Small States and International Courts

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ABSTRACT

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The number of independent states has risen remarkably in the last century which has resulted in the proliferation of very small states. For the past decades we have also seen an increasing number of international courts and tribunals. The expanding realm of international law has been perceived as beneficial to small states and small states are considered to be at less of a disadvantage when disputing large and powerful states if the outcome is primarily based on the rule of law. The objective of this thesis is to explore these notions by reviewing the relationship between the world's smallest states and three prominent inter-state dispute resolution bodies. The intention was to try to explain to what extent international courts have truly benefitted small state researched small state cases in an effort to gain an understanding into the standing of small states before international courts. The most apparent conclusion was that small states have only to a limited extent participated in international adjudication. Measures aimed at facilitating the participation of impoverished states in international judicial proceedings are for some reasons under-utilized. International courts however contribute greatly to small state interest by enhancing the credibility of state commitments as well as development and strengthening of international law. Increased involvement of civil society at the international level may also serve the interests of small states serving with common good of mankind rising above exclusive interests of individual states. If the right steps are taken to strengthen the international judiciary as well as provide small and weak state players with adequate support, the international judicial system could certainly prosper as a source of justice for all.

ÚTDRÁTTUR

Smáríki og alþjóðadómstólar

Fjöldi sjálfstæðra ríki hefur aukist hratt síðastliðna öld og leitt af sér öra fjölgun smáríkja. Undanfarna áratugi hefur alþjóðlegum dómstólum einnig fjölgað stórlega. Litið hefur verið á hið stækkandi svið alþjóðalaga sem jákvæða þróun fyrir smáríki og þegar kemur að lausn ágreiningsmála eru smáríki sem eru stödd i deilu við stór og valdamiklil ríki talin í mun betri stöðu ef niðurstaða málsins byggist fyrst og fremst á lögum og reglum. Markmið þessarar ritgerðar er að kanna grundvöll þessara hugmynda með því að rannsaka samspil smæstu ríkja heims og þriggja alþjóðadómstóla sem taka á deilumálum milli ríkja. Ætlunin var að skýra að hvaða marki alþjóðadómstólar hafa sannanlega gagnast í milliríkjadeilum smáríkja með það að markmiði að auka skilning á stöðu smáríkja fyrir alþjóðadómstólum. Í ljós kom að smáríki hafa tekið takmarkaðan þátt í starfesmi alþjóðadómstóla. Aðgerðir til þess að auðvelda fátækustu ríkjum heims að taka þátt í alþjóðlegu réttarkerfi eru af einhverjum sökum illa nýttar. Hagsmunum smáríkja er hinsvegar vel þjónað af alþjóðadómstólum að því leyti að þeir auka trúverðugleika á skuldbindingum ríkja auk þess sem þeir gegna mikilvægu hlutverki við að þróa og styrkja alþjóðalög. Aukin þátttaka almenns samfélags í alþjóðlegamálum gæti einnig þjónað hagsmunum smáríkja, þar sem heildarhagsmunir mannkynsins njóta forgangs fram yfir sérhagsmuni einstakra ríkja. Ef gripið verður til réttra aðgerða til að styrkja alþjóðlegt réttarfar og tryggja illa stöddum þjóðum viðeigandi stuðning, geta alþjóðadómstólar fullnægt takmarki sínu sem grundvöllur réttlætis fyrir öll ríki.

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1. INTRODUCTION

The topic of this paper is to review theories and the key characteristics of international courts and tribunals that deal with inter-state dispute resolution and examine whether they are a favorable venue for small states engaged in international disputes. I have chosen to look in depth at the three post prominent international courts, the International Court of Justice (ICJ), the International Tribunal of the Law of the Sea (ITLOS) and the dispute settlement mechanism of the World Trade Organization (WTO). I intend to look at small state membership in these three judicial bodies and compare them, taking the interests of small states into especially consideration. I will review small state representation in the respective judicial bodies and study all cases involving small states that have gone before these tribunals hoping to gain an understanding into the relationship between small states and international courts.

Small states are becoming a more relevant demographic within the international arena. In the twentieth century the number of independent states in the world grew rapidly and a strong wave of separatism and support for the right to self-determination affected all continents. In the 66 years since the end of World War II the number of independent states has increased from 74 to 193[1] resulting in an increasing emergence of very small states.[2]

The size of a nation is of importance for many reasons. In agrarian societies, and later in the industrial societies of the Western world, size of territory was a critical element in securing resources, whether they were of an agrarian nature or, as later became the case, of an industrial one.[3] With a larger population, the per capita costs of public goods are lower, as more taxpayers are available to pay for them. Larger markets should in many cases also lead to increased productivity.[4] Historically though, the most important reasons for a larger nation were reasons of security. Larger countries can better protect themselves from outside aggressions with its greater military power. In a less peaceful world, large countries provide better 'protection' for their citizens.[5] Relations between states have always been largely affected by the relevant power status of the disputing states. Large states with considerable military strength obviously had a huge advantage as the opposing states would have to take

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[1] 'Growth in United Nations membership, 1945-present' (United Nations) <http://www.un.org/en/members/growth.shtml> accessed 15 April 2011

[2] Alberto Alesina and Enrico Spolaore, *The Size of Nations* (MIT Press 2003) 1

[3] Baldur Thorhallsson, *The Size of States in the European Union: Theoretical and Conceptual Perspectives* (2006) 28 European Integration 7, 9

[4] Alesina and Spolaore (n 2) 3

[5] Alesina and Spolaore (n 2) 95-106

into account the risk of armed conflict to obtain their objectives.[6] But even in the absence of declared wars, the military power of a country matters in the settlement of international disputes. Therefore in a world in which international transitions often result, directly or indirectly, in the use of force, large nations have obvious advantages. But when the need to use military force is reduced internationally, defense becomes less important and smaller countries have become safer.[7]

There is no universally accepted definition of a small state. The four variables traditionally used to define the size of states are population, territory, economic capacity and military capacity. Population is the most widely used criterion for small states. Other indicators such as territory size or GDP are sometimes used. But population is highly correlated with territory size as well as with GDP; therefore the use of population as an indicator of size helps highlight small states' limited resources.[8]

Before the 1990's small state literature often focused on states that are under the population range of 10–15 million, categorizing the world's states into large, medium and small states.[9] If the 15 million inhabitants cut-off is selected, 65 states of the world are larger than 'small', which constitutes close to 2/3 of the world's 193 countries.[10] If the 10 million people criterion is used 83 states would be medium or large, still leaving almost 3/5 in the 'small' category.[11]

Recently the Commonwealth Secretariat and the World Bank have proposed a criterion that classifies small states as those with a population of less than 1.5 million people.[12] If using the aforementioned criteria that gives us 47 of the world's countries, the 'smallest' being Nauru with 9.322 inhabitants and Swaziland being the 'largest' with a

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[6] John Collier and Vaughan Lowe, The Settlement of Disputes in International Law: Institutions and Procedures (Oxford 1999) 6

[7] Alesina and Spolaore (n 2) 95-106

[8] Thorhallsson (n 3) 8; Naren Prasad, 'Small but Smart: Small States in the Global System' in Andrew Cooper and Timothy Shaw (eds), *The Diplomacies of Small States: Between Vulnerability and Resilience* (Palgrave Macmillan 2009) 44; Michael Weatherhead 'Small countries: a survey of the literature' in Grynberg Roman (ed), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press 2006) 29-32

[9] Andrew Cooper and Timothy Shaw 'The Diplomacies of Small States at the Start of the Twenty-first Century: How Vulnerable? How Resilient?' in Andrew Cooper and Timothy Shaw (eds), *The Diplomacies of Small States: Between Vulnerability and Resilience* (Palgrave Macmillan 2009) 4

[10] United Nation Member States (*United Nations*, 3 July 2006) Press Release ORG/1469 <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> accessed 15 April 2011

[11] 'The World Factbook' (Central Intelligence Agency) <https://www.cia.gov/library/publications/the-world-factbook/> accessed 15 April 2011

[12] Prasad (n 8) 44; 'Defining a Small Economy' (*World Bank*, 16 October 2007) <http://go.worldbank.org/QLCDU7B8T0> accessed April 15 2011

population of 1.370.424.[13] I have included only independent states that have been accepted as members of the UN thus excluding the Vatican City which has chosen to limit its participation in the international organs.[14]

In Chart 1[15] on the next page there's a list of the states included in our study, accompanied by key indicators. Of the 47 states, eight African, 12 are in the Americas, seven in Asia, nine in Europe and 11 in Oceania. Nine of the 47 small states are regarded as *developed*, while 38 are classified as *developing* of which 11 are on the UN list for *Least Developed Countries.* Based on GDP per capita, Qatar, Liechtenstein and Luxembourg are actually the three richest countries in the world, while Sao Tome and Principe, Tuvalu and Comoros are among the very poorest. It should be noted that two of the states in our group, Estonia and Luxembourg, are members of the European Union[16] and have an independent membership of the WTO, but for the purpose of this study only cases where small states have been direct participants will be included.

Small states have been studied extensively by political scientists who have made efforts to define their foreign policy behavior. A key characteristic of a small state, according to a professor of International Relations, Robert L. Rothstein, is that it recognizes 'that it cannot obtain security primarily by use of its own capabilities, and that it must rely fundamentally on the aid of other states, institutions, processes, or developments to do so'.[17] Political Science professor Jeanne Hey has also attempted to define the common characteristics of small states and found that they tend to display limited involvement in world affairs, generally restricting their field of interest to the issues most relevant to their own existence. They are also known to place great emphasis on the moral ideals of international law and internationalist principles, actively participating in multinational agreements and institutions. Usually small states avoid military conflict, rather aspiring to cooperate and pursue diplomatic measures whenever possible.[18]

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[13] 'The World Factbook' (n 11)
[14] 'United Nation Member States' (n 10)
[15] 'United Nation Statistics Division' (*United Nations*) <http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed> accessed 15 April 2011; 'CIA Factbook' (n 11)
[16] 'Member States of the EU' (*European Union*) <http://europa.eu/abc/european_countries/index_en.htm> accessed 14 May 2011
[17] Robert L. Rothstein, *Alliances and Small Power* (Columbia University Press 1968) 29
[18] Jeanne A. K. Hey (ed), *Small States in world politics: explaining foreign policy behavior* (Palgrave Macmillan 2003) 5-6

State	Location	Classification (UN)	Size (sq km)	Population	GDP per capita
Andorra	Europe	Developed	468	84825	46700
Antigua and Barbuda	Americas	SIDS	443	87884	16500
Bahamas	Americas	SIDS	13880	313312	28600
Bahrain	Asia	Developing	760	1214705	40400
Barbados	Americas	SIDS	430	286705	21700
Belize	Americas	SIDS	22966	321115	8400
Bhutan	Asia	LDC/LLDC	38394	708427	5000
Brunei	Asia	Developing	5765	401890	50300
Cape Verde	Africa	SIDS	4033	516100	3700
Comoros	Africa	LDC/SIDS	2235	794683	1000
Cyprus	Asia	Developing	9251	1120489	21000
Djibouti	Africa	LDC	23200	757074	2800
Dominica	Americas	SIDS	751	72969	10500
Equatorial Guinea	Africa	LDC	28051	668225	37900
Estonia	Europe	Developed	45228	1282963	19000
Fiji	Oceania	SIDS	18274	883125	4300
Grenada	Americas	SIDS	344	108419	10500
Guyana	Americas	SIDS	214969	744768	6800
Iceland	Europe	Developed	103000	311058	36700
Kiribati	Oceania	LDC/SIDS	811	100743	6200
Liechtenstein	Europe	Developed	160	35236	141100
Luxembourg	Europe	Developed	2586	503302	81800
Maldives	Asia	SIDS	298	394999	4600
Malta	Europe	Developed	316	408333	25100
Marshall Islands	Oceania	SIDS	181	67182	2500
Mauritius	Africa	SIDS	2040	1303717	13500
Micronesia, Federated States of	Oceania	SIDS	702	106836	2200
Monaco	Europe	Developed	2	30539	30000
Montenegro	Europe	In transition	13812	661807	9900
Nauru	Oceania	SIDS	21	9322	5000
Palau	Oceania	SIDS	459	20956	8100
Qatar	Asia	Developing	11586	848016	145300
Saint Kitts and Nevis	Americas	SIDS	261	50314	14400
Saint Lucia	Americas	SIDS	616	161557	11100
Saint Vincent and the Grenadines	Americas	SIDS	389	103869	10600
Samoa	Oceania	LDC/SIDS	2831	193161	5200
San Marino	Europe	Developed	61	31817	36200
Sao Tome & Principe	Africa	LDC/SIDS	964	179506	1800
Seychelles	Africa	SIDS	455	89188	21600
Solomon Islands	Oceania	LDC/SIDS	28896	571890	2800
Suriname	Americas	SIDS	163820	491989	9900
Swaziland	Africa	LLDC	17364	1370424	4500
Timor-Leste	Asia	LDC/SIDS	14874	1177834	2600
Tonga	Oceania	SIDS	747	105916	6300
Trinidad and Tobago	Americas	SIDS	5128	1227505	22100
Tuvalu	Oceania	LDC/SIDS	26	10544	1600
Vanuatu	Oceania	LDC/SIDS	12189	224564	5500

Chart 1: ***Small States***

Historically, small states have met some resistance to being accepted as equal participants in world affairs. In 1920 Liechtenstein's application for admission to the League of Nations was rejected and the microstate was offered only a limited membership, without equal voting rights.[19] Liechtenstein was unwilling to accept this lesser status and withdrew its application and consequently San Marino and Monaco decided against applying. In 1949 Liechtenstein applied to the Secretary General to become a party to the Statute of the ICJ. The matter was referred to the Security Council which on the advice of the Committee of Experts decided to support Liechtenstein's application against the will of some delegates who questioned the independence of Liechtenstein as a state. Other states however maintained that Liechtenstein was a free state as it fulfilled the qualification set out in Article 93.2 of the UN Charter and supported the extension of the jurisdiction of the ICJ noting that it was 'all the more useful for Liechtenstein since it was a small state and the protection of law was most necessary in such a case'. [20] Thus, after an affirmative vote in the General Assembly Liechtenstein became a member to the state of the International Court of Justice.[21]

The issue re-emerged in the United Nations (UN) decades later when support for the right to self-determination caused an influx of new independent states into the international arena. Some feared the numerous new states would hijack the UN by forming alliances within the General Assembly and voiced the opinion they should only be granted restricted membership. Fortunately the tension faded, due to a decreased rate in the creation of new micro-states and no attempts of mutiny.[22] With the recent recognition of Nauru and Tuvalu in 1999 and 2000, both with approximately 10.000 inhabitants, small states now seem too be accepted into the international community regardless of their size as long as they fulfill the criteria for statehood.

In the last few decades the international community has focused on co-operation between states like never before, creating numerous international organizations and international judicial bodies. These efforts have contributed to the retreat of power-based politics.[23] In a world where international relations have largely been dominated by those in

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[19] League of Nations, Records of the First Assembly, Plenary Meetings (1920) 667; See also Maurice H. Mendelson 'Diminutive States in the United Nations' (1972) 21 The International and Comparative Law Quarterly 609, 618-619

[20] UNSC 'Report of the Committee of Experts' UN Doc. S/1342 (1949) 2-3; See also Mendelson (n 19) 618-619

[21] Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996) 170-174; Jorri C. Duursma, 'Micro-States: The Principality of Liechtenstein' in Christine Ingebritsen (ed.) Small states in international relations (University of Washington Press 2006) 106-107

[22] Duursma, *Fragmentations and the International Relations of Micro States* (n 21) 133-142

[23] Collier and Lowe (n 6) 6

possession of the greatest military and economical power, international organizations and international judicial bodies have been seen as advantageous platforms for small states as they level the playing field.[24]

The past two decades have seen an explosion of new international courts and tribunals. Moreover, said organizations are being utilized much more intensively and frequently. The majority of international disputes are solved through diplomatic means or negotiation and recourse to formal dispute settlement mechanisms such as the UN or international courts is usually the exception.[25] States often prefer to retain control over disputes, employing diplomatic tools and negotiations, rather than being obligated to defer the matter to a third party. However, if states are unable to resolve disputes through ordinary means of diplomacy, international courts can be very helpful.[26]

Some claim that international adjudication is predominantly a tool for small states and powerful countries will only respect their authority if it's not against their interests.[27] Former Permanent Representative of Cyprus to the United Nations and Ambassador to the United States, Andrew Jacovides, has given the relationship between small states and international courts and tribunals some attention. In his opinion the increased options for peaceful dispute settlement are 'a positive development for the rule of law in international relations and a development which should be seen as positively and beneficially affecting small states'.[28] He also maintains that 'the proliferation of international tribunals should be and is to the benefit of small states, and that in solving a dispute through third-party settlement a small state is at much less of a disadvantage in relation to a large and powerful state in a court of law or an arbitral tribunal than in any other manner of dispute resolution.[29]

During the course of my research I was surprised to find that even though there seems to be a strong general notion that small states benefit strongly from international law and international dispute settlement mechanism, it seems as if very little research has been done on the topic. Originally I had intended to research small state dispute settlement more generally but did not find sufficient material as basis for my research. I therefore turned my

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[24] Karen J Alter 'Agents or Trustees? International Courts in their Political Context' (Trans State Working Paper, University of Bremen, 2004) 16
[25] Collier and Lowe (n 6) 6
[26] John B. Bellinger, 'International Courts and Tribunals and the Rule of Law' in Cesare Romano (ed) *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge 2009) 1
[27] Joseph S. Warioba 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts' (2001) 5 Max Planck YBUN 41, 45
[28] Andrew A. Jacovides, 'International Tribunals: Do They Really Work for Small States' (2001-2002) 34 New York University Journal of International Law and Policy 253, 258
[29] Jacovides, 'International Tribunals: Do They Really Work for Small States' (n 28) 261

attention to international courts and considered doing a statistical research on small state cases to see if any pattern could be established. I quickly realized that there were simply too few cases for any sort of quantitative analysis. I found this fact interesting and therefore decided to look into international courts more generally with regard to the reasons why small states have been party to such a limited number of cases before international courts.

I found that political scientists have taken a keen interest in small states but their focus has mainly been on the more general topic of foreign policy.[30] On the other hand, the relationship between developing states and international courts has drawn more attention from legal scholars[31]. I shall attempt to utilize the aspects of those surveys that are relevant generally to small states but also include information on special provisions provided for developing states as the majority of small states fall into that category as well. For my research I have gathered information from the statutes and agreements of the three international courts and the relevant case material. I have also relied extensively on general academic research on international courts and specific international cases. To explain in some instances the circumstances which led to international disputes I have also gathered historical information and reviewed reliable reports from news agencies which I hope will provide further context.

In the next chapter I will review theories on international courts and tribunals and their contributions to the field of international law. In chapter three I will define the key characteristics of international courts in general. The subsequent three chapters will be dedicated to reviewing individually the relevant attributes of each of the chosen courts, paying special attention to small state cases. In chapter seven I will give a general comparison of the three courts, in an effort to explain which aspects of their configuration are favorable to small states. In conclusion I intend to discuss my findings and try to shed some light on to what extent small states have benefitted from referring international disputes to judicial settlement.

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[30] See generally Rothstein (n 17); Duursma (n 21); Hey (n 18); Christine Ingebritsen (ed), *Small States in International Relations* (University of Washington Press 2006); Andrew Cooper and Timothy Shaw (eds), *The Diplomacies of Small States: Between Vulnerability and Resilience* (Palgrave Macmillan 2009)

[31] Cesare Romano, 'International Justice and Developing Countries - A Quantitative Analysis - Part 1' (2002) 1 Law and Practice of International Courts and Tribunals 367; Cesare Romano, 'International Justice and Developing Countries - A Qualititative Analysis - Part 2' (2002) 1 Law and Practice of International Courts and Tribunals 539. See also Warioba (n 27); Roman Grynberg (ed), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press 2006); Kristin Bohl, 'Problems of developing country access to WTO Dispute Settlement' (2009) 9 Chicago-Kent Journal of International & Comparative Law 130; Mustafa Moinuddin and Vilakone Sengsavang 'WTO Dispute Settlement and the Problems of Compliance: Does Cross-retaliation under TRIPS Provide a Remedy?' (2010) 15 Yokohama Journal of Social Sciences 79

2. ROLES OF INTERNATIONAL COURTS

Before looking at different aspects of international courts I would like to discuss the reasons why states create international courts to begin with. Law Professors Eric Posner and John Yoo have been engaged in a 'battle of opinions' with Professors Laurence Helfer and Anne-Marie Slaughter, who published opposing arguments on the topic.[32] Academics such as Cesare Romano, Andrew Guzman, Malcolm Shaw, Benedict Kingsbury and Tom Ginsburg and have also contributed greatly to the topic. In my classification I have especially relied on a dissection of the roles of courts according to Kingsbury[33] albeit with some modifications. In the last section of this chapter I intend to highlight which factors are most relevant to small state interest.

2.1. International Courts as Dispute Settlers

It is always optional for states to refer the settlement of disputes to a legal framework. Many other facts than the winning prospects contribute to whether states regard it advantageous to refer it to judicial settlement or choose other means where they regain more control over the procedure.[34]

It can easily be comprehended why states might submit an individual current dispute to neutral third party settlement. What some find more difficult to grasp is why states create independent international courts and give in advance acceptances of jurisdiction regarding possible future cases that could be brought against them.[35]

Independent international courts are permanent judicial organs whose composition, jurisdiction scope and rules of procedure are predetermined by their statutes. Because international courts are pre-constituted institutions they are inevitably better suited than ad hoc bodies to deal with matters of great urgency such as requests for provisional measures.[36]

Since states have to consent to the jurisdiction of international courts the question continuously asked is why states choose to refer any dispute to settlement by third-party adjudication. Historically, courts have played a useful role in providing a neutral,

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[32] Eric Posner and John Woo, 'Judicial Independence in International Tribunals' (2005) 93 California Law Review 1; Laurence R. Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California Law Review 901, 931; Eric Posner & John Woo, 'Reply to Helfer and Slaughter' (2005) 93 California Law Review 957

[33] Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order' in J Crawford J and Koskenniemi M (eds) *Cambridge Companion to International Law* (Cambridge)

[34] Collier and Lowe (n 6) 3

[35] Kingsbury (n 33) 11

[36] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' UN Doc OLA/COD/2394 (1992) par 198-199

depoliticized forum to resolve disputes that states have failed to settle through regular diplomatic means. Sometimes disputes involve contested facts or are of a complicated legal nature and a judicial process is the best venue for evaluating and resolving such issues. Also, cases can be too complicated or time-consuming for diplomatic resolve to be beneficial.[37]

2.2. International Courts as Advisory Bodies

International courts are in some instances empowered to give advisory opinions on legal questions concerning an ongoing dispute between states. Such an opinion is, like the name suggests, only advisory and is not binding for the requesting states. However, the procedure in advisory cases has many similarities to real cases, as it evolves extensive written and oral proceedings as provided by the rules of the tribunal. As such, an advisory opinion has the character of judicial pronouncements which can have a substantial effect on the parties' standing.[38] Since such opinions are just advisory they have no binding effect, unlike the judgments of the court. It is up to the requesting body whether or not it gives effect to the opinion, unless it has been provided beforehand by some legal instrument that the court's advisory opinion shall be binding regarding that specific issue. However, it is admitted that advisory opinions have considerable influence and even the ICJ website openly admits to it:[39]

> [I]t remains that the authority and prestige of the court give weight to its advisory opinion and that where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international law.

A possible future small state member to the UN, Kosovo, was the recent subject of an advisory opinion of the ICJ.[40] The courts finding that Kosovo's declaration of independence from Serbia in 2008 was not a violation of international law will undoubtedly assist the region in its efforts toward acceptance and recognition.[41]

2.3. International Courts as Credibility Enhancers

Independent courts do much more than just handing out judgments and opinions. They act as trustees that enhance the credibility of the promises that governments make to one another. By interpreting those promises and identifying behavior that violates them, independent courts

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[37] Collier and Lowe (n 6) 9
[38] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 212
[39] 'How the Court works – Advisory proceedings' (*International Court of Justice*) <http://www.icj-cij.org/court/index.php?p1=1&p2=6#advisory> accessed 15 April 2011
[40] Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion) 2008 <http://www.icj-cij.org/docket/files/141/15987.pdf> accessed 15 May 2011
[41] See 'Kosovo independence move not illegal, says UN court' (*BBC News*, 22 July 2010) <http://www.bbc.co.uk/news/world-europe-10730573> accessed 15 May 2011

increase the likelihood that states will comply with their obligations in situations where compliance generates short-term political losses but long-term political gains. Delegation enhances the credibility of international commitments.[42]

When states commit to changes in their internal policies due to participation in an international treaty the option to refer disputed matters to an effective court encourages trust in that the coherent obligations will be complied with. This applies in particular to weaker states who may question the credibility of the commitment being made by powerful states as Kingsbury confirms adding that[43]:

> The remedies available to them if they win a case may provide some bargaining leverage, but they rely much more on the prospect that the court process and eventual decision willhelp mobilize other major states to put pressure on the powerful state in order to maintain the rule-governed system and respect for its institutions.

One recent study suggests that a tribunal's ability to entrust compliance with the underlying obligations is the best measure of effectiveness.[44] This makes sense as a tribunal's main function is to deal with violations of international commitments and if a tribunal is well equipped to deal with such instances it will discourage states from risking non-compliance. Even though a tribunal which issues binding rulings carries more of a threat, a tribunal may very well be able to influence state behavior despite the lack of enforcement.[45]

Dispute resolution provisions serve the role of increasing the credibility of states dedication to their international commitments by providing for a mechanism where states can bring their allegations of violations by other states and they are investigated and the fault of the infringing state is made public. The tribunal only serves to announce what it considers to be the facts of the case and the relevant legal rules. As such the main role of a tribunal is to be a provider of information on the dispute in a legal context. The tribunal will not observe the aftermath nor does it have any tools to enforce compliance with its decision. [46]

However, if a state does not comply with a ruling of a tribunal it may indicate that the state is prepared to ignore its contractual obligations under international law, hurting the state's reputation. Such behavior may cause other states to reciprocate by refusing to uphold their own obligations towards the violating state or even retaliate in some manner. The extent

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[42] Helfer and Slaughter (n 32) 932-933
[43] Kingsbury (n 33) 11-12
[44] Andrew T. Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157 University of Pennsylvania Law Review 171, 188
[45] Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 189
[46] Andrew T. Guzman, 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms' (2002) 31 The Journal of Legal Studies 303, 304; Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 180

of harm will depend on the regime and level of commitment, the more binding the greater the risk for reputational loss and retribution in case of non-compliance.[47]

In some cases countries don't violate treaties on purpose but differ on the correct interpretation. It is one thing to be caught up in a dispute regarding the interpretation of a treaty but entirely different to disregard a ruling by an independent tribunal confirming violation of an international commitment. States can predict that behavior which is inconsistent with a treaty will have more serious consequences when a tribunal is available to monitor state conduct and interpret the relevant obligations at any time. Consequently, when states include the possibility to refer a dispute to an independent tribunal, the commitments they make are viewed as more credible than if it were not subject to judicial scrutiny. If there is a higher probability that an international tribunal will correctly identify violations and find a state at fault it increases the reputational damages done be noncompliance. It is costly for states to be branded as violators of international law and may limit their possibilities of agreements with other nation in the future.[48]

The cost of violations should be greatly increased by the probability of reputational harm, which in turn should increase compliance and enhance the value of the agreement for all states. If a tribunal were permitted to impose material sanctions, this effect would be even greater. Such measures could be sanctioned by the court itself or where retribution for non-compliance is built into the system. States can also impose unilateral punishment for violations through diplomatic means, e.g. by reducing aid or other benefits enjoyed by the violating state. Stakes in disputes routinely need to evaluate the cost of noncooperation versus the benefits from compliance. International courts as such perform an informational function and have a considerable effect on a state's reputation for honoring its promises to other nations.[49]

Credibility of international commitments can affect states beyond the realm of international relations as they can motivate private actors, such as foreign investors which can be of special importance to states with small deprived economies.[50]

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[47] Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 191-192
[48] Helfer and Slaughter (n 32) 934-935
[49] Helfer and Slaughter (n 32) 934-935; Tom Ginsburg T and Rachel H McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution' (2004) 45 William and Mary Law Review 1229, 1239-1240
[50] Kingsbury (n 33) 12

2.4. International Courts as Governance Bodies

Courts are sometimes created as a governance tool for a particular regime, to contribute to the sustainability of the established scheme. Thus dispute settlement bodies such as those of the WTO are established and granted compulsory jurisdiction to make sure that the treaty commitments will in fact provide the anticipated benefits. The advantage of such binding judiciary bodies is that they can serve to fill in terms on which agreement was not reached in the inter-state bargaining, and have the possibility of rising above ongoing political squabble of the interstate governance institutions to deal with new issues once these are operating. The WTO Appellate Body has for example taken the initiative to enunciate criteria for addressing certain environmentally-based restrictions on trade to circumvent the diplomatic impasse which had for a number of years prevented the inter-state trade and environment committee of the WTO from concluding an agreement.

Another manner of governance for international courts is in facilitating that the viewpoints of private or public interest groups be taken into consideration. Kingsbury points out that 'Acceptance of amicus briefs and the de facto espousal by state litigators or third states of private interests in specific cases may obliquely perform this role'. This kind of function has been most prominent in the WTO, as well as some human right courts, where individuals, associations and corporations can initiate cases against states and has contributed to increasing the role of civil society in international adjudication.[51]

2.5. International Courts as Lawmakers

According to Tom Ginsburg international courts have to some extent taken on the role of lawmakers. He finds that:

> The international legal system falls somewhere between the common law and civil law systems in terms of its explicit acknowledgement of precedent. The international system treats judicial decisions as a supplemental source of international law, albeit one that is subject to limitations. Whatever the formal role of precedent is in the international system, a glance at the decisions of international tribunals' shows a tendency to reference and abide by earlier decisions.[52]

As well as laying down precedents which become sources of international law, international courts also declare existing norms of international law.

Treaty law is the most basic source of international law as it is produced by states that voluntarily undertake mutual commitments. Customary international law is usually created when states act in a certain way because they feel they are obligated to do so, even without

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[51] Kingsbury (n 33) 12

[52] Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 Virginia Journal of International Law 631, 638

any explicit undertaking. However, when it comes down to it courts are most often the ones who first identify such norms stating that, based on state practice they had "crystallized" into a rule of customary international law. International courts may maintain that they are merely stating the law that is already out there, but the fact of the matter is that courts regularly declare new norms of international law albeit based on the incremental accretion of state practice. Ginsburg therefore maintains that: 'It thus would be fair to characterize much customary international law as actually being declared by judicial bodies rather than arising from the explicit agreement of states'. Although he finds it difficult to assess the total proportion of international lawmaking that is carried out by judicial actors, he is assured that the amount is high. Another interesting development is the growing tendency among municipal judges to look to decisions of other courts and of international courts in determining the law which increases even further the global influence of international courts. States can in fact avoid being bound by a component of customary international law if they make sure to repeatedly object to it. However, if states stay silent in face of a judicial announcement of customary international law they will be considered bound by it.[53]

2.6. International Courts as Producers of Legal Knowledge

Although decisions of international courts are normally only binding for the parties involved directly in the proceedings and only for that particular dispute,[54] such decisions are not devoid of external influence. Those actively involved in international dispute settlement, both state diplomats and practitioners, tend to look beyond the current case to further state dispute situations where the subject matter will be re-addressed. A successful application to an international judiciary will facilitate other conflicts being resolved similarly. A court's clarification of international legal principles can contribute to bilateral or multilateral negotiations in other situations, further the development of legal norms within the field in question or the application of existing norms in other areas.[55]

Historically, international norms could mainly be gathered from the analysis of a great number of treaties or other forms of 'state practice' found in national yearbooks. The ever increasing amount of judicial material, including decisions, opinions, pleadings, commentaries and etc. which have been generated in legal proceedings has had a significant

[53] Ginsburg (n 52) 639-640
[54] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 59
[55] Malcolm N. Shaw, 'The International Court of Justice: A practical Perspective' 46 International and Comparative Law Quarterly 831, 833

effect on the field of international law. International courts can potentially build a legal order with its own core principles which influence international and national political behavior.[56]

2.7. International Courts as a Source of Justice

The role of international courts in relations to political demands for justice and substantive equality has been difficult to navigate. Some have had high hopes for courts to embrace this possible role as a beacon of justice in the international community which in some instances has caused disappointment, controversy and rejection, and on occasion has engendered great disillusion. International courts frequently receive claims for compensation, but are almost without exception decided on a corrective justice basis and even the exceptional symbolic monetary awards are generally rather trivial. According to Kingsbury there is considerable discrepancy between contemporary political theorizing about global justice and the actual practice of most international courts, although efforts are being made to make these ideals compatible.[57]

2.8. International Courts and Politics

Even though international judicial decisions are essentially a de-politicized process based on rules and facts politics are very present in all surroundings. International courts make international law more relevant for domestic parties. Helfer and Slaughter point out that 'by clarifying the meaning of an agreement, finding facts, and determining whether a particular course of conduct is justified tribunal rulings can mobilize compliance constituencies to press governments to adhere to their treaty obligations'.[58] It should therefore come as no surprise that political concerns are often highly relevant in regard to which disputes are brought before international courts. The private consideration of political leaders can have a significant effect on whether a state will allow itself to refer a dispute to a binding resolution before an international tribunal. In case of a negative outcome the constituents may place blame on the politician himself for having allowed the subject to go to third party adjudication instead of having negotiated a more favorable outcome.[59] Political issues can have a major influence on which disputes are pursued vigorously or are adjusted diplomatically or even completely

[56] Kingsbury (n 33) 12-13
[57] Kingsbury (n 33) 14-15
[58] Helfer and Slaughter (n 32) 935-936
[59] Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 52 International Organization 457, 458

disregarded if they threaten more important interests.[60] International disputes and the reference of such matters to an international court is usually attract a lot of attention and is covered extensively by the international media which is becoming more readily accessible on a global scale. Leaders of states and politicians involved in a dispute have to consider a whole spectrum of circumstance if a disputed matter is subject to resolution by an international tribunal.[61]

In other instances, state leaders can benefit greatly from international litigations. If states are subject to domestic political pressure against any compromise which can be sidestepped with third part adjudication as we discussed earlier. This applies when governments' diplomatic scope is constrained by domestic consideration, for example if it deals with issues that are important only to a certain area or a limited number of citizens but of very little national concern. A judicial ruling can help states come to terms with a defective situations without being perceived as surrendered. According to Collier and Lowe 'Internal political forces are more often inclined to accept losing if the decision has been imposed from elsewhere than if the state concerned had simply conceded from the start'. Referring such matters to neutral international courts can therefore be extremely helpful when avoiding constraining relationships with the other state without disrespecting the interests of the affected population.[62] Former US Legal Adviser to the Secretary of State John B. Bellinger agrees finding that 'This is especially the case where the result has been arrived at by an unquestionably independent and objective process based on clear norms and processes' finding that 'at the least, there will be some international benefit to be derived from proceeding to judicial settlement and accepting the consequences.[63]

2.9. International Courts and Small States

International courts and tribunals apparently serve many roles that states may regard as beneficial or detrimental, depending on their individual interests. Bellinger concurs finding that 'Courts and tribunals should be seen as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes'.[64] As was portrayed in chapter one small states, lacking economic, political and military power are better off solving their disputes by judicial means. However,

[60] Collier and Lowe (n 6) 8-9
[61] Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 174
[62] Collier and Lowe (n 6) 9
[63] Bellinger (n 26) 2
[64] Bellinger (n 26) 2

small states also benefit greatly from the other rules of international courts which collectively serve to strengthen international law and increase its role in state relations. International courts do more than rule on the occasional dispute but are evidently an integral part of the international legal system whose maintenance and consolidation serves to benefit the entire international community. This applies especially to countries with limited economic and political power which have more to gain from state relations being governed primarily by the rule of law. The increased interest and involvement of civil society in international affairs can have a considerable effect on how disputes are handled. Hence, states that are perceived small and weak could possibly benefit from domestic scrutiny of actions of state leaders as I will present later when discussing individual small state cases.

3. CHARACTERISTICS OF INTERNATIONAL COURTS

In this chapter I intend to look at rules and norms which govern the operations of international courts and tribunals with the objective of shedding some light on the environment in which they operate. The focus of this general discussion is on international courts that deal with dispute settlement consistent with the focus of this thesis. I intend to look at the different features of international courts and tribunals, discuss acclaim and criticism, and try to point out which aspects are especially relevant to small states. Next I will dissect the three chosen courts individually according to the same criteria with an emphasis on cases that small state courts have participated in before each court. Lastly I will offer a comparison of small state involvement in the three bodies and try to identify which aspects have been perceived as beneficial or detrimental to small state interests.

3.1. International Courts and Tribunals

3.1.1. Background

The duty of states to settle disputes in a peaceful manner has been an important topic in the international realm for the past decades. Atrocities at the beginning of the century lead the international community to set up various frameworks for preserving peace, the most prominent being the UN. This objective is embodied in the UN Charter[65] were in article 2 all nations are called upon to refrain from the threat or use of force and article 33 requires that parties to any dispute which is likely to threaten international peace and security shall seek a solution through peaceful means. This means states are obliged to employ methods of dispute settlement such as by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resorting to regional agencies or arrangements. The use of force has also been banned in several other instruments of international law.[66]

States involved in a dispute have many means of dispute settlement at their disposal. International litigation is only one possibility and is usually only turned to when other peaceful means have failed. [67] Judicial settlement is a method of dispute settlement that entails a "pre-constituted international court or tribunal composed of independent judges whose tasks

[65] United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)
[66] Romano, 'International Justice and Developing Countries - A Quantitative Analysis - Part 1' (n 31) 372-373
[67] Romano, 'International Justice and Developing Countries - A Quantitative Analysis - Part 1' (n 31) 372-373

are to settle claims on the basis of international law and render decisions which are binding upon the parties".[68]

For the past two decades the number of international judicial bodies and their utilization has increased far beyond what anyone expected.[69] Romano credits these developments to three associated factors:

> 'the end of bi-polarism and the advent of multi-lateralism', 'the abandonment of Marxist-Leninist interpretations of international relations' and 'the fact that capitalist, market-based economies and free-trade doctrines have remained the only plausible way to viable economic development'.[70]

Another contributing factor is the expansion of international law into topics that were previously limited to the domestic venue. The increase in international tribunals thus is held in hand with the increasing number of fields of international law. The same goes for the multiplication of international organizations as action of states to delegate authority to establish international legal standards is followed by the power to interpret and uphold those standards.[71]

3.1.2. Case Topics

International cases can expand over various topics and the ICJ is the only standing body competent in regard to matters of international law between any states of the world. A brief analysis of the ICJ indicates that cases referred to it regularly involve how to interpret or apply a certain treaty as well as disputes on specific topics such as boundary delimitations, diplomatic protection of nationals, legitimacy of the use of force and violation of customary international law.[72] Not only has the caseload of the ICJ been increasing, but new international agreements more frequently include dispute settlement provisions. International courts and tribunals are increasingly given a more limited scope, either being exclusive to a particular region or only handling disputes of a specialized nature. The international trade regime has been enforced through the establishment of the WTO and grown to include trade of services and intellectual property rights. With UNCLOS we saw the codification of the law

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[68] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 196
[69] Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harvard International Law Journal 271, 271; Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 New York University Journal of International Law and Policy 709, 728-729; Roger P. Alford 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (2000) 94 American Society of International Law: Proceedings of the Annual Meeting 160, 160; Thomas Buergenthal 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 Leiden journal of international law 278, 268
[70] Romano, 'The Proliferation of International Judicial Bodies' (n 69) 729
[71] Romano, 'The Proliferation of International Judicial Bodies' (n 69) 728-729
[72] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 200

of the sea, legislating norms of international law as well as covering new areas such as natural resources of the high seas or common heritage of mankind. Global emphasis on human rights law has contributed to a number of new judicial bodies and as well to the expenditure of criminal justice into the realm of international law which previously was exclusively subject to domestic jurisdiction. Another expanding area of interest is global environmental law which is expected a prominent are of focus in the coming century.[73]

3.1.3. Jurisdiction

According to Romano international courts rely either on a compulsory or a consensual 'paradigm'. If there is a compulsory paradigm, then states are required to accept compulsory jurisdiction within a certain legal regime and any member state can unilaterally start proceedings against another state. With the classic consensual paradigm, sovereignty is highly treasured and states must agree explicitly to the court's jurisdiction before proceedings can initiate.[74]

Traditionally, due to sovereignty concerns, mandatory dispute resolution provisions have been an exception rather than the rule in international treaties. States however have become more willing to relinquish control if they feel they gain sufficient benefit in return. It is noticeable that a mandatory dispute settlement clause is becoming an integral part of the acquired rights and duties of any membership to an international community. Although in its early stages, one can distinguish a shift from optional dispute settlement procedure supplement to instruments establishing substantive obligations towards mandatory procedures as a fundamental element of international obligations. Such clauses increase the credibility of a state's commitment and increase compliance.[75]

Romano declares that:[76]

> Through the end of the twentieth century and the first few years of the twenty-first century, there has been a fundamental shift in the concept and practice of international adjudication from a traditional consensual paradigm, in which express and specific consent is a prerequisite to jurisdiction and adjudication largely takes place with the assent and cooperation of both parties, to a compulsory paradigm, in which consent is largely formulaic either because it is implicit in the ratification of treaties creating certain international organizations endowed with adjudicative bodies or because it is jurisprudentially bypassed and litigation is often undertaken unilaterally.

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[73] Romano, 'The Proliferation of International Judicial Bodies' (n 69) 728-729

[74] Cesare Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2006-2007) 39 New York University Journal of International Law and Policy 791, 796

[75] Guzman, 'The Cost of Credibility' (n 46) 304; Collier and Lowe (n 6) 9-10

[76] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 794-795

This does not eliminate the principle of consent although it reduces its practical significance. Consent is still present, even when jurisdiction to a court becomes a required part of a larger scheme of international obligations, even though it's now manifested in a states acceptance of the entire regime. States always have a choice whether to participate in international organs which call for binding third-party adjudication and states also retain the right to remove themselves from such commitments at anytime, thus retaining their sovereign rights. However, Romano holds that in practice 'this approach comes with significant opportunity costs that make it at best a last-resort measure'.[77]

In a world where international relations have largely been dominated by those in possession of power, whether military or economic, small states are perceived to benefit greatly from this shift towards equalized power such as international organizations and international courts offer, as it levels the playing field.[78]

3.1.4. Compliance & Enforcement

The environment in which most international courts operate is severely different from that of their domestic counterparts. Even though the appearance of the scheme is similar, international courts are not backed by any system of coercive enforcement, the respective outcome being entirely relevant on the states will to comply. Thus international law is essentially a system based on compliance rather than enforcement. States can in fact always choose to ignore the judgment if they feel that the consequences do not outweigh the benefits of continuing the breech.[79]

The majority of international judgments are in fact observed without any structured means of enforcement. According to Romano non-compliance can have serious consequences, both political and reputational, and may also prove expensive in terms of opportunity. Choosing to abstain from the domain of international law or disregard international judgments is only a feasible strategy for a few states, such as those that are already at 'the fringe of diplomatic relations' or states that have 'the political, economic, or military weight to bear the costs'. As international cooperation grows it becomes more

[77] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 800
[78] Alter (n 24) 16
[79] Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 178-182

unlikely that states will see their interests better served by staying outside of international agreements just to steer clear of judicial reflection about their actions.[80]

3.1.5. Cost

International litigation can be very expensive and the recent trend of international criminal bodies has been especially costly for the past few years. In 2004, about $420 million was spent on international courts and tribunals and criminal bodies counted for three fourths of the total sum.[81]

With arbitration the parties bear all the cost of the proceedings and the administrative cost of the panel. The expenses of permanent courts or tribunals are however usually borne collectively by their member states on a regular basis in accordance with the basic statutes and procedural rules of the institution in question.

Most international courts are financed by state contributions through international organizations on the basis of scales of assessment in an attempt to reflect redistributive fairness in the international community. Due to this, richer states pay the greater part of the cost and poor countries only receive a minuscule bill making courts and tribunals a highly subsidized good to them.[82]

Some claim that as long as international courts are financed by state contributions they cannot be perceived as fully independent. An alternative possibility might be that countries bear the cost of international adjudication according to use. This approach is clearly not convenient for all types of bodies. A 'pay-per-use' scheme would for example not be advisable for criminal judicial bodies and they do not seem feasible either for bodies such as the ICJ, ITLOS and the WTO dispute settlement mechanism, as it would discourage use. It could be especially detrimental for poor states which would be forced to surrender if they were challenged before a court or would not be able to pursue their legitimate rights due to relatively insurmountable cost.[83]

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[80] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 791, 870

[81] Cesare Romano 'The Price of International Justice' (2005) 4 Law and Practice of International Courts and Tribunal 281, 281

[82] Romano, 'The Price of International Justice' (n 81) 308

[83] Romano, 'The Price of International Justice' (n 81) 311

3.1.6. Judges

Just as international judicial bodies proliferate, so does the international judiciary. According to Ginsburg[84] 'international judges exercise lawmaking power' and 'judicial lawmaking inheres in the incompleteness of any system of rules'. In his opinion:

> [T]his is not only inherent in any system of dispute resolution, but frequently an explicit strategy of states that leave treaties vague. The judge is supposed to resolve disputes in accordance with preexisting legal rules, but quite often pre-existing legal rules do not provide a definitive answer.

Law Professors Ruth Mackenzie and Philippe Sands agree and find that when judges are faced with a disputed issue where there is no definite rule already in use, they are required to create a new rule. But retroactive law creates such aversion, judges and parties are unwilling to admit that judicial lawmaking bridges the gaps in the pre-existing rules. They go on to contemplate whether the judges of international courts should be seen as 'impartial dispensers of justice, handing down rule-based decisions' or if they are 'merely another manifestation of state power and influence in international relations'.[85]

Thus, the composition of benches of international tribunals is clearly important. Rulings which widely interpret the scope of a treaty can essentially alter the obligations of states or in politically charged cases award benefits which could never have been sustained through negotiations or other diplomatic means. Such pronouncements can have effect on the political context of a situation as a state's policy is condemned and is states do not comply in protest it can cause even further harm to reputational[86]

In the various multilateral treaties establishing international courts, provisions are made for the composition of the court in question and the selection of judges. The size of the actual body varies in accordance with the terms of each statute.[87] Usually the statutes of international courts include provisions which state the necessary qualifications for appointment to the bench. States nominate candidates for international judicial positions. As Mackenzie and Sands[88] point out:

> A state nominates or appoints individuals to international judicial office knowing that the judge may be involved in deciding a contentious case that implicates its national interests. It would be unreasonable to expect that a nominating or appointing state would not put forward as a candidate a person who shares (in general terms) the value systems of the nominating state.

A study into the voting patterns of ICJ judges by Law Professors Posner and de Figueiredo suggests that national bias does in fact have a significant effect on decision

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[84] Ginsburg (n 52) 673
[85] Mackenzie and Sands (n 69) 271-275
[86] Alter (n 24) 13
[87] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 215-217
[88] Mackenzie and Sands (n 69) 278

making. In about 90 percent of cases judges vote in favor of their home states. In approximately 70 to 80 percent of cases they vote in favor of states that are comparable to their home states in terms of wealth and political regime when their home states are not involved. Although the evidence was weaker there was also some suggestion that judges vote in 'favor of the strategic partners of their home states'.[89] Such inclinations though are maybe to be expected and are not always relevant. If both disputing parties are very similar, or very different from the judge's home state the bias shouldn't have any effect. Judges may also be aware of their bias and therefore make an effort to scrutinize their decisions in such cases in order to preserve their objectivity.[90]

Alter points out that with the increasing power of international courts there is always the fear that powerful countries can use the politicized appointment process as means to 'stack a court in a certain direction' using the re-appointment process to maintain leverage. She draws attention to criticism that 'appointments to international courts are hotly contested and highly political'.[91] Some even go as far as to suggest obvious presence of corruption within the international judiciary.[92] Former ITLOS judge, Joseph Sinde Warioba, has shared the view that:

> '[T]here is an underlying distrust of the composition and the method of election. There is a feeling that there is enormous political influence in the election of the judges. For the major powers it is easier to have a judge of their own elected that is the case for smaller powers, and representation in the court is not proportional.'[93]

In practice the nomination and appointment process appear to be ambiguous and often quite political. Romano conveys that there is much room for improvement in the way international judges are selected and the aspiration should be to make sure that the mechanisms for selecting candidates and electing judges ensures the independence and legitimacy of the judicial body. While some might perceive that rules requiring equitable geographical representation or a one judge per state scheme is favorable to small states claim that such schemes undermine the credibility of the independence of international judges. He states that 'Judges must appear to act in the interest of the overall system rather than that of this or that state, or worse, on personal whim. Judges must be independent in fact and in perception, for perception of independence matters almost as much as actual independence in the

[89] Eric A. Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 The Journal of Legal Studies 599, 624
[90] Posner and de Figueiredo (n 89) 625
[91] Alter (n 24) 14
[92] David R. Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (2003) 97 American Society of International Law Proceedings 277, 277
[93] Warioba (n 27) 46

administration of justice'.[94] All things considered, the integrity of the judicial system as a whole should be the most significant factor to all participating states, especially those most dependent on a global system governed by the rule of law for their survival.

3.2. International Court of Justice

3.2.1. Background

The International Court of Justice (ICJ) was established in 1946 as the principal judicial organ of the UN and successor of the Permanent Court of International Justice (PCIJ). Under article 36 of its statute[95], the ICJ has general jurisdiction in 'all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force' which to this day retains its uniqueness of being the only international court to address all aspects of international law. It is also the only international court with universal membership and as has already been established in chapter two its rulings have impact far beyond a given dispute. Although the rulings of international courts generally don't establish binding precedents. According to Romano ICJ judgments are regarded 'as particularly momentous interpretations and clarifications of international law' and the ICJ 'has undeniably contributed to the calming of severely compromised situations and avoided the degeneration of specific problems into larger political issues'. Even though its judges have either been considered 'too cautious or too proactive' it is difficult to disregard the contribution the ICJ has made to forming and strengthening international law.[96]

3.2.2. Case Topics

Of the 124 cases that have gone before the ICJ in its 65 years of practice small states have been parties to nine cases and the subject matters vary greatly.[97] There have been two territory and delimitation cases, the first being the *Continental Shelf*[98] case which settled a hostile dispute over maritime boundaries between Malta and Libya.[99] The second small state

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[94] Romano 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 869
[95] ICJ Statute (n 54)
[96] Romano, 'The Price of International Justice' (n 81) 285-286
[97] 'List of Cases referred to the Court since 1946 by date of introduction' (*International Court of Justice*) <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> accessed 15 May 2011
[98] *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] ICJ Rep 35
[99] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (2004 Oxford University Press) 178-181

Maritime Delimitation & Territorial Questions between Qatar and Bahrain was no less heated then the first.[100]

Two ICJ small state cases have been concerned with the treatment of nationals abroad, the *Nottebohm*[101] and *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations*[102]. The latter case was brought by Dominica because of Switzerland's refusal to recognize a diplomatic envoy of Dominica to the UN, a naturalized Dominican of Russian heritage, asserting that he should not have the right to be a diplomat as he was a businessman.[103]

Four cases have dealt with national resources or property and alleged violations of customary international law in respect to those assets, the two Icelandic *Fisheries Jurisdiction*[104] cases, *Certain Phosphate Land*,[105] and the *Certain Property*[106] case.

In the *Mutual Assistance in Criminal Matters*[107], the court found that France had violated international obligations by refusing a request by Djibouti, its former colony, to execute an international letter rogatory in a criminal investigation. The dispute originated in the murder of a French judge under suspicious circumstances in Djibouti. The initial investigation in Djibouti deemed Borrel's death a suicide. At the insistence of Borrel's widow France initiated its own investigation finding that Borrel had possibly been assassinated by high-ranking officials in Djibouti. The Djibouti administration, in return, accused the French of trying to cover up the real reason for Borrel's death linking him to pedophilic crimes against Djibouti street children. The following proceedings included two of Djibouti's president's closest associates being sentenced by a French court for obstruction of justice and international warrants being issued for their arrest. The matter put a severe strain on the

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[100] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40, par 36-39
[101] *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4
[102] *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations (Dominica v Swiss)* (Removal from List: Order) 2006 <http://www.icj-cij.org/docket/files/134/11039.pdf> accessed 15 May 2011
[103] Max Hilaire 'Case Concerning Violation of the Vienna Convention on Diplomatic Relations Dominica v. Switzerland' (*The Dominican*, May 16 2006) <http://thedominican.net/arts/casetwo.htm> accessed 14 May 2011; Thomson Fontaine 'How a Russian Became Dominica's Ambassador' (*The Dominican*, May 16 2006) <http://www.thedominican.net/arts/caseone.htm> accessed 14 May 2011
[104] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* [1972] ICJ Rep 30; *Fisheries Jurisdiction (The United Kingdom v Iceland)* [1972] ICJ Rep 12
[105] *Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240
[106] *Certain Property (Liechtenstein v Federal Republic of Germany)* [2006] ICJ Rep 6
[107] *Certain Question of Mutual Assistance in Criminal Matters (Djibouti v France) [*2008] ICJ Rep 177

relationship between the two states but Djibouti is home to France's largest military base overseas.[108]

Outside of the aforementioned nine cases, there has been one instance where a small state, Equatorial Guinea, requested and was granted the right to intervene in a delimitation case, namely the *Land and Maritime Boundary between Cameroon and Nigeria*[109]. Equatorial Guinea did not wish to become a party to the case but the final judgment took consideration of their concerns and the equidistance line between the states was only drawn where it indisputably did no impose on the sovereign rights of Equatorial Guinea.

It seems evident that cases which small states have participated in before the ICJ have routinely dealt with issues of major concern such as state boundaries, the right to natural resources, protection of nationals or matters relevant to national pride.

3.2.3. Jurisdiction

The ICJ is the court that has remained closest to the 'consensual paradigm'[110] which is comprehensible in view of its universal jurisdiction which encompasses 'any disputes between sovereign states on any matter of international law'.[111] It is available to virtually every country in the world for the resolution of disputes, but no state can be forced to appear before the court without having previously consented to the court's jurisdiction. That consent can take one of three forms, a state can give a declaration recognizing universal jurisdiction of the court[112], jurisdiction can be provided through a treaty[113] or parties may refer a case to it through special agreement[114].

Under the 'optional clause' system states are given the opportunity to submit a declaration under Article 36.2 of the ICJ statute where they accept the general jurisdiction of the court. They are allowed to provide for certain terms and conditions, excluding particular subject matters or require reciprocity e.g. that the acceptance of jurisdiction applies only to

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[108] 'Djibouti officials sentenced over French judge's death' (*France 24* 28 March 2008) <http://www.france24.com/en/20080327-djibouti-officials-sentenced-over-french-judges-death-france-djibouti> accessed May 14 2011; 'Djibouti denounces cover-up in judge's death' (*France 24* 31 March 2008) <http://www.france24.com/en/20080330-djibouti-denounces-cover-judges-death-france-djibouti#> accessed May 14 2011

[109] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303

[110] See chapter 3.1.3

[111] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 817

[112] ICJ Statute (n 54) art 36.2

[113] ICJ Statute (n 54) art 37

[114] ICJ Statute (n 54) art 36.1

those who have also made the same commitment. States can also make limitations on the subject matters to which the declaration reaches but an opposing state is also allowed to apply the same reservations and block jurisdiction of claims from the original state. If both parties have made declarations without any hindering reservations related to the dispute at hand, the court's jurisdiction is automatically established.[115]

When the ICJ statute was drafted much hope was placed on 'the optional clause' system as general acceptance of the court's jurisdiction should be construed as support of the international judicial system.[116] However, so far only a third of the UN member states have made optional clause declarations and many of those shoulder severe reservations. Of 47 small states, 11 presently have made such declarations, Barbados[117], Cyprus[118], Djibouti[119], Dominica[120], Estonia[121], Liechtenstein[122], Luxembourg[123], Malta[124], Mauritius[125], Suriname[126] and Swaziland[127]. The twelfth small state, Nauru, filed a declaration in 1988 accepting temporary compulsory jurisdiction of the court. The acceptance was extended in 1993 for a period of five year but lapsed in 1998 and has not been renewed since.[128]

All but Dominica[129], which is the only state that accepts the court's jurisdiction without any reservations, require reciprocity. Seven small states[130] provide for further

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[115] John G. Merrills, *International dispute settlement* (4th edn, Cambridge University Press 2005) 129
[116] Collier and Lowe (n 6) 154-155
[117] Declaration of Barbados recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 1 August 1980) 1197 UNTS 7
[118] Declaration of Cyprus recognizing the compulsory jurisdiction of the International Court of Justice (3 September 2002) 291 UNTS 3
[119] Declaration of Djibouti recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 2 September 2005) UNTC 41783
[120] Declaration of Dominica recognizing the compulsory jurisdiction of the International Court of Justice (registered on 24 March 2006) <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=DM> accessed May 15 2011
[121] Declaration of Estonia recognizing the compulsory jurisdiction of the International Court of Justice (21 October 1991) 1653 UNTS 59
[122] Declaration of Liechtenstein recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 29 March 1950) 51 UNTS 119
[123] Luxembourg declaration under Art 36.2 of the Statute of the Permanent Court of International Justice. <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=LU> accessed May 15 2011
[124] Declaration of Malta recognizing the compulsory jurisdiction of the International Court of Justice (6 December 1966) 580 UNTS 205
[125] Declaration of Mauritius recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 23 September 1978) 646 UNTS 171
[126] Declaration of Suriname recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 7 September 1987) 1480 UNTS 211
[127] Declaration of Swaziland recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 26 May 1969) 673 UNTS 155
[128] Declaration of Nauru recognizing the compulsory jurisdiction of the International Court of Justice (entered into force 29 January 1988) 65 UNT 157
[129] Dominica Declaration (n 132)

reservations which limit allowed subject matters, the most common being related to territory, boundaries, national resources, armed conflict or matters falling within the exclusive jurisdiction of the state. Three former British colonies, Barbados, Malta and Mauritius, have also excluded disputes with other members of the Commonwealth of Nations.[131]

The latter part of article 36.1 of the ICJ statute allows for treaties to provide for jurisdiction of the court for cases for disputes arising under that treaty. There are two types of multilateral treaties that refer disputes to international courts. Treaties can either be especially designed to promote settlement of disputes providing for general acceptance of specific means of compulsory dispute settlement. For the same reasons that the optional clause is so sparingly utilized such treaties have not gained widespread support. States have been more willing to accept compulsory jurisdiction clauses within treaties which are limited to a specific subject, 'providing that disputes as to the interpretation or application of the agreement can be referred to the court'.[132]

According to Merrils 'the most commonly used method of consenting to the exercise of the court's jurisdiction after a dispute has arisen is the negotiation of a special agreement' in accordance with article 36.1. He points out that when states negotiate their submission to the court they have the possibility of jointly defining the disputed issues as well agreeing on which basis the court should reach its decision which allows state to retain more control.[133]

Jurisdiction is considered established once a state has given its consent by any valid means. It is therefore considered bound by its earlier commitments even though it is unwilling to litigate when an actual case arises. The court is provided with the power, under article 36.6 of the statute, to rule on such objections. Even in cases where the court's jurisdiction is based on a consensual basis states, its competence is frequently contested, most often without success.[134]

Our small state cases have proposed many interesting points related to the jurisdiction of the court. Applications by Liechtenstein have twice failed to make their way to the merits stage because the court found that it lacked jurisdiction. In the *Nottebohm*[135] case the court found that Liechtenstein had failed to prove a meaningful connection to the state in question

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[130] Declaration of Barbados (n 129); Declaration of Cyprus (n 130); Djibouti Declaration (n 132); Declaration of Malta (n 136); Declaration of Mauritius (n 137); Declaration of Suriname (n 138); Declaration of Swaziland (n 139)
[131] Declaration of Barbados (n 129); Declaration of Malta (n 136); Declaration of Mauritius (n 137)
[132] Merrills (n 115) 128
[133] Merrills (n 115) 129
[134] Merrills (n 115) 128-134
[135] *Nottebohm* (n 101)

with regard to Nottebohm for whose protection Liechtenstein had initiated the proceedings. In the *Certain Property*[136] case Liechtenstein again found its application dismissed as the court found that the dispute related to facts or situations from prior to 1980 which was before the entry into force of the European Convention for the Peaceful Settlement of Disputes[137], which the application based its jurisdiction on, and therefore it lacked jurisdiction to decide on the merits of the case.

The small state Nauru fared better in the case on *Certain Phosphate Lands*[138] where the court rejected Australia's preliminary objections that the subject matter fell under the reservations made in their 36.2 optional clause declaration. The court thus found that it had jurisdiction to entertain the application but before proceeding to the merits stage, Nauru and Australia notified the court that they had reached a friendly settlement and the case was discontinued.

In the Icelandic *Fisheries Jurisdiction*[139] cases against the United Kingdom and Germany all three cases the respondent, Iceland and Bahrain, objected unsuccessfully to the jurisdiction of the court. Iceland admitted that in its earlier agreement with the two states had provided for jurisdiction of the court but claimed that the settlement was no longer in force. Iceland refused to appear before the court, even to protest the jurisdiction of the court and did not participate in any stage of the proceedings. Despite this the Court decided to address the question of jurisdiction at a preliminary hearing, without Iceland raising any formal preliminary objections as anticipated in article 67 of the ICJ Rules.[140]

Similarly, in the *Maritime Delimitation between Qatar and Bahrain*[141], jurisdiction was based on communications between the parties which were considered to constitute 'bilateral treaties' under article 36.2 of the ICJ statute. Bahrain had argued that the referred instruments did not constitute a legally binding document that entitled Qatar to bring the matter unilaterally to the ICJ. It was feared that Bahrain would refrain from participating in the proceedings similarly to the Icelandic cases but fortunately those fears did not materialize.[142]

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[136] *Certain Property* (n 106)
[137] European Convention for the Peaceful Settlement of Disputes (adopted 29 April 1957, entered into force 30 April 1958) 320 UNTS 423
[138] *Certain Phosphate Lands in Nauru* (n 107)
[139] *Fisheries Jurisdiction (The United Kingdom v Iceland)* (n 106); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (n 104)
[140] Schulte (n 99) 145-148
[141] *Maritime Delimitation between Qatar and Bahrain* (n 100)
[142] Schulte (n 99) 235-237

Even in Malta's *Continental Shelf*[143] case which is the only small state case to have been brought before the court by a special agreement under article 36.1 the disputing states were in disagreement over the extent of the jurisdiction of the court. Libya held that the court had only been permitted to define the principles and rules of international law applicable in the case while in Malta's opinion the court's competence extended to the practical application of these principles and rules by the drawing of a median line.

In the Djibouti *Mutual Assistance in Criminal Matters*[144] case jurisdiction was based on following acceptance by France, the respondent, in accordance with article 38.5 of the Rules of Court.

According to an article by International Law Professor Max Hiliare concerns would also likely have been raised in the *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations*[145] case had it not been withdrawn by Dominica. Dominica had only a few weeks prior to the filing of the case accepted the court's compulsory jurisdiction under article 36.2 of the ICJ statute as well as the Optional Protocol to the Vienna Convention on Diplomatic Relations. [146] Since Switzerland's optional clause declaration contained a reservation requiring reciprocity of the opposing party Hiliare questions whether Dominica had acted in good faith.[147]

3.2.4. Compliance & Enforcement

The question of compliance with ICJ decisions is dealt with in various instruments, the UN Charter, the ICJ statute as well as the Rules of the Court. The main provision on compliance is found in Article 94.1 of the UN Charter and provides that 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.'

In cohesion with norms of international law, the binding nature of ICJ decisions is further confirmed in article 60 of the international judgments which confirms that it is 'final and without appeal' and permits for the court upon request to further clarify the scope of meaning of its decisions. Contrasting norms of international law, article 59 of the statute diminished the effect of precedent by limiting the binding effect of judgments to parties of a

[143] *Continental Shelf* (n 98)
[144] *Certain Question of Mutual Assistance in Criminal Matters* (n 107)
[145] *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations* (n 102)
[146] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95
[147] Hilaire (n 103)

dispute. But as has been established in chapter two, this provision does not fully hold up in practice.

Despite the binding nature of judgments the court has no system for imposing sanctions on violators and no mechanism for appellate review. The only exceptions to the rule can be found in article 60 of the ICJ statute where states are permitted to request interpretations on the scope or execution of previous judgments.[148]

Interestingly, the main provision for enforcement of ICJ judgments is to be found in the UN Charter.[149] This is representative of the lack of enforcement system linked to international courts and serves according to Schulte to separate 'between the adjudicative and post-adjudicative phase in international relations'. She explains that non-compliance was anticipated to contribute to political hostility and that it would be more efficient in such instances not to embark on new judicial proceedings. Consequently, the Security Council was empowered with the enforcing ICJ decision.[150] Although it is beneficial to have the threat of the Security Council looming when states consider the opportunity cost of non-compliance with a court's decisions this also poses a problem due to its political nature. Due to the veto power of the council's permanent representatives the world's most powerful countries are given an even further advantage.[151]

Of the nine small state cases, only five lead to final judgments on the merits due to two cases being dismissed and two being withdrawn. A total of two cases have dealt with boundary issues. In the *Continental Shelf*[152] case the parties had requested the court to decide on the rules and principles applicable for the delimitation so the final judgment merely stated a possible solution but the final outcome was yet to be negotiated. However, the states took ample considerations of the court's suggestions and quickly reached an agreement.[153] The *Maritime Delimitation & Territorial Questions between Qatar and Bahrain*[154] concluded with the court drawing a definitive maritime boundary between the states which effectively divided the disputed territories between the two parties. The two nations who had been at the brink of armed conflict were both pleased with the verdict, expressing their gratitude to the court leading to UN Secretary-General, Kofi Annan, stating that '[t]he acceptance of the judgment

[148] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 198
[149] Article 94.2
[150] Schulte (n 99) 19
[151] Schulte (n 99) 199-201
[152] Continental Shelf (n 98)
[153] Schulte (n 99) 179-181
[154] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (n 100)

[…] set an excellent example for other states of how disputes of this nature should be resolved'.[155]

In the Criminal Assistance case the court found in favor of Djibouti on only one account and the court determined that its finding of this violation constituted appropriate satisfaction so the conclusion was hardly a triumph. The tension between the states seems to have fizzled after the verdict as a year later a French court of appeal acquitted two Djibouti officials who were suspected of pressuring important witnesses in the Borrel case in order to discredit their testimony as it potentially involved Djibouti's President in the matter. Borrel's widow however was not satisfied and accused French authorizes of obstructing investigations of the matter due to its military investments in Djibouti.[156]

The Icelandic Fisheries Jurisdiction[157] cases however constituted a notorious instance of non-compliance. The background of the case was Iceland's extension of its exclusive fisheries zone. The first extension took place in 1958 causing protest from Germany and especially the United Kingdom. The dispute concluded in an agreement in 1961 which later became the jurisdictional basis for the complaint brought by the two disgruntled states to the ICJ as discussed in the previous chapter. As Schulte points out Iceland began with disregarding the court by refusing to take part in the proceedings. It then went on to not only ignore the court's judgment banning its regulation but also extend its exclusive fisheries zone even further in 1975. She finds that these 'circumstance of non-compliance by a state that was without doubt in general committed to the rule of law and democracy' was very unusual.[158]

Strangely, despite haven won the case before the court the UK and Germany essentially did not benefit at all from the court's ruling. According to Schulte[159] 'The international community seemed to show little sympathy for their cause' and in the end, Iceland never had to answer for its breaches due to the changes to international laws. Britain and Germany themselves established the same right in their adjacent waters in 1976 and the exclusive economic zone was further integrated by UNCLOS in 1982. The rapid progression of international law regarding the extension of the territorial waters partly explains the global communities' disinterest, but Historian Gudni Johannesson offers further reasons which also

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[155] Schulte (n 99) 238-239
[156] 'France acquits Djibouti officials' (*BBC News*, 29 May 2009) <http://news.bbc.co.uk/2/hi/8073407.stm> accessed 14 May 2011
[157] *Fisheries Jurisdiction (The United Kingdom v Iceland)* (n 106); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (n 106)
[158] Schulte (n 99) 155-156
[159] Schulte (n 99) 154, 158

had considerable influence. One was Iceland's strategic importance in the Cold War, Iceland threatening to leave NATO and close down the U.S: military base on the island. Another explanation offered is the perception of Iceland as a tiny state engaged in a hostile conflict with no less of an adversary than the British Empire employing the Royal Navy against the moderate vessels of the Icelandic Coast Guard. Johannesson informs that British officials noticed how surprisingly many British citizens were sympathetic with the underdog or 'poor little Iceland'. People perceived David fighting Goliath out in the Atlantic Ocean. This was exemplary of the 'power of the weak' as the conflict was nicknamed due to an ironic comment in a newspaper article The small size of Iceland was indisputably an asset, as was it reliance on the fishing industry which state leaders knew was the country's sole livelihood.[160] Thus, even though Iceland was in no way a 'rogue' state nor a global heavyweight as Romano names as preconditions as was discussed in chapter 3.1.4., it got away with non-compliance without facing any serious repercussions.

3.2.5. Cost

The expenditures of the ICJ are part of the regular budget of the UN and are borne collectively by member states, in accordance with a 'scale of assessment' which is based on a 'capacity to pay' principle. As intended the richest states pay more and the poorest states pay less. The current scale of assessment provides that no member pays more than 22% or less than 0.001%.[161] The budget of the ICJ in 2010 was just over USD 25.500.000 constituting a little more than 1% of the UN budget.[162] Only if a party to a case is not a contributor to the UN the court shall decide on a contribution to meet the expenses occurred by that particular case.[163]

However, states usually bear the cost of trial themselves, regardless of their economic strength or lack thereof. There are three categories of cost usually involved with international litigation, the administrative cost of the court which in the case of permanent bodies is usually distributed amongst member states according to fiscal strength. That still leaves the litigation expenses to the states, which according to the funds 'Terms of Reference' can include cost of

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[160] Guðni Th. Jóhannesson, *Þorskastríðin þrjú: Saga landhelgismálsins 1948-1976* (Hafréttarstofnun Íslands 2006) 55, 154

[161] UNGA 'Resolution adopted by the General Assembly Scale of assessments for the apportionment of the expenses of the United Nations' UN GAOR 64th Session UN Doc A/RES/64/248 (2010) par 5

[162] UNGA 'Report of the International Court of Justice' UN GAOR, 65th Session UN Doc. A/65/4 (2009) par 291

[163] ICJ Statute (n 54) art 35.3

agents, counsels, experts, witnesses, and the preparation of memorials and counter-memorials, etc'.[164] For small states with limited institutional capacity that are required to gain expensive outside assistance the anticipated spending can surely contribute to the decision whether or not to refer a dispute to the court.

Economically weak countries can possibly qualify for financial assistance from the Trust Fund established by the Secretary-General of the UN in 1989 to enable poorer states to resort to the ICJ for the settlement of international disputes[165]. The need for this sort of enterprise was based on the notion that 'there are occasions where the parties concerned […] cannot proceed because of the lack of legal expertise or funds'.[166] According to the terms of reference the purpose of the ICJ Trust Fund is:

> [T]o provide a practical means of overcoming financial obstacles to the judicial settlement of disputes by offering financial assistance to indigent states for expenses incurred in connection with a dispute submitted to the ICJ by way of a special agreement or the execution of a judgment of the Court resulting from such an agreement'.[167]

The ICJ trust fund terms, under paragraph 8, allow for any state which can go before the court to apply for financial assistance. However, it is a prerequisite for eligibility that the dispute in question has been submitted to the court by an ad hoc agreement. This entails that if disputes are initiated unilaterally on any other basis, such as optional declaration under article 36.2, or due to a clause in either a bi- or multilateral treaty, states have no right to any funds. It is thus fair to say that the conditions are quite restrictive.[168]

When considering applications the Panel of Experts is only allowed to base its decision on the financial needs of the requesting state taking into account the availability of funds.[169] The fund is based solely on free contributions and has not seen substantial regular contributions despite the Secretary-General making efforts to encourage contributions.[170]

Based on information available in Annual Reports of the ICJ the Trust fund has received seven applications since its establishment. They have all been accepted, but most of them only on a partial basis. The identities of the four first beneficiaries, that received funding

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[164] UNGA 'Report of the Secretary-General: 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' UN GAOR 47th Session Annex to UN Doc A/47/444 (1992) par 4 (ICJ Trust Fund Terms of Reference)
[165] 'United Nations Handbook on the Peaceful Settlement of Disputes between States' (n 36) par 228
[166] ICJ Trust Fund Terms of Reference (n 177) par 7–11
[167] ICJ Trust Fund Terms of Reference (n 177) par 6
[168] Romano, 'International Justice and Developing Countries - A Qualitative Analysis' (n 31) 555
[169] ICJ Trust Fund Terms of Reference (n 177) par 11
[170] UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 56th Session UN Doc A/56/456 (2001) par 11

in 1991-1997, were not made public.[171] There was no new application until 2004 when Benin and Niger jointly applied for funds due to their boundary dispute.[172] The most recent application was made by the small state Djibouti, which received financial assistance for cost incurred due to their case against France.[173] No further applications have been received by the fund in its 22 years of existence.[174]

3.2.6. Judges

The ICJ body is composed of fifteen judges, of which five are elected every third year, by the Security Council and the General Assembly of the UN, to serve a nine-year term and they are eligible to stand for re-election.[175] Article 9 of the ICJ statute provides that:

> At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

According to Merrills this requirement was set out to 'reflect the balance and diversity of the international community as a whole' as otherwise it would be likely that states 'which consider their ideas to be inadequately represented' would not have faith in the court to reign over their affairs. He adds that 'in such circumstances the court's authority, perhaps even

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[171] UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 47th Session UN Doc A/47/444 (1992) par 7-8; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 56th Session UN Doc A/56/456 (2001) par 4-6

[172] UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 59th Session UN Doc A/59/372 (2004) par 5-6

[173] UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 63rd Session UN Doc A/63/229 (2008) par 3-6

[174] UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 57th Session UN Doc A/57/373 (2002) par 2-3; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 58th Session UN Doc A/58/295 (2003) par 3-4; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 60th Session UN Doc A/60/330 (2005) par 3-4; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 61st Session UN Doc A/61/380 (2006) par 3-4; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 62nd Session UN Doc A/62/171 (2007) par 3-4; UNGA 'Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General' UN GAOR 64th Session UN Doc A/64/308 (2009) par 3-4

[175] 'Members of the Court' (International Court of Justice) <http://www.icj-cij.org/court/index.php?p1=1&p2=2> accessed 15 April 2011

competence, to interpret and apply law for the world must be considered doubtful'.[176] However, in practice this provision has led to a system that resembles the global distribution of the Security Council. As Robinson puts it: 'This textual guide is in practice 'trumped' by the perceived political interests in membership distribution based more on region than on system.[177]

Due to the fact that states are aware that the nationality of judges matters, as was established in chapter 3.1.6., a state which is party to a case before the ICJ can choose a person to sit as a judge *ad hoc* if the bench does not include a national of the disputing state cf. article 31.2. of the ICJ statute. Some gave the opinion that countries would not feel full confidence in the decision of the court in a case which they were party to if the court did not include a judge of their own nationality, especially if the bench included a national of the opposing state. Also, many consider it beneficial for a court to encompass an individual who is better acquainted with the norms and views of the appointing state than the other judges. The *ad hoc* judge is however not required to be a national of the appointing state.[178] The ICJ also allows for the possibility of the creation of chambers under article 26 of the ICJ statute. States are consulted on the composition of the Chamber and their wishes are normally agreed to.

ICJ has had one judge out of the 100 from the world's smallest 47 states, Mohamed Shahabuddeen from Guyana, who served one term from 1988-1997.[179] Small states have 6 times (Bahrain, Qatar, Djibouti, Liechtenstein, and Malta) in 5 cases nominated ad-hoc judges in ICJ cases but for some reason the appointed individual has never been a national of the small state. Judge Mohamed Shahabuddeen has however been nominated twice as an *ad hoc* judge for other states, once on behalf of Bahrain, a small state, and once on behalf of Indonesia.[180]

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[176] Merrills (n 115) 147; 'Members of the Court' (International Court of Justice) <http://www.icj-cij.org/court/index.php?p1=1&p2=2> accessed 15 April 2011
[177] Robinson (n 92) 278
[178] 'Judges *ad hoc'* (International Court of Justice) <http://www.icj-cij.org/court/index.php?p1=1&p2=5> accessed 15 April 2011
[179] 'All Members' (International Court of Justice) <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> accessed 15 April 2011
[180] 'All Judges *ad hoc'* (International Court of Justice) <http://www.icj-cij.org/court/index.php?p1=1&p2=5&p3=2> accessed 15 April 2011

3.3. International Tribunals Law of the Sea

3.3.1. Background

The International Tribunal for the Law of the Sea (ITLOS) is established by Annex VI[181] of the United Nations Convention on the Law of the Sea (UNCLOS) as its adjudicatory branch. Article 279 of UNCLOS provides that:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

However, due to lack of consensus, the Convention also provides not just for ITLOS but for three other alternative means for the settlements of disputes, the ICJ and two different types of arbitral tribunals. If parties cannot agree on a means of dispute settlement arbitration is the obligatory procedure. UNCLOS article 281 though provides that nothing prevents states jointly deciding on other peaceful means of settling their disputes.

Under the negotiations of UNCLOS compulsory methods of dispute settlement had an appeal to some states according to Klein 'because of the impact the availability of these procedures would have on the political dynamic of a dispute'.[182] A binding dispute settlement procedure was regarded as giving weaker states a more equal footing within the regime, 'reducing the risk of more powerful states using political, economic, and military pressures to force the developing states to give up rights guaranteed under UNCLOS'.[183] Klein points out that many state representatives were in agreement that this was necessary for the protection of small states. The representative of Uruguay commented that 'international law was the only protection on which a small country could rely in cases of dispute'.[184] Cyprus representative Andrew Jacovides stated that 'by reason of our national self-interest as a small and militarily weak state which needs the protection of the law, impartially and effectively administered, in order to safeguard its legitimate rights'.[185] He also added:

> [T]he relative vagueness of the substantive rules on the one hand and the absence of compulsory third party dispute settlement procedures of a binding nature on the other is bound to create problems and to work an injustice at the expense of smaller and militarily

[181] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 186-191
[182] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 52
[183] Klein (n 182) 52
[184] Klein (n 182) 15
[185] Andrew J. Jacovides, 'Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOSIII Point the Away?,' in Louis B. Sohn (ed) *Contemporary Issues in International Law, Essays in Honor of Louis B. John* (N P Engel 1984) 165-166

> weaker states because larger and stronger states may be tempted to claim the lion's share and are not obliged to accept third party adjudication.[186]

The entire UNCLOS dispute settlement procedure is marked with the atmosphere of when it was negotiated in the 1970s. States realized the increasing importance of having a mandatory system of dispute settlement within such a regime.[187] They however, had severe reservations about being bound by an international court. This was at the height of the cold war and many states according to Schulte had diminished faith in the ICJ who's recent findings had 'precipitated an outcry particularly from developing countries and was followed by a wave of instances of non-appearance and defiance in the 1970s'.[188]

3.3.2. Case Topics

A total of 18 cases have been initiated before ITLOS. Three small states have been parties to six of those cases and all six cases dealt with violations of articles 73 and 226 on detained vessels, the *M/V 'Saiga'*[189], the *Monte Confurco*[190], the *Grand Prince*[191], the *Juno Trade*[192]*r* and *M/V Louisa*[193]. On four occasions complaints were brought requesting prompt release of the vessels under article 292 and the other two dealt with the legitimacy of the arrest and detainment as well as compensation for incurred losses.

In an article from 2004 on 'Flags of Convenience' before ITLOS Law Professor and ITLOS Judge Tullio Treves pointed out that in the cases concerning the *M/V 'Saiga'*[194], the *Monte Confurco*[195] and the *Grand Prince*[196], as well as all other prompt release cases, concerned vessels 'which had been reflagged one or more times and ships flying a flag belonging to a State that has modest connections with the ship'.[197] He points out that in the

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[186] Jacovides, 'Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Away' (n 185) 167-168
[187] Klein (n 182) 52-53, 349
[188] Schulte (n 99) 2; See also Romano, 'International Justice and Developing Countries - A Qualitative Analysis' (n 31) 584-588
[189] *The M/V 'Saiga' Case (Saint Vincent and the Grenadines v. Guinea)* (Prompt Release) (110 ILR 736); *The M/V 'Saiga' (No 2) Case (Saint Vincent and the Grenadines v. Guinea)* (Admissibility and Merits) (120 ILR 143)
[190] *The Monte Confurco Case (Seychelles v. France)* (Prompt Release) (125 ILR 203)
[191] *The Grand Prince Case (Belize v. France*) (Application for Prompt Release) (125 ILR 251)
[192] *The Juno Trader Case (Saint Vincent and the Grenadines v. Guinea-Bissau)* (Prompt Release) (128 ILR 267)
[193] *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Spain)* (Pending) Application instituting proceedings <http://www.itlos.org/case_documents/2010/document_en_349.pdf> accessed 15 May 2011
[194] *The M/V 'Saiga' case* (n 189); *The M/V 'Saiga' (No. 2) Case* (n 189)
[195] *The Monte Confurco Case* (n 190)
[196] *The Grand Prince Case* (n 191)
[197] Tullio Treves 'Flags of Convenience Before the Law of the Sea Tribunal' (2004) 6 San Diego International Law Journal 179, 180

cases regarding the *M/V 'Saiga'*[198] which flew the flag of Saint-Vincent and the Grenadines was owned by a company based in Cyprus with unknown beneficial owners and was managed by a company in Scotland. The vessel had previously flown the flag of Malta and the master, as well as the majority of the crew, was from Ukraine. In the *Monte Confurco*[199] case the company registered as owner was registered in the flag state, the Seychelles. The facts of the case pointed to the beneficial owners being Spanish as well as the ship master and the crew was of mixed nationality. In the Grand Prince case, the flag state was supposedly Belize where the owning company was registered as well. However the beneficial owners were evidently Spanish as well as the master and the crew constituted of nationals from Spanish and Chile. Upon its capture the ship was on its way to Brazil where it had already started to make arrangements to be reflagged.[200]

In the two small state cases filed after Treves wrote his article, the *Juno Trader* case and the *M/V Louisa* case, the circumstances were also very suspicious. In the Juno Trader case the vessel was 'owned by a company incorporated in the British Virgin Islands and a branch of the South African seafood company Irvin and Johnson Limited, based in Cape Town' and the ship's master was Russian.[201] The M/V Louisa case is still pending and therefore some information has still not been released but it has been made public that the owners of the vessel are in this case American.[202]

In all the small states cases the vessels have been apprehended due to unlawful activities according to the detaining states. The applications for their release have all been submitted to the Tribunal 'on behalf of' the small state, cf. article 292.2 Thus small states have not directly participated in cases before ITLOS but essentially only acted as a gateway for foreign private parties to secure their personal interests. Treves points out that this possibility allows states that 'wish to avoid the responsibilities of actively protecting ships flying their flag through prompt release proceedings' but still 'obtaining an equivalent result as flag States through the action of the private interested persons and consequently enhancing their attractiveness'.[203]This is understandable as according to Romano 'the main purpose of prompt release cases is to provide for the quick release of the vessel to avoid unnecessary loss

[198] *The M/V 'Saiga' case* (n 189); *The M/V 'Saiga' (No. 2) Case* (n 189)
[199] *The Monte Confurco Case* (n 190)
[200] Treves (n 197) 184
[201] *The Juno Trader Case* (n 192) par 33
[202] *The M/V 'Louisa' Case* (n 193) par 27
[203] Treves (n 197) 185

for the ship owner or others affected by the detention, and the release of the crew out of humanitarian considerations'[204] and is not directly relevant to state interests.

3.3.3. Jurisdiction

As has been discussed dispute resolution within UNCLOS[205] is compulsory but ITLOS is only one of the choices available. States are expected to give a declaration on which method of proceedings they prefer under article 287 of the Convention. However till this day only 39 of the 161 states parties have exercised that and only 26 have accepted general jurisdiction of ITLOS. Of the 41 small state participants only three have chosen ITLOS.[206]

Dispute settlement under the UNCLOS entails a new approach combining both paradigms resulting from a compromise between those who favor the different schemes. State parties have undertaken the duty of settling disputes peacefully but they retain a freedom of choice regarding the means. If they are unable to do this, states are entitled to prompt the compulsory dispute settlement mechanism as long as the subject matter of the dispute is not explicitly excluded from binding procedures under the Convention.[207]

Article 298 gives states permission to exempt certain topics, covered in Part XV, Section 2 of UNCLOS, from compulsory dispute settlement. States are required to 'declare in writing that it does not accept any one or more of' the permitted categories which are listed in paragraph 1 of article 290. This includes disputes concerning topics such as sea boundary delimitations, historic bays and titles, military activities, certain law enforcement activities and issues being addressed by the UN Security Council.[208] Twelve small states, Cape Verde, Equatorial Guinea, Estonia, Iceland, Kiribati, Luxembourg, Malta, Montenegro, Palau, Qatar, Sao Tome and Principe and Trinidad and Tobago have utilized this right.[209]

ITLOS has jurisdiction in cases were both parties have made declarations on choice of procedures, in accordance with article 287, naming ITLOS as their preference and neither party has excluded the topic matter in question under article 298. According to article 21 'The

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[204] Romano, 'The Price of International Justice' (n 81) 287
[205] UNCLOS (n 195) art 290, 292
[206] 'Settlement of disputes mechanism' (*United Nations Division of Ocean Affairs and the Law of the Sea*, 21 July 2010) <http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 14 May 2011
[207] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication' (n 74) 817, 831-832
[208] John E. Noyes, 'The International Tribunal for the Law of the Sea' (1998) 32 Cornell International Law Journal 109, 121-122
[209] 'Declarations and Statements' (*United Nations Division of Ocean Affairs and the Law of the Sea,* 11 June 2010) <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm> accessed 14 May 2011

jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'. Under article 22, if state parties to any treaty or convention on the law of the sea agree they may submit any disputes regarding the interpretation or application to the Tribunal.

UNCLOS also provides ITLOS with two types of incidental jurisdiction. Firstly, articles 25 and 290 provide ITLOS with the right to prescribe provisional measures upon the request of a state party if it considers that it has *prima facie* jurisdiction in the case. Article 290.5 also permits ITLOS to order provisional measures, pending the constitution of an arbitral tribunal, to prevent matters from deteriorating before a case can be heard.[210]

The other instance can be found in article 292 where ITLOS is permitted upon the request of a state party to order the prompt release of a vessel that has been detained by another state upon the posting of a reasonable security. If the detaining state is unwilling to agree to the jurisdiction of another tribunal within ten days of the detention, compulsory jurisdiction is transferred to ITLOS, unless the parties agree otherwise. As Noyes points out 'Article 292 proceedings differ from traditional interstate cases because they may involve claims by individuals, because they directly involve individual rights'. [211] The only objective of the measure is to secure the release of the vessel and its crew for a reasonable bond and according to Romano the ITLOS judgment is not a 'decision on merits of the dispute in question, nor does it prejudice the merits of any case before the appropriate domestic court of the arresting state'.[212]

Of our small state cases the three prompt release cases have been based on compulsory jurisdiction under article 292 of the Convention. The second *M/V 'Saiga'* [213] case was brought before ITLOS based on agreement between the parties - they had first initiated arbitral proceedings and then transferred the case over to the tribunal, but the tribunal also based its jurisdiction on articles 286, 287 and 288. The ongoing *M/V 'Louise'* [214] case based on both states having made written declaration in accordance with article 287(a) accepting the jurisdiction but the applicant also referred to certain compulsory jurisdiction articles. In the *Grand Prince*[215] case the application for prompt release was dismissed as the court found that

[210] Romano, 'The Price of International Justice' (n 81) 287
[211] Noyes (n 208) 154
[212] Romano, 'The Price of International Justice' (n 81) 287
[213] *The M/V 'Saiga' (No 2) Case* (n 189)
[214] *The M/V 'Louisa' Case* (n 193)
[215] *The Grand Prince Case* (n 191)

documentary evidence submitted by the applicant failed to establish that Belize was the flag state of the vessel when the application was made and thus found that it had no jurisdiction to entertain the application.

3.3.4. Compliance & Enforcement

Under article 33.1 of the ITLOS statute the decisions of the Tribunal are final and disputing parties are obligated to comply with the ruling. However, there is no explicit enforcement or monitoring mechanism and as such the tribunal is not bestowed with the power to secure compliance with its rulings. Article 33.2 of the Statute provides that decisions are binding only as between the parties and in respect of the particular dispute therefore diminishing the effect of precedents. ITLOS therefore confirms with international norms so that even if states have accepted compulsory jurisdiction court and accepted the legal obligation to abide by the court's rulings they have not provided it with the power to enforce the court's decisions. However, article 33.3 permits the parties to request further interpretation upon the meaning or scope of a tribunal ruling. Also, in the case of provisional measure, a system of surveillance within the tribunal exists under UNCLOS article 290.6, where the affected state is obligated to report what actions it has taken to conform to the prescribed measures diminishing the probability of an ongoing breach.[216]

Only 18 cases have been brought to the ITLOS and presently there is not a lot of literature on the compliance record of the completed cases. Due to the specific nature of the small state cases it is likely that they have been complied with. The first ruling regarding the *M/V 'SAIGA'*[217] however did not compel Guinea to release the ship immediately compelling the owners to request provisional measures when they filed the second *M/V 'SAIGA'*[218] case. Upon the filing of the complaint Guinea finally released the *M/V 'SAIGA'* and the final judgment of the second case found Guinea at fault and provided for compensation to the ship owner and the detainee. In the *Monte Confurco*[219] and *Juno Trader*[220] cases there was no recourse to the court so these judgments were probably complied with. The *Grand Prince*[221] case was dismissed as was discussed in chapter 5.3 and the final small state case, the *M/V*

[216] P. Chandrasekhara Rao, 'ITLOS: The First Six Years' (2002) 6 Max Planck UNYB 184, 244
[217] *The M/V 'Saiga' Case* (n 189)
[218] *The M/V 'Saiga' (No 2) Case* (n 189)
[219] *The Monte Confurco Case* (n 190)
[220] *The Juno Trader Case* (n 192)
[221] *The Grand Prince Case* (n 191)

Louisa[222] case is still ongoing and judgment not expected until 2012. Saint Vincent and the Grenadines lost the preliminary proceedings as the court did not see reason to order provisional measure. At the current stage the ship owners are asking for considerable compensation due to losses incurred because of Spain's detainment of the vessel.

3.3.5. Cost

The ITLOS budget for 2010 is USD 14.867.520[223] and in accordance with article 19 of the tribunal's statute the expenses of the tribunal are borne collectively by all member states. Non-member states that participate in proceedings before the tribunal have to contribute to its expenses on a per case basis. The member states bear the cost based upon the scale of assessments of the budget of the UN adjusted to take into account that not all UN members are members of the Convention.[224]

Even though ITLOS is an independent organ it still bases its participations fees on the scale of assessments of the UN but adjusted to take into consideration which states have ratified UNCLOS. The meeting of the state parties decides upon their maximum and minimum contribution providing that no state has to pay more than 22% and no state pays less than 0.01% percent.[225]

Even though small and poor states benefit from the scaling of expenses of the tribunal they usually still have to pay for the cost of the proceedings if they are compelled to litigate, according to article 34 of the tribunal's statute. So far, four small state cases have been ruled upon the merits and one has been dismissed. In all the cases the tribunal has ruled that each party shall bear its own costs but since on all occasions the complaint was brought to the court by the ship owner this had no effect on the states. In the second *M/V 'SAIGA'* case part of the judges issued a dissenting opinion stating they thought the judgment should have awarded costs to the applicants, as the generally successful party, but they were outvoted 13 to 7.[226]

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[222] *The M/V 'Louisa'Case* (n 193)
[223] 'Decisions on budgetary matters of the International Tribunal for the Law of the Sea for 2011-2012' UN Doc SPLOS/217 (2010)
[224] 'Frequently asked questions: Who sets the budget and how are the contributions fixed?' (International Tribunals for the Law of the Sea 27.10.2010) <http://www.itlos.org/faq/faq_en.shtml> accessed 15 April 2011
[225] 'Decisions on budgetary matters of the International Tribunal for the Law of the Sea for 2011-2012' UN Doc SPLOS/217 (2010)
[226] *The M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (Merits, Joint Declaration by Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson on the Question of Costs, 1 July 1999) <http://www.itlos.org/case_documents/2001/document_en_67.pdf> accessed May 15 2011

Within ITLOS there exists a 'Fund' similar to the ICJ Trust fund[227]. The Terms of Reference[228] for that fund states its purpose 'as to provide financial assistance to states parties to UNCLOS for expenses incurred in connection with cases submitted to the tribunal'. The Terms also specify that generally assistance should principally be provided in cases proceeding to the merits where jurisdiction is not an issue but an exception is provided for exceptional circumstances.[229] According to its Terms of Reference the ITLOS Trust Fund is limited to developing states who are members of the UN and party to UNCLOS.[230] Financial aid shall be based solely on the financial needs of the requesting developing state and the availability of funds with priority being given to Least-Developed Countries and Small Island developing states, taking into account the imminence of pending deadlines.[231] The fund is based solely on free contributions and contributions to the fund have remained very limited. No award has been granted from the fund since its establishment in 2001.[232]

3.3.6. Judges

ITLOS is constituted of twenty one members who are elected for a nine-year term. According to article 2.2 'the representation of the principal legal systems of the world and equitable geographical distribution shall be assured'. Article 3.2 provides that no two members of the Tribunal may be nationals of the same state and that 'there shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations'. This makes ITLOS the only standing body which affirms geographical distribution of judges in its statute. This unusually large body including two-thirds of its members from developing states which generally supportive of the establishment of ITLOS. It seems

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[227] UNGA 'Resolution adopted by the General Assembly: International Tribunal for the Law of the Sea Trust Fund Terms of reference' UN GAOR 55th Session Annex I UN Doc A/Res/55/7 (2001) (ITLOS Trust Fund Terms of Reference)
[228] ITLOS Trust Fund Terms of Reference (n 232)
[229] 'International Tribunal for the Law of the Sea Trust Fund' (United Nations 2004) <http://www.un.org/Depts/los/ITLOS/itlos_trust_fund.htm> accessed 15 April 2011
[230] ITLOS Trust Fund Terms of Reference (n 232) 15
[231] ITLOS Trust Fund Terms of Reference (n 232) par 21
[232] 'Annual report of the International Tribunal for the Law of the Sea for 2001' UN Doc SPLOS/74 (2002) par 88-89; 'Annual report of the International Tribunal for the Law of the Sea for 2002' UN Doc SPLOS/92 (2003) par 86-87; 'Annual report of the International Tribunal for the Law of the Sea for 2003' UN Doc SPLOS/109 (2004) par 83-84; 'Annual report of the International Tribunal for the Law of the Sea for 2004' UN Doc SPLOS/122 (2005) par 82-84; 'Annual report of the International Tribunal for the Law of the Sea for 2005' UN Doc SPLOS/136 (2006) par 80-82; 'Annual report of the International Tribunal for the Law of the Sea for 2006' UN Doc SPLOS/152 (2007) par 74-76; 'Annual report of the International Tribunal for the Law of the Sea for 2007' UN Doc SPLOS/174 (2008) par 94-98; 'Annual report of the International Tribunal for the Law of the Sea for 2008' UN Doc SPLOS/191 (2009) par 88-92; 'Annual report of the International Tribunal for the Law of the Sea for 2009' UN Doc SPLOS/204 (2010) par 82-84

apparent that third world concerns had much influence on the tribunal's structure and composition. In a manner resembling the ICJ, judges are allowed to be nationals of a disputing state party and states that are not represented on the bench are allowed to appoint a judge *ad hoc* cf. article 17 of the Statute.[233]

Since its establishment 36 judges have served on ITLOS. Cape Verde, Grenada, Trinidad & Tobago and Iceland have each had one judge who has served either a full or partial term. Small states have never nominated an *ad-hoc* judge in proceedings before the court which is interesting since none of the three small states that have brought cases to the court, Saint Vincent and the Grenadines, Seychelles and Belize, have been represented by permanent judges. [234] Perhaps *ad-hoc* judges were deemed unnecessary because the composition of the tribunal comprises broad representation. Another possible explanation is that the cases were not brought to the tribunal by the small states but by representatives of foreign ship owners and therefore small state representation was not considered necessary.

3.4. World Trade Organization Dispute Settlement System

3.4.1. Background

After World War II the states of the world showed increased commitment to global cooperation not only in the field of peace and security but also in the field of international trade. The General Agreement on Trade and Tariffs[235] (GATT) which was signed in 1947 has since developed into the World Trade Organization which was established in 1995. One of the greatest things accomplished by 'the Uruguay Round' of negotiations other than the establishment of the WTO was the extension of the regime to include trade of services[236] (GATS) and intellectual property rights[237] (TRIPS). The other significant development was the agreement on a transformed system for dispute settlement which is embodied in the Dispute Settlement Understanding[238] (DSU) annexed to the WTO Agreement.[239] Article 9 of

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[233] Merrills (n 115) 198-199; Warioba (n 27) 43-44

[234] 'General Information – Judges *ad hoc*' (ITLOS 28.02.2011) <http://www.itlos.org/start2_en.html> accessed 15 April 2011

[235] General Agreement on Tariffs and Trade 1947 (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194 (GATT 1947)

[236] General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization, (adopted April 15 1994, entered into force 1 January 1995) 1869 UNTS 183 (GATS)

[237] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization (adopted April 15 1994, entered into force 1 January 1995)1869 UNTS 299 (TRIPS)

[238] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (adopted April 15 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU)

the DSU provides that all state representatives have a seat on the Dispute Settlement Body (DSB) which serves the role of an administrator of the dispute settlement system. Article 2 empowers the DSB 'to establish panels, adopt panel and Appellate Body reports, maintain surveillance survey the implementation of the rulings and recommendations, and authorize the suspension of concessions and other obligations under the covered agreements'.[240]

A dispute settlement mechanism was considered important to promote the legitimacy of the international trade system 'for only thus can self-serving interpretation be exposed and unilateralism discouraged'. This seems to have been accomplished as Merrills finds the WTO dispute system as 'one of the most effective, as well as one of the most important, systems of international dispute settlement'.[241] Romano goes so far to say that 'with the transition from GATT to WTO, and the transformation of the dispute settlement procedure from diplomatic and voluntary, to automatic, confrontational and legally binding, the dispute settlement system has become the linchpin of the international trade regime'. Despite this success there is still much room for improvement and there have been continuous attempts since 1995 to reform the dispute system mechanism but without substantial result.[242]

Romano points out that the WTO dispute settlement system embodies many provisions providing for preferential treatment to take consideration the special needs of developing country members. The term 'developing country' is not defined in the WTO agreement and states themselves are entrusted with designating their appropriate status. The DSU requires members to show developing countries special consideration during the consultation phase according to article 4.10. A panel report is required to 'explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members' cf. article 12.11. Article 21.2 deals with implementation of panel reports requiring that the interests of developing countries shall be taken into special consideration and their impact on the developing country's economy cf. article 21.8. Under article 27.2 developing country parties to a dispute are entitled to legal advice and assistance from the WTO Technical Cooperation Services and article 12.10 provides them with extended timelines if needed.[243]

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[239] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15 1994, entered into force 1 January 1995 1867 UNTS 154 (WTO Agreement)
[240] Merrills (n 115) 212
[241] Merrills (n 115) 211
[242] Romano, 'The Price of International Justice' (n 81) 288
[243] Romano, 'International Justice and Developing Countries: A Qualitative Analysis' (n 31) 605-607; See also Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis (Eds) *The World Trade Organization: Law, Practice, and Policy* (2nd edn, Oxford University Press 2006) 373-393

Least-developed countries are shown even further consideration. States are however there bound by the designation of the UN to qualify according to article XI.2 of the WTO Agreement.[244] Only two small states, Djibouti and Suriname, qualify as LDC's in the WTO, but an additional six, Bhutan, Comoros, Equatorial Guinea, Sao Tome and Principe, Samoa and Vanuatu are in the process of negotiating for WTO membership.[245] The special considerations of least-developed countries are set out in article 24.1 of the DSU which is as follows:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

Romano finds however that 'many developing countries involved in disputes under the WTO have not had recourse to the special and differential treatment they have been granted' and wonders whether '[t]he continuing non-recourse to preferential provisions suggests there may be 'systemic' reasons for this'.[246]

3.4.2. Case Topics

There have been a total of 424 cases constituted before the DSB. The United States, European Union, Canada, Mexico, Brazil, India and Japan have been especially active litigants. Small states however have been parties to three disputes. Two of those cases were complaints by Costa Rica against Trinidad and Tobago over alleged anti-dumping measures on pasta and after more than a decade neither complaint has led to the constitution of a panel.[247] Thus a small state has only on one instance participated in proceedings before the WTO, namely the *US Gambling*[248] case which Antigua and Barbuda brought against the United States because of prohibitions on the provision of gambling services across borders. The case concerned US

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[244] 'The Least Developed Countries Report: Towards a New International Development Architecture for LDCs' UNCTAD/LDC/2010 (2010)
[245] 'Least-developed countries' (*World Trade Organization)* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 14 May 2011
[246] Romano, 'International Justice and Developing Countries: A Qualitative Analysis' (n 31) 607
[247] WTO, *Trinidad and Tobago: Certain Measures Affecting Imports of Pasta from Costa Rica - Request for Consultations by Costa Rica* [1999] WT/DS185/1; WTO, *Trinidad and Tobago: Provisional Anti-Dumping Measure on Imports of Macaroni and Spaghetti from Costa Rica - Request for Consultations by Costa Rica* [2000] WT/DS187/1
[248] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Appellate Body* [2005] WT/DS285/AB/R

actions to prevent online gambling and betting services. Antigua and Barbuda complained that these measures violated WTO commitment, especially under GATS. The US rejected Antigua and Barbuda's accusations insisting that gambling services fell outside its GATS schedule and also that gambling qualified for the general exceptions provided under article 14 of the GATS. Even though all of Antigua and Barbuda's allegations were not confirmed the panel ruling essentially found the US at fault and this was confirmed by the Appellate Body.[249]

When reviewing further material on the case, we find that quite similarly to ITLOS, Antigua and Barbuda's conflict is allegedly financed by the online gambling industry whose beneficial owners are largely American citizens. Admittedly, Antigua and Barbuda has more to gain from the continued activities, as they provide both revenues and increased employment for the otherwise natural resource stricken island. In fact, online gambling has risen to be the islands number two industry, after tourism. But the fact remains that the primarily interests of US compliance with the WTO verdict lies with the beneficial owners of the online gambling industry, not the small host state.[250]

Small states have however frequently inserted third party rights, a total of 44 times in 16 different proceedings. Most predominant has been the participation of African and Caribbean small states in the *EU - Export Subsidies on Sugar* cases[251] and in the *EU-Banana*[252] cases. These cases regard certain trade schemes in the EU which provided for preferential treatment to certain developing states, many that were quite dependent upon the EU for their banana and sugar exports. In these cases, as Romano points out, the small states 'were not the 'object' of the disputes but rather suffered collateral damage in disputes between larger WTO members' and he also finds that '[t]his has added to the pervasive sense

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[249] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Recourse to Arbitration by the United States under Art 22.6 of the DSU* [2007] WT/DS285/ARB

[250] Jane Sutton 'Antigua says U.S. online poker shutdown was illegal' (*Reuters*, April 21 2011) <http://www.reuters.com/art/2011/04/21/us-usa-antigua-poker-idUSTRE73K6Z020110421> accessed 10 May 2011; Matt Richtel 'U.S. Cracks Down on Online Gambling' *The New York Times* (New York, April 15 2011) <http://www.nytimes.com/2011/04/16/technology/16poker.html?_r=1> accessed 10 May 2011; Thomas Agar 'Rethinking the Offshore: Antigua's Internet Gambling Challenge' (*Centre for International Governance Innovation*, August 17 2009) < http://www.cigionline.org/arts/2009/08/rethinking-offshore-antiguas-internet-gambling-challenge> accessed 10 May 2011; Tobias Buck 'EU call US betting law 'protectionist' *Financial Times* (Brussel, January 30 2007) <> accessed 14 May 2011

[251] WTO, *European Communities: Export Subsidies on Sugar - Report of the Appellate Body* [2005] WT/DS265/AB/R; WTO, *European Communities: Export Subsidies on Sugar - Report of the Appellate Body* [2005] WT/DS265/AB/R WTO, *European Communities: Export Subsidies on Sugar - Report of the Appellate Body* [2005] WT/DS265/AB/R

[252] WTO, *European Communities - Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* [1997] WT/DS27/AB/R

of powerlessness of the small states'.[253] Grynberg adds that 'It is the tangible experience of small vulnerable states with the most important and powerful of the WTO institutions, its dispute settlement mechanism, which has, more than anything else shaped perceptions of the organization as being antithetical to the interests of its smallest members'.[254]

3.4.3. Jurisdiction

The WTO represents an entirely compulsory paradigm as binding dispute resolution is an integral part of state commitments according to article 2 of the DSU. WTO membership, which is currently held by 149 states, requires submission, without any reservations, to the jurisdiction of the dispute settlement bodies. The WTO system is a closed regime and non WTO members are not permitted to participate in proceedings. States are strictly prohibited from taking unilateral actions against the violating party and must turn to the procedural for amendments. [255] Article 23.1 provides that:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

The complaining state must turn to the DSB and initiate proceedings pursuant to the provisions of the DSU. Outcome of the proceedings from a panel or the Appellate Body are considered binding even though they officially have to be adopted by the DSB in accordance with article 2 of the DSU the panel reports or Appellate Body findings can only be rejected by consensus cf. article 2.4. That means every state member has to agree to reject the finding, including the winning party itself.[256] Panel decisions can be appealed to the Appellate Body by any of the parties to the dispute according to article 16.4 in a manner provided for by article 17. Under article 21 the findings and ruling of the Appellate Body are final and binding, and if a state is declared to be in violation of WTO rules it is obligated to adjust its measures accordingly.

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[253] Roman Grynberg 'Introduction' in Roman Grynberg (ed), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press 2006) 4-6
[254] Grynberg, 'Introduction' (n 253) 4
[255] Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 175-176
[256] Romano, 'The Proliferation of International Judicial Bodies' (n 69) 719

3.4.4. Compliance & Enforcement

The dispute settlement system of the WTO differs from most other international judicial bodies as it has an enforcement scheme built into the system. Article 19.1 of the DSU concerns the results of the panel process and provides that:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with the agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the member concerned could implement the recommendations.' With adoption of the report of the panel or Appellate Body by the DSB now subject only to the negative consensus procedure.

DSU article 21 then provides for a system of surveillance by the DSB to ensure the implementation of the recommended measures. If a state fails to comply or does not do so to the full extent then the system provides for retaliatory measures under article 22. If states reach an agreement article 22.1 provides that the violating state can compensate the complaining state for its breach. If no agreement can be reached the aggravated party shall under article 22.2 turn again to the DSB requesting suspension of concessions. The suspension of concessions is the final manner to penalize a faulty respondent if parties are unable to reach any agreement.[257] Overall, the WTO system seems to be very effective when it comes to enforcement and compliance. According to Moinuddin and Sengsavang the WTO dispute settlement shows 'a compliance rate of 83 percent during the first ten years of the establishment of the WTO, which is quite impressive'.[258]

Even though the WTO's strict regime with compulsory jurisdiction and built in enforcement systems may appear to be quite attractive to small and poor states, a study into developing country participation in the dispute settlement of the WTO suggests some unfairness is present in the current system. Politically, small economies face problems both externally and internally. It can therefore be very difficult for a developing country to conclude that its limited public funds are best spent on filing a suit with an unsure result. Lack of resources in addition to foreign policy concerns can greatly diminish the will of a government of any small economy to devoting time and resources to WTO disputes.[259] If the opposing party is a major trading partner, with 'the relative economic and market power' of a small developing state may be too minor to induce compliance.[260]

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[257] Merrills (n 115) 228-229
[258] Moinuddin and Sengsavang (n 31) 79
[259] Bohl (n 31) 164
[260] Moinuddin and Sengsavang (n 31) 85

Externally, developing countries may rely heavily on richer WTO members not just for trade but also for other resources such as development assistance. Bohl affirms that 'when facing such 'trade and aid friends' as potential respondents, developing countries may prefer to avoid upsetting that relationship'.[261] Small development countries which rely on a limited number of trading partners are especially vulnerable, as they are heavily invested in continued friendly relations.

Although the topics raised are especially relevant to small developing state many of the findings can also be applied to small states generally, even those which are highly developed. Developed small countries can be just as sensitive to external pressure and the stability of its trade relationships may outweigh any interests in enforcing rights according to the WTO. The greater the dependency of a smaller state on its trading partners the less likely it is to move forward with a complaint. Additionally, a small state has no assurance that DSB proceedings will have a positive effect on its trade balance, even if it wins on all accounts.[262] The WTO rules provide that even if the small state were to win the case and be permitted to sanction the violating party the only benefit which can be obtained is trade retaliation which in case of small economies versus large ones can be more harmful to the economy of the state imposing the measures than the one the measures are directed against.

This was exemplified in the *US Gambling*[263] case. The United States decided not to comply with the panel recommendations which had been upheld by the Appellate Body. Antigua and Barbuda thus was forced to request a 'compliance panel' cf. article 21 asking the DSB for permission to retaliate against the United States under TRIPS. Normal WTO practice allows for states to retaliate under the same agreement, which in this case was GATS, but Antigua and Barbuda argued that due to difficulties due to the trade and economic disparity between the two states cross-sector retaliation was necessary. Antigua and Barbuda managed to demonstrate that retaliating under GATS would only serve to the economy of Antigua and Barbuda economy by increasing costs for their consumers. The US however would most likely essentially remain unaffected. Since Antigua had satisfies the procedural requirements of article 22.3 and due to the severity of the situation Antigua and Barbuda was authorized to retaliate under the TRIPS Agreement for USD 21 million.[264]

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[261] Bohl (n 31) 164-165
[262] Bohl (n 31) 163
[263] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (n 248)
[264] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Recourse to Arbitration* (n 249)

While member states of the WTO seem unable to reach a consensus on reforms to the DSU developing countries have suggested that this method as an alternative means. The suspension of TRIPS obligations serves only to benefit the small state instead of imposing its consumers to higher prices for goods and services. Moinuddin and Sengsavang maintain that 'Since this type of cross-retaliation in TRIPS affects only the foreign owners of intellectual property rights, it does not create the detrimental effects that are typically associated with raising tariffs or increasing barriers on foreign commodities or services'. Domestic pressure from patent holders in the violating state would also be likely to induce compliance resulting in it being less likely that such retaliatory measures will ever be needed.[265]

Despite cross-retaliation being perceived as positive developments for small states some problems still remain. Antigua and Barbuda has for example, almost four years later, still not having implemented its reward. One possible reason is that the USD 21 million was a far cry from the almost USD 3,5 billion that was requested. Also, there are some practical complications associated with using intellectual property rights of others and it will hardly be profitable to set up the necessary structure to e.g. manufacture and market patented drugs, unless the award is extensive. Also, as the invested private parties are heavily involved in the litigation process their primary objectives must be U.S. compliance. In 2007, it looked like the EU might get involved in the dispute which has much more relative trading power to challenge the U.S. with. However, the U.S. seems far from backing down on April 15 2011 according to several news sites the U.S. federal prosecutor charged operators of three popular online poker sites with fraud and money laundering seizing their internet addressed.[266]

3.4.5. Cost

The WTO dispute settlement system is funded by the WTO budget and thus by all members. The contributions of individual members are based on the basis of a state's international trade in relation to total international trade of all the members for the last five years. All states are

[265] Moinuddin and Sengsavang (n 31) 87

[266] Jane Sutton 'Antigua says U.S. online poker shutdown was illegal' (*Reuters*, April 21 2011) <http://www.reuters.com/art/2011/04/21/us-usa-antigua-poker-idUSTRE73K6Z020110421> accessed 10 May 2011; Matt Richtel 'U.S. Cracks Down on Online Gambling' (The New York Times, April 15 2011) <http://www.nytimes.com/2011/04/16/technology/16poker.html?_r=1> accessed 10 May 2011; Tobias Buck 'EU call US betting law 'protectionist' (Financial Times, January 30 2007) <http://www.ft.com/intl/cms/s/0/4c93a6fa-b091-11db-8a62-0000779e2340.html#axzz1MMUvvceT> accessed 14 May 2011

required to contribute a minimum of 0.015% even if their share in total trade is less than that.[267]

Bohl asserts that unequal access to justice is sure to underscore the WTO dispute settlement system as well as the WTO as a whole as such inequality offends the universal notions of fairness. She calls for all member states of the WTO to commit to seeking ways of granting developing countries real access to dispute settlement and recognizing the nuance that comes with smaller scale trade operations, and address the differing interests of countries with smaller economies. She finds that 'Even if WTO litigation plays out in a rules-based forum the power politics of trade are omnipresent and influential on both the national and international level'.[268]

Small economies also face problems of limited institutional capacity. Members of developing country delegations to the WTO have expressed the opinion that the WTO dispute settlement system is dominated by money and that 'whoever has the most wins'.[269] WTO litigation can be very expensive and complicated, requiring extensive legal expertise. Smaller countries who participate infrequently in disputes are less likely to have the necessary experts on hand making them subject to very high relative cost for each case. WTO litigation also requires considerable funding for fact-finding and a wealthy state has the very real possibility of burying their much poorer opponent in gathered evidence.[270]

There is no Trust fund for dispute settlement within the WTO, only technical assistance is provided.[271] Instead, since 2001, an NGO has been operating in Geneva, The Advisory Centre on WTO Law (ACWL), which provides, among other things, subsidized legal assistance to least-developed countries.[272] The ACWL also offers direct assistance to states involved with proceedings and also maintains a Technical Expertise Fund from which states can request funding to finance costs of technical expertise in fact intensive proceedings before the DSB. The fund has only received donations from three of the WTO's 153 members, Denmark, the Netherlands and Norway. [273]

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[267] 'Members' contributions to the WTO budget and the budget of the Appellate Body for the year 2010' (World Trade Organization) <http://www.wto.org/english/thewto_e/secre_e/contrib10_e.htm> accessed 25 April 2011
[268] Bohl (n 31) 197-198
[269] Bohl (n 31) 150
[270] Bohl (n 31) 149-151
[271] Romano 'International Justice and Developing Countries: A Qualitative Analysis' (n 31) 563
[272] Bohl (n 31) 146
[273] 'Least Developed Countries' (Advisory Center on WTO Law) <http://www.acwl.ch/e/ld_countries/ld_countries.html> accessed May 14 2011; 'Technical Expertise Fund' (Advisory Center on WTO Law) <http://www.acwl.ch/e/disputes/tech_exp_fund.html> accessed May 14 2011

3.4.6. Judges

The WTO dispute settlement mechanism is composed of two distinct bodies, the Dispute Settlement Body (DSB) and the Appellate Body. The DSB is composed of representatives from all member states of the WTO from which panelists are chosen on an *ad hoc* basis to compose a panel for each dispute a bit resembling arbitral tribunals.[274] According to article 8.5 panels shall be composed of three or five panelists if the parties agree. Article 8.2 provides that panel must be composed 'with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience'. National of the disputing states shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise cf. article 8.3. If a developing country is a member to a dispute against a developed country the former can request, under article 8.10, that at least one panelist is also from a developing state.[275]

The WTO dispute system also entails an Appellate Body which is a standing organ that handles the appeals from the DSB panels[276]. The Appellate Body consists of a seven-member permanent body from which three members are drawn on rotation to form an appellate panel. The appeals can only relate to the points of law or legal interpretations of the DSB's panel report under paragraph 7 of article 17.

Because of the popularity of the WTO dispute system, and the fact that cases are becoming more complex and taking a longer time, qualified panelists sometimes are in short supply. Parties to a dispute have also become harder to please and now regularly object to nominees making it necessary to call upon the Director-General to make the appointments as provided by article 8.7. In the present negotiations reviewing the DSU proposals have been made to restructure the DSU providing instead for a body of permanent panelists with non-renewable fixed terms to preclude possible conflicts of interest. This would essentially create an international court on trade law which would further contribute to the credibility of dispute settlement within the regime.[277]

Lack of usage by small states holds in hand with lack of representation but of the 21 individuals that have served on the Appellate Body since its initiation in 1995, none of them have been small state nationals.

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[274] Romano, 'The Proliferation of International Judicial Bodies' (n 69) 719
[275] Merrills (n 115) 220
[276] DSU (n 238) art 17
[277] Merrills (n 115) 221; Mackenzie and Sands (n 69) 281

3.5. Comparison

3.5.1. Statistics

All of the small states are UN members according to the criteria set out in chapter 1 and therefore automatically parties of the ICJ statute according to article 93.1 of the UN Charter and article 35.1 of the ICJ statute. Only 11[278] small states currently accept the compulsory jurisdiction of the ICJ in accordance with article 36.2 of the ICJ statute. 41[279] of our 47 states have ratified UNCLOS and consequently are obliged to settle their disputes arising under the convention but only three states, Cape Verde, Estonia and Trinidad and Tobago, have given a declaration on choice of procedure, cf. to article 287, naming ITLOS as the preferred dispute settlement methods. Currently, 28 [280] small states are WTO members and are thus automatically subject to compulsory jurisdiction under the DSU[281] A further ten small states have been granted *Observer status* in the WTO which allows them the right to participate in its function to some extent but they must commence negotiations to join the organization within five years.[282] *Chart 2* shows percentage of small state participation in each of the respective bodies and the number of countries that have accepted automatic jurisdiction procedures.

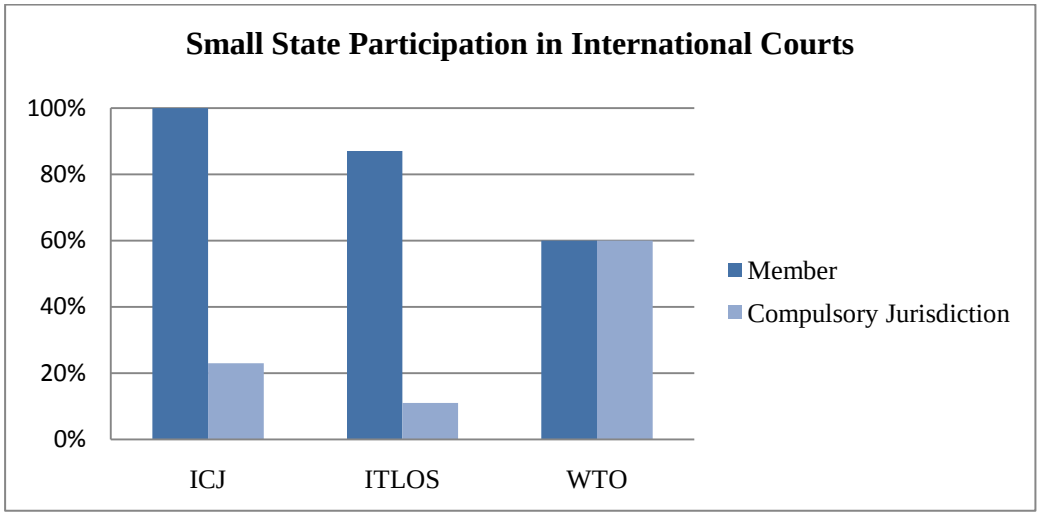

Chart 2: ***Small State Participation in International Courts***

[278] 'States Entitled to Appear before the Court' (International Court of Justice) < http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a> accessed May 14 2011
[279] 'Settlement of disputes mechanism' (*United Nations Division of Ocean Affairs and the Law of the Sea*, 21 July 2010) <http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 14 May 2011
[280] 'Member and Observers' (*World Trade Organization*, 23 July 2008) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 14 May 2011
[281] See chapter 3.4.3
[282] 'Member and Observers' (*World Trade Organization*, 23 July 2008) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 14 May 2011

3.5.2. Case Topics

Of the 566 cases that have been initiated before the three courts, small states been parties on 18 occasions for a ratio of just over 3%. Nine times they have been involved in cases before the ICJ, six times before ITLOS and three times within the WTO. This includes cases that have been withdrawn, found inadmissible or are currently ongoing. Only ten cases have been ruled upon by the merits. *Chart 3* shows small state cases versus all cases that have been initiated before the three bodies.

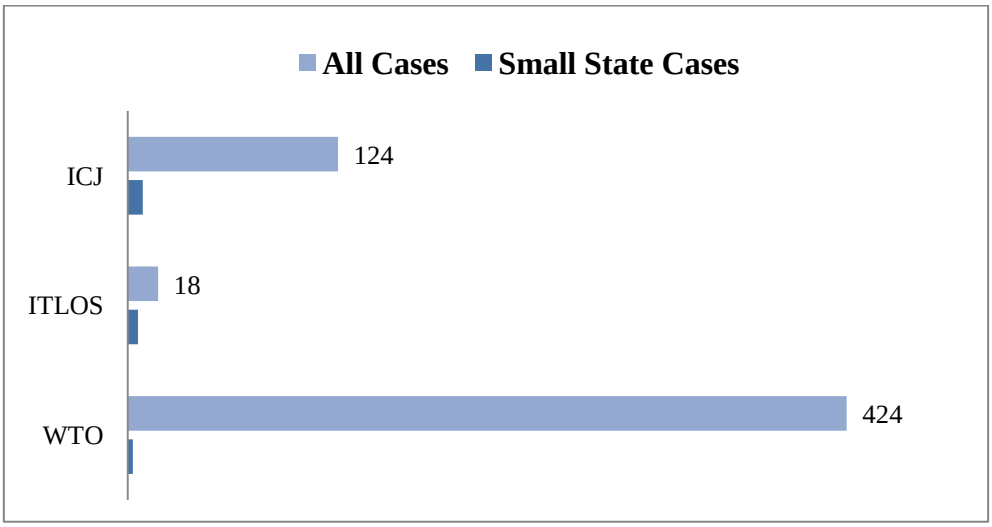

Chart 3: *Small State Cases*

This leads to a total of 18 small state cases versus 566 cases in total, 7,4% before the ICJ, 33,3% before ITLOS, 0,7% within the WTO, for a total of just over 3%. Small states cases thus in total constitute a very low percentage compared to the total number of cases, except before ITLOS but as was revealed in chapter 3.3.2. small states have not been direct participants in those cases and they have at best indirectly affected their interests.

Under articles 62 and 63 of the ICJ statute and articles 31 and 32 of the ITLOS statute states are allowed to 'intervene' in cases where the disputed matter affects their interests directly. The WTO dispute settlement system has similar rules, in accordance with article 10.2. allowing member 'having a substantial interest in a matter before a panel […] an opportunity to be heard by the panel and to make written submissions to the panel'. The prerequisites differ in the WTO to those of the other two courts and in practice third party rights are granted much more frequently.[283] This corresponds with small state experience. In addition to the 18 cases, a small state has once been granted the right to intervene in one case before the ICJ but without wanting to become a party and a small state has never intervened in

[283] Merrills (n 115) 221-222

proceedings before ITLOS. Small states have however on 44 instances in 16 separate disputes inserted third party rights in cases before the WTO.

Small states have been complainants in thirteen cases of the 18 cases before the court. In one case both parties were small states and in the remaining four the small state was a respondent. Two of the respondent cases were the Trinidad and Tobago cases before the WTO where a panel has not been constituted even though over 11 years have passed. The other two were the Icelandic 'Fisheries jurisdiction' cases where Iceland didn't participate in the proceedings and completely disregarded the verdict as we reviewed in chapter 3.2.4. This means that small states have mainly been involved in international courts as complainants and international courts are only to a limited extent being utilized to pursue small states.

The six small state ITLOS cases as well as the one concluded WTO case esentially have dealt with very specific treaty obligations and are being primarly driven by interested third parties. Small state cases before the ICJ, although also few, have however dealt with a wide range of topics, many of extreme significance to the disputed parties.

3.5.3. Jurisdiction

Jurisdiction can be based on various basis as was detailed in chapter 3.1.3. Small states cases have been based on various methods of jurisdiction. ITLOS cases have on some occasions been subject to more than one jurisdictional basis but for the purpose of this comparison the prompt vessel cases are considered to be compulsory jurisdiction cases. In the two substantive cases the jurisdiction however is based on declarations of state preferred choice of procedure. WTO cases are all based on compulsory jurisdiction as was established in chapter 3.4.3. ICJ cases however had a wide variety of jurisdictional bases with jurisdiction frequently being challenged cf. chapter 3.2.3. as can be seen from *Chart 4*.

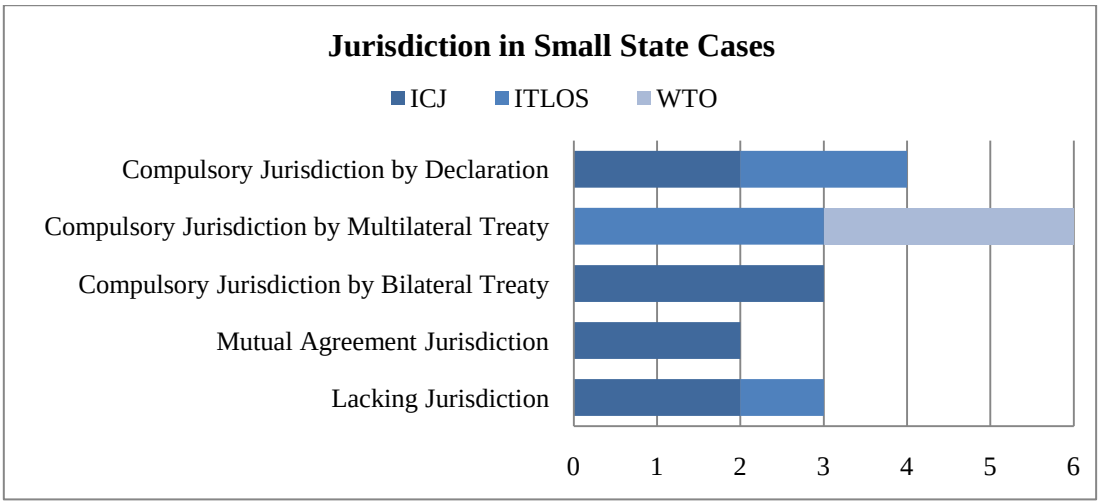

Chart 4: ***Types of Jurisdiction in Small State Cases***

3.5.4. Compliance and Enforcement

Of the nine cases before the ICJ two were withdrawn, two were found inadmissible and two dealt with fixing boundaries were both parties were content with the respective judgments.[284] Of the three remaining cases one was the Djibouti case where Djibouti 'won' on only one charge of many and in the Icelandic *Fisheries Jurisdiction* cases Iceland was found at fault. Although the winning ratio before ITLOS initially looked to provide very promising prospects for small states all six cases have dealt with detainment of vessels where none of the beneficial owners, ship masters or crew members were nationals of the flag state. The cases were *de facto* brought to the court by the ship owners who were responsible for hiring council. Of the three small state WTO cases two have not left the consultation stage although over a decade has passed since their initiation. In the US Gambling case where Antigua and Barbuda seemed to have triumphed over the kingpin of international trade, having established breaches and being provided with the possibility of cross-sector retaliation. However, further research showed that the case is allegedly mainly being funded by the US poker industry and Antigua and Barbuda has still not implemented its retaliatory rights almost 4 years later.

3.5.5. Cost

In comparison to the cost of international conflicts international dispute settlement courts are essentially not expensive operations. Disputes can cost time and money and affect state reputation and can have an effect on international trade between states, and not to mention fiscal and devastating social cost incurred is disputes lead to military conflict.

The budget of the ICJ for 2010 is USD 25.500.000[285] while the budget for ITLOS in 2010 is USD 14.867.520[286]. This means that the budget of ITLOS is roughly 60% of the ICJ budget for the same period even though ICJ handles far more disputes. A lot of the ITLOS cases have been prompt release cases which are usually quite simple proceedings compared to other inter-state cases since there is no judgment on the merits. It seems that the tribunal is clearly being underutilized and has not lived up to its potential, or expectations. The WTO budget does not provide for information on the cost of the dispute settlement aspects of the organization. According to Romano in his 2005 article 'The Price of International Justice' the

[284] See chapter 3.2.4
[285] UNGA 'Report of the International Court of Justice' UN GAOR 65th Session UN Doc. A/65/4 (2009), See also chapter 3.2.5
[286] 'Decisions on budgetary matters of the International Tribunal for the Law of the Sea for 2011-2012' UN Doc SPLOS/217 (2010)

cost of dispute settlement the previous year was USD 4.573.543 or 3,7% of the entire WTO budget for that year.[287] If this percentage were applied to the 2010 budget and converted into USD the cost would be just over USD 9.2 million. These calculations are only speculation and Romano's article does not provide information on to what extent joint overhead and administrative cost of the WTO are included in his figures. The comparative costs are reviewed in *Chart 6*.

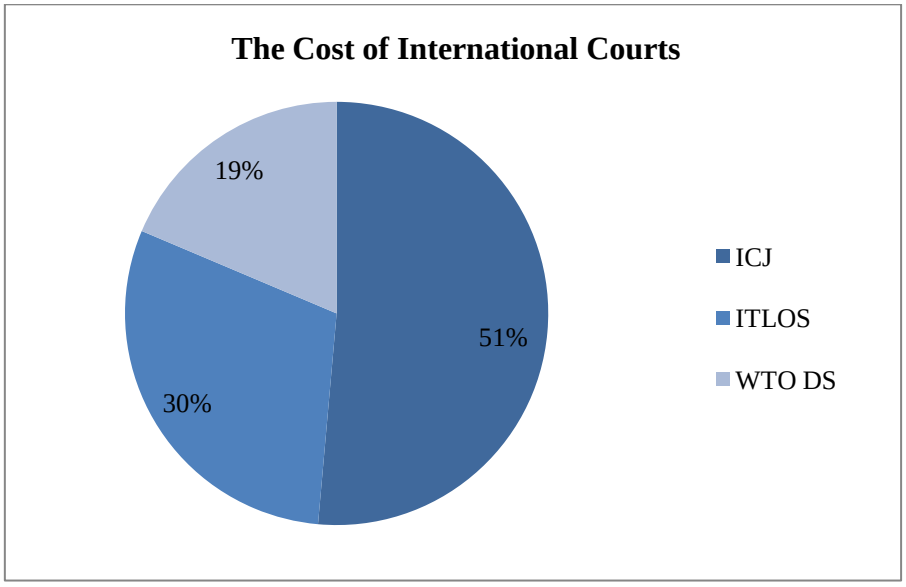

Chart 5: ***The Cost of International Courts***

It remains a fact that even though the cost of operating international courts is high the figure is comparatively low compared to other aspects of state relations. However, small and economically weak states do suffer from high relative costs as they are usually required to seek the assistant of foreign experts when engaged in proceedings. There are certain measures present for the three bodies which provide for support for their member states based on financial need. The ICJ and ITLOS provide for Trust funds for the defraying of expenses related with international litigation. These funds are subject to strict requirements and both contributions and applications have been very rare. One small state has received funding from the ICJ Trust Fund but an award has never been awarded from the ITLOS Fund. Romano[288] goes so far as to assert that 'Legal aid in the form of funds made available to defray litigation costs has proven to be a failure it 'calling the 'an inefficient form of public subside'. He is however very supportive of the efforts of the ACWL, supporting suggestions 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.

[287] Romano, 'The Price of International Justice' (n 81) 315-316
[288] Romano, 'International Justice and Developing Countries: A Qualitative Analysis' (n 31) 611

3.5.6. Judges

Even though judges in the three courts are neutral advisories only supposed to rule on the relevant law and facts the nationality of judges is still the topic of numerous provisions and a topic that is a matter of much debate. All three bodies require diverse representation even though ITLOS is the only body which has the requirement of geographical distribution present in its statute. This seems to have had some impact on small states, as well as developing countries, but small state nationals have by far been most prominent on the tribunal's bench. Small states have however been extremely underrepresented in the two other bodies as is apparent in *Chart 5*, the ICJ body having included only one small state member and the Appellate Body none.

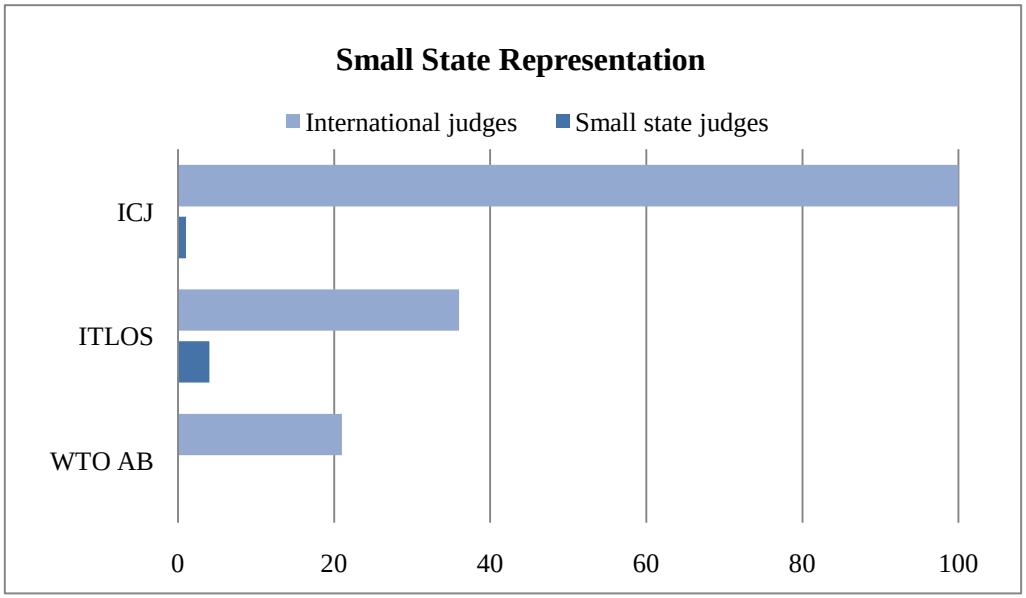

Chart 6: *Small State Representation*

The ICJ and ITLOS however provide for provisions allowing state parties to a dispute to nominate an *ad-hoc* judge if the bench does not include a member of their own nationality. Small states have nominated ad hoc judges on several occasions in ICJ proceedings but for some reason it has never been their own nationals but small states have never used this option in ITLOS. The WTO system however does not allow panelists to be nationals of disputing states but developing countries involved in disputes against a developed state can request that at least one panelist be a developing country national. This still means that the remaining panelists will be developed country nationals.

4. CONCLUSION

In the beginning I stated that the objective of this paper is to explore the relationship between the world's smallest states and three international courts, the ICJ, the ITLOS and the dispute settlement mechanism of the WTO, review to what extent small states have benefitted from international litigation before these courts and attempt to explain which aspects of these courts are either beneficial or detrimental to small state interests. One important fact which I realized quite early in my work is that this demographic has been given relatively little attention with more emphasis being placed reviewing international courts in view of developing state needs.

It has been established that there are in fact several reasons why states create international courts. I agree with former judge Warioba[289] when he finds that:

> [I]nternational judicial institutions are well established, play an important role, render important decisions and contribute enormously to the maintenance of peace and security and the development and strengthening of international law.

International law is conceived to be 'morally authoritative and legitimate', it facilitates and increases communication between states and, most likely, states perceive that a world where international law is created and complied with is of global interest.[290] In my view, the credibility enhancement of state commitments as well as amplification of international law is the most important contribution of international courts to small state interests. This is directly related to the fact that small states generally have the most to gain from relations free from relative politics. Small states have however shown that they are able to make use of their smallness to their advantage, gaining favorable public opinion from their apparent weakness.

These recent developments, with civil society having become a major contributing factor in how state leaders manage disputes, are noteworthy for small states. Warioba has observed that 'Civil society is also developing to be a potent force in the monitoring of compliance with agreements especially in areas such as humans rights and environment where society is actively involved'. He goes on to claim that '[w]hat is happening now is the development of truly international values which will make it easier for state to include international rules in domestic legislation and to naturally comply with decisions, including binding decisions of international courts.'[291]

The ICJ remains the venue where most small state cases have been brought, with the widest variety of topics often involving matters of imperative significance to the small state participant. However, small states have faced some difficulties with the ICJ, both externally

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[289] Warioba (n 27) 46; Guzman, 'International Tribunals: A Rational Choice Analysis' (n 44) 174
[290] Ginsburg and McAdams (n 49) 45 1233-1234
[291] Warioba (n 27) 50

and in cases. Due to the ICJ's consensual basis for jurisdiction, states are often caught up in lengthy preliminary proceedings which can effectively postpone a judgment on merits for month or even years. No compliance structure is in place and enforcement rests upon the highly political body of the UN Security Council. Many small states would face difficulty justifying spending money, human resources and possible loosing without more assurances. The composition of the court's bench does not serve to strengthen small state faith but it's fair to say that this demographic has been severely underrepresented.

Small and third world states alike seemed to have had high hopes for ITLOS as it is the only of the three judicial organs where they played an active part in shaping its structure and composition. So far however, the results have been quite disappointing. Perhaps due to renewed faith in the ICJ the tribunal has become a judicial excess. The court however does have the potential to become a prominent organ in this vital field of interest, especially if more states could be persuaded to commit to its jurisdiction.

The WTO goes the furthest in acknowledging that special consideration is needed for its weakest players. Those measures are all reserved for developing and least-developed states and even though small and poor states are becoming increasingly more active in the operations of the organization, limited use has been made of these provisions.[292] However, developed small states receive no preferential treatment despite having to face parallel problems of insufficient market power to persuade compliance. Romano[293] has found that:

> [S]tructural adjustments to the dispute settlement machinery are needed, though. As long as the result of the procedure remains only an authorization to retaliate by imposing tariffs on the goods of the offender rather than monetary compensation, it is unlikely that developing countries will care to fully take on the trading giants.

This applies directly to small states as well, at least when engaged in disputes against much larger adversaries. However, it must be noted that the miniscule trade volumes of small states can work both ways, possible affording them to get away with their own violations without other states bothering to challenge the measures.

The cases before ITLOS and WTO have shown that nationals of powerful states are perhaps to some extent utilizing the more lenient regimes of small states to pursue their own interest. Even though the small states are to some extent affected in the cases, this development needs to be monitored further to make sure interstate dispute settlement efforts are not being manipulated by discontent nationals in domestic policy disputes.

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[292] Romano, 'International Justice and Developing Countries: A Qualitative Analysis' (n 31) 605-607
[293] Romano, 'The Price of International Justice' (n 81) 288

In theory, international courts are an advantageous platform for small states in need of a dispute settlement venue. However, in practice, small states have not brought many cases to international courts and on even fewer occasions have cases been brought against them. One possible explanation is that small states are generally favorable towards international law and therefore perhaps more 'law abiding' then the other states. Some larger states may be discouraged from pursuing disputes with small states not wanting to be portrayed unfavorably for strong-arming a smaller state. Another guess would be that small states have less territory, fewer inhabitants, do less trade and participate less in the international arena and therefore dispute topics are not as likely to arise as with larger states. Yet another theory is that some small states simply lack the capacity to be able to withstand the expensive, elaborate and time-consuming proceedings of international courts and therefore shy away. Further research is certainly needed on the subject.

We have established that small states are not active participants in international adjudication and that they are not adequately represented in some international bodies. Likewise, the conventional methods of financial aid through random state contribution and defraying of expenses has not proven productive. While most small state cases have not led to their preferred result, on most occasions small states have not been bludgeoned either. The good news is that small states have shown they are possibly standing firm against powerful adversaries in matters of vital interest. If the right steps are taken to strengthen the international judiciary as well as provide small and weak state players with adequate support, international courts could certainly prosper as a source of justice for all.

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General Agreement on Trade in Services	GATS
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