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SPECIAL CHAMBERS WITHIN THE INTERNATIONAL COURT OF JUSTICE: THE PRELIMINARY, PROCEDURAL ASPECT OF THE GULF OF MAINE CASE.

Edward McWhinney*

The final judgment of the International Court of Justice in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*¹ brings to a close a number of years of extensive, and eventually abortive, diplomatic negotiations between Canada and the United States concerning delimitation, as between the two countries, of boundaries of their respective continental shelves and 200-mile exclusive fishery zones. Some aspects of the final judgment and of the litigation leading up to it are of predominantly internal, domestic interest to the two countries concerned. On the Canadian side, the decision to go to court against the United States in the *Gulf of Maine* case was the major International Law venture of the late Liberal Government of Canada and, following on that Government's landslide defeat in the federal elections of September, 1984, these aspects of the case seem likely to be the subject of politically revisionist interpretations and appraisals, as well as strictly legal ones. Suffice it to say, here, that while party political factors do seem to have operated, at least marginally, in the choice of counsel and others involved in the case, the effects on the final outcome still remain to be demonstrated. More substantially, however, the old Liberal Government of Canada showed a strong tendency, even in its domestic constitutional problems, to try to lay down the law in advance of actual legal problem-solving, and to approach diplomatic negotiation at the inter-governmental level forearmed with (expectedly favourable) Supreme Court rulings on the issue of constitutional competence. Such had been the approach of the Liberal Government towards resolution of its own constitutional conflicts with the Provinces (member-states) of the federal system in the dispute over legal ownership of the offshore oil resources. It worked out very well insofar as the federal Supreme Court ruled in 1967 in favour of legal title in the federal Government,² but not so

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1. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of October 12).

2. Reference re Ownership of Off-Shore Mineral Rights, 65 D.L.R.2d 353 (1968); *dis-*

well insofar as the Court ruling angered the Provincial Governments and made them politically indisposed, in the years thereafter, to negotiate operational solutions to development and exploitation of the offshore riches in partnership with the federal Government. The method of handling federal-Provincial inter-governmental conflicts was a key issue in the September, 1984, federal elections campaign, and reduced to one of governmental style, with the new Conservative Government seeking to distance itself from its predecessor by indicating that it would not use litigation, or the threat of litigation, as a constitutional weapon, but would seek to exhaust the techniques of conciliation, friendly persuasion, and quiet diplomacy as the prime instruments of legal problem-solving. Projected onto the international relations plane, what this should mean is that, as a matter of general principle, the new Conservative Government will opt for diplomatic negotiations, rather than litigation, for the settlement of its still remaining territorial water and boundary disputes with the United States.

I. CONSTITUTION OF THE SPECIAL CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE

Once the legal gauntlet had been thrown down, the two parties, Canada and the United States, opted, under the revised Rules of Court, for a five-judge Special Chamber, rather than the regular, fifteen-member, *plenum* of the Court. This was the first time such a Special Chamber had been invoked by the parties to a case before the Court. It is still not clear what the motivations were, for each side, in agreeing to the choice of the more limited, special panel. On the Canadian side it is suggested, at the political level, that the United States categorically refused to countenance the case being heard by the regular fifteen-member *plenum* and that it was, therefore, either a matter of agreeing to a five-member panel or else ending up with a political impasse. Since both countries, Canada and the United States, have been committed, over the years, to the principle of judicial settlement of international disputes, the suggestion seems strange and worth further public examination. What is known is that the then President of the International Court, Sir Humphrey Waldock of Great Britain, charged himself with the constitution of the special, five-member panel in

cussed in 2 *La Revue Juridique Themis* 277, 279 (1967); Note, *Constitutional Law: International Law: Ownership of and Jurisdiction over Offshore Mineral Rights*, 2 *OTTAWA L. REV.* 212 (1967).

consultation with the two parties; and that Sir Humphrey had already decided to form a panel excluding nationals of the parties. In this case, the permanent, national U.S. judge, on the Court, and a necessarily balancing, *ad hoc*, national, Canadian judge. The then permanent, national, U.S. judge on the Court, Professor Richard Baxter, was known to have advised the U.S. State Department, in his earlier, pre-Court years, on aspects of the Gulf of Maine file. Whether that entered into Sir Humphrey Waldock's original decision to exclude the two parties is not established. There would be a certain logic, with a panel of only five judges, in not reducing the effective decision-making group still further by having two national judges who would, inevitably, if past Court history were any guide, cancel out each other's vote. Sir Humphrey did, however, reach outside the Court's own ranks in selecting a panel including, *inter alia*, the distinguished Danish jurist and member of the European Communities Court, Judge Sorensen. Sir Humphrey, however, died in the Summer of 1981 before his recommended panel could be formally constituted by the Court, and it was left to his successor as President, Judge Elias of Nigeria, to take over the file. The U.S. State Department indicated that it now wished the permanent, national, U.S. judge, Judge Schwebel (who had replaced Judge Baxter, after his death, in a special, in-term Court election) to be included in the panel. This meant, in turn, that an *ad hoc* national, Canadian judge would now have to be included in the panel too. Judge Sorensen had also died suddenly and so his name was removed from the list. On January 20, 1982, only two weeks before the International Court was to be renewed, (as to a third of its members, by the five judges elected or reelected by the U.N. General Assembly and Security Council in the triennial elections to the Court held in the Autumn of 1981) the fifteen-member *plenum* adopted a Court Order constituting the Special Chamber. The five judges so named included Judge Andre' Gros of France, whose legal term, as judge of the Court, would automatically expire in two weeks' time. The other judges named were (as already indicated) Judge Schwebel of the U.S., Judge Ago of Italy, Judge Mosler of West Germany, and Judge Ruda of Argentina. Judge Ruda, in accordance with a preexisting arrangement, immediately withdrew his name so as to allow an *ad hoc* Canadian judge to be named to balance the U.S. judge. The particular circumstances of the timing of the constitution of the Special Chamber—that it was decided upon by what was, in effect, a "lame duck" *plenum* of the Court, with a third of its members due to be legally renewed in only two

weeks' time and with one of the "lame duck" members, Judge Gros, in fact named to the panel formed the subject of adverse comment in the individual judicial opinions accompanying the Court Order of January 20, 1982 formally constituting the Special Chamber.³

II. HISTORY OF SPECIAL CHAMBERS WITHIN THE INTERNATIONAL COURT

The institution of Special Chambers within the International Court of Justice has, as Judge Lachs has pointed out,⁴ historical roots that long precede the present Court and go back to the original Permanent Court of International Justice and to the Treaty of Versailles, particularly its Articles 336 and 376, and the provisions of the Peace treaties dealing with questions of navigation, transit and communications. The intention, then, was to establish Chambers of five judges to deal with these cases. There was also provision for a Chamber of summary procedure composed of three judges.

These provisions, though never acted upon in regard to the old Permanent Court, were taken up in the 1946 Court Statute. Article 26 of the Court Statute authorizes the formation of Chambers of three or more judges for dealing with particular categories of cases, labour and also transit and communications being mentioned specifically. The Court is also given a general authority, under its Statute, to form Chambers to deal with particular cases, "the number of judges to constitute such a chamber [to] be determined by the Court with the approval of the parties" (Article 26 (2)); and with cases to be heard and determined by the Chambers "if the parties so request" (Article 26 (3)). It is expressly stipulated that a judgment given by any such Chamber "shall be considered as rendered by the Court" (Article 27); and there is also provision for the formation, annually, of a Chamber of five judges which, at the request of the parties, may hear and determine cases by summary procedure (Article 29).

The idea of activating Special Chambers of the Court was taken up and reinforced in the 1972 Rules of Court, particularly Articles 24 to 27 of those Rules, and restated in the current Rules

3. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1982 I.C.J. 3 (Constitution of Chamber Order of Jan. 20).

4. LACHS, *THE REVISED PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 21, 42 (1980).

of Court, adopted in 1978, particularly Articles 15 to 21 of those Rules. The case for such Special Chambers appears to have hinged, then, upon arguments that there were very many small cases that were unworthy of being handled by the full Court of fifteen judges or that hardly warranted the lengthy and costly procedure involved in such *plenum* hearings. The emphasis in that argument was upon the relative importance or unimportance of a case and its financial burden.⁵ There was certainly no public reference to the irritation, voiced *sotto voce* in a number of capitals, after *North Sea Continental Shelf*, 1969,⁶ that a regionally limited, Western European case, between Western European parties, was being decided by a Court that was numerically dominated by "strangers" to the special Western European family who then compounded their putative offense by insisting on filing their own individual, separate or dissenting opinions.

Apart from any latter-day, nostalgic desires to turn back the clock to an earlier, "European family compact" era of international adjudication between the two World Wars, such an objection draws attention to the spatial dimension of International Law and its increasing regionalization today in legal-systemic, linguistic, ethnic-cultural, and ideological terms. Does it make good sense, then, today to recognize and institutionalize this regionalization of International Law, in international adjudication, by conferring on states from the one regional system the ability to regionalize their dispute settlement by opting to create their own special regional chamber within the framework of the International Court? It might certainly encourage a greater readiness to have recourse to the Court if the parties, sharing common, regional values, could thus opt in advance to exclude the "wild" judicial votes that they might fear to be present in the larger forum of the full Court. But, as against that, it might simply accentuate and exaggerate the current historical tendency to fragment International Law into a plurality of different subsystems, and deny its claims to universality. What would this do, in any case, to the stipulation in Article 27 of the Court Statute, that the judgment of any such limited, regional chamber "shall be considered as rendered by the Court" and thus of equal authority to the full Court's jurisprudence?

The 1972 Rules of Court, in many respects appear designed to

5. *Id.* at 43.

6. *North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.)*, 1969 I.C.J. 3 (Judgment of February 20, 1969).

increase the *role* of the parties in the selection of the members of the special panel or Chamber: where Article 26(2) of the Court Statute speaks merely of the "number" of judges to constitute a Chamber as something to be "determined by the Court with the approval of the parties," Article 26(1) of the 1972 Rules of Court requires the President of the Court, far more broadly, to consult with the parties regarding the "composition of the Chamber," this in addition to the requirement in Article 26(2) of the 1972 Rules of Court to determine the "number" of judges with the approval of the parties. Article 17(2) of the present Rules of Court that were adopted in 1978 in replacement of the 1972 revised Rules is a restatement of the requirement in Article 26(1) of the 1972 rules, and perhaps just a little stronger, verbally, in the *role* it gives to the views of the parties in the final composition of the Court. Where Article 26(1) of the 1972 revised Rules requires the President of the Court to "consult the agents of the parties regarding the composition of the Chamber, and [to] report to the Court accordingly," Article 17(2) of the present 1978 Rules stipulates that "when the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly." Is the intention, here, in the interests of increasing the International Court's working jurisdiction, to edge towards Court acceptance of the parties' complete freedom—as in the constitution of a special arbitral tribunal—to choose their own panel of judges by mutual agreement and bargaining?⁷ If so, it would be a departure from the normal conception of a court as something independent of, and above, the actual parties; and the necessary and useful classical institutional distinction between court of law and panel of arbitrators, with different legal values and legal processes and even different legal objectives as to dispute settlement, would tend to disappear.

Judge Lachs seems to have envisaged a positive utilization of the Special Chamber System on the Court, by applying it to certain specific subject matters and thus encouraging some mobilizing of specialist expertise within an increasingly "generalist," non-specialist tribunal.⁸ The specialization by Chamber would be of a

7. Jiménez de Aréchaga, *The Amendment to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1, 2-3 (1973); Mosler, *Aktuelle Aspekte des Verfahrensrechts des Internationalen Gerichtshofes, Völkerrecht und Rechtsphilosophie* (Internationale Festschrift für Stephen zum 70 Gerurtstag) (P. Fischer, H. F. Kock, A. Verdross, eds.) 249, 255 (1980).

8. LACHS, *supra* note 4, at 43.

functional character: one panel specifically suggested by Judge Lachs should be devoted to the subject of protection of the environment, particularly as to pollution of rivers and lakes on borders between States; the other panel suggested by Judge Lachs should be devoted to the Law of the Sea.⁹ One is reminded of the lesson of the Sibylline books and of the merits of introducing reform proposals in timely fashion, especially proposals for institutional reform. If Judge Lachs' suggestion for a specialist, Law of the Sea Chamber of the International Court had ever been considered by the Court and advanced as a reform proposal for modernizing its organization and jurisdiction even a few years earlier, it might have successfully headed off or controlled what, by the end of the 1970's, had become the burgeoning pressures, not simply to create a plurality of Special Chambers within the one International Court but to duplicate that Court by creating a plurality of tribunals specialized by function, with a specialist Law of the Sea tribunal heading the list. The movement for creation of such functionally specialized international tribunals has gained strength from the Third World's image of the International Court of Justice as a highly conservative, traditional tribunal mired in the legal procedures and values of the past and hence committed, inevitably, to the legal *status quo*. The movement is no doubt helped also by the tendency, common enough in U.N. circles, to proliferate institutions even where this means overlap or duplication, or to proliferate numbers of personnel within existing institutions, as a somewhat roundabout way of increasing opportunities for professional placement for nationals of the 150-odd member-states. Judge Lachs is right to point to the disadvantages of competing jurisdiction and jurisprudence involved in the creation of such additional, specialist tribunals, and the challenge to the organic unity of International Law.¹⁰ On the other hand, specialist final tribunals, just as much as special Senates or Chambers within the one final court, are very much part of continental European Civil Law experience, even if they tend to be foreign to the Anglo-Saxon Common Law systems.

III. "EUROCENTRISM" AND THE SPECIAL CHAMBER FOR THE GULF OF MAINE CASE

Some of the problems of legal choice inherent in the Special

9. *Id.*

10. *Id.* at 44.

Chamber system, particularly as applied under the International Court of Justice's Statute and the revised Rules of Court, have already been discussed above. The two state parties, Canada and the United States, had concluded a Special Agreement, in March, 1979, that was to enter into force in November, 1981, under which they accepted to submit their points of dispute as to maritime boundaries in the Gulf of Maine to a five-member Chamber to be constituted in accord with Article 26 and Article 31 of the Court Statute. Apart from the issue of an alleged unseemly haste in the Court *plenum's* rushing the choice of the judges for the panel through to conclusion just two weeks before the newly-elected judges, who were waiting to take their seats on February 5, 1982, would have had a chance to pass on the actual choices, there remains the major criticism—in the light of the reading of the Court Statute and the revised Court Rules—that it was in fact the two state parties, Canada and the United States, and not the Court itself, that determined the actual choice of the five members of the Special Chamber, with the full Court of fifteen apparently merely rubber-stamping the state parties' choice in the Court Order of January 20, 1982.¹¹ This would seem to go well beyond the letter of the relevant provisions of the Court Statute and even, it may be suggested, beyond the spirit of the more facultative provisions of the Court's revised Rules of Court.¹² In the result, the two parties chose a five-member tribunal which, apart from the two national judges from English-speaking North America, was wholly Western European in composition. We thus have a tribunal which, in its membership and composition, reflects that "classical," Western, "Eurocentrist" character which has been the Third World's main ground of complaint against the old Permanent Court's jurisprudence, and also that of the new International Court since its foundation in 1946. Add to that the fact that, by reason of the bilateral consensus required to achieve the parties' own special agreement as to the constitution of the Chamber, one or both of them apparently vetoed selection of the two (as it happened, Asian) members of the full Court with the greatest acquired professional expertise in the general subject matter of the suit, the Law of the Sea—Judge Oda of Japan and Judge Nagendra Singh of India. What can and should be the status, *qua* Court jurisprudence, of the eventual decision of the five-member Special Chamber, with its

11. 1982 I.C.J. 3.

12. For a contrary view see Jiménez de Aréchaga, *supra* note 7, at 2-3.

own special "regional" composition, granted the insistence, by the Third World states and other regional groupings in the World Community, that the Law of the Sea today cannot be reduced to the "classical" International Law conception of logical, analytical construction divorced from policy, but must be considered, instead, in the light of the "new" international law—equity, the general principles of law recognized by nations—and as a constituent element in the New International Economic Order? It may be, in fact, that the final judgment of the Special Chamber, rendered on October 12, 1984,¹³ because of the special political factors in the Chamber's composition and organization, will come to be classified, jurisprudentially, as a decision *inter partes*—like that of the arbitral panel it was supposed to avoid—and thus not be ranked as general International Law or part of the "progressive development of International Law." The Declaration appended by Judge Oda to the Court's Order of January 20, 1982, constituting the Special Chamber,¹⁴ and also the two dissenting opinions of Judge Morozov¹⁵ and Judge El-Khani,¹⁶ indicate, very clearly, the objections, philosophical and practical, going to the character of the Special Chamber *qua* Court, attaching to the *plenum* of the Court's apparent conceding of *pleins pouvoirs* to the two state parties as to the choice of the actual members of the Chamber. Judge, later President, Jiménez de Aréchaga, in his discussion in early 1973 of the Court's 1972 revised Rules of Court, had suggested that the main change effected thereby was to give the parties a:

[d]ecisive influence in the composition of *ad hoc* Chambers
 Recourse to *ad hoc* Chambers would prove more attractive to potential litigants if the election of their members were to be based on a consensus between the Court and the parties.¹⁷

This may or may not be so, but it would hardly be a justification, in itself, for making a change, *praeter legem*, going beyond the clear language of the Court Statute, to which, of course, the Rules of Court are, and must remain, subordinate, and which requires the Court to act "with the approval of the parties" only as

13. 1984 I.C.J. 246.

14. 1982 I.C.J. 10.

15. *Id.* at 11.

16. *Id.* at 12-13.

17. Jiménez de Aréchaga, *supra* note 7. See also Zoller, *La premiere constitution d'une Chambre speciale par la Cour internationale de justice. Observations sur l'Ordonnance du 20 janvier 1982*, 86 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [R. G. DR. INT. P.] 305 (1982).

to the "number" of judges. Judge Jimenez de Arechaga further suggested that:

From a practical point of view, it is difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected. For that it would be necessary for a majority of the Members of the Court to decide to disregard the expressed wishes of the parties. This would be highly unlikely since it would simply result in compelling the parties to resort to an outside arbitral tribunal or even to abandon their intention to seek a judicial settlement of the dispute.¹⁸

To all of which it might be asked, should that matter? If the parties wish to have the extra political prestige and legal authority of a Court judgment, as provided in Article 27 of the Court Statute, then they would seem morally obligated to accept, in good faith and with good cheer, the normal principle that they practice in their own internal, municipal, national law of the independence of the judiciary and the legal incapability of the parties to dictate or control the composition of a Court *qua* Court. From the Court's own viewpoint it would seem at least undignified—even if the Court is indeed short of cases for its roster—to surrender on such a fundamental point of the integrity of Courts and the judicial process simply to attract or retain otherwise unwilling parties.

Judge Oda, in his Declaration attached to the Court Order of January 20, 1982 on *Gulf of Maine Area*, contented himself with the following tart comment:

While I voted in favour of the Order, it should in my view have been made known that the Court, for reasons best known to itself, has approved the composition of the Chamber entirely in accordance with the latest wishes of the parties as ascertained pursuant to Article 26, paragraph 2, of the Statute and Article 17, paragraph 2, of the Rules of Court.¹⁹

Judge Morozov, in his dissenting opinion, was more caustic. He did not merely consider that the full Court's choice of the Special Chamber's members should have been postponed for the two weeks necessary to enable the full Court *as newly reconstituted after the Autumn, 1981, judicial elections* to make the choices involved, but he also castigated the majority Order for taking as a:

point of departure the erroneous presumption that, contrary to Article 26, paragraph 2, of the Statute, the Parties . . . may not

18. Jiménez de Aréchaga, *supra* note 7, at 3.

19. 1982 I.C.J. 10.

merely choose what should be the number of the members of the Chamber, but also formally decide and propose the names of the judges who should be elected by secret ballot, and even present these proposals to the Court in the form of some kind of ultimatum.²⁰

In rejecting what he characterized as the "incorrect presumption of the Parties that they may dictate to the Court who should be elected," Judge Morozov insisted on the "sovereign right of the Court to carry out the election independently of the wishes of the Parties, by secret ballot in accordance with the provisions of the Statute and Rules of Court."²¹

Judge El-Khani, in his dissenting opinion, was equally scornful of the Court majority's acceptance of the parties' dictate as to the composition and membership of the Special Chamber. He stated:

I find that the imposition of an unduly close time limit for the Chamber's formation and of a particular composition renders the Court no longer master of its own acts, deprives it of its freedom of choice and is an obstacle to the proper administration of justice. Furthermore it diminishes the prestige of the Court and is harmful to its dignity as the principal judicial organ of the United Nations. It results in its regionalization by depriving it of its basic and essential characteristic of universality. . . . On these grounds I find that this ought not to constitute a precedent, as it would be a dangerous course to follow in the future.²²

IV. CONCLUSIONS

The Special Chamber system within the Court, as interpreted by the Court majority in its *Gulf of Maine Area, Constitution of Chamber Order of 20 January 1982*, as involving the Court's acceptance of the dictates of the parties as to membership of the chamber thus begins to appear a little like a reform *manqué*, and a reform, in any case, ventured upon too late and only *after* the political pressures for creation of specialist tribunals, functionally specialized by subject matter, and separate and distinct from the International Court had gathered political strength within the United Nations.²³ Further, in their actual choice of the judges for

20. *Id.* at 11

21. *Id.*

22. *Id.* at 12.

23. See generally, Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253,

the Special Chamber, as confirmed by the *plenum* of the Court, the two state parties took a narrowly parochial view of a substantive problem with a genuine transcultural dimension and of importance to the "progressive development of International Law" as enjoined by the United Nations Charter.²⁴

That the strong intellectual reservations voiced by the three Judges who chose to append Special Opinions to the International Court's Order of January 20, 1982, constituting the Special Chamber in *Gulf of Maine* (Declaration by Judge Oda, Dissenting Opinion by Judge Morozov, Dissenting Opinion by Judge El-Khani)²⁵ have made their mark with their colleagues on the Court, seems confirmed by the Court's subsequent action in constituting a Special Chamber of the International Court for the determination of the territorial frontier dispute between two francophone African states, Burkina Faso (formerly Upper Volta) and Mali.²⁶ The five judges named in the Special Chamber for that dispute, in April, 1985, were Judge Lachs (Poland), Judge Ruda (Argentina), Judge Bedjaoui (Algeria), and two ad hoc judges (neither of the parties already having a national judge on the Court), Judge Lucnaire (France) and Judge Abi-Saab (Egypt).²⁷ The inter-cultural, inter-systemic representativeness of the Special Chamber, in contemporary World Community terms, is then guaranteed by the presence of representatives from the Western bloc, the Soviet and Eastern European bloc, and the Third World; and the Special Chamber itself will function in French, this being either the original language (Lucaire), the first European language (Bedjaoui, Abi-Saab), or an additional European language (Lachs, Ruda) of the judges designated for the Chamber.

The alternative option for State parties not wishing to accept the International Court's control of the actual composition of Special Chambers if, following the criticisms of the Court's complete

286 (1971). Compare President Elias' views, T. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* 78 (1979):

There does not appear to be any likelihood of a return to the old order in which Europe dominated the Bench . . . Western European candidates in the future would stand a far better chance of being elected if they had or were thought to have liberal or progressive views *vis-a-vis* the problems of the Third World.

See also McWHINNEY, *THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS* (1979); McWHINNEY, *UNITED NATIONS LAW MAKING* (1984).

24. U.N. CHARTER art. 13, para. 1a.

25. 1982 I.C.J. 3.

26. United Nations, New York, Press Release, ICJ/421, November 2, 1983, *reprinted in* 22 I.L.M. 1252 (1983).

27. United Nations, New York, Press Release, WS/1228, April 19, 1985.

deferment to the preferences of the parties, in *Gulf of Maine*, the Court should now insist that the selection of the judges is its own ultimate prerogative, is of course recourse to a special Arbitral Tribunal of the State parties' own choosing. This was the route in fact followed by two other African states, the former French colony of Guinee, and the former Portuguese colony of Guinee Bissau in their recent dispute over delimitation of their respective maritime frontiers.²⁸ But, even here, the two State parties seem to have accepted as a post-Gulf of Maine imperative that, to acquire authority or general credibility for its eventual ruling, any international legal tribunal, whether judicial or arbitral, must now be, as far as possible having regard to the number of members of the tribunal, representative in cultural, ideological and legal-systemic terms. The two State parties concerned chose, as members of a three-judge special Arbitral Tribunal, three serving Judges of the International Court of Justice, Judge Mbaye (Senegal), Judge Bedjaoui (Algeria), and Judge Lachs (Poland), with Judge Lachs being designated as President of the Tribunal.

The questions raised as to the claims to general legal authority, as World Court jurisprudence, of judgments rendered by five-judge Special Chambers—in spite of the stipulation in the 1946 Court Statute that they “shall be considered as rendered by the (full) Court” (Article 27)—seem confirmed by the Dissenting Opinion filed by Judge Oda in a subsequent judgment rendered by the fifteen-judge *plenum*, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*.²⁹ Judge Oda, who was excluded by the two State parties in *Gulf of Maine* from their own joint list of judges for the five-judge Special Chamber that was subsequently ratified by the *plenum* of the Court,³⁰ takes the opportunity, in the *Libya/Malta* case, to make a detailed critique of the Special Chamber holding in *Gulf of Maine* and its stated legal rationale, writing what amounts, in effect, to an *ex post facto* Dissenting Opinion to the Special Chamber's judgment in *Gulf of Maine*.³¹

28. *Tribunal Arbitral pour la delimitation de la frontiere maritime Guinee/Guinee-Bissau, Sentence du 14 fevrier 1985.*

29. 1985 I.C.J. 13, reprinted in 24 I.L.M. 1189 (1985).

30. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1982 I.C.J. 3 (Constitution of Chamber Order of Jan. 20).

31. 1985 I.C.J. 165-169; 24 I.L.M. 1265-1267 (1985).

