Country Members*	
		#	%
1995	113	79	70
2001	145	108	74

* Note that in this table the term "Developing Country Members" refers to non high-income members (L + LM + UM), not to the significantly smaller group of 30 least developed countries (LDCs) recognized by the WTO.

In the GATT years, developing country participation constantly increased, from 43%, in the early years, to 77%, at the eve of the entry into force of the Uruguay Round Agreements. At the same time, developing country utilization of the GATT dispute settlement system did not increase comparably. Aside from the first few years (in the period 1947–1950), where developing countries represented only 43% of the signatories but were involved in all four of the reports issued under Article XXIII of the GATT, and the 1960s where they appeared in two out of five reports, on average, developing countries have participated in only 25% of all disputes.

The disproportion between the number of developing States and the number of disputes in which they participate has substantially narrowed with the WTO. As of 1 January 2002, of the 145 members of the WTO (144 plus the EC), 37 are high-income States (24 members of the OECD and 13 non-OECD members); 29 are in the upper-middle income bracket;

35 are in the lower-middle group; and 44 are in the low-income group.[66] Thus, for the purpose of this paper, 37 members are developed and 108 are developing, or, for a percentage, 74.5% of all members are developing countries. At the same time, during the period 1995–2001 developing countries were involved in no less than 62% of all disputes.

The participation of WTO members in dispute settlement procedures, whether as requesting or requested party, seems to be linked to income. High-income States are present in the highest number of cases, followed, in order, by upper-middle income, lower-middle income and low-income States.[67] A possible explanation for this might be found in another set of data. Indeed, a third, and perhaps more pertinent, yardstick to gauge developing countries' resort to the GATT/WTO dispute settlement mechanisms is their relative participation in world trade.

Let us consider the volume of trade in merchandise (exports + imports) generated by WTO members since 1995 (100% representing the total of trade generated by WTO members).[68] During the last seven years, on average, developed countries (OECD members) have been involved in 73.1% of trade.[69] The figure for developing countries during the same period is 26.9%.[70] The ratio of the trade of developing countries to that of developed countries is less than half (0.36). Now, because the WTO purports to regulate and lower barriers to international trade, these percentages and the ratio can indicate, all other things being equal, how likely it is for developed or developing countries that are members of the WTO to enter into a dispute over trade in an area covered by the WTO

66 *The World Development Report*, op. cit., lists the People's Republic of China as low income, and Macao and Hong Kong as high income. Taiwan (listed as high income) joined the WTO on 1 January 2002 as the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu".

67 The total number of requests made and received is: high-income = 390; upper-middle income = 102; lower-middle income = 43; and low income = 31.

68 Admittedly, since 1995, with the entry into force of the agreements negotiated during the Uruguay Round, and, in particular, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of International Property Rights, trade in merchandise is not the sole focus of the international multilateral trade regime. However, disputes over trade in merchandise remain at the core of WTO dispute settlement activities. (See "General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations", 33 *I.L.M.* (1994) 1125 (Annex 1b: General Agreement on Trade in Services; and Annex 1c: Agreement on Trade-Related Aspects of International Property Rights)).

69 WTO, Merchandise Trade Section, Statistics Division (August 2001), <http://www.wto.org/>. These are extrapolations made by the author on the basis of the data contained in the WTO spreadsheet.

70 Ibid.

agreements, thus becoming subject to the WTO dispute settlement system. In other words, the assumption is that the more a WTO member trades, the higher are its chances of entering into a dispute with another member.

At the same time, we know that developing countries have been involved in 62% of the consultations initiated, while developed countries participated in 84%. Thus, the ratio of frequency of use of the WTO dispute settlement system by developing countries relative to the frequency of use by developed countries is 0.73. That means that, surprisingly, developing countries participate, on average, twice as often in the dispute settlement procedures of the WTO than their volume of international trade of merchandise warrants. Surprisingly, under the GATT dispute settlement system, such a disparity seems not to have existed. On average, during the period 1980–1995, the share of trade of developing countries was 22.99% while that of developed countries was 77.1% (a ratio of 0.30).[71] But during that same period, developing countries were involved in only 20 out of 72 cases (27.7%), while developed countries participated in 52 cases (72.3%) (a ratio of 0.38).

The question of whether it is more correct to correlate data on the frequency of use to the proportional membership of developing countries in the GATT and WTO, or rather to their share of global trade, will eventually be answered by the accession of the People's Republic of China to the WTO.[72] Indeed, numerically, China is just another addition to the legions of developing country members, but it is an extremely weighty one in terms of trade. It remains to be seen whether it will play a role proportionate to its share of world trade in the dispute settlement process.

C. International Tribunal for the Law of the Sea

In contrast to the wealth of data provided by the ICJ and GATT/WTO cases, the ITLOS can offer only limited insight, since its life has been too short to generate a significant amount of data. Indeed, the United Nations Convention on the Law of the Sea[73] entered into force on 16 November 1994, and the Tribunal was not ready to receive its first case before the end of 1996. However, in the five years of its existence, only eight disputes have been submitted to the Tribunal. Nevertheless, the pattern emerging in the ITLOS is relevant to the present discussion.

71 Ibid.

72 The People's Republic of China joined the WTO on 11 December 2001. Hong Kong and Macao, over which China resumed sovereignty in 1997, are original members, having signed the agreements establishing the WTO on 1 January 1995.

73 Supra note 12.

To date, the disputes submitted to the ITLOS have been: *M/V "SAIGA"*,[74] *Camouco*,[75] *Monte Confurco*,[76] *Grand Prince*,[77] *Chaisiri Reefer* 2,[78] *Swordfish*,[79] *MOX Plant*[80] and the *Southern Bluefin Tuna*[81] cases. In two of those cases, the Tribunal prescribed provisional measures;[82] in four it was called on to decide about the prompt release of vessels,[83] one case was withdrawn because the parties had reached an agreement,[84] and another has been suspended for the same reason.[85] Only in one case was the Tribunal also able to decide on the merits of the dispute.[86] Of these eight cases, two were between developed countries (OECD-members, high-income),[87] two between two developing countries (middle-lower income v. low-income, and upper-middle income v. low-income),[88] while three were brought by developing countries (Panama (upper-middle), Seychelles (upper-middle) and Belize (lower-middle income)) against a developed country (France).[89] Finally, of the eight cases, five related to fishing activities,[90] one was related to an activity ancillary to fishing (i.e., bunkering),[91] and one was about the risk of marine pollution.[92]

[74] 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 <http://www.itlos.org/> (Proceedings and Judgments, List of Cases).

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

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

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

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

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

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

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

[82] *M/V "SAIGA"* and *Southern Bluefin Tuna* cases.

[83] *M/V "SAIGA"*, *Camouco*, *Monte Confurco* and *Grand Prince* cases.

[84] *Chaisiri Reefer 2* case.

[85] *Swordfish* case.

[86] *M/V "SAIGA"* case.

[87] Australia and New Zealand v. Japan in the *Southern Bluefin Tuna* case, and Ireland v. UK in the *MOX Plant* case.

[88] Saint Vincent and the Grenadines v. Guinea in the *M/V "SAIGA"* case; and Panama v. Yemen in the *Chaisiri Reefer 2* case.

[89] Respectively, *Camouco*, *Monte Confurco* and *Grand Prince* cases.

[90] *Camouco*, *Monte Confurco*, *Grand Prince* and *Southern Bluefin Tuna* cases.

[91] *M/V "SAIGA"* case.

[92] *MOX Plant* case.

By percentage, 25% of its cases have been between developed countries, 25% between developing countries and 50% are cases brought by developing countries against developed countries[93]. In other words, 75% of the cases ITLOS has heard to date involved a developing country (in two out of six cases a low-income country was involved, and always as respondent). That figure is remarkable in itself, and some of the reasons why developing countries might, if given the opportunity, prefer the ITLOS to the ICJ will be detailed in the second Part of this study. However, this remarkable figure should also be contrasted with figures relating to the ratification of the UNCLOS. To date the UNCLOS has received 138 ratifications.[94] Of these, 111 were deposited by developing countries (80.5%) and 27 by developed countries (19.5%).[95] Thus, developing countries as a group are not over-represented before the ITLOS. Nevertheless, this data departs from the situation described above concerning the ICJ.

(to be continued)

[93] However, categorizing the *Camouco*, *Monte Confurco*, *Grand Prince* and *Chaisiri Reefer 2* as cases brought by developing countries is not completely accurate. Under the UNCLOS, requests for prompt release of vessels can be filed by or on behalf of the flag state. 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). This point will be addressed in greater detail in the second part of this study.

[94] On 1 March 2002 (<http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>).

[95] The total of 25 States includes 22 OECD members, the European Community, Monaco and Liechtenstein.