

2010

## 25th Anniversary Commemoration The Gulf Of Maine Maritime Boundary Delimitation: The Constitution Of The Chamber

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### Recommended Citation

Judge Stephen M. Schwebel, *25th Anniversary Commemoration The Gulf Of Maine Maritime Boundary Delimitation: The Constitution Of The Chamber*, 15 *Ocean & Coastal L.J.* (2010).

Available at: <http://digitalcommons.maine.edu/oclj/vol15/iss2/4>

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25<sup>TH</sup> ANNIVERSARY COMMEMORATION  
THE GULF OF MAINE MARITIME BOUNDARY  
DELIMITATION: THE CONSTITUTION OF THE  
CHAMBER

*Judge Stephen M. Schwebel\**

Judgment in the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Gulf of Maine Case)* was rendered not by the plenary International Court of Justice (ICJ) but, pursuant to Article 26 of its founding statute, by “a chamber for dealing with a particular case.”<sup>1</sup> Provision for that type of Chamber was not found in the statute of the Court’s predecessor, the Permanent Court of International Justice (PCIJ).<sup>2</sup> One of the few changes in the Permanent Court’s statute made in 1945 when the Statute of the International Court of Justice was adopted as an annex to the United Nations Charter was to add a provision for such particular, *ad hoc* Chambers.<sup>3</sup> A significant subtraction was made in 1945 as well. The PCIJ statute provided, in respect of the composition of standing, subject-matter Chambers, that the provision of Article 9, requiring that “the whole body also should represent the main forms of civilization and the principal legal systems of the world,” applied to *ad hoc* Chambers as well.<sup>4</sup> While Article 9 appears in the same terms in the PCIJ and ICJ statutes,<sup>5</sup> that Chamber application does not appear in the Statute of the International Court of Justice,<sup>6</sup> a deletion which played a significant part in the composition of

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1. Statute of the International Court of Justice art. 26, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute art. 26].

2. See Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 279 [hereinafter PCIJ Statute].

3. See ICJ Statute, *supra* note 1; PCIJ Statute, *supra* note 2.

4. See PCIJ Statute, *supra* note 2, art. 26.

5. See PCIJ Statute, *supra* note 2, art. 9; ICJ Statute, *supra* note 1, art. 9.

6. See ICJ Statute, *supra* note 1.

the *Gulf of Maine Case* Chamber. Article 26, paragraph 2 of the Statute of the International Court of Justice provides that: "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties."<sup>7</sup>

While nowadays the International Court of Justice has a heavy docket and deals with a substantial number of cases, that was not true for the decades of the 1960s and 1970s. That fact led to consideration by the United Nations General Assembly of ways to promote recourse to the Court. The Secretary-General was charged with preparing a report, based on a questionnaire sent to States' Members. Among the answers to the questionnaire was that of Sweden, doubtless prepared by the then Legal Adviser of the Swedish Foreign Ministry, Dr. Hans Blix. Sweden wrote:

No State has ever made use of the possibility of having a dispute adjudicated on by . . . a special chamber as provided for in Article 26 of the Statute . . . . In determining the number of judges constituting the chamber, the Court shall have the approval of the parties. On the other hand, the parties are without any influence when it comes to the election of the individual judges of such a chamber . . . . The Swedish Government believes that the procedure envisaged in . . . Article 26 of the Statute would prove more attractive to potential litigants if the Rules of Court were modified to the effect that also the election of the individual members of a chamber should be based on a consensus between the Court and the parties. In this way the parties will have the opportunity of submitting their case to a chamber of their choice . . . .<sup>8</sup>

The United Kingdom made a like suggestion.<sup>9</sup> So did leading court authorities, including Judge Eduardo Jiménez de Aréchaga, Judge Sture Petré, and former Registrar and later U.N. General Assembly President Edvard Hambro.<sup>10</sup>

The Court set about responsively revising its rules. Consequently, Article 17 of the Rules of Court as revised provides that, when the parties

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7. ICJ Statute, *supra* note 1, at para. 2.

8. Stephen M. Schwebel, *Chambers of the International Court of Justice Formed for Particular Cases*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 93 (Y. Dinstein & M. Tabory eds., 1989), reproduced in STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 100 (Cambridge University Press 1994).

9. *Id.* at 101.

10. *Id.* at 104-06.

to a case have agreed to the formation of a Chamber, “the President shall ascertain their views regarding the composition of the chamber and shall report to the Court accordingly.”<sup>11</sup> It was assumed that the Court would give weight to the views of the parties in electing the members of the Chamber.

The Court has not published records of the deliberations of its Rules Committee or of the full Court on the revision of its rules. Thus it is not known how contentious adoption of the revision of Article 17 of the rules was. Knowledgeable secondary sources indicate that the Court was divided.<sup>12</sup> In any event, the U.N. General Assembly in 1974 adopted a resolution endorsing the Court’s revision of its rules “allowing for greater influence of the parties on the composition of *ad hoc* chambers . . .”<sup>13</sup>

In 1979, in light of this history, the United States and Canada concluded a treaty and a special agreement providing for submission to a Chamber of the Court the course of the maritime boundary that divides their continental shelf and fisheries zone in the Gulf of Maine area.<sup>14</sup> In preparing these agreements, representatives of the United States and Canada consulted with the then President of the Court, Sir Humphrey Waldock.<sup>15</sup> The parties agreed on the names of the members of the Chamber to be elected by the Court. Sir Humphrey was to be President of the Chamber.<sup>16</sup> Among its members was to have been Professor Max Sorensen, who was not a Member of the Court. However, President Waldock and Professor Sorensen died before the Chamber was established, as did Judge Richard R. Baxter and Judge Abdullah El Erian. Had the Chamber been constituted as originally contemplated, it is highly probable that its establishment would have been less controversial. But that was not to be.

The parties revised their agreements to take account of these deaths and agreed upon the new names of the members of the proposed Chamber. Not only did they name names, but they provided that, if the Court failed to elect the specified members of the Chamber, the case

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11. *Id.* at 102 (quoting International Court of Justice Rules of Court art. 17 (1978) (amended 2005)).

12. *See* Schwebel, *supra* note 8, at 103-07.

13. *Id.* at 106 (quoting G.A. Res. 3232 (XXIX), para. 6, U.N. Doc. A/9846 (Nov. 12, 1974)).

14. Memorial of the United States of America, Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1982 I.C.J. Special Agreement 1-28 (Nov. 25, 1981).

15. *See id.*

16. *See id.*

would be withdrawn from the Court and remitted to arbitration. They prepared an arbitration agreement to meet that contingency and provided the Court with a copy.<sup>17</sup> They also proposed that one of those so named, Judge André Gros, should be the President of the Chamber.<sup>18</sup> They further specified that the Chamber had to be established during the current term of the Court, since Judge Gros' tenure was shortly to expire.<sup>19</sup>

When presented with these revised agreements, the Court found itself profoundly divided. There were those who were desirous not only that the Court, which then was dealing with only one active case, take on a very major case and one on a subject of the Court's particular experience. They also favored recourse to *ad hoc* Chambers as a way to promote increased recourse to the Court. They feared that if the Court turned down the creation of a Chamber in the *Gulf of Maine Case*, the first occasion when establishment of an *ad hoc* Chamber was proposed, that promising possibility would be indefinitely aborted.

But the opposition was intense. At its core were judges from countries which never accepted the jurisdiction of the Court and who expected themselves never to be named to an *ad hoc* Chamber. They spoke in terms of an assault on the universality of the Court. They and other Members of the Court argued that affording the parties to a case a voice in the composition of a Chamber was inconsistent with the statute, which provided for consulting the parties on the number of members of a Chamber but not its composition. They contended that permitting the parties to determine the composition of a Chamber would be consonant with arbitration but not with the character of the Court as a court.

But there was more to the opposition than this. While President Waldock was to have been president of the Chamber, the Acting President of the Court was not named to be even a member of this newly composed Chamber. A judge of the Court who was especially expert in the law of the sea was not included. And the judge who was proposed as President of the Chamber was unpopular with a number of his colleagues.

The result was that, for some weeks, the Court was at an impasse. A majority one way or the other could not be mustered for the establishment of the Chamber. One influential judge was absent during

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17. Memorial of the United States of America, Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1982 I.C.J. Pleadings 2, 6 (Nov. 20 & 25, 1981).

18. *See id.*

19. *See id.* at 2.

those weeks because of his wife's mortal illness. Finally he was able to return to The Hague, and he joined those favoring establishment of the Chamber. Once a majority for so doing was apparent, other judges joined it, and the requisite order, in the end, was adopted by a large majority of the Court.

And so the Chamber in the *Gulf of Maine Case* was established. Departing from the explicit preference of the parties, it chose to elect not Judge Gros but Judge Ago as its President. In due course, after written pleadings and oral hearings of notable quality, the Chamber rendered judgment.

Other *ad hoc* Chambers were to follow, and their establishment was uncontroversial. But genuine issues of the conformity of the revised Rules of Court with the terms and import of the Court's statute remained. They were searchingly examined in depth in an acute dissent in 1990 by Judge Mohamed Shahabuddeen in the *Case Concerning the Land, Island and Maritime Frontier Dispute*.<sup>20</sup> Judge Shahabuddeen maintained that the drafters of the PCIJ statute had designedly excluded the views of the parties to a case in the composition of a Chamber because admitting those views would entrench an arbitral rather than judicial model.<sup>21</sup> He found Article 17 of the Rules of Court as revised inconsistent with that original intent.<sup>22</sup>

For my part, I remain of the view that Article 17 of the Rules of Court is consistent with the statute as revised in 1945 and that the ability of the Court to constitute a Chamber pursuant to it is a constructive option. But I recognize that there is room for more than one view.

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20. See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1990 I.C.J. 18 (Feb. 28), (Shahabuddeen, J., dissenting).

21. See *id.*

22. See *id.*