INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT:

TRENDS AND PROSPECTS

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Dedication

This book is dedicated to the memory of Paul C. Szasz
(1929–2002)

Eminent Authority on International Law and Organizations,
Wise Mentor and Dear Friend

CHAPTER 1

INTERNATIONAL ORGANIZATIONS AND THE INTERNATIONAL JUDICIAL PROCESS: AN OVERVIEW

*Cesare P.R. Romano**

International organizations can participate in international judicial proceedings in various capacities and various forms. They can be both plaintiffs and defendants (or applicants and respondents, to use a terminology more common in the international arena) in contentious cases, or, for instance, be able to activate the court through requests for advisory opinions. Sometimes they can also play the role of the friend of the court (*amicus curiae*) in order to influence the outcome of the process.[1] This chapter is concerned solely with international organizations' participation in international judicial proceedings *as parties.*

Although it is an indivisible concept, the jurisdiction of international judicial bodies can be described according to various criteria.[2] The most common classification is based on the positive limits of the courts' jurisdiction: subject-matter (jurisdiction *ratione materiae*); person appearing (*ratione personae*); geographical scope (*ratione loci*); time (*ratione temporis*). Alternatively, jurisdiction of international judicial bodies can be categorized according to the function the judicial organ is called to exercise. International judicial bodies carry out six basic functions: i) settle disputes between two or more parties (contentious jurisdiction); ii) render advisory opinions (advisory jurisdiction); iii) decide appeals against decisions of other judicial bodies or lower-tier bodies (appellate jurisdiction); iv) hear requests from

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1 See infra, in this book, Chinkin/Mackenzie.

2 Steinberger, H., "Judicial Settlement of International Disputes," Bernhardt, R. (ed.), *Encyclopedia of Public International Law,* Amsterdam, North-Holland, 1992, Vol. 3, at 49.

national courts for the correct interpretation of the law before the case is decided at the national level (preliminary jurisdiction);[3] v) decide cases between staff of international organizations and the organizations itself (administrative jurisdiction); vi) and decide criminal cases and impose penalties (criminal jurisdiction).

Yet, no international judicial body exists that is empowered to exercise all those types of jurisdictions. Usually international criminal tribunals have only criminal jurisdiction and cannot settle disputes, give advisory opinions, or decide administrative cases or anything else. Conversely, international judicial bodies other than criminal tribunals, as a rule, cannot impose criminal penalties. The International Court of Justice and the International Tribunal for the Law of the Sea have only contentious and advisory jurisdiction.[4] Preliminary jurisdiction, which creates a direct link between national and international courts, is a feature principally of judicial bodies of regional economic and political integration organizations.

Depending upon the kind of jurisdiction an international judicial body is called to exercise, different entities might have standing. Thus, for instance, as a rule international criminal tribunals can only hear cases against individuals, not States. Human rights tribunals hear cases brought by individuals or associations of individuals against states, not the reverse, nor cases between individuals (these latter two categories of disputes are generally appropriately treated at the national level). Yet, despite the wide variety of functional jurisdictions, and organizations that might appear before the various international judicial bodies, only contentious and appellate jurisdictions deserve detailed analysis. Indeed, while in general international organizations and/or their organs can appear before international judicial bodies in contentious cases and request advisory opinions, the other four kinds of jurisdictions are marginal for the purpose of this study or self-evident.

First, it is a truism that does not deserve further discussion that international organizations have standing in administrative cases, since they will be respondents before international judicial bodies in cases filed by

3 This is the so-called "preliminary reference" in English, in French "renvoi prejudicial," in Spanish "interpretación prejudicial."

4 In its long history, the ICJ has also exercised a sort of appellate jurisdiction (or, better, a supervisory jurisdiction). First, until 1996 the ICJ could hear requests for review of judgments rendered by the UN Administrative Tribunal submitted by the Committee for Applications for Review of Administrative Tribunal Judgments. Advisory opinions thus rendered were binding. On this point see in this book, Dominicé, pp. 92–95. Second, the Court has been called to review the work of international arbitral tribunals in a few instances. See, for instance the case concerning the Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, ICJ Reports 1960, p. 192, or the case concerning the Arbitral Award of 31 July 1989, Judgment, ICJ Reports 1991, p. 53. On this aspect of the ICJ jurisdiction, see Reisman, M., *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, The Hague, Nijhoff, 1997.

their own employees. Second, appellate jurisdiction is quite a rarity in the world of international judicial bodies. Indeed, very few of them have two degrees of jurisdiction. Besides the criminal tribunals, which do have appellate chambers, only the WTO dispute settlement system, the ECHR, and the ECJ are articulated on two levels of jurisdiction (respectively Panels and Appellate Body, Chambers and Grand Chamber, and the Court of First Instance and the ECJ itself). Moreover, appellate jurisdiction is usually exercised only after the lower tier court has decided a contentious case. Thus, the analysis of the former can be subsumed in that of the latter. Third, preliminary jurisdiction has little or nothing to do with international organizations and their organs. The only instance worth mentioning is the case of the Benelux, where the College of Arbitrators, an organ of the Benelux, can ask the Benelux Court of Justice for a preliminary ruling.[5] Finally, while the Prosecutor is an organ of an international organization, international organizations do not per se have standing in international criminal proceedings.[6]

CONTENTIOUS JURISDICTION

International judicial bodies have been created, primarily and originally, to settle disputes in a legally binding way. As a matter of fact, the genes of the various species of international courts and tribunals can all be traced back to arbitration. Over decades, as new international judicial bodies have been created to address new situations and cover areas not covered before by international law, international judicial bodies have started expanding their functions beyond that of mere dispute settlement. Incidentally, the binding settlement of international disputes is the only area in which international judicial bodies and arbitral tribunals overlap and compete.

Disputes among international organizations or between international organizations and other entities can be submitted to arbitral tribunals, but that is quite a rare event. Amongst these few, the majority seem to be

5 "When it appears that the solution of a difficulty relating to the interpretation of a rule of law . . . is required for a decision in a case pending before the College of Arbitrators . . . the College of Arbitrators, if it believes that it needs a decision in the matter in order to render its judgments, must stay, even as a matter of routine, any final judgment in order to obtain a decision of the Benelux Court on the question of interpretation." Treaty Instituting the Benelux Economic Union, signed at the Hague, on February 3, 1958 [hereinafter Benelux EU Treaty]. See 381 *U.N.T.S.* 165, art. 11.

6 Nonetheless, there are several provisions in the Rome Statute regarding the role of international organizations in the Prosecutor's investigations (art. 15.2, 54.3.c, 73, 87.6 and 93.b). Moreover, the Security Council, acting under Chapter VII of the UN Charter, can submit to the Prosecutor of the International Criminal Court situations where one or more international crimes appear to have been committed. On this issue, see, in this book, Gowlland.

disputes between international organizations and private companies arising out of contractual obligations.[7] The jurisdictional basis of most of these arbitrations is to be found in a compromissory clause contained in a contract concluded between private enterprises and the organization, and many have been litigated under the auspices of the International Chamber of Commerce. Besides that kind of disputes, there is not much to be found: an award in a dispute between an international organization and a governmental organ relating to taxation liabilities of the organization's employees,[8] and another concerning the interpretation of Article V (Executive Board) of the UNESCO Constitution.[9] Currently, a series of cases against a decision of the Bank for International Settlements, filed by private shareholders, is pending before the Bank's Arbitral Tribunal,[10] while the United Nations has agreed to ultimately refer to arbitration a dispute with an Italian company arising out of damages incurred by the latter during the peace-keeping operations in Somalia.

The potentially weighty, but rarely resorted to, domain of international arbitration notwithstanding, international organizations can appear in contentious cases before international judicial bodies in several instances, although not as frequently as States.

7 League of Nations—L'Enterprise du palais des nations (EPN), Award of July 25, 1938, unpublished, referred to in Stuyt, A. M., *Survey of International Arbitrations, 1794–1989*, Dordrecht, Nijhoff,1990, 3rd. ed., at 562 (A. 2.1); Balakhany (Chad) Ltd. v. Food and Agricultural Organization (FAO), Award of June 29, 1972, UNJY 1972, at 206, Rep. 3173; Starways Ltd. v. United Nations, Award of September 24, 1969, ILR 44 (1972), at 433; UNJY 1969, at 233, Rep. 3776; Jean-Pierre Lamarch v. Organisation des Nations Unies au Congo (ONUC), Award of August 6, 1965, unpublished, referred to in Coussirat-Coustère, *Répertoire de la jurisprudence arbitrale internationale*, Boston, Nijhoff, 1989–1991, Vol. III, at 1872 (1965.D I); Organisation internationale A v. société française B, Award of June 20, 1972, R.A., 1975, 252–258; Société X v. UNESCO, Award of December 22, 1982, unpublished, referred to in Coussirat-Coustère, Vol. III, at 1894 (1982.D V); Westland Helicopters Ltd. v. Arab Organization for Industrialization et al., Award of March 5, 1984, J.D.I., CXII (1985), pp. 232–244; Organisation des Nations Unies pour l'Alimentation et l'Agriculture (FAO) v. Société BEVAC, Award of July 29, 1986, unpublished, referred to in Coussirat-Coustère, Vol. III, at 1923 (1986.D V); Société Vendôme International-Continental American/Organization for Economic Cooperation and Development, Award of July 5, 1988, unpublished, referred to in Coussirat-Coustère, Vol. III, at 1934 (1988.D VII). This list is by no means exhaustive, as in several instances the parties might have agreed to keep the arbitral proceedings confidential. That is standard practice in the case of international organizations.

8 European Atomic Energy Community (Euratom)—UK Atomic Energy Authority, Award of February 25, 1967, ILR 44 (1972), at 409, *RIAA*, Vol. 18, at 503.

9 Award of September 13, 1949. ILR 1949, at 331/7.

10 On the BIS Arbitral Tribunal, see http://www.bis.org/about/arb_trib.htm. The BIS Arbitral Tribunal was established on January 20th, 1930 by the Convention respecting the Bank for International Settlements, done at The Hague on 20 January 1930, 104 LNTS 441. The proceedings are held under the aegis of the Permanent Court of Arbitration. For the documents of the arbitrations, see: http://www.pca-cpa.org/RPC/index.htm#Bank.

Judicial Bodies Whose Jurisdiction Is Not Limited to a Specific Geographic Area

As far as international organizations are concerned, they have no standing as parties, either as applicants or as respondents, in contentious cases before the ICJ. Article 34 of the Court's Statute provides that: "Only States may be parties to disputes before the Court."[11] Although it might be argued that this provision could be interpreted as to include supranational organizations, there seems to be a consensus that international organizations are barred from having access to contentious proceedings. However, no international organization to date has tried filing a contentious case with the Court's Registrar, and thus given the judges a chance to rule on the matter themselves.

Whether opening the Court's contentious jurisdiction to international organizations is desirable has been discussed elsewhere.[12] Suffice it to say that there are certain areas of international law that in principle could benefit from suitable international organizations having the capacity, or even the duty, to commence legal proceedings on behalf of the international community against wrong-doing states. Human rights and the protection of the environment are just two possible examples.[13] Moreover, because international organizations cannot appear as respondents before the Court, States that might have suffered prejudice from actions of international organizations and their members might be forced to initiate multiple proceedings against each and every member. This is what happened when in 1999 Yugoslavia filed a battery of cases, instead of a single one, against ten members of the North Atlantic Treaty Organization (NATO) for the bombings carried out by the alliance during the Kosovo campaign.[14] The cases against Spain and the United States were removed from

11 The ICJ was established by the UN Charter. UNTS, Vol. 1, at 16, arts. 7.1, 36.3, and Chapter XIV (arts. 92–96). The Statute of the Court is annexed to the UN Charter.

12 See Lauterpacht, E., *Aspects of the Administration of International Justice*, Cambridge, Grotius Publ. 1991, at 61–65; Couvreur, Ph., "Developpements recents concernant l'acces des organizations intergouvernementales à la procedure contentieuse devant la cour internationale de justice," in Yakpo, E., Boumedra T., *Liber Amicorum Judge Mohammed Bedjaoui*, The Hague, Kluwer, 1999, at 293–323.

13 See Lauterpacht, op.cit., at 63–64.

14 Legality of Use of Force (Yugoslavia v. Belgium), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. Canada), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. France), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. Germany), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. Italy), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. Netherlands), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. Portugal), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. United Kingdom), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality

the list because the Court manifestly lacked jurisdiction.[15] Those against Belgium, Canada, France, Italy, Germany, Portugal, Netherlands, and the United Kingdom are still pending. Of course, in the merits phase the Court might decide to join those cases which survive the preliminary objections phase, if requested so by the parties, but this remains a graphic example of the kind of practical problems that may be caused by the fact that international organizations lack standing.[16]

The International Tribunal for the Law of the Sea is discussed in this book by Treves,[17] however it should be noted here that the ITLOS is ". . . open to entities other than States Parties in any case expressly provided for in Part XI [deep sea-bed mining] or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."[18] According to Part XI, the "entities different from States" that are qualified to be party before the Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea include the International Sea-bed Authority and the Enterprise.[19]

Be that as it may, these are not the only international organizations qualified to become parties in cases before the dispute settlement bodies envisaged by the Law of the Sea Convention. In light of articles 1.2, and 305.1.f, as well as of Annex IX, of the UNCLOS, the expression "States Parties" in the Convention applies to those international organizations which are parties to the Convention ". . . to the extent of the conditions

of Use of Force (Yugoslavia v. Spain), Interim Protection, Order of June 2, 1999, ICJ Reports 1999; Legality of Use of Force (Yugoslavia v. United States of America), Interim Protection, Order of June 2, 1999, ICJ Reports 1999.

15 Ibid.

16 On the issue see: Boisson de Chazournes, L., "La Cour internationale de Justice aux prises avec la crise du Kosovo: à propos de la demande en mesures conservatoires de la République fédérale de Yougoslavie," *Annuaire Français de Droit International* (1999), p. 452–471, at 466 ff. On practical problems that litigation of multi-party cases raises, see: Bernhardt, R., "Judicial and Arbitral Settlement of International Disputes Involving More than Two States," *Annuaire/Institut de Droit Internationale*, Vol. 68, 1999, pp. 185–270.

17 See, in this book, Treves, pp. 39–43.

18 ITLOS Statute, art. 20.2. U.N. Convention on the Law of the Sea [hereinafter UNCLOS] concluded on December 10, 1982, entered into force November 16, 1994. See UNCLOS art. 287, U.N.Doc.A/CONF.62/121 (1982), 21 *ILM* 1261 (1982). Part XV section 2 of UNCLOS is dedicated to the peaceful settlement of disputes. The ITLOS Statute is contained in Annex VI of the UNCLOS. On international organizations and ITLOS contentious jurisdiction see, in general, infra Treves.

19 The International Sea-bed Authority and the Enterprise are international organizations as defined in this book. However, for sake of precision, in light of the 1994 Agreement concerning the implementation of Part XI of the Law of the Sea Convention, the Enterprise is, at least for the duration of a probably long transitional period, more an organ of the Authority than a separate organization. On this point, see, in this book, Treves. (Agreement for the implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, adopted in New York on July 28, 1994, repr. in 23 *ILM*, 1309 (1994)).

relevant . . ." to them, namely to the extent of the matters governed by the Convention over which their member States have transferred competence to the organization. At present only the European Community fits this description, but in the future other regional economic and political integration organizations might be transferred competence by member States over marine areas and certain activities carried out therein (e.g. fishing, transport, exploitation of mineral resources).[20]

Thus, to summarize, currently the International Sea-bed Authority, the Enterprise, and the European Community may become parties to contentious cases before the ITLOS. The former two may become parties to contentious proceedings before the Sea-bed Disputes Chamber,[21] while the latter may be a party to contentious cases before the Tribunal as well as before an international arbitral tribunal set up in conformity with the Convention.[22]

Finally, in the case of the WTO, international organizations do not per se have standing before the WTO dispute settlement system bodies.[23] Only members of the WTO have standing. Regional organizations that have been devolved exclusive competences by member States over matters covered by the WTO agreements (such as custom unions) can accede to the agreements in their own right. Yet, at present time, the EC is the only such example. This issue has been analyzed in detail by Rosas in this book.[24] It is worth mentioning here, however, that, much as in the case of the ICJ, in theory there are instances in which giving certain selected international organizations standing before the WTO dispute settlement system's organs might be more efficient than limiting access to its members. There are numerous intergovernmental organizations grouping together producers of basic goods which might be considered (e.g. the International Tropical Timber Organization, the International Sugar Organization, or the International Cocoa Organization).

Yet, the issue is slippery. Indeed, on the one hand, with regard to passive standing, Article XX, paragraph h, of the GATT 1994 provides for

20 The Community signed the Convention on December 7, 1984 and gave its "formal confirmation" (equivalent to ratification) on April 1, 1998. On both occasions it made a detailed declaration concerning "the matters for which competence has been transferred to it by those of its Members States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement" (cf. *Multilateral Treaties Deposited with the Secretary-General, Status at 31 December 1999*, II, 218).

21 UNCLOS, article 187.

22 UNCLOS, article 7.2, of Annex IX, in light of paragraph 1 of the same article and article 287 of UNCLOS. On this point, see, in this book, Treves, p. 40 and ff.

23 The WTO dispute settlement system was established by the General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 *ILM* 1125 (1994) (Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes), at 1226–47 [hereinafter DSU].

24 See, in this book, Rosas.

an exception from GATT obligations for measures WTO members take to fulfill their obligations under certain intergovernmental commodity agreements (i.e. those that meet the criteria submitted by the Contracting Parties and not disapproved by them). Hence it places such intergovernmental commodity organizations beyond the reach of WTO dispute settlement procedures. On the other hand, with regard to active standing, one might wonder what legal rights these intergovernmental organizations might try to uphold. First, the WTO agreements hardly include rights for their benefit (as contrasted to those for the benefit of their members). Second, it is usually not within the powers of these international organizations, under the respective constitutive instruments, to ensure compliance with WTO trade rules by bringing complaints against WTO members.

Be that as it may, greater participation by international organizations in WTO dispute settlement proceedings is desirable. This can be achieved either by the use of *amici curiae* (which, however, is a thorny issue[25]), or by making greater use of Article 13 of the Dispute Settlement Understanding, which allows panels to consult with intergovernmental organizations.[26]

Regional Human Rights Bodies

In the case of human rights tribunals, in general, international organizations do not per se have standing. The only exception is the case of the African Court of Human and People's Rights (ACHPR), where African intergovernmental organizations can submit cases.[27] Whether the term "African intergovernmental organizations" extends to intergovernmental organizations not exclusively made of African countries, but where African countries are members—at least a majority of the members—is not clear. However, for the time being this is only speculative theory, since the ACHPR's Statute has not yet entered into force.

The question of whether organs of international organizations do have standing before human rights judicial bodies is, conversely, an elu-

[25] On this point see, in this book, Chinkin/Mackenzie, pp. 147–153., and Charnovitz, pp. 235–238.

[26] Use of this provision has been done in the past. For instance, in the Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, the GATT panel that was created to settle the dispute consulted with the WHO. Thailand—Restrictions on Importation of, and Internal Taxes on Cigarettes, Report of the Panel adopted on 7 November 1990, 30 *ILM* 1122.

[27] Art. 5 Protocol to the African Charter of Human and People's Rights, opened for signature on June 8, 1998 during the 34th Summit of the OAU, in Ouagadougou, Burkina Faso, 58 *Zeitschrift für auslandisches öffentliches Recht und Volkerrecht* 727 (1998) [hereinafter ACHR Protocol]. African Charter on Human and Peoples' Rights, adopted on June 27, 1981, entered into force on October 21, 1986, 21 *ILM* 58 (1982), [hereinafter African Charter].

sive one. To illustrate, individuals do not have access to the Inter-American Court of Human Rights (IACHR).[28] If an individual, group, or any non-governmental entity legally recognized in one or more member states of the Organization of American States (OAS) thinks they suffered a violation of the rights described in the American Convention on Human Rights, they can lodge a petition with the Inter-American Commission of Human Rights. The Commission investigates the compliant, and if it finds that there has been a violation it may eventually submit the individual's case to the Court. It is the Commission, an organ of an international organization, the OAS, which appears before the Court and presents the case.[29] The Court might eventually find that the individual's rights have been infringed and rule fair compensation.

In sum, while it is individual's rights violations which are sanctioned, the individual does not have per se *locus standi* before the Court.[30] All he/she has is a right of petition to the Commission, and the Commission has no obligation toward the individual to bring the case before the Court.[31] The same is valid for cases of diplomatic protection before the International Court of Justice. Individuals do not have standing before the ICJ,[32] but States may decide to bring cases against other States arising out of the infringement of their nationals' rights through the exercise of diplomatic protection. Thus, when it is said that the Inter-American Commission of Human Rights has standing before the Inter-American Court of Human Rights, the statement should be interpreted in the light of this particular situation. It is, in other words, a sort of "institutionalized" diplomatic protection through the organ of an international organization.

In the European system of protection of human rights, enshrined in the 1950 European Convention for the Protection of Human Rights and

[28] Established by the American Convention on Human Rights, signed in San José, Costa Rica, on November 22, 1969 [hereinafter American Convention]. See 1144 *U.N.T.S.* 123.

[29] Petitioners and/or representatives of the victims assist the commission in the filing and litigation of a case before the court. In practice, they participate in the preparation of briefs and the delivery of some of the oral arguments on the merits. In the reparation stage they have standing to present their own arguments and evidence. IACHR Rules of Procedure, art. 22.2 and 23. Rules of Procedure of the Inter-American Court of Human Right, Annual Report of the IACHR, 1991, OAS Doc. OEA/Ser L/V/III 25 doc 7 at 18 (1992). The 1996 Rules of Procedure, which came into effect on January 1, 1997, replaced the previous version of the Rules that were adopted in 1992.

[30] Unlike the case of criminal tribunals where cases are referred to as "The Prosecutor v. Mr./Ms. White," in the Inter-American Court of Human Rights cases are designated as the "Pablo Blanco Y Negro" case.

[31] The situation is similar to that of the International Criminal Court, where situations in which one or more crimes seem to have been committed might be referred to the prosecutor by any source, including States and the Security Council, but it is the Prosecutor who decides whether to appear, and pleads the case before the Court. See supra p. 4.

[32] ICJ Statute, art. 34. See supra note 4.

Fundamental Freedoms, it used to be the same.[33] Individuals had a right of petition to the European Commission of Human Rights, but it was the Commission which decided whether a case should be referred to the European Court of Human Rights (ECHR). However, first with the entry into force, in 1994, of Protocol 9 to the European Convention, and then with the entry into force of Protocol 11, in 1998, which redesigned the ECHR, individuals have right of standing before the Court without the "filter" of the Commission.

Judicial Bodies of Regional Economic and Political Integration Agreements

With regard to regional economic and political integration agreements (or supranational organizations), and their judicial bodies, it is only logical that the organizations' organs might be able to appear before the organization's judicial organ, for they are at the same time guardians of the organization's legal order and source of the organization's law.[34] Thus, unlike the case of other international regimes, in the case of regional economic integration organizations, (and even more in the case of supranational organizations) the organization's organs are as susceptible to being plaintiffs as to being defendants.

Europe

Starting with the archetype of a supranational organization, natural and legal persons can bring cases against the European Community's organs before the Court of First Instance[35] when EC institutions have failed to act or acted in violation of EC Law (action for annulment and action for failure to act),[36] and to recover damages caused by that.[37] Conversely,

[33] Established by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, on November 4, 1950, and entered into force on September 3, 1953 [hereinafter The European Convention]. See 213 *U.N.T.S.* 221, amended by Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, November 6, 1990, *ETS* No. 140, and Protocol No. 11 on 1 November 1998, *ETS* No. 155.

[34] On the role of the European Commission as Guardian of the Treaties, see, in this book, Rosas, pp. 64–66.

[35] The Court of First instance was established by Decision of the Council of Ministers of October 24, 1988. See 1988 O.J. (L319) 1.

[36] Arts. 230 (action for annulment) and 232 of the EC Treaty (action for failure to act). Decision 88/591, art. 3.

[37] Action for recovery of the damages caused by a Community institution through an act or failure to act which is subject to an action in front of the CFI, Decision 88/591, art. 3. Moreover, there are also the following causes of action: staff cases (Decision 88/591, art. 3); actions against the Commission on the basis of the ECSC Treaty (arts. 33, 35, 40 and 42) (Decision 88/59, art. 3); actions based on an arbitration clause contained in a contract (art. 238 EC Treaty); and actions pursuant art. 148, arts. 151 and 153 of the Euratom Treaty (Decision 88/591, art. 3).

the Community institutions[38] have various causes of action before the European Court of Justice (ECJ): actions for annulment,[39] actions for failure to act;[40] actions for default by a member state;[41] disputes concerning members of the Commission, the Court of Auditors, and the Ombudsman;[42] and actions based on an arbitration clause.[43] Certain Community institutions also have the right to bring special procedures in front of the ECJ, such as disputes concerning the European Investment Bank and national central banks.[44] Conversely, natural or legal persons can challenge Community institutions' actions before the ECJ through: actions for annulment,[45] actions for failure to act,[46] actions for damages,[47] actions against fines and penalties provided for in EC regulations,[48] actions based on an arbitration clause,[49] and action against the applicability of EC regulations.[50]

The pivotal role played by Community institutions, and the Commission in particular, in proceedings before the ECJ is illustrated by the fact that, besides preliminary rulings,[51] actions for non-compliance initiated by the Commission against member States (Art. 226 of the new EC Treaty) are the second largest part of the ECJ docket, followed by reviews of legality of the acts of Community institutions (Art. 230 of the new EC Treaty).[52]

The case of the European Free Trade Agreement (EFTA) and its Court is, unsurprisingly, similar. The EFTA Surveillance Authority, an organ of EFTA, can bring a case before the EFTA Court against a member State if it considers that that State has failed to fulfill an obligation under the

[38] The Community institutions are those named as such in the treaties, i.e. the Parliament, the Council of Ministers, and the Commission. Under the EU Treaty, the Court Auditors are also included. The Economic and Social Committee has standing in staff cases. See Lasok, K. P. E., *Law and Institutions of the European Union*, London, Butterworths, 2001 (7th ed.), at 110.

[39] EC Treaty, art. 230.

[40] EC Treaty, art. 232.

[41] EC Treaty, art. 226.

[42] EC Treaty, art. 213, art. 216, art. 247, art. 195.

[43] EC Treaty, art. 238.

[44] EC Treaty, art. 237.

[45] EC Treaty, art. 230.

[46] EC Treaty, art. 232.

[47] EC Treaty, art. 235.

[48] EC Treaty, art. 229.

[49] EC Treaty, art. 238.

[50] EC Treaty, art. 241. Staff cases are dealt with in the section entitled "Administrative Jurisdiction."

[51] See *supra* p. 4, note 3.

[52] In 2000 these figures were, respectively, 60 actions for non-compliance, and 18 reviews of legality. In the same period, preliminary rulings were 203. See Statistical Information of the Court of Justice (2000). Http://europa.eu.int/cj/en/stat/index.htm, Table 6. See also note 1 of Table 1.

agreement establishing the European Economic Area or the agreement establishing the Surveillance Authority and the Court of Justice (ESA/EFTA Court Agreement).[53] Conversely, member States can bring cases against decisions of the EFTA Surveillance Authority,[54] or the EFTA Surveillance Authority's failure to act.[55] Natural or legal persons can bring cases before the EFTA Court against decisions of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the ESA/EFTA Court Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.[56] Individuals can also bring cases against the EFTA Surveillance Authority for failure to act.[57] Remarkably, unlike the case of the ECJ, the EFTA Court is not competent to hear disputes between EFTA institutions. To date the EFTA Court has received 11 contentious cases (as contrasted to 30 requests of advisory opinions[58]). Of these, six were submitted by the EFTA Surveillance Authority against EFTA member States (four against Norway,[59] one against Iceland,[60] and one against Sweden[61]), one was submitted by Norway against the EFTA Surveillance Authority,[62] and three by privates against the EFTA Surveillance Authority.[63] Only one did not involve EFTA organs, having been submitted by a private entity against an EFTA member State (Austria).[64]

Finally, for sake of completeness, mention should be made of the other two judicial bodies active in the European region, the Benelux Court of Justice, and the Economic Court of the Commonwealth of Independent States. The CIS Economic Court has jurisdiction only with regard to interstate disputes,[65] hence it is irrelevant in this section. Organs of the Benelux

53 The EFTA Court was provided for by the Agreement on the European Economic Area [hereinafter EEA Agreement] concluded at Porto, on May 2, 1992. See 1795 *U.N.T.S.* 3. The EFTA Court was actually established by the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice [hereinafter ESA Court Agreement], concluded at Porto, May 2, 1992. See 1995 O.J. (L344) 1. ESA/EFTA Court Agreement, art. 31.

54 ESA/EFTA Court Agreement, art. 36.

55 ESA/EFTA Court Agreement, art. 37.

56 ESA/EFTA Court Agreement, art. 36.

57 ESA/EFTA Court Agreement, art. 37. They can also can bring cases on non-contractual liability of the EFTA Surveillance Authority. ESA/EFTA Court Agreement, art. 39.

58 See infra pp. 30–31.

59 Cases E-3/00 (Denmark intervening), E-2/99, E-10/97, E-7/97.

60 Case E-1/96 (removed from list).

61 Case E-6/94 (inadmissible).

62 Case E-6/98.

63 Cases E-4/97 (Norway intervening), E-7/96 (inadmissible), E-2/94 (inadmissible).

64 Case E-3/94 (inadmissible).

65 The legal basis of the Economic Court of the Commonwealth of Independent States are Article 32 of the Charter of the Commonwealth of Independent States (34 ILM 1279 (1995)), and Article 31 of the Treaty on Creation of the Economic Union (1298 ILM

do not have access per se to the Benelux Court of Justice in contentious cases. However, members of the staff of the Benelux Secretariat-General, the Benelux Trademarks Bureau, and the Benelux Designs Bureau can bring cases before the court regarding administrative matters.[66] Of course, those organizations will appear as defendants is such cases.[67]

Latin America

In the Latin American context, regarding contentious jurisdiction, organs of regional economic integration agreements have also *locus standi* before the organizations' judicial bodies, although standing is not as comprehensive as it is in the European case. There are two regional judicial fora in the Latin American region:[68] the Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina),[69] and the Central American Court of Justice (Corte Centroamericana de Justicia).[70]

34 (1995)). The powers of the CIS Court are outlined in the Agreement on Statute of the Economic Court of the Commonwealth of Independent States and Annexed Statute. The Russian text can be found in 6 *Sodruzhestvo Informatsionnii Vestnik [Commonwealth Information Bulletin]* 53 (1992). A poor English translation, and a better one in German can be found in Oellers-Frahm, K./Zimmermann, A. (eds.), *Dispute Settlement in Public International Law*, Berlin, Springer, 2001, Vol. 1, at. 894–903.

66 Benelux CJ Treaty, art. 6.1. Treaty Instituting the Benelux Economic Union, signed at The Hague, on February 3, 1958 [hereinafter Benelux EU Treaty]. See 381 *U.N.T.S.* 165.

67 Until 1999, the Benelux Court of Justice had decided 109 administrative cases. "Enkele cijfermatige gegevens betreffende de bij het Benelux Gerechtshof aanhangig gemaakte zaken van 11 Mei 1974 (datum van installatie) tot heden," ["Some statistical data concerning cases brought before the Benelux Court of Justice," translation of the author], H/g/98/156, p. 1.

68 The statute of a third forum, the Caribbean Court of Justice, was adopted on February 14, 2001, at St. Michael, Barbados. The statute can be found at http://www.caricom.org/expframes2.htm (under CCJ). The Statute will enter into force upon deposit of three ratifications (art. 35 of the Statute). The Caribbean Court of Justice can hear disputes and render advisory opinions upon request of member States and the Caribbean Community (art. 12, and art. 13.2).

69 Established by the Treaty Creating the Court of Justice of the Cartagena Agreement [hereinafter TJAC Treaty], concluded in Cartagena, on May 28, 1979. See 18 *ILM* 1203. The Cartagena Agreement has been modified by the Sucre and Cochabamba Protocols. Sucre Protocol Establishing the Andean Parliament, concluded at Quito, June 25, 1997, http://www.comunidadandina.org/ingles/treaties/trea/ande_trie4.htm; Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, concluded in Cochabamba, on May 28, 1996, http://www.comunidadandina.org/ingles/treaties/trea/ande_trie2.htm. The Sucre Protocol has not yet been ratified (except for its Chapter on Associate Members and first Transitory Provision, which are in force). The Cochabamba Protocol entered into force in August 1999. (http://www.comunidadandina.org/who/court.htm)

70 Established by the Protocol of Tegucigalpa, concluded on December 13, 1991. See 34 *ILM* 923. The Protocol of Tegucigalpa amended the Charter of the Organization of Central-American States, concluded at Panama, on December 12, 1962. See 2 *ILM* 235. [hereinafter Protocol of Tegucigalpa].

The Court of Justice of the Andean Community can hear cases submitted by the Secretariat General of the Community (Secretaría General[71]) against a member State for non compliance with community law,[72] as well as cases brought by other member States,[73] and individuals.[74] To date the overwhelming majority of cases of this kind have been submitted by the Secretariat General (33 cases), while only two have been submitted by a member State (Venezuela) against another member State (respectively Colombia[75] and Ecuador[76]), and only one has been submitted by privates.[77]

Second, decisions and other legal acts of the Andean Community Organs (Andean Council of Ministers of Foreign Affairs, the Andean Commission, the Secretariat General), as well as agreements concluded by member States within the framework of the regional integration process,[78] can be challenged before the court by member States,[79] the Andean Council, the Andean Commission, the Secretariat General and individuals, to be declared null.[80]

Third, cases in which the Andean Council of Ministers of Foreign Affairs (Consejo Andino de Ministros de Relaciones Exteriores), or the Andean Community Commission or the Secretariat General have failed to act, can also be brought before the Andean Court by community organs, member States and natural and legal persons.[81] Finally the Andean Court can also act as an arbitral tribunal in disputes arising out of the implementation or interpretation of contracts, agreements or conventions, concluded between organs of the community or by organs of the community with third parties.[82]

The Central American Court of Justice (Corte Centroamericana de Justicia) has a less crowded docket but a much broader competence, broader than most, if not all other international judicial bodies. Indeed, the CACJ's jurisdiction extends over the whole spectrum of possible judicial powers. It includes contentious, advisory, preliminary, arbitral, appellate, constitutional, and administrative jurisdictions. On the whole, the Court can hear issues brought before it by:[83] States members of the Central American Integration System;[84] States which are not members of the Central American Integration System, but that have a dispute with members States and agree to the Court's jurisdiction;[85] Supreme Courts of the members of the Central American Integration System;[86] the constitutional organs of member States;[87] national courts;[88] privates,[89] and, more to the point of this study, organs of the Central American Integration System.[90]

For what concerns the organs of the Central American Integration System (SICA), the Court can hear cases for annulment, and failure to act.[91] The Court's Statute does not specify who has these causes of action, but it is obvious that it is the organs of the Central American Integration System (Sistema de la Integración Centroamericana) which will have to appear before the Court as respondents. The Central American Court of Justice also has competence to hear any case submitted ". . . individually and directly by anybody affected by the agreements of the Organs and Organisms of the Central American Integration System,"[92] and to hear, as last instance jurisdiction, an appeal against administrative decisions of the Organs and Organisms of the SICA which affect employees of the SICA.[93] So far none of the contentious cases brought before the Court has involved organs of the Sistema de la Integración Centroamericana.[94]

ADVISORY JURISDICTION

Besides deciding contentious cases, international judicial bodies sometimes might also be given the power to hear requests to give opinions on points of law (the so-called advisory opinions). As a general rule,

71 Starting August 1, 1997, the General Secretariat of the Andean Community (the organizations' executive body), took on the junctions of the Board of the Cartagena Agreement "Junta del Acuerdo de Cartagena" (http://www.comunidadandina.org/who/secretariat.htm)

72 Cochabamba Protocol, art. 23.

73 Cochabamba Protocol, art. 24.

74 Cochabamba Protocol, art. 25.

75 Proceso 4-AI-96.

76 Proceso 2-AI-96.

77 Proceso 1-AI-87.

78 Cochabamba Protocol, art.1.e.

79 To date, 10 actions for nullification have been initiated by member states (7 Colombia, 2 Venezuela, 1 Peru), 4 by privates, and 1 by the Junta against a decision of the Commission (Proceso 1-AN-96).

80 Cochabamba Protocol, art.17–22.

81 Cochabamba Protocol, art. 37. To date there have been no cases of this kind.

82 Cochabamba Protocol, art. 38. To date there have been no cases of this kind.

83 Ordenanza de Procedimientos, art. 3. (http://www.ccj.org.ni, under "normativa juridica").

84 CACJ Statute, art. 22.a and g. (http://www.ccj.org.ni, under "normative judicica"). The CACJ Statute in English is reproduced on Oellers-Frahm/Zimmermann, op.cit., Vol. I at 242.

85 CACJ Statute, art. 22.h.

86 CACJ Statute, art. 22.d.

87 CACJ Statute, art. 22.f.

88 CACJ Statute, art. 22.k.

89 CACJ Statute, art. 22.c, j, g and arguably also paragraph ch.

90 CACJ Statute, art. 22.b (for non-compliance and nullification), 22.e (advisory jurisdiction);

91 CACJ Statute, art. 22.b.

92 CACJ Statute, art. 22.g. For a list of the Organs of the SICA, see Protocol of Tegucigalpa to the Charter of the Organization of Central-American States, art. 12.

93 CACJ Statute, art. 22.j.

94 To date the Court has heard a series of cases revolving around a dispute between Honduras and Nicaragua, and five cases brought by privates against the judicial and executive organs of Nicaragua and, in one case (Familia Mondragón), Honduras. (http://www.ccj.org.ni, under "resoluciones").

advisory opinions are not binding upon the requesting party,[95] although that does not mean that they might not be used in the context of disputes.[96]

However, although ultimately not binding, because they are given by an international judicial body, against which usually there is no appeal, and through a process of careful consideration, which resembles closely that used in the case of contentious proceedings, advisory opinions might be a powerful political tool. They might decisively influence the outcome of a dispute, or the way law is interpreted and the direction in which it will eventually develop.

In a way, the power of rendering advisory opinions is astride the divide between the judicial implementation and enforcement of law, which is the competence of judicial bodies, and the legislative function, which is not, and which in democracies is given only to elected collegiate bodies. Of course, whether in any given instance a judicial body will lean toward a conservative or progressive interpretation of the law, the object of the opinion depends not only on the scope of the opinion requested, but also on the legal philosophy of the judicial body and the perception it has of it own role. However, simple non-binding advisory opinions might wield considerable power. This is illustrated by three observations.

First, not all international judicial bodies are vested with the power to render advisory opinions. For instance, in the WTO dispute settlement system there is no provision for such capacity, as the main objective of the system is solely the settlement of disputes, while member states are

95 A major exception is the CACJ, where advisory opinions are binding for the States and organs of the SICA when dealing with the Court's Statute and SICA's law. CACJ Statute, art. 24. See *supra* note 84. A partial exception is the ECJ. The Court can render advisory opinions on request of the Council, the Commission, or a member State on the compatibility of international treaties concluded between the Community and third parties to the Treaties. If the opinion of the ECJ is adverse, the Treaty may only enter into force in accordance with art. 48 of the EU Treaty, which establishes the procedural requirements for amending the Treaty. EC Treaty, art. 300. See infra pp. 29–31. However, even in the case of those judicial bodies where it is provided that advisory opinions are not binding, states and international organizations can nonetheless provide, by consent, that they are binding. See, in this book, Dominicé, at § 5–15. For instance the UN Convention, the Specialized Agencies Convention and the IAEA Agreement on Privileges and Immunities provide so. Amerasinghe, C.F., *Principles of Institutional Law of International Organizations, Cambridge*, Cambridge University Press, 1996, pp. 92–95. The UN-USA Headquarters Agreement provides that an advisory opinion may be sought from the ICJ on a point of law during an arbitration (Section 21.b). Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 26 June 1947, 147 *UNTS* 11.

96 See, in this book, Dominicé, pp. 99–100. In the WHO Agreement Case, the WHO requested from the ICJ an advisory opinion which was given concerning the obligations of the WHO under an agreement between the WHO and Egypt. This opinion effectively resulted in the settlement of the dispute which had arisen between the parties. Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p. 73.

the jealous custodians of the power of making trade agreements progress.[97] None of the international criminal tribunals are given the power of rendering advisory opinions, principally because such power would be a distortion of and a distraction from the true function of a criminal court of law, which is to sanction criminal offenses through penalties.

Second, when international judicial bodies have the power to render advisory opinions, advisory opinions are usually only a fraction of the case-load of the judicial body. This is probably the consequence of the difficulty of reaching the required quorum in the decision-making organ that must request the opinion.[98] Indeed, and this leads to the third observation, in most instances, when international judicial bodies have the power to render advisory opinions, the capacity to request them is given not to individual States or groups of States,[99] but to qualified international organizations and collegiate organs of international organizations, which would be expected to weigh the interests of the organization as a whole before making the request.[100] It is usually the judicial body of complex international organizations, with several bodies and complex divisions of competences, that has the power to give advisory opinions.

Judicial Bodies Whose Jurisdiction Is Not Limited to a Specific Geographic Area

The case of the United Nations and the International Court of Justice graphically illustrates these points.[101] While international organizations cannot appear before the ICJ in contentious cases, they do have standing in advisory proceedings, albeit a rather narrowly limited one (the

97 The issue is still lively debated at the WTO. On the point see World Trade Organization "Minutes of Meeting of the General Council held on 22 November 2000," WT/GC/M/60, January 23, 2001. See in this book, Chinkin/Mackenzie, at pp. 149–153, and Charnovitz, pp. 235–238.

98 The exception to this is the EFTA Court, where the majority of the case-load to date is made of advisory opinions, and not of judgments in contentious cases. However, this is because under the EFTA systems advisory opinions can be requested by national courts, through a procedure akin, but not identical, to that used for preliminary rulings in other regional economic integration organizations. See *infra* pp. 30–31.

99 There are some exceptions, however. Under the UNCLOS, the ITLOS may render advisory opinions on a legal question if an international agreement related to the purpose of the UNCLOS specifically provides for the submission to ITLOS of such opinion (ITLOS Rules, art. 138.1). Any member State of the OAS may request the IACHR to provide an opinion regarding the compatibility of any domestic laws with the American Convention and other treaties concerning the protection of human rights in the American states. Finally, any member State of the OAU can request the ACHPR an opinion on any legal matter relating to the African Charter or any other relevant human rights instruments.

100 Rosenne, S., *The World Court: What it is and How it Works*, Dordrecht, Nijhoff, 1994, 5th ed., at 107.

101 On ICJ advisory opinions and their use, see more in detail in this book Dominicé, and Boisson de Chazournes pp. 107–111

reverse is also true: States cannot request the ICJ advisory opinions).[102] In 56 years of existence, the ICJ has rendered 23 opinions. By comparison, 98 contentious cases have been submitted. Thus, on average, the Court has rendered an advisory opinion every second year, or every four contentious cases. A reason for the relative paucity of ICJ advisory opinions might be found in the relatively small number of entities which can request opinions.[103]

First of all, taking article 96.2 of the Charter to the letter, international organizations that are not part of the UN family cannot request the ICJ advisory opinions. Indeed, only organs of the United Nations and several specialized agencies of the UN can do so (although organs and organizations that cannot, can still be authorized ad hoc to do so by those UN organs which do have the power to request advisory opinions).[104] This leaves out a large part of the world of international organizations. Perhaps more crucially it prevents all other international judicial bodies from referring matters to the scrutiny of the World Court, thus foregoing a potentially cogent tool in order to maintain the coherence of the international legal order.[105]

Second, not all organs and specialized agencies of the UN can request advisory opinions. Currently, the organs (principal and subsidiary) of the UN that can request advisory opinions are five: the General Assembly; Security Council; Economic and Social Council; Trusteeship Council; and Interim Committee of the General Assembly.[106] In the past the Committee

[102] ICJ Statute, art. 65

[103] On the desirability to expand access to ICJ jurisdiction by a larger number of international organizations and organs, see, in this book, Boisson de Chazournes.

[104] It is true that the IAEA, which is not a UN specialized agency, has received such authorization (see infra note 109), but that provision has never been tested by the ICJ.

[105] Under article 119.2 of the Rome Statute, in case of disputes between two or more parties relating to the interpretation and application of the Statute, the Assembly of States Parties (an organ of the Court) ". . . may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of the Court." In other words, the Assembly of States Parties may ask the UN General Assembly, or the Security Council, or another organ of the UN authorized to do so to request an advisory opinion from the ICJ, but that organ would not be obliged to comply with the request. On the point see Szasz, P./Ingadottir, T., "The UN and the ICC: The Immunity of the UN and its Officials," 14 *Leiden Journal of International Law* 867–885 (2001).

[106] Article 96.1 of the UN Charter authorizes the Security Council and the General Assembly to request advisory opinions. Paragraph 2 provides that ". . . other organs of the United Nations and specialized agencies . . . may at any time be . . . authorized by the General Assembly [to] request advisory opinions on legal questions arising within the scope of their activities." The ECOSOC was the first organ which received such authorization (GA Res. 89 (I), of December 11, 1946). Rosenne, ICJ, at 450. The Trusteeship Council was given an authorization regarding any legal question within the scope of its activities and questions regarding administrative unions affecting trust territories (GA Res. 171 (II), of November 14, 1947). The Interim Committee of the General Assembly, which functions during the

for Applications for Review of Administrative Tribunal Judgments had also been authorized to do so.[107]

A remarkable absence from this list is the UN Secretary General, perhaps again because it is preferred to leave the power to request advisory opinions to a collegiate organ rather than to an individual, and not upsetting the constitutional distribution of power between the Security Council, the General Assembly, and the Secretary General.[108]

Moreover, although there are several dozen of agencies and programs within the UN, only specialized UN agencies are currently authorized to request opinions. Sixteen out of 17 can do so.[109] Although the UN

period between the closing of one session and the opening of the next, has also been authorized to request opinions (GA Res. 196 (III), of December 3, 1948). Neither the Trusteeship Council nor the Interim Committee have ever exercised this faculty.

[107] Statute of the UN Administrative Tribunal as amended by the GA Res. 957 (X), Nov. 8, 1955, art. XI; Application for Review of Judgment No. 158 of the UN Administrative Tribunal, ICJ Reports (1973), pp. 170, 172, 173. The Committee was terminated in 1996 with UN GA Res. A/Res/50/54.

[108] In the Headquarters Agreement between the UN and the United States, it is provided that the Secretary General may ask the General Assembly to make a request for an opinion on the conditions determined by the agreement. Proposals favoring a more general authorization of the Secretary General have often been made. See, e.g., Schwebel, S., "Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the ICJ," Makarczyk, J., (ed.), *Essays in International Law in Honor of Judge Manfred Lachs*, The Hague, Nijhoff, 1984, pp. 519–529. Secretary General Butros Butros-Ghali, in his Agenda for Peace of 1992, recommended that the Secretary General himself be authorized to request opinions. Boutros-Ghali, Boutros, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, 17 June 1992, A/47/277–S/24111, paragraph 38 (available at http://www.un.org/Docs/SG/agpeace.html).

[109] These are: International Labour Organisation (ILO); Food and Agriculture Organization of the United Nations (FAO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); International Development Association (IDA); International Monetary Fund (IMF); International Civil Aviation Organization (ICAO); International Telecommunication Union (ITU); World Meteorological Organization (WMO); International Maritime Organization (IMO); World Intellectual Property Organization (WIPO); International Fund for Agricultural Development (IFAD); United Nations Industrial Development Organization (UNIDO); International Atomic Energy Agency (IAEA). For a detailed description of the UN system and its development, see: Szasz, P., "The Complexification of the United Nations System," *Max Planck Yearbook of United Nations Law*, Vol. 3, 1999, pp. 1–58. The UN specialized agency which has not been authorized to do so is the Universal Postal Union. Conversely, the IAEA, which is not a UN specialized agency, has been authorized to do so. See art. X.1 of the 1957 UN/IAEA Relationship Agreement and UNGA Resolution 1146 (XII) of November 14, 1957. On the point see Szasz, P., *The Law and Practices of the International Atomic Energy Agency*, (IAEA Legal Series No. 7, 1970), Sections 12.1.4.1 and 27.1.2. In the past the International Refugee Organization, which ceased to exists in 1952, had also been authorized to do so. The Havana Charter of the International Trade Organization, which never entered into force, provided for the advisory jurisdiction of the ICJ. Charter of the International Trade

General Assembly, or the Security Council, within the respective spheres of competence, might authorize ad hoc other bodies to request opinions, there are several agencies, programs and subsidiary organs not included in the list, which might become involved in relevant legal issues during the carrying out of their mandate, and which might benefit from being able to refer the matter to the ICJ. Examples are the UN High Commissioner for Refugees, the United Nations Environmental Program, the United Nations Development Program, the United Nations Office of Crime Control and Crime Prevention, to name a few, but also the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which are subsidiary organs of the Security Council, might be aptly added to this list.

Finally, even though there are currently, and in theory, 21 UN organs and agencies that can request the ICJ advisory opinions, in practice only seven of them have exercised this faculty so far. Since 1945, the overwhelming majority of advisory opinions have been requested by UN organs, and the UN General Assembly in particular (i.e., the General Assembly has requested 14 opinions in 13 cases;[110] the Security Council one;[111] the Economic and Social Council requested two;[112] and the Committee for Applications for Review of Administrative Tribunal Judgments three[113]). Only three UN agencies have requested opinions (UNESCO[114] and the International Maritime

Organization, done at the La Havana, March 24, 1948, UN Doc, 1948, E/Conf./2/78. *International Court of Justice Yearbook*, 1947–1948, p. 41. On this last point, see, in this book, Charnovitz, at p. 223.

110 Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter); Reparation for Injuries Suffered in the Service of the United Nations; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase; id., Second Phase; Competence of the General Assembly for the Admission of a State to the United Nations; International Status of South West Africa; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal; Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South West Africa; Admissibility of Hearings of Petitioners by the Committee on South West Africa; Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter); Western Sahara; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947; Legality of the Threat or Use of Nuclear Weapons.

111 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).

112 Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations and Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.

113 Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal; Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal; Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal.

114 Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO.

Organization[115] once, and WHO twice[116]).

The UN organs and the collegiate organs of the UN agencies decide whether to request the ICJ issue an advisory opinion by majority vote. In the General Assembly, which historically has been the source of most requests of advisory opinions, the most that is required is a two-thirds majority of those present and voting.[117] For matters other than "decisions on important questions" a simple majority of members present and voting is enough.[118] Although it is unclear whether the list of important questions contained in Article 18.2 of the Charter is exhaustive or illustrative,[119] records of voting seem to indicate that requests for advisory opinions are not considered "important questions," and thus require a simple majority of members present and voting.[120] Likewise, all decisions of the Economic and Social Council are made by a majority of the members present and voting.[121] In the Security Council, however, decisions other than procedural matters are to be taken by a majority of nine out of the 15 members, including all five permanent members.[122] In the specialized agencies, majority vote, as opposed to decision by consensus, is the norm.[123] Thus, decisions to request the ICJ advisory opinions can be, and in the past have been, taken against strong opposition, even of those states directly concerned.[124]

115 Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization

116 Interpretation of the Agreement of 25 March 1951 between WHO and Egypt and Legality of the Use by a State of Nuclear Weapons in Armed Conflict.

117 UN Charter, art. 18.2.

118 UN Charter, art. 18.3.

119 Paragraph 2 of article 18 specifies that "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1.c of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions."

120 For instance, the decision to refer the issue of the legality of the threat or use of nuclear weapons was adopted by the UN General Assembly by a 78-43-38 vote. UN Ga. Res. A/RES/49/75(K), of December 15th, 1994.

121 UN Charter, Article 67.

122 UN Charter, Article 27.3.

123 Just to use the examples of the only three UN agencies which have requested advisory opinions in the past, Article 60 of the Constitution of the World Health Organization, 22 July 1946, 14 *UNTS* 185; Article V (12) of the UNESCO Constitution, 16 November 1945, 4 *UNTS* 275; Article 43 of the Convention on the Intergovernmental Maritime Consultative Organization, 6 March 1948, 289 *UNTS* 48.

124 See Rosenne, *The World Court*, op.cit., at 109–110. WHO has requested two advisory opinions in its history. One request was adopted by secret vote (*Interpretation of the*

Be that as it may, UN organs have so far shown restraint in the use of this power. Perhaps, this is because the ICJ itself is the ultimate guardian of the process. Indeed, besides the general issue of the appropriateness of asking the Court to render advisory opinions in the context of disputes between UN organs and organizations and states, which is analyzed in the contribution by Dominicé in this book,[125] advisory proceedings might be used to create surreptitious compulsory jurisdiction to decide concrete disputes between States which have not accepted the Court's jurisdiction.[126] The Court is not obliged to render the opinion.[127] Because the advisory competence of the ICJ is "permissive" and "of a discretionary character,"[128] usually the Court debates carefully whether it is appropriate for the Court to render the opinion and whether the question is within the area of competence of the requesting organization.[129] In 1996, the ICJ declined to give an opinion to WHO on the legality of the use by a State of nuclear weapons in an armed conflict in view of the weapons' possible effects on the environment and on health. The Court observed that WHO competence extends to deal with, inter alia, the effects on the health of the use of nuclear weapons and to take preventive measures for the

Agreement of 25 March 1951 between the WHO and Egypt) (WHA46/1993/REC/2: Forty-Sixth World Health Assembly, 1993, Verbatim Records of Plenary Meetings, p. 282), and the second was adopted by secret ballot (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*). The resolution was adopted by a majority of 73 to 40, with 10 abstentions and 41 States absent. Forty-Sixth World Health Assembly Geneva, 3–14 May 1993, WHA46/1993/Rec/3). For an account of the voting in WHO about the advisory opinion on the legality of nuclear weapons, see Judge's Oda Separate Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, para. 14.

125 See, in this book.

126 The Permanent Court of International Justice exercised its discretion not to give an advisory opinion when a State is directly concerned, which at the time was not a member of the League of Nations, and which had not been invited to participate in the discussion in the Council, categorically refused to take part in the examination of the question by the Court. *Eastern Carelia* case, B 5 (1923). Rosenne, *The World Court*, op.cit., at 109.

127 ICJ Statute, Art. 65. "As the Court has repeatedly emphasized, the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so." (Advisory Opinion of 8 July 1996 "Legality of the Threat or Use of Nuclear Weapons," ICJ Reports 1996, p. 226, pp. 234–235). For a thoughtful analysis of what it actually means that the ICJ has discretionary power to decided whether to render an advisory opinion, see Abi Saab, G., "On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice," Boisson de Chazournes, L./Sands, Ph., (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 36–50.

128 Western Sahara, ICJ Reports (1975), at 21; Application for Review of Judgment No. 333 of the UN Administrative Tribunal, ICJ Reports (1987), p. 31.

129 See, for instance, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 8 July 1996, ICJ reports (1996), Application for Review of Judgment No. 333 of the UN Administrative Tribunal, ICJ Reports (1987), at 31; Application for Review of Judgment No. 273 of the UN Administrative Tribunal, ICJ Reports (1982), at 347.

protection of the health of populations in the event such weapons are used. In the majority of the judges' opinion, it did not extend to the issue of the legality of their use in view of their health and environmental effects; and these effects would be the same whether or not the use was illegal.[130]

Amongst international judicial bodies whose jurisdiction is not limited to a specific geographical area, the ITLOS, too, has the power to render advisory opinions. However, unlike the case of the ICJ, to date the ITLOS, in its relatively short period of operation, has not received requests for opinions, and thus, it is too early to judge.

Under the UNCLOS, there are two sources of requests for advisory opinions to the ITLOS. First, the Sea-Bed Disputes Chamber ". . . shall render advisory opinions at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities."[131] Second, it ". . . may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."[132] Of course, one or more international organizations might be parties to such agreements, hence the relevance of this provision for this study.

Treves has discussed extensively this topic elsewhere in this book.[133] However, it should be stressed here that the first source is specifically provided for in the UNCLOS, while the second is provided for only in the Rules of the ITLOS, which have been drafted and approved by the judges after the entry into force of the UNCLOS. This might explain an important difference between the two. The first seems to be that while ITLOS (specifically the Seabed Disputes Chamber) cannot decline to render an advisory opinion (". . . shall . . .") requested by the Authority or the Council, it is free to decide whether to give an opinion arising out of an international agreement related to the purposes of the UNCLOS (". . . may. . .").

Another difference between the two sources relates to the way in which the decision to request the ITLOS an advisory opinion is made. Voting on request of advisory opinions by the Assembly or the Council does not substantially differ from voting rules in the United Nations. Thus, under Section 3 of the Agreement Modifying part XI of the UNCLOS it is stated that ". . . as a general rule, decision-making in the organs of the

130 ICJ Reports (1996), at 66. On the same day, the Court gave an opinion to the General Assembly on the legality of the threat or use of nuclear weapons. ICJ Reports (1996), at 26. For an exhaustive account of the ICJ advisory opinions on nuclear weapons, see: Boisson de Chazournes, L./Sands, Ph., op.cit.

131 UNCLOS, art. 191.

132 ITLOS, Rules, art. 138.

133 See, in this book, Treves, pp. 37–43.

Authority should be by consensus."[134] If ". . . all efforts to reach a decision by consensus have been exhausted, decisions by voting in the Assembly on questions of procedure shall be taken by a majority of members present and voting, and decisions on questions of substance shall be taken by a two-thirds majority of members present and voting."[135]

Moreover, article 159.10 (Part XI, Section 4) of UNCLOS provides that: "Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly [of the Authority] on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal."

However, if the request of advisory opinion arises from an international agreement related to the purposes of the UNCLOS, then it is of course only to the parties to the agreement to decide whether to do so. This can be done on an ad hoc basis after the legal issue on which the parties want to get advice has arisen, or preventively by providing that all parties by agreement, or even just of the parties unilaterally, will do that.[136] Depending on how many parties the agreement in question has, this particular source might potentially generate a larger flow of requests to the ITLOS, and that might also explain why the judges of the Tribunal have felt the need to make the entertaining of such requests discretionary.

Regional Human Rights Bodies

Among international human rights judicial bodies, the power of rendering advisory opinions is common in theory, but seldom used in practice. Thus, the ECHR ". . . may, at the request of the Committee of Ministers [N.B., one of the organs of the Council of Europe], give advisory opinions on legal questions concerning the interpretation of the [European] Convention and [its] protocols."[137] However, ECHR opinions can deal only with procedural questions and may not deal with matters concerning the scope of the substantive rights and freedoms enumerated in the conventions and protocols, or any other matter which may be raised in ordinary proceedings before the Court.[138] Thus, it should be no surprise that to date the ECHR has not rendered any advisory opinions.

In the case of the IACHR, however, request of advisory opinions are not confined to procedural issues but might also encompass not only the interpretation of the American Convention but also other human rights treaties applicable in the territory of the member States of the OAS.[139] Besides OAS member States, there is a wide range of OAS organs that can request the Court advisory opinions, within their respective spheres of competence: the General Assembly; Meeting of Consultation of Ministers of Foreign Affairs; Councils; Inter-American Juridical Committee; Inter-American Commission on Human Rights; General Secretariat; Specialized Conferences; and Specialized Organizations.[140] As a result, advisory opinions are a substantial part of the IACHR cases (a share larger than that of the ECHR, of course, but smaller than the case of the ICJ). To date the IACHR has been submitted 101 cases, of which 85 are contentious and 16 are requests of opinions. However, the majority of those opinions have been requested by OAS member States (Costa Rica four,[141] Peru one,[142]

[134] Para. 2.

[135] Para. 3.

[136] "A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal." ITLOS Rules, art. 138.2.

[137] European Convention, art. 47.1.

[138] European Convention, art. 47.2. See also Protocol No 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963; *ETS* No. 44, Vol. II, 1972, at 99; *EYB*, Vol. 11, 1963, at 317. Van Dijk and Van Hoof regret such a restricted access to the ECHR advisory jurisdiction. In their opinion, ". . . access should be extended to any legal question concerning the Convention and the Protocols, though on condition that the giving of an advisory opinion by the Court must not amount to a decision of the Court under Section IV of the Convention and that the request must not directly relate to a dispute which is pending before the Commission to comply with the request or not, on the basis of character and/or the importance of the question submitted to it and in view of its case load." Moreover, access should be given, besides to the Committee of Ministers, to the Commission, the Parliamentary Assembly of the Council of Europe, and ". . . perhaps each of the individual contracting States." Van Dijk, P./Van Hoof, G.J.H., (eds.), *The Theory and Practice of the European Convention on Human Rights*, The Hague, Kluwer, 1998, 3rc ed., pp. 264–266.

[139] American Convention, art. 64.1.

[140] Art. 64.1 of the American Convention refers to the ". . . organs listed in Chapter X of the Charter of the OAS, as amended by the protocol of Buenos Aires." See, Protocol of Buenos Aires, *O.A.S. Treaty Series* No. 1–A, entered into force March 12, 1970.

[141] No. 4—Advisory Opinion OC-4/84 of January 19, 1984, "Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica"; No. 5—Advisory Opinion OC-5/85 of November 13, 1985, "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)"; No. 7—Advisory Opinion OC-7/86 of August 29, 1986, "Enforceability of the Right to Reply or Correction (Arts. 14.1, 1.1 and 2 American Convention on Human Rights)"; No. 12—Advisory Opinion OC-12/91 of December 6, 1991, "Compatibility of Draft Legislation with Article 8.2.h of the American Convention on Human Rights."

[142] No. 1—Advisory Opinion OC-1/82 of September 24, 1982, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights)."

Chile one,[143] Mexico one,[144] Uruguay two,[145] Argentina (together with Uruguay) one,[146] Colombia one[147]). Only five have been submitted by organs of the OAS, and, in all five instances, despite the panoply of organs which could do so, all were requested by the Inter-American Commission of Human Rights.[148] Interestingly, of the 11 opinions asked by States, two of them were about the attributes and the work of the Inter-American Commission itself.[149]

Finally, to complete the human rights field, the African Court of Human and People Rights may render advisory opinions on any legal matter relating to the Charter or any other relevant human rights instrument, provided the subject matter of the opinion is not related to a matter being examined by the African Commission, if so requested, inter alia, by the Organization of African unity or any of its organs.[150]

Judicial Bodies of Regional Economic and Political Integration Agreements

The judicial organs of regional economic and political integration organizations are not only custodians of the union's legal order, a function they carry out mainly through the contentious jurisdiction, but also ensure the consistent interpretation of the basic instruments and sec-

[143] No. 15—Advisory Opinion OC—15/97 of November 14, 1997, "Reports of the American Commission on Human Rights."

[144] No. 16—Advisory Opinion OC—16/99 of October 1, 1999, "The right to information on consular assistance In the framework of the Guarantees of the due process of law."

[145] No. 6—Advisory Opinion OC-6/86 of May 9,1986, "The Word "Laws " in Article 30 of the American Convention on Human Rights"; No. 9—Advisory Opinion OC-9/87 of October 6, 1987, "Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)."

[146] No. 13—Advisory Opinion OC-13/93 of July 16, 1993, "Certain Attributes of the Inter-American Commission On Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)."

[147] No. 10—Advisory Opinion OC-10/89 July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights."

[148] No. 2—Advisory Opinion OC-2/82 of September 24, 1982, "The Effect of Reservations on the Entry into Force of the American Convention on Human Rights"; No. 3—Advisory Opinion OC-3/83 of September 8, 1983, "Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)"; No. 8—Advisory Opinion OC-8/87 of January 30, 1987, "Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)"; No. 11—Advisory Opinion OC-11/90 of August 10, 1990, "Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights)"; No. 14—Advisory Opinion OC-14/94 of December 9, 1994, "International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)."

[149] No. 13 and 15.

[150] Protocol, art. 4. The Protocol does not specify which organs of the OAU are empowered to request advisory opinions.

ondary legislation. Thus, it is very common that judicial organs of regional economic and political integration organizations are given the power to render advisory opinions.[151]

Europe

In the European Communities, the ECJ has two heads of advisory competence. They are seldom utilized, but should be mentioned nonetheless. Both exert a sort of preventive judicial control over the acts of the community organs that the Court is empowered to exercise.[152]

First, Article 300.6 (formerly 228.6) of the EC Treaty allows, but does not require, the Council and the Commission, as well as member States, to request from the Court an opinion as to whether a proposed treaty between the Community and one or more States or an international organization is compatible with the provisions of the Treaty.[153] Considering that the treaty-making powers of the EC are not negligible, as witnessed by the number of agreements concluded with third parties in areas ranging from commercial to association agreements,[154] a mechanism was required, in the words of the Court, ". . . to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding on the Community."[155] Thus, if the Court believes that the proposed agreement is incompatible with the Treaty, the agreement can enter into force only through a lengthy procedure of amendment of the Treaty.[156] About a dozen opinions under article 300 (formerly 228) have been rendered to date.[157]

[151] There is nothing in the constitutive instruments and regulations of the Court of Justice of the Andean Community and the Court of Justice of the West African Monetary and Economic Union that indicates that those judicial bodies have the power to render advisory opinions.

[152] On the point see, Lasok, K.P.E., *The European Court of Justice: Practice and Procedure*, London, Butterworths, 2nd ed., 1994, at 582–586 and 588–592; Bebr, G., *Development of Judicial Control of the European Communities*, The Hague, Nijhoff, 1981, at 342–358.

[153] EC Treaty, art. 228 (New EC Treaty, art. 300).

[154] Two examples particularly pertinent for this study are the Agreement Establishing the WTO and the United Nations Convention on the Law of the Sea. See, in this book, Rosas and Treves.

[155] Opinion 1/75 [1975] *ECR* 1355 at 1360–1361.

[156] Article N of the New EC Treaty.

[157] For instance, Opinion 1/59 (Rec.1959, p. 533) of 17/12/1959; Opinion 1/60 (Rec.1960, p. 107) of 04/03/1960; Opinion 1/61 (Rec.1961, p. 505) of 13/12/1961; Opinion 1/75 (Rec.1975, p. 1355) of 11/11/1975; Opinion 1/76 (Rec.1977, p. 741) of 26/04/1977; Opinion 1/78 (Rec.1979, p. 2871) of 04/10/1979; Opinion 1/91 (Rec.1991, p.I-6079) of 14/12/1991; Opinion 2/91 (Rec.1993, p.I-1061) of 19/03/1993; Opinion 1/92 (Rec.1992, p.I-2821) of 10/04/1992; Opinion 1/94 (Rec.1994, p.I-5267) of 15/11/1994; Opinion 2/94 (Rec.1996, p.I-1759) of 28/03/1996; Opinion 3/94 (Rec.1995, p.I-4577) of 13/12/1995. The text of the opinions can be found in CELEX format at: http://europa.eu.int/cj/common/recdoc/indexaz/en/c1.htm and http://europa.eu.int/cj/common/recdoc/indexaz/en/c2.htm. For

Second, Article 95 of the ECSC Treaty provides that the ECSC Treaty may be amended where unforeseen difficulties in its application or fundamental economic or technical changes directly affecting the market in coal and steel make it necessary. Amendments are proposed jointly by the Commission and the Council (voting by majority), and then submitted to the Court for its opinion. Only if the Court finds the proposed revision to be within the limits established by the ECSC Treaty and justified by the situation, may the proposed revision be submitted to the European Parliament for approval. To date, this head of advisory jurisdiction has been resorted to even more sparingly than that under Article 300 of the EC Treaty. Only three such opinions, all in the years 1959–1961, have been delivered.[158]

The case of the EFTA Court is *distingué*, for what is ordinarily called a preliminary reference in other judicial bodies, in the EFTA Court is called an advisory opinion. Indeed, requests for advisory opinions, instead of being made by political collegiate organs of the organization, as in the case of all other international judicial bodies, in the case of the EFTA proceed from national courts of member States.[159] However, there are certain differences between preliminary jurisdiction of other regional economic and political integration organizations and the "advisory jurisdiction" of the EFTA Court. First, unlike most international judicial bodies,[160] in the EFTA system, national courts have no obligation to request advisory opinions, even if it is a court against whose decision there is no further judicial remedy.[161] Second, and again as in the case of other international judicial bodies,[162] preliminary rulings of the EFTA Court are not binding upon the requesting domestic court (and this explains the terminological confusion). Yet, despite the fact that the whole procedure is facultative and quintessentially consultative, to date most of the caseload of the EFTA Court consists of requests of advisory opinions (30 requests as contrasted to 11 contentious cases).[163]

Finally, in the case of the Economic Court of the Commonwealth of Independent States advisory opinions may be requested, besides by the highest legislative and executive organs of member States, and their highest economic and commercial courts, also by CIS institutions.[164] To date, advisory opinions are the largest part of the CIS Court docket, with about 34 opinions issued and only three contentious cases decided. Of those opinions, aside from three cases involving CIS States, the remainder dealt with interpretation of agreements concluded between CIC members, even in non-economic areas.[165]

Latin America

In the Latin American context, the Andean Court does not have advisory jurisdiction. However, the Central American Court of Justice does, and has a rather large advisory jurisdiction for that matter. Unlike any

a recent example of use of Article 300 procedures, see Opinion 2/00, of December 6, 2001, on the appropriate legal basis for EC's ratification of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, January 29, 2001, 39 *ILM* 1027 (2000).

158 Opinion 1/59 [1959] *ECR* 259; Opinion 1/60 [1960] *ECR* 39; Opinion 1/61 [1961] *ECR* 243.

159 ESA/Court Agreement, art. 34.

160 In the EC case, courts against whose decision there is no judicial remedy under national law must refer questions of interpretation arising before them to the Court of Justice (new EC Treaty, art. 243), unless the ECJ has already ruled on the point or unless the correct application of the rule of Community law is obvious (Judgment in Case 283/81 CILFIT v. Ministry of Health [1982] *ECR* 3415. In the case of the Andean Court of Justice, courts against whose decision there is no recourse must be referred fro preliminary ruling to the Court. TJAC Treaty, art. 33.2. The same is valid in the case of the COMESA Court. COMESA Treaty, art. 30. Established by the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), concluded at Kampala, on November 5, 1993 [hereinafter COMESA Treaty]. See 33 *ILM* 1067. The COMESA Treaty entered into force on December 8, 1994. Rules of the COMESA Court, art. 93 (http://www.comesa.int/court/courrule.htm). The Statute of the CACJ does not specify whether national courts must or simply may refer matters relating to the SICA to the Court. The Statute of the Benelux Court seems to leave it to national court to decide whether to request the Court a preliminary interpretation. Benelux CJ Treaty, art. 6.1.

161 "[When] a question is raised before any court or tribunal in an EFTA state, that court or tribunal may, it if considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion." ESA/Court Agreement, art. 34.2. Moreover, EFTA States may, by way of national law, limit the right to request such advisory opinions to courts and tribunals against whose decision there is no judicial remedy under national law. ESA/Court Agreement, art. 34.3.

162 Preliminary rulings of the ECJ are binding on the national court hearing the case in which the decision is given. Case 29/68 *Milch- Fett- und Eierkontor GmbH. v. Hauptzollamt Saarbrücken* [1969] ECR 165, at 180. However, it is also for the national court to decide "whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the Court." *Ibid.* See also Case 52/76 *Benedetti v. Munari E.lli s.a.s.* [1977] ECR 163, at 183. The same is the case of the Benelux Court of Justice (Benelux Treaty, art. 11); the Andean Court (TJAC Treaty, art. 36). The Statutes of the COMESA and the CACJ do not specify whether preliminary rulings of those courts are binding upon the national court requesting.

163 Http://www.efta.int/structure/court/efta-crt.asp (under "publications/decisions")

164 CIS Court Statute, art. 5. In practice the Court showed considerable flexibility in the types of entities from which it received requests for advisory opinions. In particular, it is apparently willing to accept requests from non-governmental organizations. See, e.g., opinion No. 07/95 on the interpretation of a CIS agreement requested by the Inter-State Television Company MIR, a multinational corporation, or opinion No. C-1/2-96 requested by the General Confederation of Trade Unions, a non-governmental organization. See, Danilenko, G., "The Economic Court of the Commonwealth of Independent States," *NYU JILP*, Vol. 31, N. 4, 1999, pp. 893–918, at 904.

165 See, e.g., case No. C-1/14-96 dealing with the interpretation of the notion "refugee," or case No. C-1/13-96 dealing with the interpretation of the 1993 CIS Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases. 4 (24) *Commonwealth Information Bulletin*, supra note 65, at 128 (1996). Danilenko, at 902–903.

other judicial body of regional organizations, the CACJ can act as Permanent Consultative Tribunal of the supreme courts of member States,[166] and render advisory opinions on request by member States on the interpretation of any international treaty in force, including issues of conflict between the treaties themselves and the treaties with the domestic law of member States.[167] More to the point, it can act as consultative organ of the organs of the Central American Integration System on the interpretation and implementation of the Protocol of Tegucigalpa,[168] and its complementary and derivative acts.[169] To date the CACJ has received five request of opinions. Four were presented by the Secretary General of the Central American Integration System,[170] while one was presented by the Ambassador of Honduras in Nicaragua and was declined for lack of jurisdiction.[171]

Africa

The Common Court of Justice and Arbitration of the OHADA, the Judicial Tribunal of the OAPEC, and the Court of Justice of the Arab Maghreb Union have all advisory jurisdiction.[172] In each of the three cases it is the plenary and executive organ of the organization (the Council of Ministers of the member states of the organization) which can do so. Thus, the Council of Ministers of the OHADA can request advisory opinions from the Common Court of Justice and Arbitration,[173] the Ministerial Council of the OAPEC can do so with the organization's Judicial Tribunal,[174] and the same can be done by Council of Heads of States of

[166] In the original language "Tribunal de Consulta Permanente." CACJ Statute, art. 22.d.

[167] CACJ Statute, art. 23.

[168] Protocol of Tegucigalpa to the Charter of the Organization of Central-American States (ODECA), concluded on December 13, 1991, 34 ILM 923. The Protocol of Tegucigalpa amended the Charter of the Organization of Central-American States, concluded at Panama, on December 12, 1962, 2 ILM 235.

[169] CACJ Statute, art. 22.e. Request for advisory opinions by SICA organs will be forwarded by the SICA Secretariat. Ordenanza de procedimientos, art. 55.

[170] Opinions of May 24, 1995; October 20, 1995; April 11, 1997, May 27, 1997. Http://www.ccj.org.ni (under Resoluciones)

[171] Order of April 19, 1995.

[172] Also the proposed Caribbean Court of Justice is given the power to render advisory opinions at the request of member states or the Caribbean Community. Agreement Establishing the Caribbean Court of Justice, Part II, Article IX (b).

[173] OHADA Treaty, art. 14.2. Also national courts and member States can do so. Established by the Treaty Establishing the Organization for the Harmonization of Corporate Law in Africa [hereinafter OHADA Treaty], signed at Port—Louis, on October 17, 1993. See 4 *Journal Officiel de l'OHADA* (Official Journal of the OHADA), November 1, 1997, (visited Feb. 2, 1999) http://www.refer.org/camer_ct/eco/ecohada/ohada0.htm.

[174] Established by the Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries, signed at Beirut, on January 9, 1968, and entered into force on September 1, 1968 [hereinafter OAPEC Agreement]. 68 *U.N.T.S.* 235.

the AMU with the organization's Court of Justice.[175] However, of the three judicial bodies, only the Common Court of Justice and Arbitration of the OHADA has to date rendered advisory opinions, and in none of those cases was the opinion asked for by an organ of the organization.[176]

CONCLUSIONS

To summarize this brief overview of international organizations' access and use of international judicial bodies, the widely different practices and structures existing make any generalization arduous. Indeed, one must distinguish between international organizations per se and organs of those organizations, and between judicial bodies whose jurisdiction is not limited to a specific geographic area and regional judicial fora (and regional judicial fora must be broken down between those of human rights and economic and political integration agreements). Moreover, the issue can be approached from two rather different perspectives: one outward, that is to say that of the appearance of international organizations and their organs before "alien judicial bodies" (i.e., judicial bodies which are not organs of the organization itself), and one inward, or that of the appearance before judicial bodies of the organization itself.

The inward aspect is, in a way, the evolution of the typical functions of oversight and control. Increasingly, judicial bodies are created to maintain the coherence of the organizations' legal structures and settle in a binding manner any disputes that might arise out of the interpretation and implementation of member States' obligations. Within the recent phenomenon of the multiplication of international judicial bodies, this is the largest and most fertile strain. Although in theory they can do so, States are reluctant to challenge one another before judicial bodies and formal procedures, and, when they have the option, prefer to leave the task to executive or collegiate organs of the organization. This function can be

[175] AMU Treaty, art. 13.3, first line. Treaty Instituting the Arab Maghreb Union, signed in Marrakech, on February 17, 1989, and entered into force on July 1, 1989 [hereinafter AMU Treaty]. See 94 R.G.D.I.P. 552–56 (1990). On the point see Bouny, L., "La Cour maghrébine de justice," *Revue belge de droit internationale*, Vol. 26, 1993, at 362–363. On the Maghreb Arab Union and its court, see also Belaid, S., "Le traité de Marrakech et la construction de l'union du Maghreb arabe," in *Le droit international au service de la paix, de la justice et du développment: mélanges Michel Virally*, Paris, Pedone, 1991, pp. 125–135; El Kadiri, A., "L'Union du Maghreb Arabe," *African Yearbook of International Law*, Vol. 2, 1994, pp. 141–155.

[176] Of the three advisory opinions rendered to date one has been requested by Ivory Coast (N°001/2001/EP of 30 April, 2001); another by Mali (N°002/1999/EP of 13 October, 1999); and a third by the President of the Tribunal of First Instance (Président du Tribunal judiciaire de Première Instance) of Libreville (Gabon) (N°001/99/JN of July 7, 1999). Judgments of the Common Court of Justice and Arbitration of the OHADA can be found at http://www.ohada.com/jurisprudence.php.

carried out both through contentious proceedings or via mere advisory opinions. Similarly, because increasingly international organizations are devolved by States powers in selected areas, organs of those organizations are required to be accountable for them and can be sued before the organizations' judicial bodies to ensure they do not overstep the carefully delimited boundaries of their powers.

The outward aspect, however, is still the most faltering. In this context, the protagonists are organizations per se rather than their organs. Besides the special case of the European Community, very rarely do international organizations interact either with other organizations, or States or other entities before international judicial bodies. When they do so, and that is very sporadically, interaction takes place before ad hoc arbitral tribunals.

The relative infrequency of international organizations appearing before international judicial bodies is due, in the first place, to objective limitations written in the statutes of the various standing judicial bodies. Of course, statutes can be changed, if there is the will to do so (although the fact that the Statute of the International Court of Justice is integral part of the Charter of the United Nations make its amendment difficult due to the arduous conditions to be fulfilled for amendment of the Charter). Thus, it is legitimate to ask why it should be desirable to create bridges between international organizations using judicial bodies.

Prima facie, granting standing to intergovernmental organizations before the ICJ, at least in advisory proceedings, if not *in judicio*, would reinforce the Court's centrality in the international legal order. As international organizations are increasingly being devolved extensive powers and become the seat of significant decision-making activities (from the use of force, to regulating all aspects of the international public sector), the risk is that the World Court becomes confined to mere bilateral issues (like boundary delimitation), missing out a significant part of international relations. As argued above, the ITLOS, a much younger and more flexible institution, within certain limits, can receive cases and requests of opinions from international organizations and thus, very likely, will be able to supplement the ICJ, although only within a limited issue-area.[177] Finally, international organizations (i.e., custom unions, as is the case of the EC) can access the WTO dispute settlement body as insofar as they become parties to the relevant WTO agreements, and therefore, it is an non-issue.

Yet, and as a conclusive remark, the crucial question is, when given *locus standi* whose rights and interests are international organizations likely to uphold, or, conversely, whose actions will they be held accountable for, before international judicial bodies? A close scrutiny reveals that the

[177] *Supra* pp. 25–26.

answer is not straightforward and might require a flexible approach.

As regards "active" standing (which includes not only the capacity to sue but also that to request advisory opinions on particular legal issues), international organizations might act in defense of their own rights and interests, or those of member States, or those of the international community at large. Of the three possibilities, the first is the most plausible one. Although there is no evidence that the limited standing international organizations currently have before international judicial bodies has led to injustices, it is not difficult to imagine instances in which allowing access would serve the interest of justice.[178] The second (i.e., that of international organizations acting in the name of member States), is uncalled-for, since States surely do not lack access to international judicial bodies to protect their own interests and rights. The third (i.e. that of international organizations acting in defense of the rights and interest of the international community at large), has been analyzed in this book by Boisson de Chazournes, and therefore we defer to her,[179] but one can observe that it would raise a host of problematic political issues and probably standing should be granted only to truly universal organizations which can plausibly act in the interest of mankind.

Regarding "passive" standing (i.e., the capacity to be sued), again international organizations might be required to be made accountable for their own actions or those of member States before international judicial bodies. The nonsensical situation created by the cluster of cases filed by Yugoslavia against 10 NATO members for the bombings carried out in 1999 is an obvious example. However, a satisfactory treatment of the issue of international organizations' passive standing ultimately depends on the codification of the issue of international organizations' responsibility for their own actions, and the issue of the secondary liability of international organizations for acts of members, and of members for acts of the organization.[180]

[178] Supra p. 7. Lauterpacht, op.cit., at 61–62. Lauterpacht points at the assassination of Count Bernadotte in Jerusalem as the only possible instance. Lauterpacht, op. cit., at 62. However, as he rightly notices, the possession of the capacity of the UN would have been insufficient to establish proceedings in the absence of consent by the prospective respondent (Israel) to the exercise of jurisdiction by the Court. As it was, the matter was dealt with by the Court through an advisory opinions. See *Reparations for Injuries*, ICJ Reports 1949, at 174.

[179] See, in this book, Boisson de Chazournes, pp. 107–111.

[180] The ILC Draft Articles on State responsibility explicitly exclude from their purview the issue of the responsibility under international law of international organizations, or of any State for the conduct of an international organization. See Article 57 and commentary, ILC Report 2001, 53rd session, pp. 360–363. The commentary can also be found in Crawford J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002. However, it is likely the ILC will include the topic in its agenda in the near future. Para. 4 of the Commentary to Article 57 reads: "Article

57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization. . . . Formally such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with [in the Draft Articles]. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations." On the issue see: Annuaire de l'Institut de Droit International, volume 66-I, session de Lisbonne, 1995, p. 249 and ff., Klein, P., *La responsabilité des organizations internationals dans les ordres juridiques internes et en droit des gens*, Bruxelles, Bruylant, 1998; Hirsch, M., *The Responsibility Of International Organizations Toward Third Parties: Some Basic Principles*, Dordrecht, Nijhoff, 1995; Hartwig, M., *Die Haftung der Mitgliedstaaten für internationale Organisationen*, Berlin, Springer-Verlag, 1993; Wellens, K., *Remedies against International Organizations*, Cambridge, Cambridge University Press, 2002.

CHAPTER 2

INTERNATIONAL ORGANIZATIONS AS PARTIES TO CONTENTIOUS CASES: SELECTED ASPECTS

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GENERAL ASPECTS: CONTENTIOUS CASES AND INTERNATIONAL ORGANIZATIONS

Participation by international organizations in contentious cases may be envisaged within different systems of law and before different adjudicating bodies. Without attempting to be exhaustive, it seems important to underline that a basic distinction must be drawn between cases in which rights and obligations of subjects of international law are in dispute, and the applicable law is international law, and cases in which rights and obligations of entities provided with legal personality within legal systems different from international law are at stake, and the applicable law is not international law. International organizations can have rights and obligations under international law, and the question may arise of their participation in cases under international law before adjudicating bodies established for settling such cases. They may also be subjects within legal systems distinct from international law, and as possible parties to contentious cases brought before adjudicating bodies established for settling disputes arising within such legal systems.

CONTENTIOUS CASES UNDER GENERAL INTERNATIONAL LAW

"Only States may be parties in cases before the Court." This rule, couched in slightly emphatic terms in article 34.1 of the Statute of the International Court of Justice, has been considered by one of the former Presidents of the Court, Sir Robert Jennings, as an "extraordinary anomaly."[1]

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1 R. Jennings, "The International Court of Justice at Fifty," *American Journal of*