DISSENTING OPINION OF JUDGE DE CASTRO

[Translation]

1. It is with great regret that I have written the present dissenting opinion. May I say that I find much of the reasoning and many of the conclusions in the Judgment to be entirely sound; I am thus relieved of any duty to deal with these. I shall therefore confine myself to discussing a point which has not been decided by the Judgment, and to examining in detail the subject on which I disagree.

I understand the practical reasons why there has been a departure from the logical order, and reservation *(b)* in Greece's accession to the General Act has been dealt with first, before any decision whether the General Act is still in force. By taking it as settled that reservation *(b)* excludes the Court's jurisdiction, it has been possible to avoid deciding a very delicate question.

I am unable to follow the Judgment in this respect, because my interpretation of reservation *(b)* leads me to find in favour of the Court's jurisdiction.

2. The very first question which I have had to consider has been whether the General Act is still in force. This question has already been raised in the *Nuclear Tests* cases, and it was then carefully examined and discussed by the Court. It was not settled, because in the Judgments given in 1974 it was considered that the Applications had become without object as a result of the statements made by the French Government. I think that, despite the doubts which may still be entertained, it must be admitted that the Act is still in force, for the reasons which have already been treated *in extenso* in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock (*I.C.J. Reports 1974,* pp. 327 ff.) as well as in my own dissenting opinion (*ibid.,* pp. 377 ff.) and the dissenting opinion of Judge Sir Garfield Barwick (*ibid.,* pp. 405 ff.), to which I venture to refer [1]—I feel obliged to take this course in order to avoid making this opinion unnecessarily lengthy.

3. The reason why I disagree with the Judgment relates to a single point, but a fundamental one, namely the way in which reservation *(b)* should be interpreted. I think that a rigorous application of the appropriate rules for interpretation should have been adopted. Since my view is quite different from that taken in the Judgment, I feel obliged to explain the reasons for my dissent.

[1] It should however be noted that in the same cases, Judges Gros (*I.C.J. Reports 1974,* pp. 296-297) and Petrén (*ibid.,* p. 302), expressed doubts as to the current validity of the General Act in their separate opinions, without however giving fully their reasons.

The meaning has to be ascertained of the phrase in the reservation reading "disputes relating to the territorial status of Greece". Does this cover disputes over the continental shelf? In order to elucidate this, I shall endeavour to examine the arguments in favour of and against such inclusion.

4. It is a well-established principle that the purpose of interpretation is to ascertain the true will of the parties. The terms used in a declaration of intention must be regarded as the means ("traces", clues, *indicia*) to be used in order to reach a conclusion as to the intention of the authors of the declaration.

When a declaration of intention made a considerable time ago has to be construed, it will always be necessary to verify how the words should be understood at the present time. The meaning of words may change with time. In order to interpret any statement, to ascertain its real meaning, we must first of all concentrate on the meaning which it could have had at the time when it was made. Words have no intrinsic value in themselves. They are, or represent, sounds *(phonema),* but their semantic value depends on the time and the circumstances in which they were uttered [1].

5. Greece's accession to the General Act is a unilateral declaration, as is that of Turkey. Each is made in the context of the pacific settlement of disputes instituted by the Act; these declarations, which tie up with the declarations of accession made by other States, establish links between each pair of States acceding to the Act and to the extent that both States have entered into the same commitments. By virtue of their accession to the General Act, a link was forged between Greece and Turkey, the extent of which depends upon the two declarations which, by the agreement which they embody, becomes the common will of the two States [2].

In seeking to ascertain what it was that had become the common will of Greece and Turkey with regard to the meaning of Greece's reservation *(b),* we are faced with the fact that at the time when these two States acceded to the Act, on 14 September 1931 and 26 June 1934, States in general, and Greece and Turkey in particular, were totally unaware that there could be problems relating to the continental shelf. It was only much later that jurists, publicists and technical experts began to concern themselves with the continental shelf. The Truman Proclamation of 1945 can be regarded

[1] The Court has said that it

> "cannot base itself on the purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, *having due regard to the intention* of the Government of Iran *at the time when it accepted* the compulsory jurisdiction of the Court" (*I.C.J. Reports 1952,* p. 104, emphasis added).

[2] A situation is thus created which is analogous to that of a treaty—a "treaty situation", an expression I owe to Sir Gerald Fitzmaurice: "The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", *British Year Book of International Law,* XXXIV, 1958, p. 77.

as the starting point of the law and doctrine on this subject. It is therefore obvious that at the time of the meeting of wills between Greece and Turkey, there was not—and could not be—any agreement between their respective declarations to exclude from the jurisdiction of the Court questions relating to the continental shelf.

That being so, the following legal question arises: if the words "disputes relating to the territorial status" in Greece's reservation *(b)* could be interpreted—which is highly doubtful—as comprising a subject (questions relating to the continental shelf) which neither Greece nor Turkey had conceived or were even in a position to conceive, should it be held that this was something which could have constituted the subject of a reservation?

Legal tradition settles the matter logically, and is condensed in the principle of interpretation expressed in these terms by the French Civil Code:

> "However general may be the terms in which an agreement is conceived, it includes only the things on which it appears that the parties proposed to contract [1]."

6. If on the other hand the unilateral nature of reservation *(b)* is kept in view, it must be interpreted in the light of the object and purpose of Greece, taking into account the circumstances in which the declaration of accession was made.

As the contemporary practice shows, the purpose of the use of the expression "territorial status" in the reservations contemplated by paragraph 2 *(c)* of Article 39 of the General Act was the same as that expressed in other treaties by such terms as "territorial integrity of States", "territorial questions", "questions relating to existing frontiers". The purpose of Greece's reservation *(b)*, on the advice of M. Politis (letter of 9 September 1928), was to prevent any questions being brought before the Court relating to the application or interpretation of the treaties, and the revision of the frontiers, territorial statuses, and international servitudes (rights over

[1] Article 1163. A basis for this Article can be found in a long-established tradition. It appears to have originated in a fragment of Ulpian (D2.15.9, para. 3, *in fine*), which was taken up into common law; in France, by Domat (*Les lois civiles*, I,1,2, Rule 23, Paris edition of 1777, Vol. I, p. 24) and by Pothier (*Traité des obligations*, Part I, Chap. I, Art. VII, Rule 8, *Works*, Paris edition of 1818, Vol. III, p. 67). Article 1163 of the *Code Napoléon* was followed, almost word for word, by other civil codes; see for example Article 1138 of the Italian Civil Code of 1865, and Article 1364 of the 1942 Code; Article 1283 of the Spanish Civil Code; and Article 1386 of the Civil Code of the Netherlands.

It should be observed that the common concept underlying the articles referred to is also known in the legal systems of Greece and Turkey ; Article 173 of the Greek Civil Code; Article 18 of the Swiss Federal Code of Obligations (Parts I and II of this Code were taken over by the Turkish Republic on 4 October 1926).

These rules derive from the very nature of consent. For consent to exist, there must be a meeting of wills on a subject-matter which must be determined at least as regards its species (see Art. 1129 of the French Civil Code, which expresses general teaching).

ports and lines of communication), laid down in the treaties concluded following the dismantling of the Ottoman Empire.

7. To meet this argument, it has been possible to contend that the expression "territorial status" is generic or general in nature, and covers the concept of continental shelf. It is correct to say that the term is a generic one; the meaning of most words is in fact subject to a certain degree of flexibility, with the exception of those which refer to individual concrete objects. This is so with regard to the expression "territorial status". It refers to situations which are susceptible of development, whether it be development of the status or legal régime (rights, servitudes, restrictions), or whether it be development of the territory itself (for example, by modification of frontiers).

However, any term may have a wide meaning or a narrow meaning, a meaning which is more or less limited. A term which has a meaning of its own cannot be understood as comprising anything which is foreign to its ordinary and natural meaning [1]. In my opinion, it is not possible, as a result of differences of essential nature, to regard the term "territorial status" as capable of applying to the existence, legal régime, and delimitation of the continental shelf.

8. There is no doubt that the term "territorial status" is equivalent to the term "status of the territory". In order to be able to conclude either that the status of the continental shelf (rights, delimitations) is comprised in "territorial status", or on the other hand that it is not, it will be necessary to ascertain which of the two solutions can be reached in a natural way from the point of view of status and on that of territory.

The status of territory is something which is clear and well defined; it is the status of sovereignty itself. On the other hand, the régime of the continental shelf is the result of accelerated development of the law of the sea, which does not seem to have reached finality with the 1958 Geneva Convention. At the present time, it is made up of narrowly limited rights, i.e., nothing more than what are called sovereign or exclusive rights for the purposes of research and exploration of the shelf and exploitation of its natural resources.

The territory of a State, in the strict sense of *terra firma* (mainland and islands) is also something which is well defined. On the other hand, the continental shelf has to be delimited in every case, and to do this, account must be taken of various factors (geological structure, distance, geographical position, depth of the sea, existence and economic value of mineral resources, etc.).

[1] An example which has been given is that of the following clause in a will: "I bequeath all my vehicles to my former chauffeur." This provision may be interpreted as signifying that the testator leaves to the beneficiary his new Cadillac, but not the locomotives or trucks of the railway company of which he was proprietor, nor aircraft from his fleet. On the intention implied in terms of general scope, cf. Vattel, *Le droit des gens*, ed. Pradier-Fodéré, Vol. II, Chap. XVII, para. 262, p. 249, Paris, 1863; *P.C.I.J., Series A/B, No. 50*, pp. 377-378.

9. The fact remains that the Court may, as a result of the arguments put forward in its Judgment in the *North Sea Continental Shelf* case, have sown some doubt concerning the concept of territory. In that Judgment it is repeatedly stated that the coastal State's continental shelf area "constitutes a natural prolongation of its . . . territory" (*I.C.J. Reports 1969,* p. 22, para. 19) and that:

> ". . . the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea" (*ibid.,* p. 31, para. 43; see also pp. 34, 37 and 47, paras. 51, 58 and 85).

These statements notwithstanding, it must not be thought that the Court considers the continental shelf to be a real part of the coastal State's territory, enjoying the same legal status. It seems rather that the Court wished to express, in metaphorical but striking terms, what was the basis of the rights over the shelf, that is to say of the application of the so-called principle that "the land dominates the sea" [1].

The essential difference between the meaning of the term "territorial status" and that of the term "status of the continental shelf" is highlighted in the relations between Turkey and Greece. Turkey has at present no difficulty in recognizing, as regards the territorial status of Greece, that the Greek islands form, together with mainland Greece, a legal and political unity. On the other hand, Turkey denies that the Greek islands have a continental shelf.

10. It can, of course, be supposed that Greece intended, when formulating the reservation, to give the term "territorial status" a meaning so broad that it could come to comprise the continental shelf as well. However, that would be to depart from the sphere of interpretation proper, based on the intention of the declarant as revealed by the natural and ordinary meaning of the terms employed, and to enter the domain of imagination or analogy, thereby undermining the stability of the law.

11. It has been observed, and rightly observed, that, in order to delimit the continental shelf, it will sometimes be necessary to elucidate questions concerning the circumstances of the territory and even its status (for example, the drawing of baselines, the relative configuration of adjacent or

[1] The Geneva Convention on the Territorial Sea states, in Article 1: "The sovereignty of a State extends, *beyond its land territory* and its internal waters, to a belt of sea adjacent to its coast, *described* as the territorial sea." (Emphasis added.) It is, I think, apparent that the term "territorial sea" is deliberately used here with the value of a legal fiction. Similarly, when the Court observes, in connection with the continental shelf, that *it may be said* to be a prolongation of the territory or that it *may be deemed* to be a part of the territory, it is employing a useful formula which is useful as a justification of the rights of the coastal State over the shelf; States have also been able to use this assimilation in order to justify their claims to extend or to fortify their rights over the shelf.

opposed territories, historic bays, the extent of territorial waters). But the fact that it may be necessary to consider questions relating to territory in order to decide the merits of the case does not transform the dispute relating to the continental shelf into a dispute relating to territorial status. If the merits of the case had to be decided, and if questions concerning the territory had to be taken into account, they would have to be treated as preliminary questions. Such questions are well known in private international law, as is the difficulty which they present. The Court has had occasion to consider this legal concept in the *Nottebohm* case. Liechtenstein had instituted proceedings before the Court for restitution and compensation on the ground that the Government of Guatemala had acted towards Nottebohm, "a citizen of Liechtenstein, in a manner contrary to international law". In order to decide upon the admissibility of the Application, Nottebohm's nationality fell to be considered. The Court treated this as a preliminary question. It stated:

> "The Court does not propose to go beyond *the limited scope of the question* which it has to decide, namely whether the nationality conferred on Nottebohm *can be relied upon* as against Guatemala *in justification of* the proceedings instituted before the Court." (*I.C.J. Reports 1955,* p. 17.) (Emphasis added.)

Of course the Court, by finding in favour of jurisdiction in the present case, might have come up against great difficulties of this kind, but that could not constitute a ground for a denial of jurisdiction. The same problems might have arisen if Greece and Turkey had brought the case before the Court by means of a special agreement or if Greece had withdrawn, or if it were to withdraw, reservation *(b),* at an appropriate time.

12. Such a far-reaching question raises the possibility that the meaning of the terms used in a declaration of intention may alter as a result of the evolution of law. Is it possible that the expression "territorial status", as employed in 1931, has changed its meaning because modern law attributes rights over the continental shelf to coastal States?

This question requires some elucidation, with the aid of a few distinctions, before it can be answered.

At the outset we shall have to examine separately, first, the rule of contemporaneity applicable to the interpretation of declarations of intention—according to which the words used must be given the meaning attaching to them at the time when they are employed—and secondly, that of intertemporal law, which indicates what is the law to be applied to *facta praeterita.*

To seek to establish what lies behind the use of a term in order to ascertain the intention of the party which made the declaration is one thing; to determine the effect which a new legal régime may have on an already existing situation is another.

The purpose of interpretation is to ascertain the meaning of the words used in the declaration, so as to verify what could have been the intention of the declarant and how it may have been understood by the party to whom the declaration was addressed. The evolution of law cannot modify the meaning which the words had for the authors of the declaration. The evolution of law can, by establishing new legal rules, confer or withdraw rights, and can even change an entire legal régime, but it cannot change the meaning of a declaration: it cannot make the declarant say what he did not wish to say or even what he could not have wished to say.

There is even less reason to interpret a unilateral declaration, like Greece's accession to the General Act in 1931, as including a reference to the continental shelf. It would not be right to attribute to Greece a manifestation of will concerning something of which it was unaware and which, for that reason, it could not have intended *(nihil cognitum nisi praecognitum).*

13. The Vienna Convention has laid down, as a general rule for the interpretation of treaties, that they must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31, para. 1). As a supplementary means of interpretation, it provides that recourse may be had to the *circumstances in which* the treaty *was concluded* (Art. 32); in other words, the meaning at the time when the treaty was concluded must be sought. There is every reason to apply these rules to Greece's accession to the General Act. It is not at the level of interpretation that the evolution of law can have consequences but at another level: if a new peremptory norm *(jus cogens)* emerges, the Convention considers that any existing treaty which is in conflict with that norm becomes void and terminates (Art. 64) [1].

It therefore seems permissible to conclude that the task of interpretation is to verify what was or could have been the will of Greece in 1931 when it used the expression "territorial status" in reservation *(b)* to its accession to the General Act. The function of intertemporal law is different; it is by the operation of the rules of intertemporal law that new sovereign or exclusive rights over the continental shelf have been attributed to Greece and Turkey.

14. It should also be noted, in order to avoid any confusion on other points, that the interpretation of treaties and contracts must follow different rules from those appropriate to the interpretation of laws. The latter, as sources of law, cannot be considered in isolation. They must be interpreted and applied in the context of the legal system in force at the time when the interpretation takes place. This is what is called systematic interpreta-

[1] Except for the provisions of this Article, it seems that general intertemporal law, that is to say the principle of non-retroactivity, and the rule *tempus regit factum,* will have to be applied to treaties.

tion [1]. This interpretation procedure is also that applicable to law-making treaties *(Vereinbarungen),* as, for instance, the United Nations Charter, which, being also sources of law, are subject in their interpretation to the evolution of law [2].

15. Treaties, and declarations made within the framework of a treaty, have to be interpreted in their context (Vienna Convention, Art. 31, para. 1); the same applies to Greece's reservation *(b).*

The Greek accession to the Act contains declarations of two types: one is designed to accept the jurisdiction of the Court in general; the others, constituted by the reservations, are intended to delimit the subject-matter of the jurisdiction attributed to the Court. Each of them has its own purpose and nature.

In accordance with Article 17 of the Act, Greece's accession recognizes the jurisdiction of the Court for *all disputes* with regard to which the parties are in conflict as to their respective rights. The instrument of accession (if, for the moment, the reservations are disregarded) contains a general and unlimited reference to any legal dispute which might arise between the parties which have acceded to the Act. Consequently, and if reservation *(b)* is not taken into consideration, it can be stated beyond any doubt that the Court has jurisdiction in the dispute between Greece and Turkey concerning the Aegean Sea continental shelf.

Reservation *(b),* on the other hand, is designed to limit the Greek accession to the Act by means of a clearly specified exception which establishes a special demarcation in the extensive area covered by the accession. Outside the specific area of the exception, the general declaration on jurisdiction has effect.

16. Reservation *(b)* covers in particular a clearly defined special case, which must be interpreted according to its individual and particular nature. The General Act stresses that permitted reservations are required to be of this kind. It makes it clear that reservations should be formulated with regard to disputes relating to *particular* cases or clearly *specified* subject-matters, such as *territorial status,* or disputes falling within *clearly*

[1] The systematic element is considered to be one of the four elements to be employed in interpretation, according to Savigny's generally accepted doctrine, especially since the publication of *System des heutigen römischen Rechts* (I, para. 33).

In discussing the evolution of law it must be remembered that, according to Hobbes's observation (text cited by Radbruch, "Arten der Interpretation" in *Recueil d'études sur les sources du droit en l'honneur de François Gény,* 1934, II, p. 218), the legislator is not the person whose authority has made the law for the first time, but the person whose authority causes it to continue to be law; this explains the influence of the evolution of law as a whole on the interpretation and development of individual laws and law-making conventions. On the other hand, in the interpretation of treaties, whose force is founded on the will of the parties *(pacta sunt servanda),* no account is to be taken of a will extraneous to that of the authors.

[2] *I.C.J. Reports 1971,* p. 31, para. 53; see also my separate opinion, p. 184.

defined categories (Art. 39, 2, *(c)*) [1]. Therefore, and in conformity with the received rules of interpretation, we must confine ourselves to the strict meaning of the terms employed in the reservation, and it does not seem permissible to extend this reservation to questions relating to the continental shelf. These questions were also *aliquis de novo emergentibus*; they are questions which nobody had conceived or could have conceived at the time when Greece and Turkey acceded to the Act. To read the expression "disputes relating to territorial status" as comprising "disputes relating to the continental shelf" would amount to giving the expression an extensive interpretation which does not accord with the intention of the authors of the unilateral declaration, and runs counter to the meaning which could be attributed to it, and in which it was understood, in 1931 and 1934.

Moreover, a strict interpretation is generally appropriate for all reservations. Its very nature as an exception to a declaration of a general character means that the traditional rule of *exceptio strictissimi interpretationis* must be applied to the reservation [2].

17. Before concluding this statement of my opinion, it would seem not without interest to consider, in that connection, the so-called principle of the restrictive interpretation of declarations conferring jurisdiction upon the Court, the shadow of which is in the background of any discussion of the Court's jurisdiction.

The interpretation here proposed would lead to the conclusion that the Court has jurisdiction in the *Aegean Sea Continental Shelf* case. Should it be rejected by virtue of the principle of restrictive interpretation?

This principle or rule of interpretation is justified in so far as it is used to counter attempts at extensive or analogical interpretation. States are mistrustful of any restriction on their sovereignty. Instruments referring the settlement of disputes to a court or arbitral tribunal are justified in their view only by virtue of an express declaration whereby they give their consent.

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[1] With reference to this rule laid down in the General Act, Gallus observes:

> "The words employed ('clearly specified subject-matters') and the example of territorial status which illustrates them seem to indicate that the questions which can be excluded must be particular questions having clear contours, such as the nationality of individuals, aliens control, damage caused by insurrections, customs, etc." ("The General Act of Arbitration", *Revue de droit international et de législation comparée,* 1930, Nos. 1, 2 and 4, p. 907.)

[2] In a study which appeared in the same year as that in which Greece acceded to the Act it is stated, in connection with the interpretation of reservations, that:

> "An international tribunal called upon to interpret a reservation is bound by the rule that exceptions to general principles are to be interpreted restrictively. Therefore, if a treaty contains the principle of pacific procedure for any dispute whatsoever between the parties, any reservations contained in it must be interpreted in a narrow sense." (Habicht, Part II, "Analysis of the Treaties", in *The Post-War Treaties for the Pacific Settlement of International Disputes,* Cambridge, 1931, p. 1000).

The Charter of the United Nations shows its respect for this idea in the limits it lays down in Article 2, paragraph 7; but the Charter also says that States parties to a dispute, the continuance of which is likely to endanger the maintenance of peace, shall, first of all, seek a solution by peaceful means, including judicial settlement (Art. 33). As a result of this rule, on 25 August 1976 the Security Council, by consensus, invited the Governments of Greece and Turkey to

> "continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences".

Support for the theory favouring restrictive interpretation has been looked for in the text of a number of judgments of the two Courts. Indeed, it has even been stated that the Court will only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. However, a study of these texts as a whole seems to show that the real concern of the two Courts has been to verify whether or not it was the intention of the authors of the declaration to submit their disputes to the Court; and, if so, to what extent, subject to what reservations and on what conditions [1].

The Court is perfectly right to state that declarations conferring jurisdiction upon it must be interpreted strictly, by seeking out the intention of their authors and by sticking closely to their text and to the circumstances obtaining at the time when they were issued.

18. The interpretation which I have ventured to give to Greece's accession endeavours to be faithful to this criterion. It consists in construing the basic text of the accession in accordance with its own terms—that is to say, as covering all kinds of legal disputes. The reservation is construed narrowly, in the sense that it avoids an extensive interpretation which would be extraneous to the will expressed by Greece in 1931.

It may also be added that the effect of the accessions by States to the General Act was to create ties of co-operation among States for the purpose of promoting the peaceful settlement of disputes. There is no reason to look upon them with mistrust, and to include them in the category of "undesirable" matters which as such should be interpreted restrictively *(odiosa sunt restringenda)*; on the contrary, there are grounds for thinking that they are worthy of *favor iuris (favorabilia sunt amplianda).*

(Signed) F. DE CASTRO.

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[1] A theory which holds that *a priori* declarations conferring jurisdiction upon the Court are given to restrictive interpretation has been regarded as "singularly unconvincing": Rosenne, *The Law and Practice of the International Court,* 1965, Vol. I, p. 408. In the same sense, see De Visscher, *Problèmes d'interprétation judiciaire en droit international public,* 1963, p. 201.