A Comparison between the European Court of Justice, the International Court of Justice and the International Tribunal of the Law of the Sea Convention with Special Emphasis on Jurisdiction and Enforcement

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Round table on the developement role of the European Court of Justice

I. European Court of Justice

1. Historical development

On May 9, 1950 Robert Schuman, the French Foreign Minister, announced his proposal to place the whole French and German steel production under a common High Authority which allowed other European countries the opportunity to participate. In his proposal he took care to provide for the establishment of a court of justice subjecting the new authority to judicial control.[1] One year later, in April, 1951 the European Coal and Steel Treaty (ECSC) was signed in Paris creating the Court of Justice, which was intended to ensure that the new community was governed by democratic principles and the rule of law.[2]

Following this, the ratification debates took place in the parliaments of the six countries.

Later, on July 24 and 25, 1952 a further conference was held in order to discuss the seat, language and commencement of the Court's duties.[3]

- First it was decided that the Court of Justice would commence its duties on August 10, 1952 and that the names of the members and of the President would be the subject of a special statement before that date.[4]
- The second issue discussed was the question of where the Court would be situated. The conference debated this controversial matter until six o'clock in the morning and „owing to the general exhaustion" it stipulated „that an outsider had won this Derby - Luxembourg"[5]. Luxembourg was only the provisional choice the final decision was final decision was referred to the next conference of Ministers of Foreign Affairs[6].
- Thirdly the language question, four official languages were agreed- French, German, Italian and Dutch[7]. Today the group of official languages is wider, it contains among others Spanish, Portuguese, Danish and Greek. Irish can be also used in proceedings before the Court[8].

On March 25,1957 the same six founding Member States - Belgium, France, Germany, Italy, Luxembourg and Netherlands established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) by signing the two Treaties of Rome[9]. Each of the new Commissions was endowed with a Court of Justice, but at the same time it was provided by the Convention on Certain Institutions Common to the European Communities, that there should be a single court to serve all three Communities.

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[1] Valentine p 1.
[2] Brown, Jacobs p 1.
[3] Valentine p 2.
[4] Le Monde, July 26, 1952; Valentine , p 3.
[5] M. Schuhman see Le Cashiers de Burges, 1953, p 283.
[6] Valentine, p 3.
[7] Le Monde, July 28, 1952; Valentine p 3.
[8] Lasok, p 52.
[9] Brown, Jacobs p 1.

Thus the Court of the ECSC became the Court of Justice of the European Communities.[10]
The European Court of Justice is the judicial body created by Treaties establishing the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

The Single European Act (an amendment of the ECSC and Eurotom Treaties) provided the creation of a court of First Instance as an 'attachment' to the Court of Justice.[11]
In 1988 the Council of Ministers enacted this creation pursuant to the request made by the Court of Justice and adopted a decision establishing 'the Court of First Instance of the European Communities'[12]. The Court of First Instance was created to exercise at first instance the jurisdiction of the Court of Justice in respect of certain matters.[13] The court was seated at the European Court of Justice (referred hereafter ECJ) and its members were sworn in on 25 September 1989.[14]
With the institution of the Court of First Instance (referred hereafter CFI), the organisational and institutional structure of the Court of Justice of the European Communities gained complexity.[15]
The CFI is entrusted to exercise at first instance, jurisdiction of the ECJ only in regard to those matters that the Council of Ministers has specified.[16] Therefore, the CFI is to be regarded as an integral, but subordinate part of the ECJ[17].
From an organisational point of view, both courts are separate part of the same institution - both consist of two parts: firstly the members of the court including their personal staff secondly and the Registrar and the different departments which fall within the sphere of his responsibility.

2. Composition and organisation

a) The members of the Court of Justice

The Court of Justice comprises 15 judges and 9 advocates general.

The judges and advocates general are appointed by common accord of the governments of the Member States and hold office for a renewable term of six years. They are chosen from persons whose independence is beyond doubt and who are of recognised competence.[18]

The judges select one of their number to be President of the Court for a renewable term of three years[19]. The President directs the work of the Court and presides at hearings and deliberations.[20]

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[10] Brown, Jacobs p 2.
[11] Single European Act, arts 4, 11 and 26.
[12] Decision 88/591 (OJ No C 215 of 21) with Amendment 93/350 (OJ No L144, p 21).
[13] Decision 88/591, arts 1 and 3.
[14] Lasok, p 2.
[15] Lasok p 2.
[16] Decision 88/591, art3.
[17] Lasok p 3.
[18] Wall, p 188.
[19] The Rules of Procedure of the Court of Justice of the European Communities, art 6, paragraph 1.

The advocates general assists the Court in it's task with complete impartiality and independence. They deliver, in open court and with complete impartiality and independence, opinions on the cases brought before the Court. Their duties should not be confused with those of a prosecutor or similar official - that is the role of the Commission, as guardian of the Community's interests.[21]

b) The members of the Court of First Instance

The Court of First Instance is composed of 15 judges, appointed by common accord of the governments of the Member States to hold office for a renewable term of six years. The members of the Court of First Instance select one of their number as President.[22]

There are no permanent advocates general in the Court of First Instance. The duties of advocate general are performed, in a limited number of cases, by one of the judges.[23]

c) Plenary sessions and chambers

The Court of Justice may sit in plenary session or in chambers of three or five judges. It sits in plenary session when a Member State or a Community Institution that is a party to the proceedings so requests, or in particularly complex or important cases. Other cases are heard by a chamber[24].
The Court of First Instance sits in chambers of three or five judges. It may sit in plenary session in certain particularly important cases, too.[25]

d) The registries and the administration

The Registrar is appointed by the Court of Justice to hold office for a term of six years. He has the same court duties as the registrar or clerk of a national court[26], but he also acts as secretary-general of the institution and he performs his duties under the authority of the president[27].
The Court of Justice, as an independent and autonomous institution, possesses, in addition to the registry, its own administrative infrastructure, which includes a large translation and interpreting service as the Court has to use all the official languages of the Community in the course of its work.[28]
The Court of First Instance appoints its own Registrar; for its administrative needs it relies on the services of the Court of Justice.[29]

3. Jurisdiction

It is the responsibility of the Court of Justice to ensure that the law is observed in the interpretation and application of the Treaties establishing the

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[20] Wall p 188.
[21] Wall p 189.
[22] Lasok, p 13,14.
[23] Lasok, p 14 footnote 93.
[24] Lasok, p 25.
[25] Lasok, p 29.
[26] Brown, Jacobs, p 17.
[27] Brown, Jacobs, p 18.
[28] Valentine, p 35, 36.
[29] Lasok , p 30.

European Communities and of the provisions laid down by the competent Community institutions[30].
To enable it to carry out that task, the Court has a wide jurisdiction to hear various types of action and to give preliminary rulings.

a) The various forms of action

•Proceedings for failure to fulfil an obligation

Such proceedings enable the Court of Justice to determine whether a Member State has fulfilled its obligations under Community law. An action may be brought by the Commission - as is practically always the case - or by another Member State. If the Court finds that the obligation has not been fulfilled, the Member State concerned must comply without delay[31].
However, if, after new proceedings are initiated by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgement, it may impose a fixed or a periodic penalty[32].

•Proceedings for annulment

A Member State, the Council, the Commission and, in certain circumstances, the Parliament, may apply to the Court of Justice for the annulment of all or part of an item of Community legislation, and individuals may seek the annulment of a legal measure which is of direct and individual concern to them.[33]
The Court may thus review the legality of the acts of the Community institutions.[34]
If the action is well-founded, the contested measure is declared void.[35]

•Proceedings for failure to act

The Court of Justice may also review the legality of a failure to act by a Community institution, and penalise silence or inaction[36].

•Actions for damages

In an action for damages, based on non-contractual liability, the Court of Justice rules on the liability of the Community for damage caused by its institutions or servants in the performance of their duties[37].

•Appeals

Finally, the Court of Justice may hear appeals, on points of law only, against judgments given by the Court of First Instance in cases within its jurisdiction[38].

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[30] Feld, p 34.
[31] Brown, Jacobs p 75,76.
[32] EC Treaty, art 172 as amended by art G (E) (51) of the EU Treaty; Lasok P. 568, 569; Art. 36 of the ECSC Treaty; art 43 of the ECSC Statute.
[33] Lasok, p 539.
[34] Lasok, p 539.
[35] ECSC Treaty, art 34; EC Treaty art 174; Euratom Treaty art 147.
[36] Lasok, p 539.
[37] Lasok, p 565.
[38] Lasok, p 472.

•Preliminary rulings

The Court of Justice also has jurisdiction in another very important kind of procedure.

Although the Court is, by its very nature, the supreme guardian of Community legality, it is not the only judicial body empowered to apply Community law.

The courts of each of the Member States are also Community courts in two constellations:

-First they have jurisdiction to review the administrative implementation of Community law, for which the authorities of the Member States are essentially responsible; and

-Second they must uphold the conferring individual rights on nationals of Member States to rights provided by the Treaties and of secondary legislation - regulations, directives and decisions.

To ensure the effective application of Community law and to prevent differences between the rules of interpretation applicable in different national courts from leading to different interpretations of Community law, the Treaties provided for a system of preliminary rulings which, while not setting up any hierarchical relationship, has institutionalised fruitful co-operation between the Court of Justice and the national courts in mutual regard of their respective competences.[39]

In cases involving Community law, national courts, if in doubt as to the interpretation or validity of that law, may, and in some cases must, seek a preliminary ruling from the Court of Justice on the relevant questions.[40]

That system, the benefits of which have been amply demonstrated by the large number of questions referred to the Court since it was set up, ensure that Community law is interpreted and applied uniformly throughout the Community.[41]

It is a procedure which, by ensuring permanent co-operation between national courts and the Court of Justice, clearly demonstrates that national courts too are the guardian of Community law.[42]

A preliminary ruling is also the form of procedure by which any European citizen may seek clarification of the Community rules which concern him[43].

Although such a ruling may be sought only by a national court, which alone has the power to decide that it is appropriate do so, all the parties involved may take part in the proceedings before the Court of Justice.

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[39] Wall, p 130, 131.
[40] Brown, Jacobs, p 214.
[41] Wall, p 130.
[42] Lasok, p 559.
[43] Brown, Jacobs p 175.

Finally, it must not be forgotten that several important principles of Community law have been laid down in preliminary rulings, sometimes in answer to questions referred to it by courts of first instance against whose decisions an appeal would lie under national law.

What are the effects of a preliminary ruling by the Court of Justice?

The Court of Justice rules on the law, that is to say that it declares the relevant Community law. The national court to which that ruling is addressed must apply the law, as interpreted by the Court of Justice, without modification or distortion, to the dispute before it.

A ruling on interpretation by the Court also serves as a guide for other national courts dealing with a substantially similar problem or a question on which a preliminary ruling has already been given.

b) Jurisdiction of the Court of First Instance

The Court of First Instance currently has jurisdiction to rule at first instance on:

(1) disputes between the Community and its officials and servants ('staff cases') falling within arts. 179 of the EEC Treaty and 152 of the Euratom Treaty[44].
(2) actions brought by legal or natural persons for annulment or in respect of a failure to act.[45]
(3) actions for damages[46]
(4) actions over which the Court has jurisdiction pursuant to an arbitration clause in a contract concluded by or on behalf of the Community[47]

In the future, the Treaty on European Union will enable all other categories of cases except references for preliminary rulings to be transferred upon a decision taken by the Council, to the Court of First Instance.

3. Procedure

Procedure before the Court of Justice is based on that followed before national courts. Whatever the type of case, there is always a written stage and almost always an oral stage, which takes place in open court.

However, a distinction must be drawn between direct actions and requests for preliminary rulings.

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[44] Lasok, p 52.
[45] pursuant to the second paragraph of art 33 and 35 of the ECSC Treaty, the second paragraph of art 173 and the third paragraph of art 148 of the Euratom Treaty.
[46] Actions under the first and second paragraphs of art 40 of the ECSC Treay, arts 178 of the EC Teaty or art 151 of the Euratom Treaty
[47] actions under art 42 of the ECSC Treaty, art 181 of the EC Treaty or art 153 of the Euratom Treaty.

a) Direct actions

(1) Initiation of the proceedings

The action must be brought before the Court by a written application sent to the Registry by a lawyer.

As soon as it is received, the application is entered in the Court register. The Registrar publishes a notice of the action and of the applicant's claims in the Official Journal of the European Communities. A judge-rapporteur and an advocate general, whose duty it is to follow the progress of the case closely, are then appointed. The application is also served on the other party, who has one month within which to lodge a defence. The applicant may submit a reply, and the defendant a rejoinder, the time allowed being one month in each case. The time-limits for lodging these documents must be strictly adhered to unless an extension is specifically authorised by the President.

(2) Preparatory inquiries and the Report for the Hearing

Once the written procedure is completed, it is decided, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, whether any preparatory inquiry is necessary and whether the case should be dealt with by a Chamber or by the full Court. After the last pleading has been lodged, or on completion of the preparatory inquiry, if any, the President sets the date for the public hearing. In a Report for the Hearing, the Judge-Rapporteur summarises the facts alleged and the arguments of the parties and the interveners, if any. The report is made public in the language of the case at the hearing.

(3) The public hearing and the Opinion of the Advocate General

The case is then argued at public hearing for the judges and the advocate general to whom the case has been assigned. They may put to the parties any questions they think fit.

Some weeks later, again in open court, the advocate general delivers his opinion to the Court. He analyses the facts and above all the legal aspects of the case in detail, and proposes his solution to the problem. This ends in oral proceedings.

b) Deliberation and judgement

Next, the judges deliberate alone on the basis of a draft judgement drawn up by the Judge-Rapporteur. Each of the judges may propose changes. When a final text has been agreed upon, judgement is given in open court.

(1) Procedure in preliminary rulings

The national court submits questions concerning the interpretation or validity of a provision of Community law, generally in the form of a judicial decision in accordance with national procedural rules.

The Registrar has that request translated into all the Community languages, then serves it not only on the parties to the original proceedings but also on the Member States, the Commission and, where appropriate, the Council. A notice is published in the Official Journal indicating the names of the parties involved and the tenor of the question.

The parties, the Member States and the Community institutions have two months within which to submit their written observations to the Court. The remainder of the procedure is identical to that followed in direct actions. All those entitled to submit written observations may present their arguments orally at the hearing. When the advocate general has delivered his opinion and once the judges have deliberated, the judgement is read in open court and sent by the Registrar to the national court which sought the ruling.

c) Judgements

In principle the Court proceeds to judgement after the delivery of the advocate general's opinion; depending upon the complexity of the case and the workload of the Court, the judgement may be delivered a month or two after the delivery of the opinion.[48]

The judgements of the Court of Justice are reached by a majority vote. There are no dissenting opinions, and the judgements are signed by all the judges who took part in the deliberations and read in open court.[49]

The judgements of the Court and the opinions of the Advocates General are published in the Reports of Cases before the Court of Justice and the Court of First Instance in all the official languages of the Community.[50]

Although there is no appeal from a judgement of the ECJ, there are two methods of seeking review of a judgement by the ECJ itself.[51]
First a person that is not a party to the original proceedings may challenge the judgement if it is prejudicial to his rights; the ' third party proceeding'.[52]
A second procedure can be applicable if a party brings a new fact to light which is a 'decisive factor' and which was unknown to both the Court and the party applying for revision at the time of the judgement.[53]
Finally any party or Community institution showing an interest in a judgement of the Court may apply for it to be construed by the Court if its meaning or scope is in doubt.[54]
The same procedures are also applicable to judgements of the CFI.[55]

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[48] Lasok, p 91.
[49] Lasok , p 94.
[50] Valentine, p 177.
[51] Lasok, p 94.
[52] Lasok , p 94.
[53] RP-ECJ 98-100.
[54] PR-ECJ 102.
[55] PR-CFI 123-124 (third party proceedings), 125-128 (revision) and 129 (interpretation).

d) The language of the case

The language of the case may be one of the eleven official languages of the Community, or Irish[56]. In principle, the choice lies with the applicant[57]. When the defendant is a Member State or a legal or natural person having the nationality of a Member State, the language of the case will be the official language of that Member State[58]. If the State has more than one official language, the applicant chooses whichever suits him best[59].

Where a preliminary ruling has been requested, the language used is that of the national court which referred the question to the Court of Justice[60].

e) Legal aid

If a party is unable to meet all or part of the costs of the case, he may apply for legal aid.[61] The application must include all supporting evidence. The Chamber to which the Judge-Rapporteur belongs decides whether or not to grant legal aid.[62]

d) Procedure before the Court of First Instance

Procedure before the Court of First Instance comprises two stages, written and oral, and is governed, essentially, by principles similar to those governing direct actions before the Court of Justice. However, the specific structure and jurisdiction of the Court, as a Court of First Instance, have made certain adaptations necessary, particularly with regard to preparatory inquiries.

4. Execution and enforcement of judgements

a) Enforcement against private parties

The judgements are binding from the time of delivery,[63] i.e. from the time the operative part is read out in open court.[64] In accordance with the Treaties the enforcement is governed by the rules of civil procedure in the member state in whose territory the judgement is executed.[65]
Enforcement is not possible without an order being appended to the decision for its enforcement.[66] A national authority designed for this purpose, performs this operation automatically. The only formality that is to be

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[56] Lasok , p 52.
[57] PR_ECJ 29 (2) last sentence, Lasok, p 53.
[58] PR-ECJ 29 (2): this provision led the ECJ to state in Case 1/60 FERAM Spa vs. High Authority [1960] ECR 165 at 170 that, unless the defendant is a Community institution, 'the language of the case is the language of the defendant'.
[59] Lasok p 54.
[60] RP-ECJ 29(2), last sentence.
[61] RP-ECJ 76 (1) and RP-CFI 94 (1).
[62] Lasok, p 147.
[63] RP-ECJ 65; RP-CFI 83.
[64] RP-ECJ 64(1); RP-CFI 82(1)
[65] Treaties: ECSC Treaty, art 44; EC Treaty, art 187; Euratom Treaty art 159; ECSC Treaty art 92; EC Treaty, art 187; Euratom Treaty, art 164.
[66] Lasok, p 534.

approved is the verification of the authenticity of the judgement.[67] The next step for the party concerned would be to bring the judgement with the appending order of enforcement before the competent national authority. In case the enforcement is carried out in irregular manner it falls under the jurisdiction of then national court, although only the ECJ or CFI (depending on whom the decision is made) can order suspension of the enforcement of its own decision.[68]
The expenses of the enforcement measures are to be covered by the opposing party on the basis of the scale in the country concerned where the judgement order will be executed.[69]

b) Enforcement against state parties.

Looking at enforcement against state parties the basic principle is the non-infringement of the parties' sovereignty. This means that every possible enforcement measure has to be backed up by the provisions of Community law.[70] In other words: wherever a signatory state party agreed voluntarily to give up their particular sovereign right, there is no infringement..

Therefore it is very important to interpret the provisions of the Treaties properly in order to define the exact scope of enforceability.
Unfortunately the situation is not quite clear.

It appears doubtful, if judgements against States imposing a pecuniary obligation can be enforced.

On the one hand the enforceability of judgements appears to be restricted to 'persons other than States'.
Under the EC Treaty, judgements are enforceable 'under the conditions' laid down in the article of the Treaty covering the enforcement of 'decisions ... which impose a pecuniary obligation on persons other than States.' [71]

In contrast to that the parallel provision in the ECSC Treaty.[72] and the Euratom Treaty[73] do not contain limitations 'on persons other than States.'

On the other hand, a limitation of enforceability for the abovementioned reason appears doubtful, because Art. 192 of the EC Treaty sets out in the opening sentence the decision of the Council or Commission to which it applies.
There then follows the description of the conditions upon which enforcement of the decisions, so defined, may be effected. Judgements of the court cannot be effected by the opening sentence, because they are not mentioned in it.

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[67] Lasok, p 534.
[68] See case 4/73 J Nold Kohlen- und Baustoffgrosshandlung v Ruhrkohle AG [1977] ECR 1.
[69] Lasok, p 535.
[70] Klinke, Der Gerichtshof der Europäischen Gemeinschaften, p 68.
[71] Art. 192 EC Treaty.
[72] Art. 92 ECSC Treaty.
[73] Art. 164 Euratom Treaty.

The question arises whether there was an intention to limit the enforcement to judgements against persons other than member states.
If there was such an intention one would expect to see a limitation in this article.
In fact its scope is not cut down by any restrictive definition of the type of judgements to which it refers.

Some authors find no reason to apply a further limitation to the scope of the enforceability, because Art. 192 is already considered to be already the restricting element. In other words:
only restrictions mentioned in art. 192 should apply if one considered the list of restrictions as exhaustive (numerus clausus).

Another strong argument against enforceability against parties other than persons comes from the fact that, in any event, enforcement of a judgement is governed by the rules of civil procedure in the member states in question. Often these rules do not even provide enforcement against a state party anyway.

c) Conclusion:

Enforcement against a state would be only possible if there is no infringement of the sovereignty of the state. An infringement cannot be excluded if the Treaties the Member States agreed upon contain provisions allowing enforcement. The provisions do not contain a clear answer to that question whether one could read a certain meaning into the provisions.
Also the fact that the civil procedures in the different countries allow different degrees of enforceability against a state would favour a solution with no enforcement against 'parties other than persons'.

Looking at the practical relevance of the cases one has to admit that almost all cases against state parties do not rise enforcement questions.

In practice, however the most judgements against member states are made in connection with actions in accordance with article 169 of the EC Treaty in respect of a failure to fulfil an obligation under the Treaty.[74]
If the procedure is successful the Court has to give a declamatory judgement[75]. There are no sanctions for non-compliance.[76] Art. 171 simply declares that a State has an obligation to take the necessary measure to comply with the judgement. However the competent national authorities are obliged to take positive or negative measures to avoid further infringement of Community law.[77]
Although the judgement does not contain an order (except concerning the costs) which is capable of enforcement, a violation of a Treaty obligation by a Member State is a serious matter which can generate political pressure from the other Member States. Also the Commission can put non-enforcement pressure on a State through its power to grant or withhold

[74] Lasok. p 535.
[75] Brown. Jacobs p 76.
[76] Lasok. p 535.
[77] See case 48/71 Commission v Italy [1972] ECR 527 (Export Tax on Art Treasures (No 2)) (paras7-8).

various authorisations which the State may seek from it under numerous Articles of the Treaty[78]

Another measure to put pressure upon a member State comparable to the effect of an enforcement provision is the procedure under art 88 ECSC.
After the Commission has reached a positive decision that a State is in breach, the State must bring the case before the Court by way of challenge to the Commission's decision.[79] If the Court upholds the decision or the State does not challenge the decision the Commission is empowered to impose certain sanctions by a two-third majority Council decision.
The possible sanctions include the suspension of payments by the Commission to the State in default or the taking of discriminatory measures which would normally be proscribed under Art. 4 ECSC (e.g. ban of import from the State in question.)
In practice these „quasi enforcement measures" are in most cases an efficient tool to force States to comply with the judgements or the provisions of the Treaty[80]

In some Member States it has been accepted that a person proving sufficient interest can sue its government for damages for a breach of Community law.

5. The Function of the ECJ and the Courts in the member states

In accordance with the EC Treaty, the European Court of Justice is authorised to ensure that the law is upheld when the treaty is interpreted and applied.[81]
There is a very complex relationship between the functions of the national courts and the ECJ creating a balance between Community and National Jurisdiction.[82]

The Court of Justice develops European law further, whilst the national courts make sure that the application of European law does not overstep the limits of interpretation and does not represent a *de facto* amendment of the Treaty.[83]

The two different functions of the European and national courts involve a substantial degree of judicial prudence.

If a Member State transfers the task of safeguarding sovereign rights to the institutions of the European Community and a dispute arises concerning the

[78] Brown, Jacobs, p 76.
[79] Brown, Jacobs, p 88.
[80] Brown, Jacobs, p 77.
[81] EC Treaty, Section 164.
[82] Kirchhof speech, para 2.
[83] Kirchhof speech, para 2.

extent to which such rights are transferred, the decision in such a case cannot be taken by one side alone[84].
The responsibility for the judicial development of European law is entrusted to the European Court of Justice while the responsibility for making sure that the borderline between developing European law and altering it is left with the national courts.[85]
The European Court of Justice and the national courts are mutually dependent on one another and committed to co-operation

In this situation both are courts are mutually depend on each other and are committed to co-operation.
This co-operation is based on the principle of limited individual authorisation.[86]
In contrast to the institutions of the sovereign states, the institutions of the European Communities may not allocate duties and powers to themselves in line with their political preferences.
For example in the German constitution (Grundgesetz) the regulating element for the co-operation between national constitutional law and European law is Section 23 providing that the law agreed upon by the Treaty is given preference if and insofar as the national parliament has given approval, if indeed this is requried.

II. International Court of Justice

1. Historical development

Between the 1870s and the outbreak of the Great War there was a period of great international organisational creativity which led to the formation of a revolutionary tribunal; the Permanent Court of Justice .
This court was designed in accordance with article 14 of the League of Nations and became an important part of it. It embodied an institution created to hear and decide disputes between States[87].

Prior to this Court, disputes between States were settled by diplomacy, sometime assisted by the good offices of a third State acting as mediator or intermediary.[88] This former State practice was also formalised by an arbitrator and a court-like structure, which was not much more than a panel of individuals from whom arbitrators could be selected for a particular dispute.[89]

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[84] Kirchhof speech, para 2
[85] Kirchhof speech, para 2
[86] pursuant to Section 3b of the Treaty on the European Communities.
[87] Seidel-Hohenveldern, Völkerrecht, p 386.
[88] Kimminich, Einführung in das Völkerrecht, p 501.
[89] Hunnings, The European Courts, p 3.

The revolutionary improvement was the introduction of a new, much more institutionalised body of international dispute settlement. With the Permanent Court of International Justice a true court, with judges who sat regardless of the wishes of the disputants and applied the law which likewise was beyond the control of the litigating State.[90]

In order to overcome the States' resistance to this dilution of sovereign independence in comparison to the Permanent Court of Arbitration (which was more an extension of the diplomatic arm rather than an independent juridical body), the acceptance of the Court's jurisdiction had to be voluntary in every individual case.[91]
But once a "defendant" State accepted the Court's jurisdiction, the party was bound to accept the ultimate judgement of the Court.[92]

In addition to that, a further device an "optional clause" was established. States could at any time make a declaration that they accepted the Court's jurisdiction in the future for an unlimited period of time or for a certain number of years.[93] The Court's judgement would then be compulsory and mark a step in the process of States' unlimited sovereignty towards the creation of an independent institution providing the possibility of peaceful settlement of inter- state disputes.

After the Second World War the United Nations established in accordance with the Arts. 92-96 of the UN-Charter the International Court of Justice. [94] This Court is based upon the old Permanent Court of Justice and its main features remain the same, particularly the optional clause in Art. 36(2)of the Court's Statute.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Its seat is at the Peace Palace in The Hague (Netherlands).

2. Functions of the Court

The Court has a dual role: to settle the legal disputes submitted to it by States in accordance with international law, and to give advisory opinions on legal questions referred to it by duly authorised international organs and agencies.

3. Composition

The Court is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and Security Council sitting independently of each other.[95] It may not include more than one judge of any

[90] Seidel-Hohenveldern, Völkerrecht, p 387.
[91] Kimminich, Einführung in das Völkerrecht, p 501.
[92] Seidel-Hohenveldern, Völkerrecht, p 388.
[93] Seidel-Hohenveldern, Völkerrecht, p 388.
[94] Lutz, agenda, p 273.
[95] Eyffinger, The International Court of Justice, p 152.

nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The Members of the Court do not represent their governments but are independent magistrates.

The judges must possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence in international law. [96] The composition of the Court must also reflect the main forms of civilisation and the principal legal systems of the world.[97]

When the Court does not include a judge possessing the nationality of a State party to a case, that State may appoint a person to sit as a judge *ad hoc* for the purpose of the case.[98]

4. Cases between States

a) The Parties

Only States may apply to and appear before the Court. The States members of the United Nations (at present numbering 185), and two States not members (Nauru and Switzerland) which have become parties to the Court's Statute, are so entitled.

b) Jurisdiction

The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

(1) Jurisdiction by virtue of a Special Agreement or Compromise

Firstly two or more States may conclude a special agreement to submit the dispute to the Court limited to a defined question or issue.[99]
The parties can request the Court to lay down in a final and binding judgement the applicable principles , leaving the parties to negotiate the final settlement.
While the Court determines with binding force the legal issues, the closing settlement is left to the parties on the basis of that decision.[100] This method of combining the best features of both judicial and diplomatic means of dispute settlement will probably become more and more popular, because it combines authoritative and binding legal guidance with the freedom of the parties to negotiate the conclusive settlement between themselves.[101] In certain situations it can appear very attractive, because this form of juridical dispute settlement reduces the risk for a party of an 'all or nothing' decision.

[96] Rosenne, The World Court, p 53.
[97] Rosenne, The World Court, p 54.
[98] Eyffinger, The International Court of Justice, p 163.
[99] Eyffinger, The International Court of Justice, p. 126.
[100] see: *North Sea Continental Shelf* cases
[101] Rosenne, The World Court, p 87.

(2) Jurisdiction by virtue of a compromissory clause in a treaty

Secondly the jurisdiction can be conferred by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court.[102] Several hundred treaties or conventions contain a clause to such effect.

This option brought fourteen cases before the Court. In this context it is important to mention that the Court is not used on a regular basis as an institution acting on a regular basis in terms of a normal process of adjudication.[103]

Experience shows that the Court works more effectively as a reserve in case the diplomatic negotiations fail.

Opponents of a wide use of compromissory clauses like the (former) Soviet Union, used to state that the more parties add rules for the settlement of disputes to the rules dealing with substantive matters the less parties are willing to accept of the treaty. Furthermore parties would have to face the danger of jeopardising the efficacy of the substantive rules.

One has to mention in this context that the LOSC is an international agreement containing a very precise written formulation of dispute settlement procedures and is a highly accepted convention. The dispute settlement clause guarantees the validity of substantive rules.

(3) Compulsory jurisdiction

Thirdly the Court can have jurisdiction through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration.[104] The declarations of fifty-nine States are at present in force, a number of them having been made subject to the exclusion of certain categories of dispute.

The "compulsory jurisdiction" or the system of the optional clause is embodied in Article 36 paragraph 2, of the Statute:

> The state parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement , in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> a. the interpretation of the treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation made for the breach of an international obligation.

A declaration may be made unconditionally or subject to reservations which are not incompatible with the purpose of the optional clause. Reciprocity is inherent in the system, and where two declarations are in different terms , jurisdiction exists only to the extent that they coincide. A declaration may be

[102] Rosenne, The World Court, p 87.
[103] Rosenne, The World Court, p 88.
[104] Rosenne, The World Court, p 90.

limited or unlimited in time and there is no form to be followed, except the requirement that a declaration must be deposited with the Secretary General of the United Nations.

The reservations which are made in these declarations fall into several common patterns and most of them are reasonable. They include, for instance reservations limiting acceptance of jurisdiction to disputes arising after a given date, to disputes for which a solution is not reached through diplomatic means or for which the parties have not agreed on a mechanism of dispute settlement (exclusions relating to wars or compulsory action by the Security Council, and so on).[105]
A very common form of reservation excludes disputes which fall within the domestic jurisdiction of States, although it is not necessary to exclude them expressly. According to a principle in current international law, a subject within the domestic jurisdiction of a State cannot be governed by international law and therefore in the nature of things cannot come within the scope of compulsory jurisdiction.

In cases of doubt as to whether the Court has jurisdiction, it is the Court itself which decides.

c) Procedure

The procedure followed by the Court in contentious cases is defined in its Statute, and in the Rules of Court adopted by it under its own Statute. The Rules now in force were adopted on 11 April 1978. The proceedings include a written phase, in which the parties file and exchange pleadings, and an oral phase consisting of public hearings at which agents and counsel address the Court. As the Court has two official languages (English and French) everything written or said in one is translated into the other. After the oral proceedings the Court deliberates *in camera* and then delivers its judgement at a public sitting. The judgement is final and without appeal. Should one of the States involved fail to comply with it, the other party may have recourse to the Security Council of the United Nations.

The Court discharges its duties as a full Court but, at the request of the parties, it may also establish a special chamber. The Court constituted such a chamber in 1982 for the first time, formed a second one in 1985 and constituted two more in 1987. A Chamber of Summary Procedure is elected every year by the Court in accordance with its Statute. In July 1993 the Court also established a seven-member Chamber to deal with any environmental cases falling within its jurisdiction.

Since 1946 the Court has delivered 60 Judgements on disputes concerning *inter alia* land frontiers and maritime boundaries, territorial sovereignty, the non-use of force, non-interference in the internal affairs of States, diplomatic relations, hostage-taking, the right of asylum, nationality, guardianship, rights of passage and economic rights.

[105] Rosenne, The World Court, p 95.

d) Pending cases

Nine contentious cases are at present pending:

1. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain).

2. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom).

3. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America).

4. Oil Platforms (Islamic Republic of Iran v. United States of America).

5. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro).

6. Gabcikovo-Nagymaros Project (Hungary/Slovakia).

7. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria).

8. Fisheries Jurisdiction (Spain v. Canada).

9. Kasikili/Sedudu Island (Botswana/Namibia).

e) Sources of applicable law

The Court decides in accordance with international treaties and conventions in force, international custom, the general principles of law and, as subsidiary means, judicial decisions and the teachings of the most highly qualified jurists.

5. Other Cases

a) Advisory Opinions

The advisory procedure of the Court is open solely to international organisations. The only bodies at present authorised to request advisory opinions of the Court are the six organs of the United Nations and sixteen specialised agencies of the United Nations family.[106]

On receiving a request, the Court decides which States and organisations might provide useful information and gives them an opportunity of presenting written or oral statements. The Court's advisory procedure is

[106] Eyffinger, The International Court of Justice, p 148.

otherwise modelled on that for contentious proceedings, and the sources of applicable law are the same.

In principle the Court's advisory opinions are consultative in character and are therefore not binding as such on the requesting bodies. Certain instruments or regulations can, however, provide in advance that the advisory opinion shall be binding.

Since 1946 the Court has given 23 Advisory Opinions, concerning *inter alia* admission to United Nations membership, reparation for injuries suffered in the service of the United Nations, territorial status of South-West Africa (Namibia) and Western Sahara, judgements rendered by international administrative tribunals, expenses of certain United Nations operations, and applicability of the United Nations Headquarters Agreement.

The last two Opinions were rendered in July 1996 in response to a request made by the World Health Organisation (WHO) on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict; and a request made by the United Nations General Assembly on the Legality of the Threat or Use of Nuclear Weapons.

b) The Mission of the Court

The ICJ is the most prominent of all post-Second World War institutions symbolising the willingness of the nations to settle their differences peacefully.[107]
Although its successes are noteworthy some authors find that the Court has failed yet to archieve its goal of becoming the global peacemaker prescribed by its early advocates.[108]
The Court at one time or the another has been maligned for its partiality[109], ignored[110] and defied.[111] To improve the situation a revival appears necessary in respect of greater state use and reform.[112]

6. The role of the International Court of Justice in comparison with the European Court of Justice

The features of the ICJ which distinguishes it from the European courts is twofold: it applies public international law and international treaties (Art. 38 of its Statue); and it is concerned with disputes between sovereign States.

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[107] Lutz, persp, p 677.
[108] Lutz, agenda, p 267.
[109] Gordon. Observations on the Independence and Impartiality of the Members of the Internatinal Court of Justice, 2 Conn. J. International L. 397 (1987); Weiss: Independence and Impartiality: A Preliminary Inquiry, in The International Court of Justice at a Crossroads 123 (L. Damorsch ed. 1987).
[110] During the period of 1970-1980, the ICJ heard nine contentious and four advisory opinion suits. The average number of cases per year since 1946 is 1.8 (1.2 contentious and 0.4 advisory)
[111] Charney, Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation and Non-Performance, in The Internatinal Court of Justice at a Crossroads 288 (L. Damrosch ed. 1987)
[112] Lutz, agenda, p 677.

Thus it can only operate in cases where one State brings an action against another State.
(Although one has to also bear in mind that certain organs of the UN do have the authority to request the Court to give an advisory opinion - Art. 96 UN Charter.)

The European courts on the other hand have very different reads of jurisdiction.
All EU Member States are UN members and parties to the Statue of the ICJ. Thus they are entitled to bring cases before the court with an important exception; Recourse in relation to matters in relation to the European Community are prohibited.[113]
Looking from the perspective of the ICJ this means that the court's jurisdiction concerning disputes between EU Member States arising out of the EC, Euratom and ECSC Treaties are excluded from the jurisdiction of the ICJ. However the EU Member States are to be adjudicated by the European Court of Justice on the basis of Community law; whereas inter-State disputes arising out of the Maastricht Treaty will fall under the jurisdiction of the International Court of Justice on the basis of international law.[114]

7. Compliance with the Court's decisions

A fundamental principle of the law governing international litigation before the International Court is the implication that disputing parties to agree comply with the final judgement of the court.[115]

This basic principle has been included in the Charter of the United Nations and the Statutes of the Court.
Articles 59 and 60 of the Statutes of the Court provide that the Judgement in a contentious case is final and without appeal and is only binding on the parties in respect of that particular case.
Furthermore there are two important provisions in the Charter:
First Article 94 paragraph 1 provides that:

> „Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a part"

Second paragraph 2 of the same article:

> „If any party to the case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement."

If a party does not comply with the decision of the Court it could face new political problems and the Security Council is given wide powers to deal with the consequent situation.[116]

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[113] see Arts. 219 EC Treaty, 193 Euratom Treaty, 87 ECSC Treaty.
[114] Bleckmann, Allgemeine Staats und Völkerrechtslehre, p 700.
[115] Rosenne, The World Court, p 42.
[116] Damrosch, The International Court of Justice at a Crossroads, p 290.

In addition to Article 94, Article 41 of the Statute requires that notice of any provisional measures suggested by the Court should be given both to the parties and to the Security Council, although this does not place the matter automatically on the agenda of the Security Council.

But in a situation where a dispute before the Court is also brought before the Security Council, no further action is required for the measure to be indicated on the record of the Security Council.

Although there has never been a case of such an "enforcement" action there have been some cases of complete or alleged failure to comply with the final judgement of the Court.

In the Corfu Channel case the Albanian Government refused to pay the damages awarded to the United Kingdom. Instead of forwarding the matter to the Security Council the United Kingdom resorted to other methods in order to recover the sum in question. This led to the *Monetary Gold Removed from Rome* case.
After the regime changed in Albania in 1992 diplomatic relations were re-established and the judgement debt was paid in full.[117]
According to the judgement Albania had to pay compensation to the United Kingdom of almost £ 850,000 . Some Albanian monetary gold recovered by the Western Allies after World War II was retained in the Custody of the Tripartite Commission ending a final settlement of claims between the Albania and other (Italian) Governments concerned. A general settlement between Albania and the United Kingdom was reached on 9 May 1992. This required the restoration of the gold to Albania, and the payment of the agreed sum of money to the United Kingdom in settlement of outstanding claims, including the claims arising out of the Corfu Channel judgement.

In 1981 Nicaragua brought a case against the United States to the Court.
The United States refused to acknowledge the jurisdiction of the Court and therefore the US did not accept the court's decision.
Consequently the US did not take any of the actions required in the executory provisions of the judgement on the merits of June 27th 1986.[118]
For the first time a judgement creditor itself (Nicaragua) brought the matter before the Security Council in reliance of Article 94 of the Charter.[119]
As the United States voted against a resolution the Security Council hasn't been able to adopt it. However Nicaragua took the matter to the 41st session of the General Assembly which adopted resolution 41/31 on November 3rd 1986, reading:

> The General Assembly,
> Having heard the statement made by the Minister for External Relations of the Republic of Nicaragua,

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[117] See G. Marston, „United Kindom Materials on International Law", 63 British Year Book of International Law 781 (1992).
[118] Rosenne, The World Court, p 141,142.
[119] Rosenne, The World Court, p 143.

Recalling Security Council resolutions 530 (1983) of 19 May 1983 and 562 (1985) of May 1985,
Aware that under the Charter of the United Nations, the International Court of Justice is the principal organ of the United Nations and that each Member undertakes to comply with the decision of the Court in any case to which it is a party,
Considering that Article 36, paragraph 6, of the Statute of the Court provides that" in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court",
Taking note of the Judgement of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua",
Having considered the events that have taken place in and against Nicaragua since the Judgement was rendered, in particular the continued financing by the United States of America of military and other activities in and against Nicaragua
Emphasising the obligation of States, under customary international law, not to intervene in the internal affairs of other States,
1. Urgently calls for full and immediate compliance with the Judgement of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua" in conformity with the relevant provisions of the Charter of the United Nations;
2. Requests the secretary-general to keep the General Assembly informed on the implementation of this resolution.

With the change of government, Nicaragua discontinued the case in the World Court, and the General Assembly deferred further considerations in 1990.

In April 1990 the Security council took, in connection with the situation in Bosnia-Herzegovina, note of one of the three operative paragraphs of the Court's first order.[120]
This order indicated provisional measures in *the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.
While that and the third paragraph had been adopted by the Court unanimously, the Russian member of the Court had dissented from the second operative paragraph.[121] For the first time the Security Council picked out only one operative paragraph of a decision of the Court without a referring to the judgement or order as a whole.[122] Although the Security Council refrained from taking action on the second order including provisional measures, it took, like the General Assembly, note of one of the operative paragraphs of the Court's second order indicating provisional measures.[123]

8. (Provisional) conclusion

The Functioning of the Security Council at the given moment is a condition for the validity of Article 94 paragraph 2. In cases of non-compliance the

[120] Resolution 819 of 16 April 1993.
[121] Rosenne, The World Court, p 240, 241.
[122] "This case had the potential for a head-on clash between the Court and the Security Council." Rosenne,The World Court, p 241.
[123] Resolution 48/88 of December 1993.

instances of recourse to the Security Council happened at times of great international tensions.
As an indication for these tensions the permanent members of the Security Council appear incapable of reaching an unaninous decision, which is the qualification needed to impose the action concerned.

One also has to make a distinction between two types of cases of problems caused by compliance or non-compliance.
The first possibility is that States have been brought unwillingly before the Court on the basis of a unilateral application.
The second possibility is that state parties decided to solve a dispute before the Court by agreement.

III. International Tribunal for the Law of the Sea

1. Historical development

Almost 20 years ago the United Nations demanded the establishment of an international court for disputes concerning matters related to the law of the sea.

In 1970 the United States proposed the establishment of an international Sea-bed Authority as a part of the "Darft United Nations Convention on the Law of the Sea"[124]According to this draft, the Authority had three main organs Assembly, Council and Tribunal.
A remarkable novelty was that the privilege of access to the Court, hitherto reserved to States, was to be extended to natural and juridical persons engaged in deep sea- bed mining activities.
This proposal led to the Sea-bed Chamber as contained in the Convention today

In 1973, the United States submitted draft articles for a chapter on the settlement of disputes and proposed a Law of the Sea Tribunal.[125]
These draft articles provided that disputes concerning the interpretation or application of the future Law of the Sea Convention were to be submitted to compulsory dispute settlement procedure on the application of one of the parties and that the decisions of that tribunal would be binding upon the parties.[126]

In accordance with resolution I of UNCLOS III it was the task of the Preparatory Commission (first in 1983) to provide the member states with the draft articles dealing with establishment of the International Law of the Sea Tribunal.[127]

The International Tribunal for the Law of the Sea is the central forum established by the United Nations Convention on the Law of the Sea for the peaceful settlement of disputes. Its seat is at the Free and Hanseatic City of Hamburg, Germany. The Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable.

2. Sea-Bed Disputes Chamber

The Tribunal can also act as a body of appeal in relation to disputes on the utilisation and exploitation of the deep sea-bed. The Sea-Bed Disputes Chamber is a qualified jurisdictional organ of ITLOS specialised in disputes

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[124] UN Docs. A/AC 138/25, 3 August.
[125] UN Docs. A/AC 138/25 and .A/AC. 138/97, 21 August 1973; Resolution 2749 (XXV) of the General Assembly.
[126] Platzöder, Der Internationale Seegerichtshof, p 15.
[127] Wolfrum, Der Internationale Seegerichtshof in Hamburg, Vereinte Nationen 6/1996, p 206,

of corresponding issues. The LOSC contains a list of situations that would fall under the jurisdiction f the Chamber.[128]
The difference between the scope of jurisdiction of the Tribunal and the Sea-bed Disputes Chamber is that it is not possible for the parties to exclude the jurisdiction of the latter through a contractual arbitration clause.[129]

3. Scope of Jurisdiction

Art. 288 LOSC gives the Tribunal for the Law of the Sea, jurisdiction over issues and disputes concerning the application and interpretation of the Convention. The Tribunal itself is limited to applying only the law provided by the Convention, it is however authorised to apply any other rule of international law as long as these rules are not incompatible with the LOSC.

Practically it appears very likely that the court will mostly deal with the exercise of the rights of the coastal state concerning its exclusive economic zone.[130]
Disputes will essentially arise in connection with fishing, marine scientific research as well as the general use of the sea within this territory.

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the United Nations Convention on the Law of the Sea ("compulsory jurisdiction") and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal ("optional jurisdiction".[131]

The Tribunal has exclusive jurisdiction, through its Seabed Disputes Chamber, with respect to disputes relating to activities in the International Seabed Area. These matters include disputes between states parties concerning the interpretation or application of the provisions of the Convention, along with those of the Agreement relating to the Implementation of the Part XI of the Convention, concerning the Deep Seabed Area; and disputes between states parties or a contractor and the International Seabed Authority.

a). Advisory Jurisdiction

The Tribunal, through its Seabed Disputes Chamber, has jurisdiction to provide 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.[132]
Furthermore the Assembly can request advisory opinions, when certain procedural requirements are met, on the conformity with the Convention of a proposal before the Assembly on any matter.[133]

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[128] Art. 186 LOSC.
[129] Becker, p 3.
[130] The EEZ has a breadth of 200nm from the baseline; Becker, .2.
[131] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 428.
[132] Article 191.
[133] Art 159, para. 10.

In addition to this, one has to bear Article 96 of the UN Charter in mind, which reserves the right to request the ICJ to issue an advisory opinion to international organisations and organs thereof.
The difference is that the General Assembly and the Security Council may request them "on any legal question" and other organs of the United Nations and Specialised Agencies - with the authorisation of the General Assembly, may request the opinions only on questions arising within the scope of their activities".[134]

Thus the only organisation directly created by the Law of the Sea Convention is the International Sea-bed Authority[135]. According to Art 96 this organisation can request (through its assembly and Council) an advisory opinion to the specifically competent Sea-bed Disputes Chamber of the Tribunal.[136]
Some authors think that there is a third institution inside the Convention, the Commission on the Limits of the Continental Shelf that should have been given the right to request advisory opinions. But following sloppy drafting it was forgotten to provide this institution with the right in question.[137]

b). Jurisdiction ratione personae

Article 20 of the Statute of the Tribunal states that the Tribunal shall be open to State Parties. Compared to the Statutes of the ICJ there is a significant difference; Article 34 of the Statute of the ICJ provides that only States may be parties in cases before the Court.
For international law of the sea matters, the definition of possible parties is provided by Article 1 of the Convention and also includes entities different from States, which have consented to be bound by the Convention.[138]
These are mainly International Organisations which Member States have transferred competence to.
Furthermore the Tribunal can be accessed in cases expressly provided for in Part XI of the LOSC.[139]
The Sea-bed Disputes Chamber has jurisdiction even in cases involving the International Sea-Bed Authority, State and private parties to a contract and state or private contractors.[140]

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[134] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p.427.
[135] Other authors disagree and find another institution directly created by the LOSC - the Commision on the Limits of the Continental Shelf; Eitel, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994 - Comment, p 454.
[136] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 427.
[137] Eitel, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994 - Comment, p 454.
[138] mentioned in Article 305 paragraph 1 b, c, d, e and f.
[139] Article 20, paragraph 2.
[140] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 428.

The tribunal can also hear cases brought by entities other than State Parties in any case submitted to any other agreement conferring jurisdiction on the Tribunal which is accepted by all parties of the case.[141]
In other words: all parties to a case agree upon the jurisdiction of the Tribunal, it would become the competent international organisation even if one party included is a International Organisation or an entity which is not party to the Law of the Sea Convention.[142]
This feature is a characteristic distinction between the jurisdiction *ratione personae* of the Tribunal of the Law of the Sea Convention and the Jurisdiction of the World Court.

c) Compulsory jurisdiction

(1) Compulsory jurisdiction independent of the option for the tribunal

Certain disputes fall under the jurisdiction of the Tribunal although there have not been previous declarations of the parties to submit the matter to the LOSC. It is possible to talk about compulsory jurisdiction independent of the option for the tribunal.[143]
The Convention entrusted the Tribunal with these cases, because they involve functions that cannot be performed properly by an arbitral Tribunal, these cases require a permanent pre-established body.[144]

(a) Jurisdiction on disputes concerning provisional measures and prompt release of a vessel

Comparing the jurisdiction of the World Court in this context, it is interesting to notice that the Law of the Sea Convention gives preference in these cases to the Tribunal although the World Court is another pre-established body and can be chosen under Article 287.
For this reason the Tribunal is the only possible dispute-settlement body independently of the choice of procedure in two cases

Firstly, in accordance with paragraph 5 of Article 290 any party may request the LOSC tribunal to prescribe, modify or revoke provisional measures which have been requested in a dispute which has been submitted to an arbitration tribunal.[145]

The Tribunal can prescribe provisional measures if the measures are required by the urgency of the situation and that *prima facie*, the arbitral tribunal to be constituted would have jurisdiction.[146] The Seabed Disputes Chamber,

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[141] Article 20, paragraph 2.
[142] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 428.
[143] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 428
[144] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 428
[145] The only exemption from this would be a case where the parties agreed to seize another court of tribunal within two weeks from the date of the request for provisional measures.
[146] Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, p 429.

may prescribe, modify or revoke provisional measures in respect to activities in the Area.

Secondly, in the case of a vessel or its crew detained by the authorities of a State which is a party to the Convention, the Tribunal may be seized by the flag State or on its behalf.
The matter will fall under the Tribunal's jurisdiction if the parties have not agreed on a different judicial body within ten days of the detention.

Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to the Tribunal, failing agreement between the Parties within ten days from the time of detention.[147]
The Tribunal is competent to scrutinise cases concerning the prompt release of vessels and their crews (having violated the provisions of the Convention) upon the posting of a reasonable bond or security.

The most frequent and important cases of detention are:

-Detention for investigation of matters of pollution by dumping or violations of applicable international laws and regulations,[148]
-Detention of ships decided for ensuring compliance with the coastal State's sovereign right in respect to fisheries in the exclusive economic zone,[149] and
-Detention decided in cases of a possible violation of international rules and standards for the prevention of vessel-based pollution, if a discharge is causing major damage or threat thereof and provided appropriate procedures for bonding have been agreed.[150]

A remarkable peculiarity is the cases dealing with the question of the release of detained vessels may not only be submitted by the flag State. It is also possible for the State to allow submission "on its behalf".Thus it can entrust, for instance, a single ship owner or a association of ship owners to act on its behalf after notifying the Tribunal by an official communication.[151]

Remarkable in this situation is that the Convention allows in practice, even though not in principle, private parties to further their interest before the Tribunal.

It is likely that the cases just mentioned will often be brought before the Court, because the jurisdiction of the Tribunal could appear in many cases more attractive to ship owners of detained vessels and the flag States for a simple reason. The Tribunal is often a preferable alternative to domestic

[147] Article 287 or 292.
[148] Article 226, paragraph 6.
[149] Article 73, paragraph 2.
[150] Article 220 paragraph 7.
[151] see Article 292 LOSC and Article 49, paragraph 3 of the Final Draft Rules of the Tribunal prepared by the Preparatory Commision.

courts whose proceedings may not give sufficient guarantees. These provisions are a big advantage especially for States whose flag is flown by vessels fishing, and by tankers navigating in foreign exclusive economic zones.

(b) Accessory jurisdiction

The mechanism of the choice of procedure has, apart from the two cases mentioned above, two other important exceptions.
The Convention provided jurisdiction for the Tribunal for titles of jurisdiction which are in various ways accessory to other titles of jurisdiction.

Firstly the Tribunal has the "Competence of the competence"- meaning that it can decide in cases of doubt if a matter falls under its jurisdiction or not.[152]

Secondly the Tribunal has the power to prescribe provisional measures in cases brought to it when it considers *prima facie* that it has jurisdiction.[153]

Thirdly the court can decided on *a prima facie* basis whether a dispute referred to in Article 297 constitutes an abuse of legal process or is well founded.[154]

Fourthly in accordance with Article 33 paragraph 3 the Court is given the power to construe its own decision, in cases of disputes concerning the meaning or scope of a decision.

Fifthly the Court has jurisdiction on questions arising in connection with the interpretation and application of the Convention or agreements conferring jurisdiction on the Tribunal. The judgement has binding effect on a State Party, which has intervened in a pending case in accordance to Article 32 of the Court's Statute.

In a sixth case the power to pronounce on the claim of the State Party, which has been permitted to intervene according to Article 31 of the Statute depends on whether the Tribunal follows the jurisprudence of the Would Court on Article 62 of its Statute.
Article 62 of the Statutes of the International Court of Justice says:

> "1. Should a state consider that it has an interest of a legal nature which may be affected by the
> decision in the case, it may submit a request to the Court to be permitted to intervene.
> 2. It shall be for the Court to decide upon this request."

For an intervention in connection with Article 62 the World Court only requires the existence of an independent title of jurisdiction between the intervening state and the parties to the pending case.[155]

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[152] Article 288.
[153] Article 290, paragraph 1.
[154] Articke 297 gives the coastal State sovereign rights and limited jurisdiction in the exclusive economic zone.
[155] Treves, The Law of the Sea Tribunal, p 433.

Lastly the Tribunal has the competence to make exceptional decisions concerning costs if it does not apply the general rule that each party shall bear its own costs.[156]

(2) Compulsory jurisdiction: the limitations

As we have seen the Convention entrusts the Tribunal with compulsory jurisdiction on the request of one party, if the "choice of procedure" provisions have been obeyed.[157]
This general rule has certain exceptions.

(a)The Limitation in Article 297

Article 297 provides some „limitations" that apply automatically.
The first paragraph excludes disputes concerning:

> „the interpretation or application of th[e] Convention with regard to the exercise by the coastal State of its sovereign rights or jurisdiction provided for in the[e] Convention ,

It remains unclear, if Article 297 includes compulsory jurisdiction concerning the exercise of "sovereignty" of the coastal State over the territorial sea and disputes in archipelagic waters.[158]

(b) Optional exceptions according to Article 298

Furthermore Article 298 in context with Article 287 provides the possibility for States to declare in writing that they do not accept the compulsory jurisdiction of the Tribunal concerning certain categories; "optional exception". In order to find out whether a particular dispute falls under one of these categories it is necessary to look at the description of these categories of disputes.

The disputes which can be excluded and which, consequently, must be considered as covered by compulsory jurisdiction whenever the appropriate declaration has not been made are the following:
Firstly, disputes "concerning the interpretation or application of Articles 15,74 and 83 relating to sea boundary delimitations".
Secondly, in accordance with Article 298 paragraph 1(a) disputes "involving historic bays or titles". It appears doubtful that one could conclude the existence of compulsory jurisdiction over *all* disputes concerning historic bays or titles. Article 286 provides that a binding settlement procedure is only set forth to disputes concerning the interpretation or application of the Convention.[159]
The compulsory jurisdiction seems to end with the interpretation and application of Articles 10 paragraph 5 and 15 when it comes to historic bays

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[156] Article 34 of the Statutes of the Tribunal of the Law of the Sea.
[157] Treves, The Law of the Sea Teribunal., p 433.
[158] This controversy will not be discussed here, because it is of little practical relevance because cases in which the Convention regulates the e x e r c i s e of "Sovereignty of the coastal State" are very rare. Treves, The Law of the Sea Tribunal., p 433.
[159] Treves, The Law of the Sea Tribunal p 436.

and titles, because these are the only provisions mentioning the historic bays and tiles.
an other words; the compulsory jurisdiction on the request of one party is limited to disputes belonging to these two categories.[160]
Thirdly, disputes in the field of law enforcement activities in regard to the exercise of sovereign rights or jurisdiction are excluded from compulsory jurisdiction under Article 297 paragraphs 2 and 3.[161]
Fourthly, disputes concerning military activities, including military activities by government vessels and aircraft engaged in non- commercial service.
Finally, disputes concerning the exercise of the functions of the UN Security Council.

d) Optional jurisdiction

State parties also have the option to submit a dispute to the Tribunal by notification of a special agreement.[162]
If the dispute is brought before the court by optional jurisdiction, all the limitations just mentioned above are overcome by the special agreement.[163]
This principle is provided by Article 24, paragraph 1 of the Statute of the Tribunal saying that:

> " nothing in the Convention impairs the right of any State Party to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice".

The term "peaceful means" includes obviously the procedure before the Tribunal.
As mentioned above this opportunity has the effect of widening the jurisdiction *ratione personae* of the Tribunal.[164]

Furthermore, in certain cases the "optional" jurisdiction of the Tribunal is extended beyond the limitations of Article 287.

As mentioned above Article 287 gives, on the one hand preference to the procedures chosen by both parties[165] and on the other hand entrusts the settlement of the dispute to arbitration when the parties have chosen different procedures[166]
But this rule applies only "unless the parties otherwise agree"[167].

Thus the Tribunal even has jurisdiction in cases where the mechanism of choice of procedure according to Article 287 would have excluded its

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[160] Treves, The Law of the Sea Tribunal p 437.
[161] questions of marine scientific research and fisheries.
[162] Article 24, paragraph 1 of the Statute of the Tribunal.
[163] This principle is provided by Article 24, paragraph 1 of the Statute of the Tribunal saying that: "nothing in the Convention impairs the right of any State Party to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice".
[164] see: Article 20 paragraph 2 of the Tribunal's Statute.
[165] paragraph 4 of Article 287.
[166] paragraph 5 of Article 287.
[167] Article 287.

jurisdiction, if there is an agreement of the parties to bring the dispute to the Tribunal.
As one can see, the optional jurisdiction prevails over the choice of procedure provisions.

However in the converse scenario the result is converse as well; if the parties have chosen the Tribunal but agreed to submit the dispute to some other institution entailing a binding result, the actual agreement overrules the choice.[168]

Looking at cases of jurisdiction *ratione materiae* of the Tribunal the optional jurisdiction prevails over the compulsory jurisdiction in certain cases.
Agreements of the parties can invalidate the limitations set forth in Article 297 and exceptions permitted by Article 298.
This emerges from Article 299, paragraph 1:

> „A dispute excluded under Article 297 or excepted by a declaration made under Article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute."

Concerning the „optional exceptions" of Article 298 the same phenomena applies.
Paragraph 2 provides that:

> "A State party which has made a declaration under paragraph 1 may at any time [...] agree to submit a dispute excluded by such declaration to any procedure specified in the Convention."

Another situation where the Tribunal has jurisdiction is the so-called *forum prorogatum.* A singular procedure attesting to the flexibility of the Court, is when the Court agrees to assume jurisdiction when consent is given by one party only after the proceedings have been started by the other. In this way procedural irregulations or jurisdictional voids in the institution of the proceedings may be waived to afford the Court jurisdiction on the substance of the case.[169]

e) Jurisdiction in Disputes Concerning "Activities in the Area".

The provisions on disputes concerning "activities in the Area"[170] are remarkably innovative concerning the dispute settlement mechanism. In contrast to the provisions of the Tribunal as a whole which are very similar to the provisions of the ICJ, the provisions mentioned are closer to the model of the ECJ.
The jurisdiction *ratione personae* is not only restricted to State Parties. It includes disputes in which also the Authority, the Enterprise and natural or juridical persons can be parties.[171]

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[168] Treves, The Law of the Sea Tribunal p 438.
[169] Treves, The Law of the Sea Tribunal, p 438.
[170] Definition of the expression in Article 1 paragraph (3), of the Convention.
[171] Treves, The Law of the Sea Tribunal p. 440.

The jurisdiction of the Tribunal on disputes concerning "Activities in the Area" is exercised by its eleven-member Sea-Bed Disputes Chamber.[172]

Moreover the contentious jurisdiction of the Sea-Bed Disputes Chamber is in all cases compulsory - even though the will of one party may exclude some aspects of certain disputes and bring them to commercial arbitration.[173]
Furthermore a significant difference between the ICJ's, the general ITLOS's and the Sea-Bed Disputes Chamber's jurisdiction is that the jurisdiction of the latter exists independently of the 'choice of procedure' mechanisms mentioned above.

In this respect the jurisdiction of the Sea-Bed Disputes Chamber is much closer to the one of the ECJ, whose provisions also contain no 'choice of procedure' provisions.
A declaration concerning the choice of procedure made under Article 287 paragraph 1:

> "shall not affect or be affected by the obligation of the State party to accept the jurisdiction of the Sea-Bed disputes Chamber of the Tribunal to the extent and in the manner provided for in Part XI, section 5."

The scope of jurisdiction *ratione materiae* of the Sea-Bed Disputes Chamber is not only limited by the requriement "activities in the are".
However the scope of jurisdiction *ratione materiae* depends in a very complicated way on the parties to the dispute and on its specific subject matter. Also Part XI, containing the jurisdiction provisions must be interpreted and applied as a single instrument together with the Implementation Agreement of 1994 to impact of the scope of jurisdiction.
Not only State parties to the Convention are bound - also States and entities for which the Implementation Agreement and consequently also Part XI and Annexes III and IV, as modified by the Agreement apply provisionally.
Although States applying provisionally Part XI and Annexes III and IV do not participate in the election of the Tribunal, they have no right to opt out the jurisdiction of the Sea-Bed Dispute Chamber.[174]
But on the other hand states provisionally applying the Implementation Agreement can participate in the adoption of recommendations about the principal legal systems of the world and equitable geographical distribution, according to Article 36 paragraph 2 of the Statute of the Tribunal.
Due to this possibility these States have a limited influence on the Chamber.[175]

The LOSC entrusts the Sea-Bed Disputes Chamber jurisdiction with over six categories of dispute settlement.[176]

- Firstly disputes between State Parties including those provisionally applying the Implementation Agreement, which concern the interpretation

[172] Only one exception applies; in the situation set forth in Article 188 paragraph 1a the (State) parties may bring the case to anoter Chamber of the Tribunal.
[173] Article 188 paragraph 2.
[174] Treves, The Law of the Sea Tribunal p 441.
[175] Treves, The Law of the Sea Tribunal p 411.
[176] Article 187.

and application of Part XI and Annexes III and IV.[177] Included also are changes introduced by the Implementation Agreement. One has to keep in mind that all parties to the dispute can request to move the dispute out of the Sea-Bed Chamber by referral to a special Chamber of the Tribunal.

- Secondly disputes between a State Party and the Authority. They may concern acts and omissions of the Authority or a State Party violating Part XI, its Annexes, the Implementation Agreement or rules, regulations and procedures adopted by the Authority[178]. Included also are acts and omissions of the Authority alleged to be in excess of jurisdiction or a misuse of power.
- Thirdly, one has to mention disputes dealing with contractual relationships between parties to a contract. A party can be the Authority, the Enterprise, a State, and a natural or juridical person. The jurisdiction covers disputes concerning the interpretation of the contract or plan of work and

> "acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests"[179]

In the context of a contract, a 'remedy' could be the suspension or termination of the contract or monetary penalties imposed by the Authority on a contractor.[180]
Emergency orders to prevent serious harm to the marine environment according to Article 162 paragraph 2(w) may in some cases be directed at a contractor and in other cases affect directly his interests. Although, the jurisdiction can be limited in these cases by the will of the parties, they have the legal possibility of removing themselves from the jurisdiction of the Chamber through submitting themselves to binding commercial arbitration.
However one has to keep in mind that the commercial tribunal has to refer certain matters back to the Chamber for ruling. These matters are questions arising on the interpretation of the Convention.[181] This procedure is based on the model of the preliminary rulings procedure of the EEC Treaty.[182]
Comparing the jurisdiction of the Chamber with the jurisdiction of the EU it is significant that in this respect the Chamber's jurisdiction is much wider than the general ITLOS jurisdiction and is as wide as the ECJ 's jurisdiction.

- Fourthly, there are "pre-contractual" disputes, namely those between the Authority and a prospective contractor who is sponsored by a State Party[183] who has to accept the undertakings mentioned in Annex II,

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[177] Article 187 (a).
[178] On the basis of Part XI and its Annexes.
[179] Article 187 (c).
[180] See: Article 18 of Annex III.
[181] Treves, The Law of the Sea Tribunal p. 442.
[182] Article 177 of the EEC Treaty.
[183] according to Article 153 paragraph 2 (b).

Article 4 paragraph 2(b).[184] These disputes may deal with "the refusal of a contract or a legal issue arising in the negotiation of a contract".

- Fifthly, disputes concerning the alleged liability of the Authority in accordance with Article 22 of Annex III. If a State Party, a State enterprise or a natural or juridical person sponsored by a State Party suffers any damages arising out of wrongful acts in the exercise of the Authority's powers and functions it is entitled to claim compensation.
- Lastly the Chamber has jurisdiction to decide on "any other disputes for which the jurisdiction of the Chamber is specifically provided in the Convention".[185] This provision may allude to Article 185 paragraph 2, according to which no action may be taken for suspending a State member from the exercise of the rights and privileges of membership of the Assembly "until the Sea-Bed Disputes Chamber has found that a State Party has grossly and persistently violated" the provisions of part XI. It would seem, however , that this category of dispute belongs to that of disputes between a State Party and the Authority mentioned in Article 187 (b).

The jurisdiction of the chamber is limited by various rules, set out in Article 189, which aim at the need to provide for effective judicial remedies against decisions of the Authority, and the need - considered important by some States - that the possibility to challenge the use of its discretion by the Authority should not be allowed and that no judicial entity should have the power to decide that certain acts or omissions of the Authority are invalid because they are not in conformity with the Convention.

Therefore Article 189 provides that the Chamber "shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority".
The Chamber only has competence on questions related to a decision, whether an act of the Authority was adopted within its discretion.
This competence is laid down in Article 187 (b) (ii)[186]; the Chamber is competent to judge disputes between the Authority and State Parties concerning

> "acts of the Authority alleged to be in excess of jurisdiction or a misuse of power"

Furthermore the same Article provides that, in exercising its contentious jurisdiction, the Chamber

> "shall not pronounce itself on the question of whether any rules , regulations and procedures of the Authority are in conformity with th[e] Convention, nor declare invalid any such rules, regulations and procedures."

In cases where the Chamber has to settle a dispute, that includes rules, regulations and procedures which might not be in conformity with the Convention, the judgement will state that their application would be in

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[184] mentioned in Annex III, Article 4 paragraph 2 (b) as modified by paragraph 3 of Section 8 of the Annex to the Implementation Agreement.
[185] Article 187 (f)
[186] to read in connection with Article 189, last sentence.

conflict with the parties' obligations under the Convention. On this basis the Chamber can decide on claims for damages for failure to comply with the contractual obligations or obligations under the Convention. But this judgement will not be part of the *dispositif*, as the binding force of the judgement will remain limited to the specific relationship between the parties to the dispute.

f) The difference between "compulsory jurisdiction" of the World Court and the Sea Tribunal

The first difference between the "compulsory" jurisdiction of the ICJ and the Law of the Sea Tribunal is that the compulsory jurisdiction of the Court is optional while that of the Tribunal is not.[187]
A dispute only falls under the World Court's jurisdiction, if both the applying and the "defending" party have made a special declaration of acceptance of the court's "compulsory" jurisdiction.[188] In contrast with that the Tribunal may only be seized by one party without any previous declaration of acceptance on the basis of the rules of the Convention conferring the power to submit disputes to third party binding decisions.
The only condition is that the Tribunal has been chosen among from the various bodies to which such power is recognised.
The Tribunal can be seized unilaterally in cases of compulsory jurisdiction if certain conditions are met.
These conditions are set forth in the "Montreux choice of procedure" providing that all parties must have made a choice in favour for the Tribunal at the time of signature, ratification or later.[189]
If the parties have not made the same choice, the choice of procedure will be decided in such cases by an arbitral Tribunal.[190]

4. Composition

The Tribunal is composed of 21 independent members elected by State Parties to the Convention on the Law of the Sea from among persons with recognised competence in the field of the law of the sea and representing the principal legal systems of the world. The first election was held in August 1996.[191]

Upon their election, the members of the Tribunal will elect a President and a vice-president whose term of office shall be three years.[192] The Tribunal also appoints its Registrar and other officers of the Registry as may be necessary. The President of the Tribunal, as well as the Registrar, reside at the seat of the Tribunal.[193]

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[187] Treves, The Law of the Sea Tribunal, p 429.
[188] Article 36, paragraph 2 of the ICJ Statute.
[189] Article 287, paragraphs 1, 4.
[190] Article 287, paragraph 5.
[191] LOSC, Annex VI, Section 1, Article 2.
[192] LOSC, Annex VI, Section 1, Article ,paragraph .
[193] LOSC, Annex VI, Section 1, Article 12, paragraph 2.

In hearing a dispute, all available members of the Tribunal may sit, although a quorum of 11 members is required to constitute the Tribunal.[194] All disputes and applications submitted to the Tribunal shall be heard and determined by it, unless the dispute is to be submitted to the Seabed Disputes Chamber or the parties request that it be submitted to a special chamber.

The Seabed Disputes Chamber is to be composed of 11 members selected by a majority of the members of the Tribunal from among them.[195] Members of the Chamber will serve for three years, and are eligible for re-election.[196] A quorum of seven members is required to constitute the Chamber.

In addition to the Seabed Disputes Chamber, the Tribunal will form annually a chamber composed of five of its members which may hear and determine disputes by summary procedure. The Tribunal will also form special chambers for dealing with a particular dispute submitted to it if the parties so request. The composition of those chambers will be determined by the Tribunal with the approval of the parties. Finally, the Tribunal may form such other chambers, composed of three or more its members, as it considers necessary for dealing with particular categories of disputes.[197]

Members of the Tribunal may not exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.[198]

Members of the Tribunal may not participate in the decision of any case in which they have previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity.[199]

Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members. If the Tribunal, when hearing a dispute, includes upon its bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.[200] In cases where the Tribunal does not include a member of the nationality of the parties, each of the parties may choose a person to participate as a member.[201]

The first members of the Tribunal were elected at the meeting of States Parties held on 1 August 1996. They were sworn in by the secretary-general of the United Nations at a ceremonial inauguration on 18 October 1996 in Hamburg, Germany.

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[194] LOSC, Annex VI, Section 1, Article 13, paragraph 1.
[195] LOSC, Annex VI, Section 4, Article 35, paragraph 1.
[196] LOSC, Annex VI, Section 4, Article 4, paragraph 4.
[197] LOSC, Annex VI, Section 1, Article 15.
[198] LOSC, Annex VI, Section 1, Article 7, paragraph 8.
[199] LOSC, Annex VI, Section 1, Article 8, paragraph 1.
[200] LOSC, Annex VI, Section 1, Article 17, paragraph 2.
[201] LOSC, Annex VI, Section 1, Article 17, paragraph 3.

5. Applicable Law

The Tribunal will apply the provisions of the United Nations Convention on the Law of the Sea and other rules of international law not incompatible with the Convention in deciding disputes submitted to it. It does, however, have to the power to decide a case ex aequo et bono, if the parties so agree.[202]

6. Procedure

Disputes are to be submitted to the Tribunal, depending on the case, either by notification of a special agreement, or by written application, addressed to the Registrar.[203]

The Tribunal and its Seabed Disputes Chamber have the power to prescribe provisional measures. If the Tribunal is not in session or a sufficient number of its members are not available to constitute a quorum, the provisional measures can be prescribed by the chamber of summary procedure. Such measures are subject to review and revision by the Tribunal.[204]

All hearings before the Tribunal are under the control of its President, and are to be public, unless the Tribunal decides otherwise or unless the parties demand that the public not be admitted.[205]

States Parties not party to a dispute but which consider that they have an interest of a legal nature which may be affected by the decision in any dispute may submit a request to the Tribunal to be permitted to intervene.[206] Whenever the interpretation or application of the Convention or any other agreement is in question, the Registrar will notify all States Parties to the Convention or to such agreements. Those parties have the right to intervene in the proceedings.[207]

7. Judgement and Enforcement

All issues are decided by the majority of its members who are present. If there arises a situation where an equality of votes occurs, the President's vote will be decisive.[208] The judgement of ITLOS states the reasons on which it is based. So called "separate opinions" of the members of the tribunal are allowed as known in other judgements of Anglo-Saxon courts.[209] Although the statutes provide for resolution through judgement and not through withdrawal of of action, the parties are allowed to agree on different procedures for amicable settlement of their disputes.[210]

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[202] LOSC, Annex VI, Section 2, Article 23.
[203] LOSC, Annex VI, Section 3, Article 24, paragraph 1.
[204] LOSC, Annex VI, Section 3, Article 25, paragraph 1,2.
[205] LOSC, Annex VI, Section 3, Article 26, paragraph 2.
[206] LOSC, Annex VI, Section 3, Article 31, paragraph 1.
[207] LOSC, Annex VI, Section 3, Article 31, paragraph 3.
[208] LOSC, Annex VI, Section 3, Article 29, paragraph 2.
[209] Becker, Marx, P.5
[210] LOSC, Art. 299, para 2 of the LOSC.

This again opens the possibility for the parties for resolutions through unilateral withdrawal of action through the backdoor.
However, this provision includes the possibility for the parties to choose the procedural regulations of the International Tribunal in Den Haag (ICJ). These proceedings allow settlement through a unilateral withdrawal of an action.

Decisions of the Tribunal are final and shall be complied with by all the parties to the dispute. However, decisions will not have a binding force except between the parties in respect of the particular dispute.[211]

Unless otherwise decided by the Tribunal, each party shall bear its own costs.[212]

In certain cases the enforcement of judgement can be problematic; if one State Party does not comply with it there are no mechanisms in international law to execute the judgement.[213]
Although all State parties to LOSC have committed themselves to its provisions and to the decisions of ITLOS there is no court bailiff who would enable the successful party to execute its judgement.[214] The only possible measure is to use the right to self-help which is recognised in general international law. State parties could, within the means of self-help, put pressure on the party that lost the case by economic sanctions, diplomatic measures and appeals to international organisations. The principle of self-help, in these circumstances includes of course non-violent measures, which can be just as powerful as a tool for enforcement.
'In conclusion, considerable economic interests of all parties will always be at stake with such a tribunal decision.'

8. Enforcement and the Sea-Bed Disputes Chamber

In respect of the enforcement of decisions of the Sea-Bed Disputes Chamber Convention
the situation is different; The Convention of the United Nations provides a variety of implementing and sanctioning measures.
Firstly the International Sea-Bed Authority has the power to temporarily suspend a mining licenser even to terminate it absolutely, if the unsuccessful party refuses to comply with the obligation imposed by the judgements.
Secondly the decisions of the Sea-Bed Camber which usually impose liabilities on the unsuccessful party, are enforceable in the territories of the State Parties in the same manner as judgements of the highest court of the State Party in whose territory enforcement is sought.

9. Enforcement mechanisms of the three judicial bodies

Enforcement is the forcible exaction of a payment, an action etc.[215] In this sense there are no enforcement mechanisms set forth for ITLOS (excluding

[211] LOSC, Annex VI, Section 3, Article 33,paragraph 1,2.
[212] LOSC, Annes VI, Section 3, Article 34.
[213] Becker, p 5.
[214] Becker, p .5.
[215] Shorter Oxford English Dictionary 1959.

the Sea-Bed Disputes Chamber), the ICJ and the ECJ in respect of disputes between states, because otherwise there would be an infringement of State sovereignty.
The question now arising is, if there are any other measures that can be used in case a State does not comply with a judgement in the cases mentioned.

The international arbitral procedure of the nineteenth century came, as a matter of course, to include in every arbitration agreement an implied obligation that the decision of the arbitral tribunal would be in good faith.
This is also a fundamental principle of the law governing international litigation before the International Court.

10. Conclusion.

The jurisdiction of the ECJ is much more 'compulsory' than that of the ICJ and ITLOS. One of the provisions of ITLOS contains the possibility of taking a dispute to other judicial bodies in cases where the Tribunal would have *jurisdiction materiae*[216].

Compared to this the ECJ statutes do not contain a 'backdoor' to avoid a decision of the Court. What could be the reason for this ?

The reason is connected to the structure of the European Communities. While the State parties to LOSC and the UN are totally sovereign entities, the European Communities contain certain aspects of federalism, although they are not a federation in the classic sense of the United States. In certain well defined areas member states surrendered some of their own rule-making powers to the Community institutions in the wider interests of the members.
This exceptional and far reaching integrational institutional structure requires a powerful judicial body. If you give someone the power to make rules which can effect every single inhabitant of all member states, you have to create a institution that can control the power.

A similar but not as powerful and far reaching Organisation is the International Sea Bed Authority. Since the creation of the provisions of LOSC concerning the Deep Sea - Bed Regime, the belief has been that resources are the common heritage of mankind and the exploration of these resources should be regulated in a restrictive manner. The State Parties freedom of exploration and exploitation is very limited and the permission of a independent institution is required.
Here again, the limiting regime of Part XI of the LOSC and limitations on the unrestricted use of the high seas creates a certain situation which requires a powerful dispute settlement body.
This is the reason for the creation of the Sea- Bed Disputes Chamber.
As a general rule one can say: The more a group of States are joined by a Treaty or a convention and the more sovereignty is administrated by central

[216] Exception: it was previously contractly agreed to use the ITLOS.

entities and organisations the higher the necessity of a wider jurisdiction, which does not contain provisions for 'opting out'.

11. Conclusion: Enforcement

Enforcement of the decision of a judicial body always require a baliff or a police organisation. When it comes to enforcement of decisions concerning International relationships and matters, the possibility of enforcement ends where a State's sovereignty comes into play. Therefore as a general rule, one can say that international courts cannot have enforcement jurisdiction over States, that are parties to their statutes.
The only exception is decisions of the EEC on the basis of a claim by a private party. But still the enforcement of the decision will always take place in accordance with the national procedural rules concerened.
A national Court will carry out the enforcement of a decision of the ECJ.
If the dispute arises between State Parties, even a Community with far-reaching federalist features like the EEC cannot enforce decisions of is highest court.

The question arises about how efficient a judicial body can be, if it has a wide jurisdiction but there are no enforcement mechanisms at all

In other words: what can make the State Parties obey a Courts' decision?
The only option will always be fear of the threat of using political pressure.

As we have seen there is no enforcement against State Parties although Article 5 of the EC Treaty contains a "loyalty clause".
A possible enforcement measure, in the sense of multilateral police action against a member state would always collide with the sovereignty of the member state.

Therefore one has to investigate, if there are any instruments to ensure compliance by imposing pressure (for example political pressure) on a member state refusing to fulfil its obligations arising out of the Treaty.

This obligation is laid down in Article 5.

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community' s tasks.
> They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

Since there is no enforcement against member states in the sense comparable with enforcement in a national context the question arises how much the loyalty clause matters in reality.
In 1991 the UK government proposed at the 1991 Maastricht IGC a measure to provide a more specific discipline to encourage Member States to comply with adverse judgements of the ECJ.
On this bases a new paragraph 2 to Article 171 was adopted. For the first time, financial sanctions are now available against recalcitrant States through

a careful procedure which allows the latter to maintain their dignity. If they remain obdurate, however, the Commission may bring a second action, for failure to comply with the earlier judgement, and at the same time suggest an appropriate financial penalty. Then, if the Court of Justice finds that the Member State concerned has not complied with its judgement, it may impose a lump sum or penalty (i.e. daily until compliance) payment on it.[217]

There is so far no instrument of the ICJ or of ITLOS comparable in efficiency to this.

Dealing with the particular situation of the ECJ one has to notice that one of the two possible classes of litigants against whom a judgement might be enforced, does not present a problem.
Decisions against community institutions are practically self-enforcing.[218]
In cases where the institution claims obedience to an act and this act is annulled by the judgement the institutions base for its claim of obedience is destroyed. Therefore neither policemen nor debt collectors are required for enforcement.
If the remedy is a positive act or an injunction there is no means of enforcement against a recalcitrant institution..
Institutions are in general willing to obey the law and do not cause situations where measures for non-compliance are necessary.[219]

Concerning the other class of litigants - member states - the situation is much more difficult. Sometimes obeisance to a judgement takes far reaching steps like parliamentary or constitutional measures, which require consent among a large group of people. Sometimes the government itself is not willing to correct their politics, to comply with a judgement.
Although there is an obligation to comply provided by Article 171(1) EC Treaty and the loyalty obligation of Article 5 EC Treaty, it is not possible to *enforce* on the basis of these provisions.

This situation corresponds with the situation ITLOS and the ICJ are in (excluding the Sea-Bed Disputes Chamber for certain aspects).

The new remedy, introduced by Maastricht in 1995, of an award of damages against a recalcitrant State makes a big difference .[220]
In cases of disobediance today it is even possible to enforce through domestic civil debt recovery concerning steel and coal matters on the basis of Art. 92 ECSC. Even enforcement through budgetary adjustments seems possible, although it could involve constitutional difficulties at Community level.

Another instrument is the national courts, which could, if sufficiently independent, apply their own enforcement measure mechanisms, albeit within the limits of available procedural remedies in the domestic legal system.

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[217] 171(2) EC TReaty.
[218] Hunnings, The European Courts, p 131.
[219] Hunnings, The European Courts, p 131.
[220] Article 171 (2) EC Teaty

However this example makes it clear, that the European Community and its Court have far more efficient instruments for pressuring member states into obeying their judgements.

On the other hand this far reaching 'enforcement power' of the Court has certain limits when it comes to politics.
The ECJ is not the 'driving force of the integration [...] it monitors the activities of the European institutions , checking whether they conform to the treaty legislation. It does not however, seek to revise this treaty.'[221]
Also it might in certain situations seem there is "wisdom, [...] in the declamatory form of the Court's judgement against a Member State [...] that has an obstinate attachment to the condemned conduct'.[222]
The ECJ ensures enforcement in practice by 'taking care in its judgmental policy not to push the willingness of the Member State over the limit'.[223]

There was a remarkable example of a judgement which was trimmed to avoid irreversible damage to the Community and Community law.[224]
The UK had to go through a very unstable referendum campaign, which was to decide whether it would remain a member of the EC.
The Court accepted nearly all challenges and reaffirmed that Article 48 EC providing for free movement of workers had, direct effect in national courts.
But then the Court showed wisdom by allowing the UK to win on quite dubious grounds. At the same time it established a leading principle that the public policy of a member state remains subject to the supervision of the ECJ.
The Court managed to make a highly controversial legal pronouncement that it found was not necessary to apply in the actual case. In this context it also avoided hostile headlines in the newspapers at this sensitive time.

This shows that the political limitations of the enforcement power are more intense than the ones provided by the Treaties or the statutes.

a) Methods of securing compliance with regard to the ICJ

(1) The Corfu Channel Case

The post-adjudicative history of the Corfu Channel case is an excellent illustration of the whole process of autonomous compliance and attempt at enforcement through diplomatic measures.

One has to distinguish four phases: the attempt of the parties involved to agree on compliance, the attempt of one party to get satisfaction thought self-help, an attempt at multilateral self-help by means of a process akin to attachment of property and finally the attempt to resolve, thought the ICJ, the competitive claims to the property sought to be attached[225]

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[221] Kirchhoff speech 12.5.95, round table on the developement of the role of the European Court of Justice.
[222] Hunnings, The European Courts, p 131.
[223] Hunnings, The European Courts, p 132.
[224] Case 41/74, *Van Duyn v.Home Office.*
[225] Rosenne, The Law and Practice of the International Court, p.142.

The first phase started after the decision of the Court in 1949. The Court found in its final judgement that Albania had to pay the sum of £ 843,947 to the UK for compensation. The payment was never made because the representatives of both countries did not agree on the question of how the sum awarded to the UK should be paid.[226]
Finally in 1950 the Government of Albania offered to settle with a final payment of the sum of £ 40.000.
A few months later the UK government rejected the offer as not worthy of consideration.

This ushered in the second phase. The British authorities were looking for Albanian property under the control of the UK.
The to seize Albanian property to satisfy the British claim failed because there was none within the area of British sovereignty.
If the authorities had been successful, if would have provided a precedent of economic measures to obtain satisfaction of a judgement debt on a self-help basis.[227]

The next step of the UK Government, phase three, was also unsuccessful but showed new ways of international litigation and progress in this context.
During World War II the Germans wrongfully removed an enormous amount of gold from Rome.
This asset was found by the Allied forces and according to Part III of the final Act of the Paris Conference on Reparations[228] was subject to distribution as restitution through a Tripartite Commission.
Albania and Italy made competitive claims to this gold. However the Tripartite Commission decided that it was beyond it's competence to decided on this question and referred it back to the three governments, which decided to request the President of the Court to designate an arbitrator for advice.[229]
The situation became even more complicated through the fact that Italy also had an independent claim to the same gold.
The three Governments concluded by declaring that they would accept as defendants the jurisdiction of the Court for the purpose of the determining the applications by Italy or by Albania
in relation to the question of to whom the gold should be delivered.
They agreed 'to conform in the matter of the delivery of the gold with any decision of the International Court given as the result of such applications by Italy or by Albania'.[230]
Summarising the case, one can conclude that the problem with the enforcement of the *Corfu Channel* case is, that in a complicated situation where various State parties have various claims the Court can only decide on such parts of the question as are completely covered by its jurisdiction. In other words, judgements (in respect of compliance with judgements) in multilateral International disputes like the *Corfu Channel case* and *the Monetary Gold* case are only possible if all involved State Parties, agree

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[226] ditho 143.
[227] ditho
[228] 14 January 1946; British and Foreign State Papers, 148 (1947, Part II), p 96.
[229] Rosenne, The Law and Practice of the International Court, p 144.
[230] This was the orgin of the *Monetary gold* case.

upon the competence of the judicial body to decide as far as their rights or sovereignty is involved.

In comparison to the European Community, the competence of the ECJ has developed further. The treaties conferred jurisdiction on the Court in advance and an adequate judicial decision making process would therefore not be hampered. While compliance within the EC can be 'enforced' through Court decisions, on the UN level diplomatic measures or - as mentioned in the context of the Corfu Channel case - self-help are the only instruments the winning party can rely upon.

(2) Institutional Measures to give effect to judgements

Furthermore one has to keep in mind that the possibility of the United Nations providing machinery and procedures for giving effect to judgements of the Court is separate from the Court.
There are two phases - the adjudication and the post-adjudicative phase. The latter provisions are dealt with in the UN Charter and not in the Statute of the Court, because of the complexity of international litigation.
The stipulations concerned are exclusively related to the powers of the Security Council and not to the functioning of the Court. Therefore the efficacy of the institutional post-adjudicative process will never be determined by a judicial examination of the situation brought about by the non-compliance, but will depend on immediate political considerations.