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Ad Hoc Chambers of the International Court of Justice

Andreas Zimmermann*

I. Introduction

Prior to 1982, the provision in the Court's Statute for chambers of the International Court of Justice (ICJ) was practically a dead letter.¹ Recently, however, the attitude of litigant States has significantly changed. So far three judgments have been rendered by ad-hoc chambers² and one other case is actually pending before this chamber.³ Due to the enlarged practice of the Court, the interest in the literature has recently increased to a considerable extent.⁴

Nevertheless, some questions have not yet been dealt with, such as the relation between the chamber procedure and intervening States and the delimitation of the competencies between the full Court (and its President) and the chamber. Therefore, it is worth-


In relation to the Frontier Dispute Case see Gautron, La création d’une chambre au sein de la CIJ — Mêmes conservatoires et Médiation dans le différent frontalier entre le Burkina Faso et le Mali, 32 Ann Franc. Dl. Int. 192 (1986); Décaux, L’arrêt de la Chambre de la CIJ dans l’affaire du différent frontalier, id., 215;

See also, M. Bediaoui & J. Perez, Universalisme et regionalisme au sein de la Cour internationale de Justice: La constitution de chambres "ad hoc" 155-71 (1988); A. Saavedra, La creacion y el funcionamiento de las salas "ad hoc del Tribunal Internacional de Justicia 1285-1303 (1988).
while dealing with these and other problems in view of the future litigation before such chambers.

II. Historical Development

A. Draft Convention for the Establishment of a Court of Arbitral Justice

This proposal, brought forward during the 1907 Peace Conference at the Hague, envisaged in its Arts. 6 and 18, summary procedure. For this purpose, a special 'délégation' was foreseen. If the parties agreed, they would have had the possibility of gaining access to a more limited entity to decide their dispute. Nevertheless, under the Art. 20 Draft Convention, each party had the right to nominate one judge of the Court to participate in the proceedings of the delegation. While this project never saw life, it nonetheless inspired the Statute of the Permanent Court of International Justice (PCIJ).

B. Permanent Court of International Justice

Under the Statute of the PCIJ, several types of chambers were foreseen. Art. 29 regulated the Chamber of Summary Procedure. This chamber convened twice during the lifetime of the PCIJ. In 1924, it had to deal with a dispute between Greece and Bulgaria as to the meaning of Art. 179, Annex, Par. 4 of the Peace Treaty of Neuilly. Three months later, Greece requested an interpretation of this judgment under Art. 60 of the Statute. The same chamber dealt with this request.

In the Serbian Loans Case in 1928, a reference to the Chamber of Summary Procedure was suggested, but the Serbian Government thought it to be unacceptable in view of the importance of the case. The chamber also met once in 1935 in connection with a later withdrawn request to appoint members of an arbitral tribunal. Finally, some treaties provided for the jurisdiction of the chamber, either if both parties agreed to refer the case to the Chamber for Summary Procedure, or upon unilateral request by one of the parties.

5. PCIJ (ser. A), No. 3.
6. The request was, however, not admitted. It was doubtful whether the chamber or the full Court would be competent to hear such request; this problem was addressed during the revision of the Rules of Court of the PCIJ in 1926; it is now clarified by Article 100 Rules of the Court of the IJC of 1978 [hereinafter Rules 1978].
7. PCIJ, (ser. C), No. 16-III, pp. 792, 793, 808; this contradicts the view that litigation by chambers of the World Court is regarded as highly prestigious; but see, Rhee, Equitable Solutions to the Maritime Boundary between the United States and Canada in the Gulf of Maine, 75 AJIL 590, 596 (1981); Brauer, supra note 4, at 475.
8. PCIJ, (ser. E), No. 11, 152.
10. Art. VI, Traité de Commerce entre le Danemark et la Bolivie, Nov. 9, 1931, id.
However, even the introduction of the system of judges ad hoc for the Chamber of Summary Procedure during the amendment of the Statute in 1929\(^1\) did not render the chamber procedure more popular.\(^2\) The reasons for this non-use may be seen in the fact that the parties to a possible dispute had no influence on the composition of the chamber. Another reason for the ad hoc system’s failure to improve that situation\(^3\) was that the parties had the same right when referring the case to the full Court.\(^4\) Furthermore, the proceedings were not necessarily shorter than regular proceedings, since further written communications beyond the single memorials could be filed, if the parties agreed to do so,\(^5\) and oral proceedings could be held.\(^6\) Finally, in case of an urgency, the broad powers of the Court under Art. 41 Statute provided a sufficient safeguard for the rights of the concerned party.

In addition to this Chamber for Summary Procedure, the Statute of the PCIJ also provided for chambers for labor cases (Art. 26) and for a chamber dealing with transit and communications problems (Art. 27). However, neither have held a meeting.\(^7\) Therefore, the Statute of the ICJ left it to the Court’s discretion to form chambers for particular categories of disputes and refers to the above-mentioned cases only as examples for such categories.\(^8\)

Notably, a proposal during the drafting of the Statute of the PCIJ which authorized parties to submit their case to a panel of three judges, or to one sole judge, chosen by them from among the members of the Court, was rejected on the basis that such a method

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\(^1\) Art. 31(4) Statute.
\(^2\) Under the Statute of the ICJ, the Chamber of Summary Procedure, while annually formed by the Court, Art. 29 Statute, has never been used.
\(^3\) This was contrary to the expectations when that provision was amended, M. Hudson, *The Permanent Court of International Justice* 348, n.94 (2nd ed., 1943).
\(^4\) The only difference would be that the importance of the vote of such judge would have been higher.
\(^6\) Art. 69 Rules 1922; Art. 92 Rules 1978.
\(^7\) In the S.S. Wimbledon Case, the PCIJ considered the parties’ attention to Art. 27, but decided in the negative, PCIJ, ser. E, no. 3, p. 189; such a question was not even raised in the Order Commission Case, nor in the Oscar Chinn Case, M. Hudson, *supra* note 13, at 348, n.94.
would too closely resemble arbitration. However, a somewhat similar proposal received more attention during the drafting of the Statute of the ICJ.

C. International Court of Justice

In the United Nations Committee of Jurists, charged with drafting the Statute of the future ICJ, Sir Gerald Fitzmaurice, the representative of the United Kingdom, proposed to grant the Court with "a general faculty to constitute special chambers in such cases as may seem appropriate." This proposal was later modified in accordance with a United States proposition which can now be found in Art. 26, paragraph 2 of the Statute:

The Court may from time to 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.

This provision was regarded as being marginally useful since it would, under certain circumstances, facilitate recourse to the Court. However, Judge Hudson, arguably the foremost expert on World Court procedure at that time, realized that the system of such ad hoc chambers would constitute a complete departure from the system of chambers established by the Statute of the PCIJ, since it would involve the parties in the decisions pertaining to the size and composition of the chamber.

Despite this new provision in the Statute, the Rules of 1946 set out in Art. 24 dealt only briefly and conservatively with chambers, conforming to the 1936 Rules of Court of the PCIJ. Therefore, since the ad hoc chambers were not adequately covered by the procedural law of the Court, growing unease has resulted from this neglect.

19. PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, at 526; see also the Swiss proposal of 1919 under which the Court would have consisted of a panel of 15 judges and where each of the parties would have been able to reject five of them, supra note 13, at 147; M. Ricci-Busatti favored a panel of 15-20 judges from which ad-hoc tribunals should be formed, PCIJ, id., at 177, 183.


22. G. Schwarzenberger, supra note 20, at 291.


25. Schwebel, supra note 4, at 834, interpreting Hudson's statement in that sense.

26. Id.

The concern surfaced in the debate of the Sixth Committee of the General Assembly in 1970-71, in which States were given an opportunity to express their ideas about this topic. As a result, the Court, which in 1967 had formed a Court’s Revision of Rules Committee, significantly reframed the relevant provisions of the rules both in 1972 and in 1978. These changes involved two major elements.

The first and most significant innovation now obliges the President of the Court to ascertain the views of the parties as to the composition of the chamber and to report to the Court accordingly. Based on the resulting consequences of this provision, the parties to a case are now clearly endowed with at least a strong influence regarding the composition of the chamber:

[... ] From a practical point of view, it is difficult to conceive that [...] 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 tribunal.

The second new feature deals with the composition of the chamber over time. Unlike the cases heard before the full Court, where a replaced judge shall only discharge his duties upon the completion of a particular phase, members of an ad hoc chamber shall continue to sit in all phases of the case. (Art. 17, para. 4 Rules 1978).

28. See the overview in id.; Rosenne, The 1972 Revision of the Rules of the International Court of Justice, 8 ISR. L. REV. 197, 213 (1973); “[... ] strong desire on the part of many Governments that parties to contentious cases should be able to agree on the actual composition of an ad hoc tribunal [... ]”; detailed references in Schwebel, supra note 4, at 836-37.

29. See infra V. C.

30. Jiminez de Aréchaga, The Amendments to the Rules of Procedure of the International Court of Justice, 67 AJIL. 1, 2-3 (1973). This view was confirmed by the practice of the Court of the Gulf of Maine Case, but see also the Dissenting Opinions of Judge Morozov, 1982 ICJ Rep. 11 and Judge El-Khani, 1982 ICJ Rep. 12; the view of Aréchaga is shared by (former or actual) members of the Court: Schwebel, supra note 4, at 841; Oda, supra note 4, at 559 and his declaration in the El Salvador/Honduras Case, 1987 ICJ Rep. 13; Mosler, The International Court of Justice at its Present Stage of Development, 5 DALHOUSSIE L.J. 545, 559 (1979); Peiren, Some Thoughts on the Future of the International Court of Justice, 6 NETHERLANDS YB. INT’L L. 59 (1975); but see Evensen, The International Court of Justice Main Characteristics and its Contribution to the Development of the Modern Law of Nations, 57 NORDIC J. INT’L L. 1, 9 (1988): “In practice, the Court has been responsive to the views of the Parties.”

31. The importance of this provision is stressed by Mosler, Aspekte des Verfahrensrechts des Internationalen Gerichtshofes, 256 VÖLKERRECHT UND RECHTSPHILosophie-INTERNATIONALE FESTSCHRIFT FÜR ST. VEROSTA, (Fischer, Kock, Verdross, eds. 1980). The same procedure had been proposed by Switzerland and Sweden for both the full Court and the chambers. See Dupuy, La Réforme du Règlement de la Cour Internationale de Justice, 18 ANN FRANC. DT. INT. 265, 273 (1972).
Iona Traction and the South West Africa (First/Second Phase) Cases. However, while these advantages are important, ad hoc chambers provide other advantages for the parties with regard to both arbitral tribunals and the full bench of the ICJ.

III. Comparison between Ad Hoc Chambers of the ICJ and other Judicial Bodies

A. Ad hoc Chambers v. Arbitral Tribunals

In the 1970's and 1980's, on three occasions, States had recourse to dispute-settlement by arbitral tribunals, consisting either partly or completely of members of the ICJ. In the Beagle Channel Arbitration between Chile and Argentina, Chile had favored arbitration by the British Government, while Argentina, one the other hand, due to its political difficulties with Great Britain in regard to the Falkland (Malvinas) Islands, preferred recourse to the ICJ. Eventually, the parties agreed to settle their dispute before a Court of Arbitration composed of five ICJ judges. Notably, their designation was not influenced primarily by their personal qualifications, but by their membership on the ICJ. While the seat and the registry of the tribunal were located in Geneva, the Court also utilized the Peace Palace at the Hague for a meeting.

A second example refers to the arbitral tribunal chosen to resolve the continental shelf boundary dispute between the United Kingdom and France. However, in this instance, only two of the five judges were members of the ICJ. More likely than not, these ICJ judges were chosen for the simple reason they were nationals of the two parties involved.

Finally, in the Delimitation of the Maritime Boundary between Guinea and Guinea Bissau, the affinity to an ad hoc chamber of the ICJ reached its most striking point. In this case, the Tribunal consisted of three ICJ judges, among them the former President of the

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33. 1962 I.C.J. 319 and 1966 I.C.J. 6. See also, M. HUDSON, supra note 13, at 350, for cases where the composition of the PCIJ changed significantly during different phases.
35. Id. at 735; the judges chosen were Dillard (USA); Fitzmaurice (UK), Gros (France), Onyeama (Nigeria) and Petren (Sweden).
36. The registrar was Prof. Ph. Cahier, Institut de Hautes Études Internationales.
37. 1 J. WETTER, THE INTERNATIONAL ARBITRAL PROCESS 297 (1979). A meeting was held on Nov. 29, 1974.
38. For the text of both, the compromis and the decision, see UNRIAA, vol. XVIII, 1.
39. In fact, Judges Gros (France) and Waldock (UK) were both nominated by their respective home countries.
While the seat for this matter was originally determined to be Geneva, the parties agreed to move it to the Hague. As to the procedure, it was agreed that the Rules of Court of the ICJ would be applicable. Mr. Pillepich, then Deputy-Registrar of the ICJ, was named registrar of the Tribunal.

These examples demonstrate the slight distinction that exists between an arbitral tribunal and an ad hoc chamber of ICJ judges. Ad hoc chambers of the ICJ, however, have some advantages when compared to arbitral tribunals.

First, even if an arbitral tribunal consists exclusively of members of the ICJ, its award is not a judgment of the ICJ under Art. 94 of the UN-Charter. In contrast, judgments rendered by an ICJ ad hoc chamber are considered as binding as a judgment rendered by the Court itself (Art. 27 Statute). Thus, an arbitral award may not be enforced by the Security Council, as evidenced by the Beagle Channel Arbitration.

However, it is important to note that the Security Council has yet to take significant steps toward enforcing a judgment of the ICJ. Moreover, if one of the permanent members of the Security Council is a party to the dispute before the Court, the action may be illusory in view of Art. 27 UN-Charter.

Second, from a political standpoint, the higher visibility of the Court on the political stage, when compared to an arbitral tribunal, encourages compliance with its judgments. Consequently, the ICJ is regarded as more prestigious, which makes it easier for the litigant Governments to justify a negative outcome to their respective domestic public.

Yet another advantage for the parties lies in the fact that both the substantive and procedural law applied are — at least to a certain extent — predictable. As to the procedural law, both the Stat-

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41. The composition was: Judge Bedjaoui, Judge Mbaye and Judge Lachs.  
44. Art. 5, para. 2 Special Agreement empowered the tribunal to choose its own registrar, see 89 Rev. Gen. Dt. Int. Publ. 484 (1985).  
45. Hambro, Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?, 1 THE FUTURE OF THE ICJ 365, 367 (Gross, ed. 1980). It took another mediation by the Pope to finally settle the dispute. See 89 Rev, Gén. Dt. Int. Publ. 397-400 (1985); S. ROSENNE, supra note 45, at 41 argues that a reference to Art. 94 UN-Charter could be included into a special agreement.  
46. See, e.g., Security Council Draft Resolution concerning the implementation of the judgment in the United States-Nicaragua Case, vetoed by the United States; this problem is diminished when — as in ad hoc chamber cases — the dispute is brought before the Court by way of Special Agreement.  
47. Brauer, supra note 4, at 475.  
48. Id. Rhee, supra note 7, at 596.  
49. Rovine, The National Interest and the World Court, 1 FUTURE OF THE ICJ, supra note 45, at 322.
ute and the Rules are determined in advance and clarified by the prior extensive practice of the Court itself. Besides, States may only depart from the Rules upon an agreement between the parties and the chamber. As to the substantive law, while the stare decisis principle does not apply under Art. 59 of the Statute, the jurisprudence of the Court is highly relied upon in future court proceedings in accordance with Art. 38, lit. d of the Statute. Therefore, States can generally foresee the basic principles the Court will apply. Furthermore, the services of the Court's Registry are at the disposal of the Chamber.

Finally, the litigation before an ad hoc chamber is less expensive than before an arbitral tribunal. This is due to the fact that under Art. 33 of the Statute, the expenses of the proceedings are borne by the ICJ budget fixed by the United Nations, to which the litigants contribute as members under the Statute. Thus, parties only have to bear their own costs. This may be a significant advantage in particular for less developed countries, and in situations where disputes will last for a long period of time.

Thus proceedings before ad hoc chambers have some important advantages when compared to arbitral tribunals. From the perspective of potential parties, they may also be more advantageous than proceedings before the full Court.

**B. Ad Hoc Chambers v. The Full Court**

In addition to the aforementioned advantages relating to the composition of the chambers, it may be also easier for an ad hoc chamber, with its limited number of members, to choose a language other than English or French as a working language. Moreover, the ad hoc chamber is more flexible than the whole Court, making decisions, pursuant to Article 22, paragraph 1 of the Statute and Article 55 of the 1978 Rules, to hold proceedings at a place other than at the Court seat considerably easier.

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50. Art. 101 Rules 1978; Art. 93-97 Rules dealing with judgments are mandatory under all circumstances.
51. Mosler, supra note 30, at 599.
52. Under Art. 64 of the Statute, the Court may burden one party also with the other's party costs.
53. Aréchaga, supra note 30, at 3; Zoller, supra not 4, at 311 n. 19; Mosler, supra note 30, at 558.
54. See supra note 3.
55. Hambro, supra note 45, at 369.
56. Mosler, supra note 30, at 560.
IV. Submission of a Case to an Ad Hoc Chamber

A. Forms of Agreement of the Parties to Submit to a Chamber

Article 26, paragraph 3 of the Statute stipulates that cases shall be heard by a chamber if the parties so request. In three out of the four chamber proceedings, which up to now have been dealt with by the ICJ, both the jurisdiction of the Court and the request to form a chamber were based on a special agreement. However, in the Case concerning Elettronica Sicula S.P.A., the United States, by a unilateral application on February 6, 1987, initiated an action against Italy, requesting the Court to form a chamber. Italy, while questioning the admissibility of the application, subsequently accepted the proposal presented by the United States Government.

Under the Statute of the PCIJ, it had been doubtful whether proceedings before the Chamber for Summary Proceedings could be instituted only by means of a special agreement. This was due to the fact that prior to 1926, the Court had decided to apply the system of simultaneous submission of documents only to cases in which the suit was brought by special agreement. Pursuant to the rule governing summary procedure, a provision required, without exception, such a simultaneous submission. As a result, a unilateral action to bring a case before such a chamber was seemingly excluded. However, the changes made in 1926 accounted for different ways in which cases may be submitted for summary procedure. This suggested therefore, the possibility of an application as the document instituting summary procedure.

On the other hand, under Article 26, paragraph 2 of the Statute of the ICJ, a case can be heard by a chamber if the parties so request. This seems to indicate that the necessary agreement of the parties can take different forms, such as a special agreement; a clause of a treaty under which a state might bring an action before an ad hoc chamber; an application with later acceptance by the respondent; or, finally, declarations under Art. 36, paragraph 2 of the

57. For the text of the Special Agreement see:
Land, Island, Maritime Frontier: text not available in I.L.M.
61. This was the opinion of Judge Anzilotti during the revision of the Rules of Court in 1926, PCIJ, (ser. D), No. 2 (Add.), at 182.
62. Registrar of the PCIJ. PCIJ, id.
63. But cf. statement by the President of the PCIJ, id.
Statute, which foresee the use of such a chamber. This liberal interpretation is confirmed by Article 17, paragraph 1 of the 1978 Rules, under which a request for the formation of a chamber may be filed at any time until the closure of the written proceedings. Moreover, the second sentence of the same provision specifically provides for a request to be made by one party. However, accepting the jurisdiction of the Court under Article 36, paragraph 2 of the Statute, and conditioning such an acceptance on the disputant's agreement to use such a chamber may be incompatible with the Statute itself.

B. Exclusion of the Full Court by Reservations to Declarations under Art. 36(2) Statute

Several authors, among them former State Department Legal Adviser Leigh, have proposed that the United States should resubmit itself to the jurisdiction of the ICJ, but that such a resubmittal should be accompanied with a reservation that would apply the procedure used by the US and Canada in the Gulf of Maine Case to the Optional Clause System:

The Government of the United States accepts [...] the jurisdiction of the International Court of Justice in any dispute providing that, at the instigation of either party: (1) a dispute shall be submitted to a chamber of the International Court of Justice consisting of such members of the Court as are elected by the Court in accordance with the preferences of the parties expressed in an agreement between them and that if no such agreement is reached or the Court fails to elect the judges named in the agreement, the Court shall not [...] have jurisdiction over the dispute [...]66

It is doubtful, however, whether such a reservation would be compatible with the optional clause under Article 36, paragraph 2 of the Statute.

As a matter of principle, it is generally acknowledged that States have the right to make reservations to declarations under Article 36, paragraph 2 of the Statute.67 This is confirmed by the legis-

67. Hambro, Some Observations on the Compulsory Jurisdiction of the International
lative history of the Statute and specifically by Article 36, paragraph 5 of the Statute, under which declarations shall be deemed to confer jurisdiction to the ICJ "in accordance with their terms." However, Article 92 of the Charter and Article 1 of the ICJ Statute require the Court to "function in accordance with the provisions" of said Statute. The Court simply cannot depart from any binding norms or rules of the Charter and its Statute. Moreover, the Court has even ruled that it cannot act pursuant to a compromise stipulating that only certain judges can sit. This may, however, not be true for a chamber reservation, for example, which specifically invokes a procedure provided for in the Statute and the Rules.

An even more serious question surrounds whether the proposed declaration would create a legal obligation at all. Since the government, which issued the declaration with this reservation in question, could always obstruct an agreement pertaining to the composition of the chamber, one could question not only the validity and enforceability of this instrument, but also whether the Court should even take notice of such a declaration. It remains unclear, however, as to what needs to be recognized for an obligation to be considered substantive. It can be argued that the term "obligation" in paragraph 2 is more of a description of what is recognized than a requirement of what should be recognized. Furthermore, from the obligations incurred by the State under the exercise of the incidental jurisdiction once the Court is validly seised, the State issuing the declaration is also under an obligation to negotiate in good faith to reach an agreement regarding the composition of the chamber. This

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68. UNCIO, vol. XIII, 559, 591.
69. Some of these declarations did, indeed contain reservations; Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 50 BRIT. YB. INT’L L. 63, 79 n.7 (1979).
70. 1947/48 I.C.J. 26; 1953 I.C.J. 122. Already the PCIJ acted that way although it was not bound by the express provisions of the Covenant and its Statute requiring it to act in accordance with the Statute, see PCIJ, (ser. A), No. 22, at 12; (ser. A/B), No. 46, at 161; (ser. B), No. 5, at 29.
71. PCIJ (Ser. A), No. 22, at 12 (Free Zones) — however, ad hoc chambers with an influence of the parties as to their composition were not foreseen under the Statute of the PCIJ; but see 1957 I.C.J. 44-46 (Opinion of Judge Lauterpacht, Norwegian Loans).
72. Ende, supra note 65, at 1180.
73. Art. 36, paragraph 2 specifically refers to the motion of an obligation as a necessary element of a declaration under that rule.
75. Crawford, supra note 69, at 75.
can be inferred from the fact that such declaration, coupled with a corresponding second declaration, would constitute a *pactum de negotiando*.† Therefore, even by the reservation in question, the issuing State would still incur an obligation under Article 36, paragraph 2. Despite this result, the reservation may be incompatible with the Statute for some other reasons.

Unlike other reservations, the proposed condition would not restrict the Court's jurisdiction *ratione materiae*, *personae* or *temporis*. It seeks to impose positive obligations on the other party *after* the Court has been already validly seised.‡ On its face, this fails to create a problem with the principle of sovereign equality, since the other party would also be potentially able to rely on that reservation pursuant to the principle of reciprocity. However, one can argue that such a clause, by the will of the other party, divests a State of the protection of the full fifteen-member Court.‡ Furthermore, Article 26, paragraph 3 of the Statute stipulates that cases shall be heard by a Chamber only if the *parties* so request. Thus, the power of one State to initiate the chamber procedure alone is seemingly excluded. This is further confirmed by Article 91, paragraph 1 of the Rules which states that the request to form a chamber will be given effect only if the parties are in agreement in that respect.

Finally, such reservation would also give one party the unilateral power to withdraw the case upon the Court's failure to elect the judges agreed upon by the parties.¶ This contradicts the provisions pertaining to the discontinuance of case proceedings under Articles 88 and 89 of the Rules which, in principle, require the participation of both parties in such a discontinuance or withdrawal.‖ This requirement was acknowledged by the United States and Canada in the Gulf of Maine Case.‖ In this dispute, the parties agreed to *jointly* notify the ICJ of a discontinuance of the proceedings in the

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77. To a certain extent, it is doubtful whether such corresponding declarations are governed by the law of treaties, Crawford, *supra* note 69, at 76-77; *but see* Anzilotti, PCIJ (ser. A/B), No. 77, at 87 (Electric Company of Sofia): "[...] an agreement came into existence between these two States accepting the jurisdiction. This agreement . . . referred to as the Declarations . . ."; and Judge Urratia: "... equivalent in law to an international agreement . . . ." *id.*, at 103; *see also* Gross, *Compulsory Jurisdiction under the Optional Clause, The International Court of Justice at a Crossroad*, *supra* note 65. Special reference should be made to the US-Nicaragua Case (1987). As to the obligation to negotiate in good faith under a *pactum de negotiando*, see Beyerlin, *Pactum de Contraendo-Pactum de Negotiando*, 7 ENCL. PUBL. INT. L. 371 (Bernhardt, ed. 1984).

78. Ende, *supra* note 65, at 1181.


80. *See also* Ostrihansky, *supra* note 1, at 42: "... powers common to each party-to consent to litigation before a chamber . . . ."

81. *See supra* note 66 and accompanying text (proposed reservation).


83. *See supra* note 66 and accompanying text.
event that either party terminated the Special Agreement on account of the Court's failure to constitute the chamber according to the wishes of the parties.84

Furthermore, more problems surface in regard to the compatibility of the proposed declaration with the procedural law of the World Court. Under Article 36, paragraph 2 of the Statute, States "recognize as compulsory ipso facto and without special agreements,"86 the jurisdiction of the Court. In other words, a State, which made a valid declaration of acceptance, may find itself subjected to the obligations of the Optional Clause at any time.86 Under this system, the contractual relations between the parties must be established automatically, so that the terms on which a State bases its recognition of the compulsory jurisdiction cannot be subject to negotiation.87 Therefore, a transaction, which appears to be a declaration under Article 36, paragraph 2, but which contains or purports to require elements of negotiation, is in fact incompatible with the normalities of the Statute.88

The proposed reservation, however, presupposes that the parties — after the dispute has arisen — agree on a common proposition entailing the composition of the bench. The condition, in turn, mandates a phase of negotiation not present in the decision regarding compulsory jurisdiction. Therefore, such a condition, which is inadmissible, precludes this proposed clause from being regarded as a valid declaration under Article 36, paragraph 2 of the Statute.89 The next problem considers, however, what the legal effects of such a "declaration" would be.

It is possible that such an acceptance — while not a valid declaration under Article 36, paragraph 2 due to its involvement with mandatory negotiation — may nevertheless confer jurisdiction upon the Court. Indeed a "declaration" under this provision, which entails such negotiation, may be regarded as an acceptance of jurisdiction under Article 36, paragraph 1 of the Statute.90 Moreover, the Court has held that the acceptance of jurisdiction in a case is not subject to

84. Treaty between the Government of the United States of America and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Art. II, 20 ILM 1377 (1981). Thus in order to be compatible with the Statute and the Rules, the declaration would have to force the other party to agree to discontinue the case if the Court does not act in accordance with the reached agreement as to the composition of the chamber.
85. Emphasis added.
86. 1957 I.C.J. 146.
88. Id.
89. Id.
90. S. ROSENNE, supra note 87, at 371, n.1. The transaction as a whole is controlling, not the formal text of the "declaration"; see the example of the "declarations" made by the United Arab Republic (Egypt): 265 U.N.T.S. 299; 272 U.N.T.S. 224.
90. Crawford, supra note 69, at 83-84.
the use of a specific form.\textsuperscript{91} In fact, nothing prevents a party to the Optional Clause from entering into an agreement pertaining to both the utilization and composition of such a chamber with a state which has made a chamber reservation.\textsuperscript{92} An acceptance of such a chamber "reservation declaration" would be similar to the system of compulsory jurisdiction between parties to the Statute and non-parties to the Statute who recognize its jurisdiction. Notably, a declaration under Article 36, paragraph 2 by such a non-member is only opposable to a member State (which has made a matching declaration under Art. 36, par. 2) if the latter explicitly agreed.\textsuperscript{93} Having determined the mode whereby a case can be submitted to a chamber, inquiry into problems related to the composition of such an ad hoc chamber must be made.

V. Composition of the Chamber

A. Ad Hoc Chambers and Article 9 Statute

It is questionable to what extent Article 9 of the Statute, which proscribes that the ICJ should represent the main forms of civilization and the principal legal systems, applies to ad hoc chambers. One criticism concerning the adjudication of the United States and Canada in the Gulf of Maine Case was that the chamber consisted only of Western judges.\textsuperscript{94} Although the chamber was representative of different legal systems in the Frontier Dispute Case (Burkina Faso v. Mali)\textsuperscript{95} and the Land, Island and Maritime Frontier Case (El Salvador v. Honduras),\textsuperscript{96} it was devoid of diversity in the Elettronica Sicula Case (Italy v. US).\textsuperscript{97}

Articles 26 and 27 of the Statute of the PCIJ, concerning labor, transit and communications chambers, stated that such chambers should be established "so far as possible with due regard to the provisions of Article 9." However, the Statute of the ICJ provides that the provisions of Article 9 apply only to the election of Judges of the

\textsuperscript{91} S. ROSENNE, supra note 88, at 371; PCIJ (ser A), No. 15, at 22-3 (Upper Silesia — Minority Schools); 1947/48 I.C.J. 27 (Corfu Channel — Preliminary Objections). This creates the possibility of forum prorogatum.

\textsuperscript{92} This would require, however, a coexistence of subject-matter of the two declarations.

\textsuperscript{93} See S. ROSENNE, supra note 87, Appendix 7, 872 (Security Council Resolution 9(l)) of 15 October 1946.

\textsuperscript{94} Judges Ago (Italy), Gros (France), Mosler (Federal Republic of Germany), Schwebel (USA) and Judge ad hoc Cohen (Canada).

\textsuperscript{95} Judges Lachs (Poland), Ruda (Argentina), and Bedjaoui (Algeria); Judges ad hoc Luchaire (France) and Abi-Saab (Egypt).

\textsuperscript{96} Judges Sette Camara (Brazil), Oda (Japan) and Jennings (United Kingdom); Judge ad hoc Valtikos (Greece); Information about the successor to Judge ad hoc Virally (France), who died on 27 January 1989.I.C.J. Communiqué No. 89/2 is not available at that point.

\textsuperscript{97} Judges Ago (Italy), Schwebel (USA), Jennings (United Kingdom) and Oda (Japan). The vacancy in the chamber resulting from the death of Judge Singh (India) on Dec. 11, 1988 was filled by Judge Ruda (Argentina).
Court by the General Assembly and the Security Council. Neither Article 26 of the Statute nor Section E on Proceedings before the Chambers in the Rules of Court ("Proceedings") contain any reference to Article 9 of the Statute. This lack of diversity may be justified. Due to the limited number of judges in a chamber it may be impossible to comply with the provisions of Article 9. Furthermore, it is hardly conceivable that the Court based on Article 9 of the Statute, would disregard the suggestions of the parties. However, it has been suggested that the parties in such a case should pay heed to the provisions of the article.

B. Number of Judges to Form an Ad Hoc Chamber

In each of the previous four cases adjudicated by ad hoc chambers of the ICJ, the number of judges has been five. The number five is not proscribed, however, by the Statute.

Under Article 26, paragraph 2 of the Statute, the number of judges constituting an ad hoc chamber is determined by the Court with the approval of the parties. The drafters of the Statute rejected the attempt to insert a fixed number in the Statute. The travaux preparatoires even show that the drafters envisioned a chamber consisting of only one judge, provided that the parties agree. However, Article 26, paragraph 2 of the Statute provides that a chamber is constituted of judges, the plural of which excludes a one-judge chamber. Article 13, paragraph 3 of the Rules confirms this interpretation, where it states that the ICJ will determine the number of its Members to constitute the chamber. In contrast, an argumentum e contrario may be drawn from Article 26, paragraph 1 of the Statute which determines a minimum of judges for chambers dealing with particular categories of cases.

In accordance with Article 26, paragraph 1 of the Statute, it is possible for a chamber to be composed of three judges; two would be chosen by each of the parties respectively, and the third would be elected by the Court and would be president of the chamber. Only

98. See infra V, B.
100. Evensen, id. See also supra note 30 (all citations).
102. Schwebel, supra note 4, at 851.
103. Doc. Jurist 32, G/24, 273; Doc. 57, G/45, 199-200; Schwebel, supra note 4, at 833. This position was in particular supported by the representative of the USSR.
104. Schwebel, supra note 4, at 833, n.8.
105. Hyde, supra note 27, at 440; Aréchaga, supra note 30, at 3, Aréchaga, JUDICIAL SETTLEMENT OF DISPUTES 68 (H. Mosler, R. Bernhardt, ed. 1974); Jessup, supra note 30, at 561; Gross, JUDICIAL SETTLEMENT OF DISPUTES 57 (H. Mosler, R. Bernhardt ed.); Schwebel,
Rosenne is of the opinion that the 1978 Rules do not permit the previously described formulation. According to Rosenne, the 1972 Rules delegate to the ICJ broad powers to form a chamber, including the power to form a one member ad hoc chamber. He ignores the 1978 Rules, however. Under the 1978 Rules the role of the Court in determining the number of its members to constitute a chamber is limited. Article 31 of the Statute limits the number of judges to be chosen by each of the parties to one. Thus, in conjunction with Article 17, paragraph 3 of the 1978 Rules, the possibility of a one-member chamber is excluded.

The solution for this problem may be found in Articles 31 and 26, of the Statute. Pursuant to Article 31 of the Statute, one to two of the judges on the ICJ must volunteer to serve as a member of the chamber, in addition to the judge ad hoc to be chosen by the party which has no national on the bench. The procedure as exercised mandates that then initial number of judges on a chamber be more than one. Also due to the required procedure, the chamber may end up consisting of one member of the Court and two judges ad hoc.

Finally, the determination of the number of judges depends upon the approval of the parties. In practice, the parties may also determine, through the approval procedure, the final composition of the chamber.

C. Composition Strictu Senso of the Chamber

The extent of the parties' influence as to the actual composition of the chamber was both the most important and the most criticized feature of the Rules, when revisions of the Rules of Court took place in 1972 and in 1978. This feature of the Rules was strengthened by its use in the Gulf of Maine Case (United States v. Canada). The United States and Canada submitted their dispute to the ICJ Chamber, but at the same time retained an "escape" mechanism to eliminate the risk that the Court would elect a chamber that did not meet the criteria.

supra note 4, at 351; Ostrihansky, supra note 1, at 35; Oellers-Frahm, supra note 4, at 317, n.7; Hambro, Quelques Observations sur la révision du Règlement de la Cour Internationale de Justice, 125, 130; MÉLANGES OFFERTS À CHARLES ROUSSEAU (1974).

106. S. Rosenne, supra note 23, at 43.
107. Article 17, paragraph 1 Rules 1972.
108. And only if there is no Member of the Court possessing the nationality of that party, Art. 31 paragraph 3 of the Statute.
110. G. Guyomar, supra note 15, at 71. This procedure was followed in the Gulf of Maine Case, 1982 I.C.J. 10 (Order of 20 January 1982). However, in the Frontier Dispute and the Land, Island and Maritime Frontier Case, the I.C.J. only elected three of the five members of the Chamber and further declared that the judges together with the two judges ad hoc chosen by the parties form the chamber, 1985 I.C.J. 7 (Frontier Dispute) and 1987 I.C.J. 12 (Land, Island and Maritime Frontier).
their preferences. If the chamber had not been composed in accordance with the wishes of the parties, or if a vacancy had not been filled in such a manner, then the parties would have discontinued the proceedings and would have instead resorted to dispute settlement by an arbitral tribunal. Similarly, El Salvador and Honduras, in their Special Agreement of May 26, 1986 stipulated:

"Las Partes someten las cuestiones [. . .] a una Sala de la Corte Internacional de Justicia, compuesta por tres miembros, con la anuencia de las Partes, las cuales la expresaran en forma conjunta al Presidente de la Corte, siendo esta conformidad esencial para la integración de la Sala [. . .]."

The Statute only contemplates that the number of judges will be determined with the approval of the parties. As to the composition of the chamber, the Statute is silent. The Rules, however, in Article 17, paragraph 2, ask the President to "ascertain [the parties] views regarding the composition of the Chamber and he shall report to the Court accordingly." The first problem in interpreting this phrase is whether such consultation is praeter or contra legem. If Article 17, paragraph 2 of the Rules is not in conformity with the Statute then Article 17, paragraph 2 and any subsequent action based upon it would be ultra vires, and thus, null and void. In order to obtain the parties' approval as to the number of judges of the chamber, however, consultation is unavoidable, which means that the subject of consultation with the parties is within the purview of the Statute.

Furthermore, Article 26, paragraph 2 of the Statute is open to two contradictory interpretations. On one side, the approval of the parties refers only to the number of judges, but not to the composition of the chamber. On the other side, the Statute does not expressly or impliedly prohibit consultation as to the composition of judges. While the drafting history of the Statute is unclear and the travaux preparatoires of the Rules are not published, the Gen-

113. "The parties submit the questions . . . to a chamber of the International Court of Justice, which is composed of three members, with the consent of the Parties, who express such consent in joint form to the President of the Court, such consent being an essential condition for the creation of the chamber." [Translation by the author.]
114. G. Schwarzenberger, supra note 20, at 393.
115. Id.
116. Schwebel, supra note 4, at 852.
117. Schwebel, supra note 4, at 834 and 852.
118. For a complaint in that respect see G. Guyomar, supra note 15, at XVII.
eral Assembly by consensus accepted that the new Rules provide "for greater influence of the parties on the composition of ad hoc chambers," which is in accordance with the Statute. 119 General Assembly acceptance is of special importance, considering the fact that the Court is, under Article 92 of the Charter, the principal judicial organ of the United Nations. Furthermore, seven States, by their participation in such proceedings, have currently expressed their opinio juris as to the compatibility of this procedure with the Statute. 120 Moreover, the ICJ itself, by adopting the 1978 Rules, has treated consultations with the parties "as to the composition of the proposed chambers" as "in accordance with Article 26, paragraph 2 of the Statute." 121 ICJ approval is of particular importance in light of Article 38 of the Statute and in light of the deeply-rooted tradition of the Court to rely upon its own prior practice in procedural matters.

While the parties may present their views regarding the composition of the chamber, it is the Court which, by the terms of Article 26, paragraph 1 of the Statute, may form the chamber. The ICJ also controls the chambers as the number of the judges is finally determined by the Court itself, and since elections of the members of the chamber must take place by secret ballot. These powers of the Court are in a position of tension with the powers of the parties to withdraw a case under Articles 88 and 89 of the Rules, especially since the Court has previously held that the ICJ is not called upon to inquire into the motives of such a withdrawal. 122 Thus, both sides retain their full discretion; "it is inevitable, that if a chamber is to be viable, its composition must result from a consensus between the parties and the Court." 123 This consensus has more easily developed in

120. At this moment, consultations between the five permanent members of the Security Council are under consideration to submit themselves for specific questions to the jurisdiction of the Court. This proposal would also foresee the chamber procedure, see statement of Abraham Sofaer, Legal Adviser U.S. Department of State to the Panel at the Annual Meeting of the ASIL on "Current Developments concerning the Settlement of Disputes involving States by Arbitration and the World Court" on April 8, 1989.
121. 1987 I.C.J. 4; 1987 I.C.J. 12; not even Judges Morozov and EI-Khani in their respective Dissenting Opinions to the Order constituting the Gulf of Maine Chamber, 1982 I.C.J. 12 and 13, questioned the consulting procedure per se.
122. 1964 I.C.J. 19-20 (Barcelona Traction): "[. . .] these provisions [on discontinuance] are concerned solely with the "how, not the "why" of the matter. They impose no conditions as to the basis on which a discontinuance may be effected."; Wegen, supra note 83, at 331; Zoller, supra note 4, at 313-14; declaration of Judge Oda, 1987 I.C.J. 13. A problem may arise, however, in a situation where a vacancy is not filled in accordance with the wishes of the parties, but where the chamber is then able to reach a final decision before the parties are able to discontinue the proceedings, Zoller, id.; such decision would constitute a valid binding decision of the Court; see also S. Rosenne, supra note 23, at 43.
123. Judge Oda, id. The fact that the Court will not act according to some kind of "dictate" — as put forward by Judges Morozov and EI-Khani 1982 I.C.J. 12 and 13, was stressed by the Court in another context, 1982 I.C.J. Rep. 336-37 and 347 (Application for Review of Judgment No. 273 — Advisory Opinion); Oellers-Frahm, supra note 4, at 322.
the last three chamber proceedings.\textsuperscript{124}

\subsection*{D. Chambers and Judges Ad Hoc}

Under the Statute of the PCIJ, the system of judges ad hoc had been foreseen from the beginning for Articles 26 and 27 specialized chambers. The Chamber for Summary Procedure provisions in the Statute did not contain references to the system of judges ad hoc during the elaboration of the Rules; some judges argued that participation of judges ad hoc was not excluded, notwithstanding silence in the Statute.\textsuperscript{126} They contended that the Chamber for Summary Procedure acted as the Court, and that Article 31 of the Statute did not expressly exclude such judges ad hoc. However, the majority of the judges argued that Article 31 was not applicable.\textsuperscript{126} This view was supported by the wording of Article 15, paragraph 2 of the Statute, according to which the composition of the Chamber for Summary Procedure was not subject to change by the parties.\textsuperscript{127} During the drafting of the protocol of revision of the Statute, a new Article 31 was introduced, which gave rise to the system of judges ad hoc in the Chamber for Summary Procedure.\textsuperscript{128}

The Interallied Committee of Jurists' proposal for the creation of regional chambers with five members of the Court, consisting of at least two deputy judges out of the region and two judges ad hoc,\textsuperscript{129} was not retained. Instead, Article 31, paragraph 4 of the Statute of the ICJ provided that the general provisions concerning Judges ad hoc were paramount and take precedence over the provisions in Articles 26 and 29. The system of such judges ad hoc would be applied, as follows: the President would request one or two members of the Court to step aside and to give their authority to the judges chosen by the parties.\textsuperscript{130} This somewhat bizarre procedure\textsuperscript{131} was followed by the Court in the Gulf of Maine Case.\textsuperscript{132}

\begin{itemize}
\item[\textsuperscript{124}] The critique of Judge EI-Khani, 1983 I.C.J. 12 referring to the fact that due to the composition of the chamber, more than one judge of the same nationality was acting in the name of the Court, is unfounded, since Art. 17, par. 4 Rules can be considered as lex specialis to Art. 3, par. 1 Statute.
\item[\textsuperscript{125}] President Loder, Judges Anzilotti and Huber, P.C.I.J. (ser. D), No. 2, 32 and 192.
\item[\textsuperscript{126}] The vote was 9:3, P.C.I.J., id., 193.
\item[\textsuperscript{127}] Lachume, \textit{Le Juge ”Ad Hoc”}, 70 REV. GÉN. DT. INT. PUBL. 266, 281 (1966). He argues that this is one of the reasons for the lack of use of the Chamber for Summary Procedure — \textit{but see supra} 1, (2) and the non-use of the other chambers.
\item[\textsuperscript{128}] Cassin, \textit{La révision du Statut de la CPJI}, 36 REV. GÉN. DT. INT. PUBL., 377, 393 (1929). Cassin argues that this was a logical consequence of the chamber system. However, this reform did not improve the popularity of this chamber, \textit{supra} 1, 2.
\item[\textsuperscript{129}] 40 A.J.I.L. (1946), supp., 8.
\item[\textsuperscript{130}] Article 31, paragraph 4 Statute.
\item[\textsuperscript{131}] G. Guyomar, \textit{supra} note 15, at 71.
\item[\textsuperscript{132}] In one order, the Court declared that the chamber has elected, \textit{inter alia}, Judge Ruda to be member of the chamber ad that he has been requested to give place to the Canadian judge ad hoc Cohen, Judge Ruda having expressed his readiness to do so, 1982 I.C.J. 9-10. According to the text of the Statute, there appears to be no obligation of the judge in
\end{itemize}
Frontier Dispute Case and the Land, Island and Maritime Boundary Case, the Court chose a different route, electing only three members of the chamber of five judges, and leaving two places for nominees of the parties. While the reasons for the difference in practice are not clear, the distinction may be based upon frequent statements by the Court that it is not bound procedurally in the same manner as domestic courts.

Once a judge ad hoc has become member of the chamber, the extent of his powers may be limited. It is clear that a judge ad hoc may only participate in a decision exclusively dealing with the case for which he had been chosen. Beyond this determination, a judge ad hoc chosen for an ad hoc chamber may not be entitled to be “present” in the full Court when the Court takes decisions on that case. The judge may be precluded from voting but may participate in the deliberations. For instance, the Order of the ICJ of February 1, 1982 in the Gulf of Maine Case on the written pleadings procedure only mentions Judge ad hoc Cohen as “in attendance at the invitation of the Court” and “expressing support for the Order which the Court had just adopted.” In the Land, Island and Maritime Frontier Dispute, the Court was more cautious, and did not invite the two judges ad hoc “to attend” the meeting of the Court fixing the time-limits for the filing of the memorials.

It must be noted that a judge ad hoc can only act after he has made the solemn declaration under Article 20 of the Statute, as foreseen in Article 31, paragraph 6 of the Statute. Article 8, paragraph 2 of the Rules stipulates that this declaration shall be made, if the case is to be dealt with by a chamber, in the chamber. This means that the judges ad hoc can only act after the chamber has been formed. After that moment, Article 31, paragraph 6 of the question to give place. See the wording “request” in Art. 31, par. 4 and the language of the Order: “Judge Ruda indicated his readiness to do so.”

133. 1985 I.C.J. 10; 1987 I.C.J. 6, 7. In the Elettronica Sicula Case, both parties were already represented on the bench (Judge Schwebel for the US, Judge Ago for Italy).
134. Ostrihansky, supra note 1, at 45.
136. In case such a judge dies or becomes unable to exercise his functions, the party in question seems to be entitled to choose a successor without any further acts by the Court. I.C.J. Press Communiqué, No. 89/2 referring to the right of Honduras to choose a successor for Judge ad hoc Virally.
137. G. Guyomar, supra note 15, at 105 referring e.g., to administrative or budgetary issues; see also Art. 20, par. 3 of the Rules: “Judge ad hoc are “[... ] bound [... ] to attend all meetings held in the case in which they are participating.” Id.
140. Article I of the Treaty between the Government of the United States of America and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of
Statute rules that such judges “shall take part in the decision on terms of complete equality with their colleagues.” Therefore, according to this rationale, the non-participation of such a judge ad hoc in decisions rendered by the Court, but related to the case dealt with by the chamber, is incompatible with the Statute.\textsuperscript{144} The PCIJ, however, in the Electricity Company of Sofia Case, held that when the issue before the Court was only a question of orders related to the administration of the case, and not a “decision” which settles the case, the presence of a judge ad hoc is not required.\textsuperscript{142} Thus, the approach of the Court in the Gulf of Maine Case is in accordance with the settled practice of the Court.\textsuperscript{143}

The judge ad hoc would probably not be in a position to take part in an election to fill a vacancy in the chamber.\textsuperscript{144} It is settled procedure of the Court that any judge ad hoc may not participate in “decisions” related generally to the composition of the bench. A judge ad hoc may not participate in a vote concerning whether the other party is entitled to be represented by a judge ad hoc,\textsuperscript{146} nor may he vote on the question of Presidency, if the term of a President of the Court is about to expire. These voting rules are confirmed by Article 6 of the Rules, which prescribes that only Members of the Court are allowed to take part in a vote on the dismissal of a judge. The Rules further stipulate that the member of the Court who obtained “the largest number of votes constituting a majority of the Members of the Court composing it at the time of the election,”\textsuperscript{147} shall fill the vacancy. Thus, in accordance with the practice of the Court, this provision excludes judges ad hoc from voting.\textsuperscript{148}

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\textsuperscript{141} S. ROSENNE, supra note 23, at 51; Zoller, supra note 4, at 316.

\textsuperscript{142} PCIJ (ser. E) No. 16 at 180.

\textsuperscript{143} The pure “presence” of a judge ad hoc does not seem to create specific legal problems, unless he would participate in the deliberations, which would be excluded under Article 54, paragraph 3 of the Statute. The wording of the order, mentioned above, “order which the Court had just adopted,” seems to indicate the contrary. Therefore, there may be no problem of compatibility with Art. 54, par. 2 and 3 Statute and Art. 21, par. 2 Rules; but see S. ROSENNE, supra note 23, at 27.

\textsuperscript{144} The following arguments also apply to a situation where an ad hoc chamber is established during consideration of a dispute by the full Court including a judge ad hoc, since in both cases Article 18, par. 1 Rules is applicable.

In the two situations, where vacancies in chambers occurred, the problem did not arise: in the Elettronica Sicula Case, no judge ad hoc was member of the chamber; in the Land, Island and Maritime Frontier Dispute Case, the vacancy concerned a judge ad hoc, the successor to be chosen by Honduras.

\textsuperscript{145} P.C.I.J. (ser. E) No. 5 at 238.

\textsuperscript{146} P.C.I.J. (ser. E) No. 7, at 281.

\textsuperscript{147} Article 18, paragraph 1 Rules.

\textsuperscript{148} S. ROSENNE, supra note 23, at 44, argues that this practice violates Art. 31 Statute; in contrast hereto, Ostrihansky, supra note 1, at 40 submits that the voting power extends to
VI. Separation of Powers Between the Court and Ad Hoc Chambers

The powers of the Court and the powers of the chamber are not clearly delineated by the Rules, especially during the initial phases of a case. Lacking any specific authority in the Rules, it has been the President of the Court who has opened the first session of ad hoc chambers.\(^{149}\)

According to Article 92, paragraph 1 of the Rules, the time limits concerning the delivery of pleadings "shall be fixed by the Court or by the President if the Court is not sitting." Assuming that the chamber concerned has been formed, the chamber and the possible judge ad hoc\(^{150}\) shall be consulted. In three of the four cases, it was the entire Court which determined these time limits.\(^{161}\)

The power to extend such a time limit is not exhaustively dealt with by the Rules. Under Article 44, paragraph 3 of the Rules, it is the Court which may do so, but if the Court has been adjourned, this power shall be exercised by its President. Since the President of a chamber is to exercise Presidential powers with respective to cases dealt with by a chamber,\(^{162}\) it was Judge Ago, the president of the chamber in the Gulf of Maine Case, who exercised this function.\(^{163}\)

Most striking is the fact that the chamber in the Land, Island and Maritime Frontier Dispute fixed the time limits for the filing of counter-memorials and replies.\(^{164}\) This procedure contradicts Article 45, paragraph 2 of the Rules, whereby the Court may authorize replies and rejoinders. There is no Rule whereby the chamber would be entitled to do so, nor is there any authorization by the Court. Here again, as in the procedure for electing judges ad hoc, the Court has taken a more pragmatic approach in applying its own rules, a

\(^{149}\) Pillepich, *supra* note 4, at 70; in the Elettronica Sicula case, Judge Singh, then President of the I.C.J., was himself a member of the chamber and became thus automatically its President, Article 18, paragraph 2 Rules. It may be noted, that the chamber, when entering for a public sitting, is announced as "The Court." Bedjaoui, *supra* note 101, at 77.

\(^{150}\) See *supra* note 150.


Only in the Border Dispute Case, the President acted: Order of April 4, 1987.

*But see* S. Rosenne, *supra* note 28, at 248, where he stresses the incompatibility with the chamber's independence and Ostrihansky, *supra* note 1, at 50 referring to a speeding up by the decision of the Court/President of the Court.

\(^{152}\) Article 18, par. 3 Rules.


\(^{154}\) Order of May 29, 1987.
questionable arrangement. Finally, it is again the Court which is authorized under Article 54, paragraph 1 of the Rules to determine the date of opening of the oral proceedings.

VII. Transfer of a Case from the Court to an Ad Hoc Chamber (and vice versa)

A. Transfer of a Case from the Court to a Chamber

Article 26, paragraph 2 of the Statute empowers the Court to form an ad hoc chamber at any time. Requests that cases be referred to one of the Court's chambers were governed by Article 35 of the 1922-1931 Rules of the PCIJ, in which it was implied that such demands should be made either in the special agreement or in the application. Under the 1936 version of the Rules, such a request had to be made at the commencement of a proceeding, though not necessarily in the document instituting the proceeding. This excluded the possibility that a proceeding instituted before the full Court might later be transferred to a chamber.

While the 1946 Rules of the ICJ did not make any specific reference to this transfer problem, the 1972 Rules, as well as the 1978 Rules, allow the parties to file a request for the formation of a chamber until the closure of the written proceedings. Rosenne argues that the closure of the written proceedings may be too early, especially if there has been only one round of written pleadings. He also argues that since the Statute does not impose such a strict time limit, the Court should allow the parties to agree before the opening of the oral proceedings, but after all written proceedings have been filed, to transfer the case to an ad hoc chamber. The Court, however, is bound by its own Rules, and cannot proprio motu deviate from them. The only authority for the Court to adhere to such an agreement of the parties is under Article 101 of the Rules, if the Court considers such modification appropriate. While this problem is at least partially regulated by the Statute and the Rules, the inverse situation or transfer from a chamber to the Court, is not expressly mentioned in the Statute and the Rules.

156. *See, e.g.*, Press Communiqué no. 89/1 concerning Elettronica Sicula.
159. Art. 76, par. 3 Rules 1972; Art. 17, par. 1 Rules 1978.
160. *See Arts. 44 and 45 Rules.*
161. S. ROSENNE, *supra* note 23, at 42-43; *but see also* S. ROSENNE, *supra* note 87, at 591, where he took a stricter view; and Ostrihansky, *supra* note 1, at 48.
B. Transfer of a Case from a Chamber to the Full Court

It is doubtful that a request to transfer the case from an ad hoc chamber to the full Court can be made by the parties.  This seems to be unjust, for it is more important to ensure a fair and just trial than to speed up the proceedings by referring the case to a chamber. Furthermore, the need for such transfer may arise whenever a vacancy in an ad hoc chamber is not filled in accordance with the wishes of the parties.

Article 16, paragraph 3 of the Rules provides that a chamber hearing a case arising under article 26, paragraph 1 of the Statute may not be dissolved before it has finished that case pending before it. Thus, it may be argued e contrario that the Court in fact does have the power to transfer a case from an ad hoc chamber. This argument is even more convincing because a discontinuance and possible resubmittal of the case to the full Court would constitute an unnecessary formality.  Concerning time limits for such a transfer, the Court would most probably have to apply Article 17, paragraph 1 of the Rules by analogy to apply the time limit of this kind of transfer, especially since this time limit is also mentioned in other parts of the Rules.

VIII. Ad Hoc Chambers and the Exercise of Incidental Jurisdiction

There are several different forms of incidental jurisdiction.  The chamber’s power to exercise these forms of jurisdiction, however, is not fully delineated.

A. Interim Measures of Protection

For the first time in the history of the World Court an ad hoc chamber of the Court indicated interim measures of protection under Article 41 of the Statute in the Frontier Dispute Case.  Since under the Statute of the PCIJ there is only provision for the exercise

163. Ostrihansky, supra note 1, at 46 and 48, denies such a possibility.
164. The United States and Canada in their Special Agreement had foreseen the referral of the dispute to an arbitral tribunal in such a situation, Article III, Treaty between the Government of the United States of America and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, 20 I.L.M. 1377 (1981).
165. Ostrihansky, supra note 1, at 48, submits that this is the only possibility for such a transfer.
166. See, e.g., Art. 37, par. 3.
167. On the notion of incidental jurisdiction in general see Briggs, supra note 76, passim.
168. See in general in respect to that order Gautron, supra note 4, at 203-06 (1986); Gross, Some Observations on Provisional Measures, INTERNATIONAL LAW AT A TIME OF PERPLEXITY — ESSAYS IN HONOR OF SHABTAI S. ROSENNE, (Dinstein, ed. 1989).
of summary procedure by a chamber, the question of indicating interim measures of protection by this or another chamber never became relevant. Several authors, however, have argued that any decision as to interim measures were to be taken by the full Court.

In the Frontier Dispute Case, the ad hoc chamber based its power to take interim measures on Article 90 of the Rules which provides the procedure for contentious cases by analogy to such chambers. The chamber stressed that its power to take interim measures did not depend upon agreement of the parties once the chamber had been validly seised. Accordingly, the powers of the President of the Court under Article 74, paragraph 4 to demand that the parties not undermine later possible measures by the Court could be exercised by the president of the chamber.

A problem may arise, however, when the request for such measures is made while the chamber has not yet been formed. Several provisions of the Rules, as well as the practice of the Court, show that the Court is empowered to attach urgency to interim proceedings. Thus, the Court may decline to appoint a judge ad hoc for such urgent proceedings. Similarly, the Court only needs to assert its jurisdiction in a provisional way. It would be similarly inadequate to postpone interim measures pending the formation of an ad hoc chamber, since experience shows that the required consultations with the parties as to the number and composition of the chamber may take a significant period of time. Dictum of the PCIJ confirms this rationale: "[T]he Court is entitled, as normally composed, to indicate interim measures of protection."

B. Jurisdiction under Article 36, paragraph 5 of the Statute

When a case is to be adjudicated by an ad hoc chamber, the problem of whether the chamber or the full Court will decide jurisdiction arises. There are several arguments in favor of the chamber’s
power to decide its jurisdiction. First, any objections regarding the jurisdiction of the ICJ can be raised until the time limit for the delivery of the Counter-Memorial. Second, since only the chamber is entitled to exercise jurisdiction as to the merits, the objection to jurisdiction may be joined to the merits and entitled jurisdiction. Third, Article 90 of the Rules provides that the regular procedure of contentious proceedings is applicable to the ad hoc chambers.

Finally, even if the chamber has not been formed when an objection regarding the Court’s jurisdiction is raised, the Court’s practice shows that the Court can nevertheless take procedural steps, such as indicating interim measures of protection, before it renders a decision on its jurisdiction. Therefore, it is generally the chamber’s responsibility to determine the existence and extent of its jurisdiction.

C. Intervention by a Third State

The Land, Island and Maritime Frontier Case (El Salvador v. Honduras), concerned, among other things, the Bay of Fonseca and the possible problem of an intervening third state in a case decided by an ad hoc chamber. The intervention was a practical issue, since the Bay of Fonseca has been administered severally by the two parties and by Nicaragua since 1971. The intervention would engender several problems, such as the problem of whether the full Court or the chamber, must consider such a request, and the problem of whether an intervening State may have an opportunity to influence the composition of the chamber.

It is generally accepted that chamber procedure and intervention by a third party are not per se incompatible. Since intervention by a third party is incidental to the main proceeding, the intervening State may not decide whether the case shall be decided by an ad hoc chamber.

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179. This is confirmed by the exercise of another form of incidental jurisdiction (Statute Art. 41) by ad hoc chambers, supra VIII, A.
180. 1957 I.C.J. 111.
181. The only exception where the Court would not even be able to form a chamber is where there is not prima facie any basis of jurisdiction. See, e.g., the Antarctic cases (U.K. v. Chile, U.K. v. Argentina), 1956 I.C.J. 12 and 1956 I.C.J. 15, where the Court was not able to join the proceedings due to an obvious lack of jurisdiction and could only strike the cases from the general list. S. Rosenne, supra note 87, at 551.
183. W. Fritzemeier, Die Intervention vor dem Internationalen Gerichtshof 84 (1984); W. Liedermann, Das Prozessrecht des Ständigen Internationalen Gerichtshofes 25 (1934); Friede, Die Intervention im Verfahren vor dem Ständigen Internationalen Gerichtshof, 3 ZAöRV 1, 52-55 (1933).
184. Friede, id. This problem was specifically addressed in the Draft Rules submitted to
The power to decide whether a third party will be allowed to intervene must be divided into two distinct situations: when a request to intervene occurs prior to formation of the chamber and when a request to intervene occurs after formation of the chamber. This distinction is critical, since States which are allowed to intervene under Article 62 or 63 of the Statute must accept the state of the case at the time the request is granted.\(^{185}\) This principle applies to a State which is about to ask for permission to intervene. Therefore, the request will be judged by the chamber if such chamber had been already formed. The interest of the intervening State that its request for intervention is not decided by a chamber with a composition influenced by the main parties is protected by several provisions of the Rules. The application for permission to intervene must be filed as quickly as possible,\(^{186}\) yet the Court is bound to decide upon such an application as a matter of priority.\(^{187}\) Thus, in practice, the application will be considered by the full Court before the chamber is formed, unless the application is filed late.\(^{188}\)

A second issue is whether a State, admitted as an intervener before the chamber is formed, can influence the composition of the chamber.\(^{189}\) An intervention under Article 62 of the Statute must be distinguished from an intervention under Article 63 of the Statute. Article 26, paragraph 2 of the Statute and the corresponding provisions of the Rules stipulate that the parties can, in one way or another, influence the composition of the chamber. Thus, the question arises whether an intervener can be legitimately regarded as a party.

It is certain that a state which is about to ask for permission to intervene under Article 62 is not yet a party to the case.\(^{190}\) Once a State is admitted for reasons of intervention under Article 62 of the Statute, the situation is less clear. The original wording of Article 62 of the Statute of the PCIJ provides that a State may request permiss-

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\(^{185}\) S. ROSENNE, supra note 87, at 443; V. MANI, INTERNATIONAL ADJUDICATION 273 (1980).

\(^{186}\) 1978 Rules, Art. 81, para. 1, in regarding to Statute Art. 62; Rules, art. 82, para. 1, in regard to Statute Art. 63.

\(^{187}\) Rules, Art. 84, par. 1.

\(^{188}\) Prima facie such decision by the full Court would go beyond the jurisdiction of the Court, since the main parties had only granted jurisdiction to a chamber of the Court. It should be noted, however, that the decision on such application for intervention is an exercise of incidental jurisdiction and thus is based solely on Arts. 62 or 63 of the Statute, Briggs, supra note 76, at 93.

\(^{189}\) In case the State is admitted at a stage where the chamber had already been formed, the just mentioned principle applies, i.e. that the State has to participate in the proceedings as they were when said State was admitted.

\(^{190}\) 1981 I.C.J. 6-7, where the request of Malta for the nomination of a judge ad hoc was denied.
sion “to intervene as a third party.” The French text, however, never contained any corresponding phrase. Since both texts are authentic,\(^{191}\) the authors seemingly assumed that a State permitted to intervene under Article 62 would become a “party.”\(^{192}\) On the other hand, the Preface to the Proces-Verbaux of the Proceedings of the Advisory Committee of Jurists, which was responsible for drafting the Statute of the PCIJ, stated that the English text of the Proces-Verbaux is to be considered only as a translation.\(^{193}\)

During the drafting of the statute of the ICJ, the phrase “as a third party” was deleted from the English text, since it was considered to be “misleading.”\(^{194}\) The rapporteur of the committee at the same time emphasized that the elimination of this phrase was not intended to “change the sense thereof.”\(^{195}\) Therefore, the guidance as to conclusions that may be drawn from the wording of the Statute is ambiguous.\(^{196}\)

Article 65 of the 1936 Rules of Court provided that “the party intervening” has a right to file a memorial. This choice of words was abandoned in 1978, since Article 85 of the 1978 Rules speaks only of the “intervening State.” In the next sentence, however, the rules provide that the “parties” may furnish observations on the statement “of the intervening State.” Since the travaux preparatoires of the rules of the ICJ have not been published, this interpretation is also insecure. Article 85, paragraph 1 of the 1978 Rules stipulates that the intervening State shall be supplied with copies of all relevant documents, and that it shall be entitled to submit a written statement; it is doubtful whether these rights are exclusive.\(^{197}\)

The decisive factor should be that the intervening State is also bound by the judgment.\(^{198}\) By allowing the main parties to determine the composition of the chamber and thereby influence the outcome of the binding judgment, while denying these rights to the interven-
ing state, the basic principle of sovereign equality of the States involved is jeopardized. The Court confirmed this by stating that it considers a State admitted under Article 62 as a party.\textsuperscript{199} As a result the intervening third State would enjoy the full rights under Article 26 of the Statute and Articles 17-18 of the Rules.

The situation concerning an intervening State participating under Article 63 of the Statute is different. Such a State does not participate as a party on equal footing with the original litigant States. This rule may be derived from both the travaux preparatoires of the Statute\textsuperscript{200} and from the practice of the Court in the S.S. Wimbledon Case.\textsuperscript{201} Accordingly, this state may not exercise any influence as to the composition of the chamber, either while its application is under consideration or after it has been admitted.

\section*{D. Interpretation and Revision of Judgments}

Article 100 of the 1978 Rules provides that a request for the interpretation or revision of a chamber’s judgment shall be considered by that chamber. In the case of an ad hoc chamber under Article 26, paragraph 2 of the Statute, a conceptual difficulty is encountered.

The Chamber for Summary Procedure and the special chambers under Article 26, paragraph 1 of the Statute are to be regarded as continuing bodies in the same sense as the Court itself,\textsuperscript{202} in which the individual composition at a given moment is incidental. Therefore, that same chamber may interpret or revise its own prior judgment. This result is confirmed by the practice of the PCIJ in the Treaty of Neuilly Case.\textsuperscript{203}

Theoretically, an ad hoc chamber may become functus officio and dissolve when the final judgment is delivered.\textsuperscript{204} Articles 33 and 17 of the Statute do not answer this question. While it is true that

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  \item \textsuperscript{199} 1981 I.C.J. 15 and 18 (Tunisia/Libya Continental Shelf — Request for Permission to intervene by Malta); see also Sep. Op. Mbaye, 1984 I.C.J. 39 (Libya/Malta Continental Shelf — Request for Permission to intervene by Italy); Elis, \textit{The Limits of the Right of Intervention in a Case before the International Court of Justice}, Festschrift für H. Mosler 159, 167-68 (Bernhardt ed 1983); Aërchéage, \textit{Intervention under Art. 62 of the Statute of the International Court of Justice}, 453-54; Morelli, \textit{La Théorie Générale du Procès International}, 61 Hague Recueil 256, 321 (1937 III).
  \item \textsuperscript{200} 200 P.C.I.J. (ser. D) No. 2, at 216.
  \item \textsuperscript{201} Poland was called an intervener, but not a party, P.C.I.J. (ser. A) No. 1, p. 11; the use of the term “intervening Party” in regard to Cuba in the Haya de La Torre Case, 1951 I.C.J. 72, amounts to a falsa demonstratio, Oda, \textit{supra} note 193, at 644-45; the statements in the literature unanimously deny the status of a party, see, e.g., Hambro, \textit{Intervention under Art. 63 of the Statute of the International Court of Justice}, Il Processo Internazionale — Studi in Honore di Gaetano Morelli 387, 397 (XIV Comm. e Studi 1975); M. Hudson, \textit{supra} note 13, at 422.
  \item \textsuperscript{202} S. Rosenne, \textit{supra} note 23, at 45.
  \item \textsuperscript{203} See \textit{supra} II, B.
  \item \textsuperscript{204} Oellers-Frahim, \textit{supra} note 4, at 324; S. Rosenne, \textit{supra} note 23; Ostrihansky, \textit{supra} note 1, at 46.
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these articles foresee that judges shall continue to sit in all phases of the case, the interpretation or revision is not a "phase" of the case, but a new case in itself. Furthermore, the provisions apply to individual judges but not to the chamber per se.

The prior practice of arbitral tribunals may reveal a solution to this question. Scholars have argued that a court of arbitration likewise becomes functus officio upon the rendition of its award. The continuing powers of interpretation or revision to be exercised after the final judgment, depend, however, upon the terms of the compromise. The Model Rules on Arbitral Procedure, drafted by the International Law Commission, confirm this and provide: "A dispute [regarding interpretation] may be submitted to the tribunal which rendered the award." Only if it was impossible to submit the dispute to the arbitral tribunal would the parties refer the request for an interpretation to another tribunal.

The practice of international tribunals further confirms this procedure. In the UK/France Continental Shelf Case, the request for interpretation was submitted to the Court of Arbitration three months after its final judgment; indeed, the tribunal did not consider itself being functus officio. Thus, the question of when and under what circumstances a tribunal becomes functus officio depends upon the parties' agreement.

The practice followed in relation to ad hoc chambers of the ICJ confirms this determination. The special agreement submitting the Gulf of Maine Case to the ICJ demonstrates this in a particular way. Canada and the United States agreed that, "in case of a dispute regarding the extension of the maritime boundary seaward as determined by the chamber of the ICJ, [ . . . ] either party may submit the question [ . . . ] to the chamber of five judges constituted in accordance with this special agreement." This language indicates that the parties did not consider that the chamber became functus officio with the judgment; they instead believed that the chamber continued to exist for the purposes of the instrument granting juris-

205. See the numbering of the cases in the General List.
207. Model Rules Art. 28, par. 1.
208. Model Rules, Art. 28, par. 2.
209. 18 U.N.R.I.A.A. 272; see also the Sabotage Cases before the German-American Mixed Commissions, where the umpire stated, that the commission after rendering its decision has not become functus officio, Mixed Claims Commissions 1933-1939 (United States v. Germany) (Administr. Decisions) 1127 [cited in W. Carlston, supra note 206, at 227], the commission had to deal with a large group of cases and may be thus regarded as semi-permanent; see for the relevance of this distinction C. Hyde, International Law Chiefly as Interpreted and Applied by the U.S. 1962 (2nd ed. 1945).
In the Frontier Dispute Case the Court nominated experts on April 9, 1987, pursuant to Article IV of the Special Agreement between Burkina Faso and Mali, even though the ad hoc chamber had previously rendered its judgment in December 1986. Thus, the Court's practice demonstrates that the Court believes an ad hoc chamber to remain intact upon judgment, and not to become ipso facto functus officio with the rendering of the judgment.

The only prerequisite to the chamber's continuing vitality seems to be that the instrument granting jurisdiction must have provided for post-judgment functions of the chamber. Since the jurisdiction of the chamber to deliver an interpretation or to revise its original judgment is contained in Article 60 and 61 of the Statute, which grants compulsory jurisdiction, this requirement is fulfilled even if not expressly provided for in the compromis. Therefore, an ad hoc chamber is empowered to interpret or revise its own judgments.

This interpretation power presents a practical problem. No time limit is found anywhere in the Statute for instituting a case of interpretation, though this may be stipulated in a compromise. The only time limit in the Statute is found in Article 62, paragraph 5, which stipulates a time limit of ten years after which, under all circumstances, a revision would be excluded. The term of office of a member of the chamber may have expired when the question of interpretation or revision arises. Since Articles 33 and 17 of the Statute do not address that problem, the judge whose office has expired is not entitled to remain in the chamber and may not be re-elected to the chamber. In order to cope with this difficulty, such vacancies should be filled in accordance with Article 17, paragraph 3 and Article 17, paragraph 2 of the Rules. Article 17, paragraph 3 covers "any vacancies," also covering this situation.

IX. Outlook and Conclusion

Some authors have expounded the idea that an ad hoc chamber of the Court could be enabled to render advisory opinions either by an extensive interpretation of the Statute, or by a delegation from the Court to the chamber. While it is already questionable

212. Zoller, supra note 4, at 317; contra Oellers-Frahm, supra note 4, at 324.
214. S. ROSENNE, supra note 23, at 45.
215. See supra note II, C.
216. Ostrihansky, supra note 1, at 46.
217. In regard to judges ad hoc no specific problems occur.
219. Ostrihansky, supra note 1, at 52.
whether the Court can render advisory opinions through one of its chambers, it is even less convincing that the Court can delegate such a duty to an ad hoc chamber. This rationale depends upon the fact that in an advisory opinion there is not a "case" in the sense of Article 26 Statute, nor are there parties necessary to agree to the number of judges.

It was written some years ago that the Court's time seems to be running out, unless its ad hoc chambers open a road back to the Court's former position in the life of the international community. This road has been opened in view of the recent cases considered by such chambers, but it seems to have led to a point halfway between adjudication and arbitration. The Court must take a long journey on this road in order to clarify and solve some of the issues and problems raised in this paper.

Considering the role of such ad hoc chambers within the structure of the Court brings to mind the basic principle in the field of international adjudication: "In the present state of the law, a dispute cannot be submitted to a tribunal, except with the consent of the States concerned." Thus, the States may choose to what extent they will select such a "necessary evil," the ad hoc chamber procedure. On the other hand, the Court should not yield to any temptation, in order to allure more clients, to go beyond the limits provided by the Statute and its own judicial function.

222. Petren, supra note 30, at 75.
225. Mosler, supra note 30, at 559.
226. See the four cases mentioned infra. But see also the four cases pending before the full Court: Military and Paramilitary Activities in and against Nicaragua, reparations phase (Nicaragua v. United States), 187 I.C.J. 188 (Order of November 18, 1987); Border and Transborder Armed Actions (Nicaragua v. Honduras), 1988 I.C.J. 9 (Order of March 31, 1988); Nicaragua v. Costa Rica (discontinued); Guinea-Bissau v. Senegal; Iran v. U.S.; Nauru v. Austrl. and a case brought by Denmark against Norway for the delimitation of the maritime and continental shelf boundary between eastern Greenland and Jan Mayen Island.