CR 98/9 (traduction)

CR 98/9 (translation)

Mardi 9 juin 1998

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Le PRESIDENT : L'audience est ouverte.

La Cour se réunit aujourd'hui, conformément aux dispositions des articles 43 et suivants de son Statut, pour entendre les Parties en leurs plaidoiries sur la question de sa compétence pour connaître de l'affaire de la *Compétence en matière de pêcheries (Espagne c. Canada)*.

Avant de rappeler les principales étapes de la procédure en l'espèce, il échet de parachever la composition de la Cour aux fins de l'affaire. Aucune des Parties n'ayant de juge de sa nationalité sur le siège, chacune d'elles a usé de la faculté, que lui confère le paragraphe 3 de l'article 31 du Statut, de désigner un juge *ad hoc*. L'Espagne a désigné M. Santiago Torres Bernárdez et le Canada le très honorable Marc Lalonde. L'article 20 du Statut de la Cour dispose que «Tout membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». De par le paragraphe 6 de l'article 31 du Statut, cette disposition est applicable aux juges *ad hoc*. Le paragraphe 2 de l'article 8 du Règlement stipule que les juges *ad hoc* font leur déclaration en audience publique dans l'affaire à laquelle ils participent; et le paragraphe 3 du même article précise que les juges *ad hoc* «prononcent une déclaration à l'occasion de toute affaire à laquelle ils participent, même s'ils en ont déjà fait une lors d'une affaire précédente». Je dirai donc maintenant quelques mots de chacun des juges *ad hoc*, puis les inviterai, suivant l'ordre dans lequel ils prennent rang, conformément à l'article 7 du Règlement, à faire leur déclaration solennelle.

Le très honorable Marc Lalonde, de nationalité canadienne, a commencé sa carrière comme professeur d'université et avocat, et a pu ainsi s'investir d'emblée aussi bien dans l'étude théorique que dans la pratique du droit. Il fut vite appelé à exercer des fonctions politiques de haut niveau : comme conseiller politique du premier ministre Lester B. Pearson, puis comme directeur de cabinet du premier ministre Trudeau; il fut élu membre du Parlement, avant d'être nommé à divers postes ministériels importants, dont ceux de la santé, de la justice, de l'énergie et des finances. M. Lalonde continue de remplir des missions spéciales pour son gouvernement. Il a eu à remplir des fonctions d'arbitre international. Il est conseil de la reine depuis 1971.

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M. Santiago Torres Bernárdez, de nationalité espagnole, n'a plus à être présenté dans cette enceinte. Après une carrière longue et remarquée à la division de codification du Bureau des affaires juridiques de l'ONU, et après avoir travaillé avec distinction au sein de la Commission du droit international, il fut le greffier énergique de cette Cour de 1980 à 1986. Après avoir quitté ce poste, il fut désigné comme juge *ad hoc* par le Gouvernement du Honduras dans l'affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)*. Il est actuellement juge *ad hoc* désigné par le Gouvernement de Qatar dans l'affaire de la *Délimitation maritime et des questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*. M. Torres Bernárdez a aussi été le conseil de plusieurs Etats dans des arbitrages internationaux. Il est membre de la Cour permanente d'Arbitrage et de l'Institut de droit international.

Il est heureux pour la Cour que le choix des Parties se soit porté sur d'aussi éminentes personnalités.

J'inviterai maintenant chacun de ces juges à prendre l'engagement solennel prescrit par le Statut, et je demande à toutes les personnes présentes à l'audience de se lever. Monsieur Lalonde.

M. LALONDE : "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Monsieur Torres Bernárdez.

M. TORRES BERNÁRDEZ : «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Lalonde et Torres Bernárdez et les déclare dûment installés en qualité de juges *ad hoc* en l'affaire de la *Compétence en matière de pêcheries*.

L'instance a été introduite par une requête du Royaume d'Espagne, déposée au Greffe le 28 mars 1995, au sujet d'un différend relatif à la loi canadienne sur la protection des pêches côtières, telle qu'amendée le 12 mai 1994, et à la réglementation d'application de ladite loi, ainsi qu'à certaines mesures prises sur la base de cette législation et de cette réglementation, notamment

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l'arraisonnement en haute mer, le 9 mars 1995, d'un bateau de pêche, l'*Estai*, naviguant sous pavillon espagnol. La requête invoque, pour fonder la compétence de la Cour en l'espèce, les déclarations faites par chacune des Parties conformément au paragraphe 2 de l'article 36 du Statut.

Conformément au paragraphe 2 de l'article 40 du Statut, le greffier a immédiatement communiqué la requête au Gouvernement canadien.

Par lettre du 21 avril 1995, l'ambassadeur du Canada aux Pays-Bas a fait connaître à la Cour que, de l'avis de son gouvernement, celle-ci n'avait «manifestement pas la compétence nécessaire pour se prononcer sur la requête introduite par l'Espagne ..., en raison de l'alinéa *d)* du paragraphe 2 de la déclaration du 10 mai 1994 par laquelle le Canada a accepté la compétence obligatoire de la Cour».

Compte tenu de l'accord intervenu en l'espèce entre les Parties au sujet de la procédure lors d'une réunion que le président de la Cour a tenue avec leurs représentants le 27 avril 1995, le président, par une ordonnance du 2 mai 1995, a décidé que les pièces de la procédure écrite porteraient d'abord sur la question de la compétence de la Cour pour connaître du différend. L'ordonnance fixait au 29 septembre 1995 et au 29 février 1996, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire de l'Espagne et d'un contre-mémoire du Canada sur cette question. Le mémoire et le contre-mémoire ont été dûment déposés dans les délais ainsi fixés.

Lors d'une réunion que le président de la Cour a tenue avec les agents des Parties le 17 avril 1996, l'agent de l'Espagne a exprimé le souhait de son gouvernement d'être autorisé à présenter une réplique, et l'agent du Canada a indiqué que son gouvernement y était opposé. Chacune des Parties a ultérieurement confirmé ses vues à cet égard par écrit. Par ordonnance du

8 mai 1996, la Cour a décidé qu'elle était suffisamment informée, au stade considéré, des moyens de fait et de droit sur lesquels les Parties se fondaient au sujet de sa compétence en l'espèce, et que la présentation, par celles-ci, d'autres pièces de procédure sur cette question n'apparaissait en conséquence pas nécessaire. L'affaire s'est donc alors trouvée en état pour ce qui est de la question de la compétence.

Je note aussi qu'après s'être renseignée auprès des Parties, la Cour a décidé, conformément au paragraphe 2 de l'article 53 de son Règlement, de rendre accessibles au public les pièces de procédure déposées à ce jour en l'instance, avec les documents y annexés.

Je donne maintenant la parole à Monsieur le professeur José Antonio Pastor Ridruejo, agent du Royaume d'Espagne.

Mr. PASTOR RIDRUEJO: Thank you, Mr. President. Mr. President, Members of the Court.

Appearing before the Court for the first time, I wish to pay tribute to the remarkable work it has done, since its establishment, in the area of the peaceful settlement of international disputes. I also wish to present my most sincere compliments to its distinguished Members.

1. I recognize at the outset that the Respondent in this case, Canada, is a great country. It is, moreover, a country for which Spain has always held feelings of sincere friendship. It is also one of its partners in an important military alliance as well as in other no less important international organizations.

It is for that reason that we fail to understand why, on 12 May 1994, Canada amended the *Coastal Fisheries Protection Act* (Act C-29) and the Criminal Code (Act C-8) and why, pursuant to that legislation, on 3 March 1995 the Canadian Government approved new fishery regulations providing for the seizure on the high seas of Spanish and Portuguese vessels. Nor do we understand why on 9 March 1995, the *Estai*, a ship flying the Spanish flag, was forcibly stopped and inspected on the high seas by two Canadian patrol boats, pursuant to the above-mentioned laws and regulations. Again, we fail to understand why, in the days which followed, Canadian patrol boats once again harassed other Spanish vessels on the high seas.

Finally, we cannot understand why, since that date and up to the present time, given such a serious infringement of Spanish sovereignty, Canada, a country claiming friendship with us, has not sought a peaceful settlement to its specific dispute with Spain and persists to this day in its negative attitude. Spain now threatens us — and, in fact, the international community — with the introduction of new legislation, C-27 ("Act amending the *Coastal Fisheries Protection Act* and the *Canadian Merchant Navy Act*"). This text contains many provisions similar to those of the above-mentioned Act C-29.

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In its Counter-Memorial, Canada claims the existence of a long tradition of friendship between itself and Spain (para. 227). We do not deny this, but to be frank, Mr. President, Members of the Court, I must say that Spain has a very different idea of what friendship means, even inter-State friendship in the area of international relations.

2. The Canadian Counter-Memorial is littered with provocative asides aimed at the authors of the Spanish Memorial. We shall not recount them in detail. Nor shall we linger over replies to those remarks. That would be a waste of time for the Court and for ourselves. These provocative remarks are nothing compared with the very serious facts which underlie the Spanish Application.

What we see as important is Canada's lack of legal entitlement to take action on the high seas, including even the use of force, against ships flying the Spanish flag. It is the Canadian legislation with which we take issue, as well as the serious blow that was struck against the sovereignty of Spain as a flag State, on the basis of that legislation. What we are seeking first of all is legal satisfaction: a statement by the Court to the effect that Canada has no authority to take action against Spanish vessels on the high seas. We would then ask the Court to enjoin Canada from repeating the acts complained of, for which it should also offer adequate reparation. Lastly, we call on the Court to find that the seizure of the *Estai* was unlawful, since Canada has up to now refused to recognize the unlawfulness of that action.

3. Let it be clear, however, that we are not here to avenge the sullied honour of Spain, or to take up the subject of fisheries management and conservation in the NAFO Regulatory Area or

elsewhere. Indeed, it is in order to speak about a dispute as to sovereign jurisdiction that Spain appears today before the Court. It is Canada's rules providing for action on the high seas by its authorities against Spanish vessels which we do not accept. It is for the sake of respect for Spain's exclusive jurisdiction over ships flying its flag on the high seas — a power or jurisdiction derived from sovereignty — that we request the protection of the Court. It is Canada's lack of international authority to take action on the high seas against fishing boats flying the Spanish flag which led us to file the Application.

We therefore regard the title given to this case — "Fisheries Jurisdiction" — as entirely appropriate. Naturally, the term "jurisdiction" in this title does not refer to the jurisdiction of the Court, but to the lack of Canadian jurisdiction, or to put it another way, Canada's lack of legal entitlement to take action on the high seas against ships flying the flag of another State and, in this case, ships flying the Spanish flag.

However, Spain is not only defending its own interests. It considers that it is also defending the interests of the international community as a whole. This case relates to a very topical debate in modern international relations, one concerning the conflict between national unilateralism and international co-operation. Indeed, in the present case, the question ultimately is one of who should have international title to exercise certain powers on the high seas. Is the international community really prepared to leave fisheries protection on the high seas exclusively in the hands of coastal States with coastlines adjacent to the zone concerned? That is not, in any case, what emerges from the new law of the sea. By promulgating and implementing Act C-29 and the Criminal Code amended by Act C-8, Canada has shown itself to be the champion of unilateralism on the high seas. Spain, for its part, is firmly convinced that the only procedure for the exercise of the powers in question in conformity with international law is one of institutionalized international co-operation. The issue in this case is not just one of obtaining reparation. It is also one of guaranteeing respect for the rights of the flag State on the high seas.

3. Let me emphasize that Spain, a modern and democratic State, strongly supports the idea of international co-operation to preserve the marine environment, particularly as regards conservation of fish stocks on the high seas, both from the standpoint of principles and rules, and from that of practice.

Spain's membership of the European Union and the latter's participation in the work of many international fishery organizations is proof of this support. Spanish fishermen today respect the measures for the conservation and management of fish stocks adopted by those organizations. Canada itself has acknowledged this fact. As an illustration of Spain's commitment to co-operation, and without even alluding to the norms established by the institutions of the European Community, mention may be made *inter alia* of the Royal Decree of 28 March 1980, on the regulation of national fishing activity (*Boletin Oficial del Estado* of 16 April 1980); the Order of 2 March 1982 on catches of fish stocks in waters not subject to Spanish jurisdiction (*Boletin Oficial del Estado* of 22 March 1982); and the Order of 17 October 1988 on the regulation of activity by the Spanish fishing fleet in NAFO waters (*Boletin Oficial del Estado* of 20 October 1988). Naturally, these provisions ensure compliance with national and international rules on the subject by Spanish fishermen. They have been promulgated and they are applied.

4. In its Counter-Memorial, Canada attempted to redefine or circumvent the subject of its dispute with Spain. In this way, it seeks strenuously to bring the dispute within the framework of its reservation to the Court's jurisdiction. The reservation in question relates to

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."

In order to demonstrate that the Court has jurisdiction in this case, it is important for us to rebut the Canadian arguments on that subject. The main subject of the dispute should be clearly defined, as there is no doubt that it is not covered by the Canadian reservation which I have just read out to you. The subject has always been quite clear, both in our Application and in our Memorial.

Indeed, as we said in the Application:

"The question is not the conservation and management of fishery resources, but rather the entitlement to exercise a jurisdiction over areas of the high seas and the opposability of such measures to Spain." (point 4.)

We also said that the Application:

"does not refer exactly to the disputes concerning those measures, but rather to their origin, to the Canadian legislation which constitutes their frame of reference. The Application of Spain directly attacks the title asserted to justify the Canadian measures and their actions to enforce them, a piece of legislation which, going a great deal further than the mere management and conservation of fishery resources, is in itself an internationally wrongful act of Canada, as it is contrary to the fundamental principles and norms of international law; a piece of legislation which for that reason does not fall exclusively within the jurisdiction of Canada either, according to its own Declaration (para. 2 *(c)* thereof). Moreover, only as from 3 March 1995 has an attempt been made to extend that legislation, in a discriminatory manner, to ships flying the flags of Spain and Portugal." (*ibid,*. point 4.)

We also referred in the Application to "Canada's obduracy in defending the recourse to measures of coercion on the high seas" (point 3) and to, "a disquieting precedent of recourse to force in inter-State relations" (*ibid.*).

In the Memorial, we have adopted the same position on the subject of the dispute, either implicitly or explicitly (pp. 9, 36 and 37, and 85 *et seq.*).

In a nutshell, it is the lack of title to take action on the high seas which Spain has emphasized in its Application and in its Memorial. That is the argument which it again puts forward today. It must therefore be absolutely clear that the dispute submitted to the Court essentially relates not to measures for the management and conservation of fish stocks, but to Canada's lack of title to take action on the high seas, as it did in March 1995, against ships flying the Spanish flag.

5. As we are on the subject of title, however, all possible ambiguity should be dispelled, and we should make clear what we mean by that term. To that end, we shall rely on the settled jurisprudence of the Court itself.

Indeed, it found in 1986 that this concept:

"may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right" (case concerning the *Frontier Dispute (Burkina Faso/Mali)*, (*I.C.J. Reports 1986,* p. 564, para. 18).

In fact, the term "title" was employed in the Application and is still used by us in its sense as the source of a right. It must be emphasized that this concept should not be unknown to Canada, in so far as it relates to maritime areas. In the case concerning *Gulf of Maine* (*Canada/United States of America*), the Chamber of the Court pointed out that:

> "it is therefore correct to say that international law confers on the coastal State a legal title to an adjacent continental shelf or to a maritime zone *adjacent* to its coasts; it would not be correct to say that international law recognizes the title *conferred on the State by the adjacency* of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences" (*I.C.J. Reports 1984*, p. 296, para. 103; italics supplied in the original).

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In short, the conception of title which Spain has invoked in its Application and in its Memorial, and which it continues to invoke, is precisely the one confirmed by the consistent jurisprudence of the Court. When we contend that Canada has no international legal title to take action on the high seas against ships flying the Spanish flag, we are using the concept of title accepted by the Court: in other words, Canada's lack of entitlement to engage in such actions.

It is true that Spain also uses the word "title" in another sense in this case. Indeed, in the context of Canada's domestic law, laws would constitute title for the adoption of regulations.

7. That having been said, the Spanish Government's two main arguments concerning the jurisdiction of the Court can easily be put forward.

First main argument. The Canadian reservation with regard to the Court's jurisdiction covers only measures for the management and conservation of fish stocks, as well as the implementation of such measures, in the NAFO Regulatory Area. It is clear that these words must be interpreted in accordance with international law. It is also clear that the reservation does not cover the main subject of the dispute, namely the question of Canada's international title to exercise its jurisdiction against foreign ships on the high seas. Allow me to remind you in this connection of the Court's finding in the case concerning the *Gulf of Maine (Canada/United States of America)*: the mere natural fact of adjacency is not in itself a title recognized by international law (*I.C.J. Reports 1984*, p. 296, para. 103). I would also emphasize that, for lack of title, the Canadian Act C-29 and

Act C-8 amending the Criminal Code do not constitute a measure. They are mere facts. Accordingly, they are not covered by Canada's reservation with regard to the Court's jurisdiction.

Second main argument. The use of force against foreign vessels on the high seas cannot reasonably be considered to constitute implementation of measures relating to the management and conservation of fish stocks. I should mention in this connection the finding made by the Court in

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the case concerning *Right of Passage over Indian Territory* (*I.C.J. Reports 1957, Preliminary Objections*, Judgment of 26 November 1957, p. 21): "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."

After the statement by Professor Remiro Brotóns concerning the general principles governing the Court's jurisdiction which are relevant in this case, Professors Highet and Dupuy will show that, if international law prohibits the use of force, the provision for such behaviour in the Canadian legislation (Act C-29 and Criminal Code) which we are attacking, is covered neither by the terms nor by the spirit of Canada's reservation with regard to the jurisdiction of the Court. As you will be asked again by Professor Highet: could the bombing or torpedoing of a fishing boat be considered to constitute implementation of measures for the management and conservation of fish stocks merely because Canada says that they do, according to its reservation?

8. Throughout the Counter-Memorial, Canada showed an obsessive concern to conceal the substance of the case from the Court. And for good reason! The facts underlying the present case — unjustified promulgation of legislation at variance with international law and, on the basis of that legislation, forcible seizure of a Spanish ship on the high seas — are not likely to promote the international image of a country.

Of course, we are aware that, at the current stage of the proceedings, it is the question of the Court's jurisdiction which is under discussion, as a result of the Order made by the Court on 2 May 1995.

However, leaving aside the generic links which inevitably exist between the substance of a dispute and the jurisdiction of an international court to resolve that dispute, I would observe that, in so far as reasonable links exist in this case between the jurisdiction of the Court and the substance of the case, it lies with us to put the spotlight on them in order to assure ourselves of your jurisdiction.

In the present case, the reasonable links are three in number, namely:

First, the actual terms of the Canadian reservation with regard to the jurisdiction of the Court, as it contains basic concepts;

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Second, the need for Spain to define the real subject-matter of the dispute and to show that it continues to exist. These two demonstrations need to be based on substantive considerations; and

Third, the rebuttal of Chapter I of the Canadian Counter-Memorial, which also calls for considerations of this type. Let it not therefore be said, in a somewhat contemptuous tone, as is done by Canada in its Counter-Memorial, that we are putting the cart before the horse, by giving precedence to substance over jurisdiction.

First of all, the reservation of paragraph 2 *(d)* of the Canadian Declaration of acceptance of the Court's jurisdiction contains substantial definitions. There can be no doubt that the expressions "disputes arising out of or concerning conservation and management measures ... and the enforcement of such measures" concern questions of substance. In connection with this, the pleadings of Professor Highet and Professor Dupuy will show that the use of force provided for in Canadian legislation (Sec. 8.1 of Bill C-29 and Bill C-8), and used in fact in the seizure of the ship *Estai* and in the harassment of other Spanish ships, is not a measure concerned with the conservation or management of fish stocks or with the execution of such measures. In this first case, there is clearly a more than reasonable link between the merits of the case and the jurisdiction of the Court.

Secondly, mention must be made of Canada's position on the object and existence of the dispute. Regarding the persistence of the dispute, Canada maintains that there is no longer a

dispute; according to the Counter-Memorial, it was settled by the Agreement concluded between the European Union and Canada on 16 April 1995. A Counsel for Spain, Professor Remiro Brotóns, will presently be showing you that this position is not correct since the Agreement in question dealt only with the dispute that had arisen between the European Union and Canada. What was concerned there was another dispute regarding conservation and management measures in respect of fisheries in the NAFO Regulatory Area. The dispute between Spain and Canada has quite another object. It chiefly relates to whether Canada possesses any title whatsoever to exercise

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jurisdiction on the high seas against ships flying the Spanish flag or, to put it another way, to the inconsistency of some Canadian norms with international law. What we are talking about are the norms relied upon by Canada to violate, by means of the use of force, a sovereign right of Spain.

The right to exclusive jurisdiction of a State over ships flying its flag on the high seas has of course not been transferred to the institutions of the European Union. It unquestionably rests with the member States. As I have already said, Professor Remiro Brotóns will be the one to develop these arguments when he addresses you, but I announce them now synoptically to demonstrate that the discussion between Spain and Canada on the object and persistence of the dispute must of necessity take into consideration some features belonging to the merits of the case.

There is a third reason for Spain to concern itself with some questions of substance. Canada's Counter-Memorial devotes an entire chapter, Chapter I (16 pages), to what is termed the "factual and historical background" of the case. The chapter of course contains constant references to matters of substance, most of which references incidentally are inaccurate.

Professor Sánchez Rodríguez will presently, in his oral arguments, be taking the time to refute them so as to show the Court the glaring contradictions of the Counter-Memorial in this respect.

9. I should like to turn now to some matters raised in the written proceedings. These subjects will be broached by the various Counsel of Spain throughout their statements, but I propose to consider them briefly in an overall perspective. I think that my account and those of my colleagues

will help the Court to interpret the Canadian reservation to its unilateral Declaration of acceptance of the Court's jurisdiction.

For want of legal title, it is absolutely clear that the Canadian Bills C-29 and C-8 constitute wrongful acts in international law. They infringe an important series of principles of international law specified by us in the Application, including the general principle proclaiming the exclusive jurisdiction of the flag State over ships on the high seas, and that prohibiting the threat or use of force. The application of Canadian legislation to Spanish fishing vessels on the high seas thus constitutes an internationally wrongful act engaging Canada's responsibility towards Spain. It is also clear that the violation of international law by Spain has a character of continuity that helps to keep

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intact the interest attaching to the object of the Spanish Application. Canada has still not abrogated the Act enabling its Government to act once more against Spanish fishing vessels on the high seas. In these circumstances, in accordance with the general principles governing the international responsibility of States, as set forth by the International Law Commission in its draft articles of 1996 (Article 41, Report, pp. 148 *et seq.*), Canada is obliged to cease its wrongful conduct. Which is to say that it is obliged to abrogate Bill C-29 and Bill C-8 modifying the Penal Code. According to the principles drawn from customary law as stated by the Commission, it is also obliged to give us assurances or guarantees of non-repetition of the wrongful act (Art. 46). This means, in particular, that Canada should give Spain an undertaking not to promulgate Bill C-27.

In accordance with the general principles just mentioned, Spain, as the aggrieved State, is entitled to full reparation from Canada. Since the harm caused by Canada to Spain is in part non-material — a serious violation of a right deriving from sovereignty, such as exclusive jurisdiction over ships flying its flag on the high seas — we shall in due course seek judicial satisfaction in the form of a decision by the Court that Canada has breached international law against Spain. But the Court will have observed, on hearing the reminder I have just given of our Application, that we do not let it go at that.

10. Everyone knows the importance and worth of the contribution of the Permanent Court and of this Court to the affirmation and development of the most basic rules of the law of the sea. The Hague Court did so, in particular, regarding the jurisdiction of the flag State or the rights and duties of coastal States. It would be very regrettable for all States should the Court henceforth give up this type of dispute for other tribunals to handle, including cases in which its jurisdiction is nevertheless well assured, notably on account of the contradiction between Canada's declared intention and actual action.

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In conclusion, Mr. President, I shall state once more on behalf of Spain that, in this case, the Court well and truly has jurisdiction because the actual action taken by Spain went beyond its declared intentions, which cannot be properly construed as admitting of recourse to armed force.

This case is also certainly admissible because the rights of Spain as the flag State were prejudiced, have still not given rise to reparation and remain under threat.

Mr. President, Members of the Court, this is where I finish my statement this morning and I thank you for your kind attention.

Mr. President, I would ask you kindly to give the floor to my colleague, Professor Sánchez Rodríguez. Thank you very much.

Le PRESIDENT : Merci, Monsieur le professeur Pastor. Je donne maintenant la parole à Monsieur le professeur Sánchez Rodríguez.

Professor SANCHEZ RODRIGUEZ: Thank you, Mr. President. Mr. President, Members of the Court, I shall give you an account of the relevant facts or situations and the features which, in Spain's view, are important in this case. I should first like to make it clear that the term "facts" is to be taken in its broadest sense of all those that the Court needs to establish its own jurisdiction and to rule on admissibility.

From this point of view, international case-law distinguishes between constitutive situations or facts and dispute or justiciable dispute. For example, in its Judgment in the *Interhandel*

(Preliminary Objections) case, the Court stated that "the facts and situations which have led to a dispute must not be confused with the dispute itself" (*I.C.J. Reports 1959*, p. 22. I shall spare you the subsequent references since they are to be found in my oral pleadings). Consequently, the facts or situations constituting the dispute, in addition to the factors relied upon, are features defining the *causa petendi*, and I shall tell you only what you need to know to reach a decision in this initial phase of the proceedings.

Here are the facts that should hold our attention in this case.

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1. On 10 May 1994, Canada deposited with the Secretary-General of the United Nations a new Declaration of acceptance of the compulsory jurisdiction of the Court. It thereby accepted *"all disputes . . . other than"*:

> "*(d)* disputes arising out of or concerning *conservation and management measures* taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, *and the enforcement of such measures*" (MS, p. 8; emphasis added).

It is clear that in relation to the previous Canadian Declaration, that of 10 September 1985 (see *I.C.J. Yearbook 1990-1991*, No.45, pp. 73-74), the novelty of the present Declaration lies in the addition of subparagraph *(d)* just cited; of course in the general context of its Declaration of acceptance as a whole.

2. This Declaration was deposited a mere two days before the *"Act to amend the Coastal Fisheries Protection Act"*, promulgated on 12 May 1994 (MS, Anns., Vol. I, pp. 69 *et seq.*). The said Act determines, under the conservation and management measures, that "[n]o person, being aboard a foreign fishing vessel of a prescribed class, shall ... fish or prepare to fish" on the high seas (Sec. 5.2). The legislation in question does not expressly define of what the enforcement of such measures consists. On the other hand, it contemplates a wide range of actions concerning foreign ships on the high seas, such as the boarding of foreign fishing vessels by Canadian protection officers (Sec. 7) and exercising the power of arrest, entry, search or seizure or other power (Sec. 18.2).

The Canadian Act also mentions other such unwonted and exceptionally serious actions as the use of force (Sec. 8.1: "A protection officer may ... use force that is intended ... to disable a foreign fishing vessel"), and the application of Canada's criminal law to any act or omission on the high seas that would be an offence under an Act of Parliament (Sec. 18.1). The Act also contains, in Section 8, provisions concerning the parallel Bill C-8, entitled *An Act to amend the Criminal Code and the Coastal Fisheries Protection Act (force)* (a copy of which is available to the Court in its library), for the very purpose of reinforcing the provision in Section 8.1 on the use of force, even situating it on the same strictly criminal plane.

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A preliminary conclusion that can be drawn from the foregoing is that the use of force can never be interpreted, from any objective and reasonable point of view, as the implementation of any conservation and management measure. The fact of giving the hypothetical rights of fish species precedence over the rights of human beings and of the ships of a State runs counter to general international law, the law of the sea and human rights.

3. This Canadian Act has been closely co-ordinated, in time and in its material implementation, with actions conducted at the same time in the field of Canadian criminal law. It is also relevant to stress that the Canadian criminal legislation was adopted two days after the deposit of the new Canadian Declaration. On the 12 May in question the *Act to amend the Criminal Code and the Coastal Fisheries Protection Act (force)* was promulgated. An Act was thus adopted that declared lawful, in a premeditated manner, the use of force in areas under Canadian jurisdiction and in purely international maritime areas.

It is indispensable, at this juncture, to quote the terms of paragraph 25 (4) of the Criminal Code, according to which:

> "A peace officer, and every person lawfully assisting the peace officer, *is justified in using force that is . . . likely to cause death or grievous bodily harm . . .*" (Emphasis added.)

Furthermore, Article 8 of the *Coastal Fisheries Protection Act* was also amended, by adding text, as follows:

> "8.1. (1) An officer may, in the manner and to the extent prescribed by the regulations, use *force that is intended or is likely to disable a foreign fishing vessel.*" (Emphasis added.)

As regards this new, different, but related Act, also dating from 12 May 1994, in other words two days after the deposit of the new Canadian declaration, I should just like to briefly emphasize two preliminary aspects. Firstly, Canadian criminal law permits the use of force of such a kind that it may cause death or cause serious bodily harm; secondly, the use of force is expressly contemplated against foreign vessels on the high seas.

4. The discussion surrounding the above-mentioned acts gave rise to interesting debates in the Canadian Parliament, which even continued after Canada had deposited its new declaration. We are not going to reproduce them here in detail but would like to draw the Court's attention to certain arguments.

To begin with, Minister Tobin eventually acknowledged, even though using all kinds of puns and euphemisms, that the *Act to Amend the Coastal Fisheries Protection Act* permitted the Canadian authorities to use force against foreign vessels on the high seas (cf. MS, pp. 79-80). However, at the time, the latter were not supposed to include vessels of the other NAFO member States. It was other vessels: private or stateless ones.

Secondly, during the Senate debates (cf. *ibid.*, p. 271), one senator alluded to the opinions of various jurists that the legal provisions aimed at the taking of measures against foreign vessels on the high seas by the use of force might run counter to international law. The reply by the Minister of Foreign Affairs was curious to say the least:

> "Our bill, which contains provisions that enable us to take action, has a solid legal basis. As you know, to protect the integrity of this legislation, we registered a reservation to the International Court of Justice, explaining that this reservation would of course be temporary and would apply only during such time as we felt was necessary to take retaliatory action against those engaged in overfishing."

It is a strange concept of legality which reduces it to the sole criterion of impunity. Indeed, Mr. Tobin, Minister of Fisheries and Oceans, also indicated, for his part, that:

> "In 1970, Canada passed the Arctic Waters Pollution Prevention Act. That act was passed after Canada had registered, exactly as we did on Tuesday, a reservation to the International Court of Justice." (Cf. *ibid.*, p. 273.).

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In other words, he does not deny that what was then a draft bill is in contradiction with international law. However, it is clear that these comments, as well as the adoption of these bills, took place *after* — and never *before* — the deposit of the new Canadian declaration, which included the reservation relating to the conservation and management measures.

Various conclusions can be drawn from these parliamentary debates. To begin with, the express acceptance of the use of force on the high seas, which, without perverting the most classical rules of legal interpretation, can never be interpreted as a resources conservation or management measure, still less as the enforcement of such measures. Secondly, the implicit acceptance of the intrinsically unlawful character of the Bill as regards international law. Its rhetorical justification has always been the argument that it was not likely to come before this Court. To do so, it based itself — it is important not to forget this — on purely domestic antecedents, such as the 1970 Arctic Act and the corresponding reservation made at the time in that country's declaration of acceptance of the jurisdiction of the Court.

This attitude of the Canadian authorities is tantamount to an admission that Canada is bereft of any valid international legal title to act on the high seas. In this context, Minister Tobin carefully refrained from broaching two legal questions of fundamental importance before his parliamentary colleagues. The first of these is whether the new reservation would be capable of compensating for the lack of legal title, given that his text did not refer to this question. The second aspect which Mr. Tobin "overlooked" is the reason why the new reservation of 1994 was much more restrictive in its terms and in its wording than Canada's reservation of 1970, which remained broader and more ambiguous. In short, he did not explain the reasons and the technical consequences of the new

reservation in the explicit context of the legislation which, two days after the date of deposit, was already being discussed and adopted.

5. During the introduction of the bill, the Minister of Justice and Attorney General of Canada, Allan Rock, expressly acknowledged that the

> "protection officers employed by the Department of Fisheries and Oceans with a view to implementing the fisheries regulations are assumed to be peace officers within the terms of the Criminal Code . . . and may sometimes have to use force in order to disable a foreign fishing vessel which has infringed our laws and is seeking to escape" [*translation by the Registry*]

and as everyone knows, peace officers may cause death or grievous bodily harm (cf. *Canada. House of Commons Debates, Vol. 133, No. 021, 1st Session, 35th Legislature, Official Records (Hansard). Monday 14 February, 1994,* pp. 1293-1294).

At the time, certain Canadian Members of Parliament voiced their strong opposition to certain aspects of what was still only at the bill stage. Mr. Ivan Bernier, for example, made eloquent reservations regarding its legality:

> "The Criminal Code permits the peace officer to use force in order to arrest a fugitive. We accept this principle in the context of criminal law, but consider this approach unsuitable for the fisheries context, [as] in our eyes illegal fishermen are not criminals."

Indeed, "foreign fishermen are human beings. They do not deserve to die for having sought to earn a bit of extra money at the end of the month", and it must be borne in mind that a

> "hole from a 303 rifle shell could indeed sink a boat, but the reason it can sink a boat is that it has holed a hull as a warning, apparently. However, in the case of a bullet hole in a glass fibre fishing vessel, I would not like to be the crewman sleeping in steerage."

His second reservation was equally fundamental, asserting as he did that "Canada cannot legislate in an international zone and, consequently, negotiation becomes the only possible avenue" (cf. MS, pp. 1295-1296). Once again, we are confronted with the problem of the title or, in other words, Canada's lack of an international title to act on the high seas — still worse using force — against foreign vessels.

Mr. Dhaliwall, Parliamentary Secretary to the Minister of Fisheries and Oceans, made a muddled allusion to the need for protection against improper fishing by vessels under flags of convenience "hidden behind obscure subtleties of international law". He went on to allude to various precautions allegedly adopted in advance with respect to them before concluding: "Only after that is force used and then only such force as is necessary to stop the vessel and make the arrests. This is in compliance with international usage concerning the use of force to disable a vessel on the high seas". Having made such a surprising assertion, he ultimately had to

acknowledge that: "On the high seas, we must respect international laws, but we are working extremely hard to get that changed". The immediate response from Mr. Ivan Bernier was:

> "However, I must remind him that the Nose and Tail of the Grand Banks of Newfoundland lie outside the 200-mile zone. In other words, this does not fall within Canadian jurisdiction. It is not the reinforcement or buttressing of the proposed bill which is going to solve this problem." (*Ibid.*, pp. 1316-1317.)

Canadian parliamentary debates have finally highlighted a number of quite clear-cut conclusions: *(a)* "Canada cannot legislate in an international area"; *(b)* consequently, the only way to settle the problems of overfishing in international waters is co-operation between the States involved; *(c)* it is difficult to use force to disable a vessel on the high seas "without the risk of endangering the lives of the crew" (*House of Commons Debates, Official Report (Hansard)*, 1st Sess., 35th Parl., Vol. 133, No. 054, Thursday 21 April 1994, pp. 3322-3323).

During the debate on Bill C-8 no Canadian Government minister dared to affirm once more that its subject-matter was in keeping with international law under the pretext that Canada was going to present a new reservation to its Declaration of acceptance of the compulsory jurisdiction of the Court, as it had for the Coastal Fisheries Protection Act. There is therefore an essential difference between fisheries law and criminal law. That is certainly due to the difficulty of explaining a law permitting the use of force as the implementation of any measures of conservation or management of fishery resources.

6. What Spain cannot concede, making a logical interpretation in good faith, is that the regulation of the use of force on the high seas against foreign vessels, involving the possibility of

causing death or grievous bodily harm, can be regarded as a measure of conservation or management of fishery resources and, still less, as an aspect or indication of the enforcement of such measures. Above all, that would be gravely detrimental to the most elementary principles of international law in respect of interpretation, as Spain will have occasion to repeat to you in the course of these proceedings.

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7. On 3 March 1995 a modification to the 1994 regulations (MS, Ann. 19, pp. 309-315) was approved, being the addition of a Table IV in which, beside the "pirate" vessels or those flying a flag of convenience, this bad company includes Portuguese and Spanish vessels. This decision is most surprising since, during the parliamentary procedure of debating the draft legislation, the possibility of extending it to cover ships flying the flag of a NAFO participant State was explicitly denied.

8. Only six days after the approval of the aforesaid regulations, namely on 9 March 1995, the fishing vessel *Estai*, flying the Spanish flag and with a Spanish crew, was stopped and inspected on the high seas in the area of the Grand Banks, some 245 nautical miles off the coast, by the patrol boat *Leonard J. Cowley* and the coastguard vessel *Sir Wilfred Grenfell*; this came after successive attempts at boarding by gunboats manned by individuals armed with automatic weapons and intimidatory manoeuvres with warning shots fired from a 50-mm gun by the patrol boat *Leonard J. Cowley*, after receipt, according to the Canadian note of 10 March 1995, of "the necessary authorizations". The said authorizations were clearly obtained from the Canadian authorities beforehand; yet at no time was any attempt made to obtain the authorization of the flag State, Spain.

The boat and its crew, whose security and integrity had been endangered as a result of the coercive action by the Canadian flotilla, were forcibly escorted away and held incommunicado in the Canadian port of St. John's, Newfoundland, where the master of the Spanish boat was imprisoned and subjected to criminal proceedings for having engaged in a fishing activity on the high seas outside the 200-mile Canadian zone, and for resisting authority (*ibid.*, Anns. 1, 2 and 3).

It is important to emphasize that all the Spanish vessels were engaging in their activities in accordance with the NAFO system and with the express authorization of the Community. The Spanish authorities were never warned by the Canadian authorities of their intention to board and inspect Spanish vessels.

029 On the following days other Spanish vessels suffered various measures of harassment and inspection by several Canadian coastguard vessels or patrol boats, with the obvious danger that they represented for the physical safety of persons (*ibid.*, Anns. 4 to 8), also in the free areas of the high seas outside the 200-mile zone of Canada's fisheries jurisdiction.

After these occurrences both Spain and the European Community and its member States presented Notes Verbales of protest to the Canadian Government. We wish to draw your attention to the fact that Canada has never formally replied to the Spanish Notes and has remained totally silent. Bilateral negotiation has never been possible. For their part, the Council and the Commission of the Community made condemnatory declarations in this respect, which also received a negative response from Canada. In view of what has just been outlined, we should now bear in mind the fact that by stopping and inspecting the *Estai*, Canada was not refuting a NAFO conservation and management measure; on the contrary, what were involved were unilateral measures running counter to those adopted by NAFO itself.

Mr. President, I still have a few observations to make but, in view of the hour, you may wish us to break off here for a pause.

Le PRESIDENT : En effet. Nous allons donc faire une pause.

Mr. SANCHEZ RODRIGUEZ: Thank you very much, Mr. President.

Le PRESIDENT : L'audience sera suspendue pendant quinze minutes.

L'audience est suspendue de 11 h 20 à 11 h 30.

Le PRESIDENT : Veuillez vous assoir. Je donne la parole à Monsieur Sánchez Rodríguez.

Mr. SANCHEZ RODRIGUEZ: Thank you, Mr. President.

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9. Spain therefore considered that it had an obligation to restore the application of international law, which had been infringed in regard to it by Canada. It consequently chose the course of litigation before this Court, which is quintessentially the most peaceful means of settling disputes between States.

10. According to Spain, all the *internal contradictions* detected in the Canadian Counter-Memorial, which are often striking and always significant, also constitute a relevant fact and a relevant situation.

11. The first contradiction we have observed concerns the love/hate relationship that seems to be aroused by the references to the fisheries system of the European Community in Spain's Memorial. Hatred because some references are regarded by Canada as unimportant and out of context (CMC, p. 56, para. 139; p. 56, para. 141; p. 66, para. 172). Love when it attempts to demonstrate that the dispute is settled and therefore non-existent (*ibid.*, p. 5, para. 12), or in the constant references to be found in Chapter IV (strangely on the merits of jurisdiction) where it has no hesitation in alluding copiously to specific features of Community fishing policy and implementation (*ibid.*, pp. 81 to 86), once more to deny the existence of the dispute.

12. The second dispute of the Canadian Counter-Memorial consists in accusing the Spanish Memorial of broaching the merits of the dispute while [itself] making substantive allegations.

The Canadian Counter-Memorial once more reproaches Spain with having created a premature debate on the merits of the dispute when the present state of the proceedings refers solely to jurisdiction. It says that Spain systematically put the cart before the horse, as it were (pp. 4-5, para. 11; p. 7, para. 14; pp. 7-8, para. 16; p. 22, para. 45; p. 53, para. 128).

After the apparently neutral, peaceful and innocent heading of Chapter I (Factual and Historical Background), the opposing Party launches resolutely into a demonstration on the legitimacy and legality of the 1994 legislation, and has no hesitation in entering into considerations

of substance in an attempt to justify its national legislation and the reservation added in 1994 to its Declaration of acceptance of compulsory jurisdiction, which is exactly what it holds against the Spanish Memorial.

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We shall merely recall in this respect that Article 79, paragraphs 3 and 4, of the Rules of Court contemplate the possibility of separating procedural and substantive allegations n a given case. As our Agent, Professor Pastor Ridruejo, said, the core of the dispute existing between the two countries is the existence or non-existence of title to act on the high seas against ships flying the flag of a foreign State. If there is no title, the so-called Canadian measures are not measures but purely and simply wrongful acts.

13. The third fundamental contradiction of Canada consists in affirming and, at the same time, denying the existence and persistence of a legal dispute. But I shall not develop this aspect in depth since it will be dealt with by my colleague, Professor Remiro Brotóns.

14. The fourth contradiction of the Canadian Counter-Memorial refers to the present absence of a dispute with Spain since the name of my country no longer features in the *Coastal Fisheries Protection Regulations* of 1 May 1995. The Canadian Counter-Memorial describes this little regulatory deletion as follows:

— "Canada's legislation thus *no longer* applies to Spain" (p. 5, para. 12);

— "Canadian legislation *no longer* applies to Spanish . . . vessels . . . " (p. 81, para. 210);

— "The matters in dispute between Canada and Spain have been settled. Spain is *no longer* subject to the Canadian legislation." (P. 88, para. 230; emphasis added.)

Hence, what Canada does not tell you, is that the bill continues, potentially, to be applicable to Spain and to any other State in the world, since it has not been amended. Such a conclusion does not hold water since Bill C-29 and Bill C-8 remain in force and since it is clear that their content can be applied to Spain at any time, simply by amending the Regulations.

15. Canadian legislation has not only violated the individual rights and interests of natural and legal persons, such as those of the owner, master and crew of the Spanish vessels. It has

violated and continues to violate the rights and interests of flag States. In this case, the rights and interests of the Spanish State.

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The Canadian Counter-Memorial questions "what Spain might expect in addition to what Canada has already done, or what damages might be requested in addition to those claimed in the pending civil case" (p. 86, para. 224). Further on, it adds that "the proceedings against the *Estai* and its master have been discontinued" (p. 88, para. 230).

The opposing Party thus seeks to minimize the case: according to it, it is a matter of minor importance between a ship, its master and the Canadian authorities, an individual case, without importance, minor, lacking the necessary weight for it to be brought before this Court, since it absolutely does not involve the Spanish State.

However, what we are discussing here is the jurisdiction of the Court to consider a piece of Canadian domestic legislation which applies on the high seas, which has affected and which still potentially affects, a large number of ships, Spanish, Portuguese and others; it may infringe their freedom, security and life of their crews. This body of legislative initiatives, lacking any legal title, cannot hide behind the term "management measures". They are simply international wrongful acts. We are discussing the Court's jurisdiction to consider harm caused to a flag State, i.e., Spain, whose prerogatives on the high seas have been seriously disregarded; it is not a matter of the private or individual rights of Spanish ships. It is the very right of the State which has been violated; consequently, this violation had caused it direct, serious, assessable and clear prejudice.

Spain was obliged to despatch as a matter of urgency a number of units of its navy to protect the Spanish fishing vessels and their right to sail and fish on the high seas (cf. MS, Anns., Vol. I, Ann. 5, pp. 21 *et seq.*). Spain was also obliged to initiate intense negotiations on several fronts at once. Canada's actions thus effectively caused it direct harm and prejudice independently of the measures adopted by Canada with respect to the owner, master, crew and the fishing vessel *Estai*.

16. Mr. President, we are now going to analyse another fact which, without any doubt, causes serious problems from the legal standpoint.

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The Canadian Counter-Memorial devotes a good many pages to interpreting the terms of its reservation, in particular to the meaning of the terms "conservation and management measures", and "the enforcement of such measures"; indeed, in its argument, it draws a careful distinction between those *measures* and their *enforcement* (cf. CMC, para. 4; para. 6; para. 87; paras. 89 and 90; para. 92, etc . . .). I would emphasize that the word "enforcement" cannot be interpreted independently of the word "measures", to which it is subordinate. In the literal context of the Canadian reservation of 1994, it would be impossible, without the existence of "measures", to refer to their "enforcement".

At one point, the opposing Party makes a reasonable textual interpretation of its reservation, acknowledging the distinction between enabling legislation and its enforcement. Nevertheless, and quite wrongfully, it adds a new material and textual content: the *enforcement measures*. This new category is the result of a formidable conjuring trick (cf. *ibid.*, para. 40; para. 109; para. 153; para. 188; para. 219; para. 222; para. 223).

The purpose of the expression "enforcement measures" is to gloss over the important relationship between "the management and conservation measures . . . *and* the enforcement of such measures", since they are trying to make us forget the word "such" or minimize its importance. What Canada is after is the introduction of the expression "measures to enforce such measures", but without including the last three words. This is a very revealing game.

17. We have now reached one of the sensitive points. Let us analyse the facts.

To begin with we have an objective fact: Canada amended its Criminal Code when Bill C-29 was being drawn up, linking Article 8.1 of the latter to what is laid down by Bill C-8 with respect to *necessary force*. This question is always well concealed in the Canadian Counter-Memorial, as though Spain were only presenting objections to Bill C-29. However, this fact was the subject of a major debate in the Canadian Parliament when the government bills were under discussion. But the silence of the opposing Party is explained by the fact that Canada is currently applying measures of a clearly criminal nature, which are manifestly not included in its reservation.

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Secondly, the Canadian criminal and fishing legislation currently in force considers coastguards to be "peace officers" and permits them to use force to the extent of causing the death or serious bodily harm to members of the crew of foreign vessels fishing on the high seas and, in addition, permits the use of force directly against such ships. However, the fact that the Canadian Counter-Memorial scrupulously glosses over Bill C-8 should not make us overlook its existence.

Thirdly, the Canadian Counter-Memorial devotes only two short lines and four more at the foot of the page to the question of the use of force, which had already been suggested in the Spanish Memorial, but solely by reference to fisheries legislation (cf. para. 31 and note 53). This silence in the Canadian Counter-Memorial speaks volumes. It reveals the difficulty experienced by the opposing Party in including this decisive question in the legal discussion on jurisdiction. In reality, Canada knows that, where the facts are concerned, it has gone too far in relation to the field actually covered by its declaration and its reservation *(d)*. At this point Canada makes two assertions: firstly, the use of force constitutes the enforcement of the management and conservation measures; secondly, the use of force permitted by Canadian legislation is regulated according to strict criteria. Canada does not dare to say that it would also be permitted by international law. Regarding the boarding of the *Estai*, the Canadian Counter-Memorial carefully omits to say that warning shots were fired from a 50-mm gun by the patrol boat *Leonard J. Cowley*, and it uses more peaceful and clement expressions: "inspected, seized, boarded" (cf. para. 15; para. 42). It does not state that it used real deterrent fire — concealing the true facts by describing them in what is supposed to be neutral terms — and that armed men boarded the vessel. It must not be overlooked that what was at issue was the peaceful navigation of fishing vessels on the high seas.

The use of force, of "the necessary force" to use the Canadian euphemism, is contemplated and directly permitted by Bills C-8 and C-29; not just by the regulations enforcing those Bills! This is one of the reasons why Canada cannot now assert that, because the names of Spain and Portugal have disappeared from the final version of the regulations, it will never again be possible to invoke the use of force against Spain and that the dispute raised by Spain no longer exists.

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Moreover, what it did yesterday it can just as easily do again tomorrow, in other words, invoke again to a rule which does not presuppose the intervention of its Parliament and under which Spanish vessels will again be pursued on the high seas irrespective of their flag. This reasoning is completely erroneous. It is permitted by laws, as the laws have not been altered. Only the rules have been changed. As to the new draft Bill C-27, it still contemplates the use of force.

18. If we revert to the parameters which, according to the Canadian Counter-Memorial, must be used for the interpretation of a declaration and of its reservations, which "must be based upon a natural and reasonable way of reading the text" (p. 23, para. 46, pp. 25 *et seq.*, paras. 54 *et seq.*), still in the context of the principle of good faith (pp. 30-31, paras. 67-68), we must ask ourselves the following questions.

Firstly, can it be assumed that the penal provisions in Canadian law currently in force, which permit the occasioning of death or serious bodily harm on the high seas are included in the fishery resources management measures, if the text is interpreted in a literal natural and reasonable way and in good faith?

Secondly, could these provisions be included in the fisheries conservation measures (not in the euphemism of the phrase "enforcement measures") in accordance with any of the criteria of interpretation used hitherto by the Court?

Thirdly, and this is at least as important as the previous two points, can the penal provisions to which we refer be interpreted in accordance with a reasonable, logical and systematic legal criterion such as the enforcement of fisheries management and conservation measures on the high seas?

Spain is persuaded that the Court will never be in a position to reply in the affirmative to any of these three questions. This is why the Canadian Counter-Memorial merely skates over the question of the use of force or adds the new conceptual category — which did not exist in its reservations — of the "enforcement measures" or seeks, in its inaccurate presentation of the facts,

to gloss over the force actually used against the Spanish vessels. This is the achilles heel of the Canadian reservation which the opposing Party endeavours to conceal.

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In point of fact there is jurisdiction *ratione materiae* and the Kingdom of Spain brought this matter before the Court at the outset. However, Canada has hitherto not provided any justification that the use of force and the possibility of causing death or serious bodily harm to persons may be considered as fisheries resources management and protection measures, or as "enforcement measures" of such measures.

Is there any need to recall here Article 73 of the 1982 United Nations Convention on the Law of the Sea, which does not even envisage, in the exclusive economic zone, that the enforcement of the laws and regulations of the riparian State includes provisions such as those referred to above? And that the same applies to the Articles 87 to 90, 110, 111, 117 and 118 of that Convention? Is there any need to recall here the legal rules which protect the safety of life on the high seas? No, as we have not yet come to the merits of the case?

Lastly, a complete interpretation of its declaration must be made in accordance with international law and not exclusively in accordance with Canadian domestic law. This interpretation must not be limited, as it suggests, to paragraph 2 *(d)*, but must also take account of the Canadian declaration as a whole. There are provisions in the Canadian legislation which do not fall within the terms of its reservation to the declaration of acceptance of the compulsory jurisdiction of the Court. Accordingly, the Court has jurisdiction. There is even another argument for reaffirming the jurisdiction of the Court: Canadian legislation as a whole, considering the absence of a valid basis and legal title, cannot be considered, properly speaking, as a measure, but as a simple fact, from which important legal consequences may flow with respect to third parties.

In 1994, Bill C-29 was not adopted in order to be applied to any Spanish fishing vessel, and above all not to the *Estai*. The Bill is not covered by the Canadian reservation — and never could have been. The reservation does not apply *to the Bill*; even if the reservation applied to the

boarding of the *Estai* — which we totally reject — , the reservation would in no way exclude a consideration of the Bill itself.

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19. The continuing relevant facts in the present dispute do not end here; the history of Canadian domestic legislation did not stop in 1994, but continues today through a number of bills currently being prepared.

Indeed, Canada's hectic legislative activity subsequently resulted in the presentation of Bill C-62 ("Fisheries Act") (*House of Commons of Canada, 2nd Session, 35th Legislature, 45 Elizabeth II, 1996, First Reading, 3 October 1996,* pp. 17978 *et seq.)* of 1996. In the first part ("Fisheries Protection and Management"), there are a great number of similar provisions to those discussed above, to describe and analyse which would make my statement too long, complex and verbose. I would therefore ask Members of the Court to read Articles 32 to 41 of the bill concerned *in extenso,* the text of which will be found in the library of the Court. In these provisions, new rules can be found which are just as serious relating to the extraterritorial application of that country's criminal law to zones on the high seas, as is the case of Articles 37 to 39.

However, the legislative activity of the opposing Party does not stop there; indeed, at the end of 1997, not very long ago, the Bill C-27 was tabled before the Canadian Parliament ("Act to amend the Coastal Fisheries Protection Act and the Canadian Merchant Navy Act"), to replace Bill C-96 *(House of Commons of Canada, 1st Session, 36th Legislature, 46 Elizabeth II, 1997,* p. 90013). Surprisingly, this bill is presented as the implementation in Canadian domestic law, with a view to their application *erga omnes,* of the provisions of the *United Nations Agreement of 1995 Straddling Fish Stocks.* Recently, moreover, the Canadian press announced to us that the Canadian Parliament might soon approve this Bill.

Once again, this Bill is of interest to Spain's line of argument before the Court. Canada's unspoken desire to give itself a legal right to act on the high seas is so great that it has no hesitation in summoning up the said 1995 Agreement on Straddling Fish Stocks; it endeavours to give its domestic legislation a cloak of international legitimacy.

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I am convinced that the close scrutiny to which Members of the Court will subject this Bill relieves me of the need for any further comment; nonetheless I would draw the attention of the Court to two specific aspects of the Bill. On the one hand, I would recall that at least two requirements must be met for the provisions of an international treaty to be binding upon a State: first, the treaty must be in force; second, the State(s) to which the provisions are to be applied must be States parties. In this case, neither condition has been met. Neither Canada nor Spain are contracting States. On the other hand, there are still many provisions in the Canadian Bill C-27 which, together with those which are currently in force, involve the use of force by coast guards on the high seas, as is apparent from reading Articles 6, 16 and 18. These Articles are at variance with the provisions of Article 21 of the New York Agreement of 1995, even though the Agreement has not yet come into force and even though Canada and Spain are not parties to it.

20. It would seem that Canada cannot be content with being the country having the longest coastline in the world (over 244,000 km), bordering on three oceans, and having an area of over 5 million square kilometres within its 200-mile zone. It needs to increase its jurisdiction over the high seas, ever more so each day, and makes use of its criminal law to this end, including the use of force. This is in no way a measure of conservation or management, nor is it the enforcement of measures to conserve resources.

In no way. These measures are designed for the high seas, beyond and within the NAFO area. The situation recalls another, very similar one, which occurred 25 years ago when Iceland unilaterally extended its jurisdiction for fishery purposes to maritime areas adjacent to its coast which at the time were considered to be the high seas. The case currently before the Court is almost identical.

In the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, Sir Gerald Fitzmaurice stated:

> "agreed measures of conservation on the high seas for the preservation of common fisheries in which all have a right to participate, is of course a completely different matter from a unilateral claim by a coastal State to prevent fishing by foreign vessels entirely, or to allow it only at the will and under the control of that State. The question of conservation has therefore no relevance to the jurisdictional issue now before the Court, which involves its competence to adjudicate upon a dispute

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occasioned by Iceland's claim unilaterally to assert exclusive jurisdiction for fishery purposes up to a distance of 50 nautical miles and around her coasts." (*I.C.J. Reports 1973,* pp. 26-27.)

The affirmation advanced by Judge Fitzmaurice in his separate opinion of 1973 is perfectly applicable to the jurisdiction and to the merits in the present case.

Fortunately, the international law of the sea has not changed since then with regard to the legal régime governing the high seas. Moreover, the distinction made by Judge Fitzmaurice — between conservation measures for fisheries on the high seas and the legal entitlement of a State to act unilaterally in the said area, riding roughshod over the rights of other States — appears to my country, which I have the honour to represent here, to be not only impeccable but also and above all definitive. Indeed, the Canadian legislation is designed to be applied on the high seas in general, in three oceans, and not merely in that part of the high seas which is considered to be or designated the NAFO area.

The only alleged Canadian entitlement is unilateral, but not international. Its domestic legislation is not binding on other States if it is not in conformity with international law. Nor is the policy behind it one which can be invoked against other States — the old policy of the gun-boat. In this respect, let us again recall that what we have just said derives from paragraph 2*(c)* of its declaration. As the other Party expressly recognizes, the questions which fall exclusively within the jurisdiction of Canada must be classed as such "by international law", not by domestic law.

In conclusion, Mr. President, Members of the Court, Canada's reservation does not cover all the facts which I have mentioned in my statement, neither *ratione materiae*, nor *ratione loci*. For Spain, the facts are clear and unambiguous, as the Court will see for itself. This assertion will be corroborated immediately by my colleagues, counsel for Spain, Messrs. Remiro, Highet and Dupuy.

Mr. President, Members of the Court, this brings me to the end of my statement for this morning. Thank you for your kind attention. Mr. President, may I ask you to give the floor to my colleague Mr. Remiro Brotóns?

040 Le PRESIDENT : Je vous remercie, Professeur Sánchez. Je donne la parole au Professeur Remiro Brotóns.

Mr. REMIRO BROTONS: Mr. President, Members of the Court,

I. The dispute between Spain and Canada is extant and has not been resolved

1. In the present case the Respondent claims that the legal dispute between Spain and Canada has been settled since the filing of the Application, implying that the Spanish submissions are henceforth moot and that, in the absence of any dispute, the Court has no jurisdiction[1]. This is not so. Canada mixes up the dispute, the Applicant and the object of the Application with the intent of confusing the judges. The legal dispute between Spain and Canada is a real one; the submissions contained in the Application are still valid; the Court must make a finding on these submissions if it respects its raison d'être.

2. Spain has not come before the Court to speak of the conservation and management of fisheries. Spain is here to speak of sovereignty, the foremost, traditional principle of international law, a principle of order which is also a democratic principle, one which is recognized in international relations when a State observes the norms and co-operates with other States in order to resolve their shared problems. Today Spain is one of those States. Thus, when its exclusive jurisdiction over ships flying its flag on the high seas is disregarded and swept aside by another State which even resorts to force, Spain deems that it has the right — as indeed it has — to request the protection of the Court, so that the Court may recognize the facts, may establish the responsibility of the offending Party, may assess the consequences for the purposes of compensation, and may order the Party responsible to cease and desist from the unlawful act. The dispute between Spain and Canada and the object of Spain's Application therefore concern the most traditional strands of international law. The wording of the Application is simple; its content is fundamental; its settlement is of vital importance.

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[1]See Counter-Memorial of Canada, Chap. IV, paras. 204-207.

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3. There is a dispute between Spain and Canada arising from the entry into force of Act C-29 and amendments to Canada's Criminal Code. A dispute which took concrete form in the inspection of the *Estai* and the harassment of other ships flying the Spanish flag in the NAFO Regulatory Area, beyond Canada's exclusive economic zone. A dispute which remains extant since the Respondent has not only made no effort whatsoever to compensate the victim and to pay an indemnity for the damage caused but moreover persists in keeping in force the legislation which makes the continuous internationally wrongful act possible. Thus a sword of Damocles remains suspended above the Spanish ships.

4. The civilized manner in which the Application has been submitted, faced with conduct which may indeed be described as barbarous, must not be confused with an abandonment of rights or a lack of interest in our country's legitimate defence before the Court. The apparent normality of Hispano-Canadian relations has neither extinguished the dispute nor rendered the Application moot. Spain does not waive its claims, claims which could not be more legitimate: the claim for confirmation of its sovereign right to have its flag respected on the high seas, the claim for satisfaction before the Court by a finding that Canada has breached international law, the claim that Canada be obliged to guarantee that the breaches complained of will not recur.

5. Can such a dispute fade away, be whisked away as if by magic, vanishing into the mists of a parallel, concurrent dispute concerning the conservation and management of fisheries in the NAFO Regulatory Area? Of course not. There is a further dispute between Canada and the European Community but it is quite separate from the dispute between Spain and Canada.

II. The Canada-European Community Agreement of April 1995 does not prevent the Court from exercising its judicial function in the dispute between Spain and Canada

6. Canada acknowledges that there was a dispute between itself and Spain at the outset but holds that the events which have occurred since 28 March 1995 (the date on which Spain's Application was filed) have radically changed the situation, that the dispute has been resolved and that Spain's Application is henceforth moot.

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7. The *events* referred to in the Canadian Counter-Memorial are however limited to the Canada-European Community Agreement of April 1995[2]. The Agreement, it was said, "settled all the elements of the dispute that Spain has brought before the Court"[3].

8. This is an erroneous approach and consequently the conclusions which may be drawn from it are also erroneous. Spain does not question that the Agreement of April 1995 resolved some aspects of a dispute between Canada and the Community caused by Canada's unilateral action on fisheries in an area of the high seas which is subject to regulation by an organization — NAFO — to which the Community and Canada both belong. Nonetheless, Canada deliberately mixes up the dispute between itself and the Community and the dispute between itself and Spain, without even attempting to refute the arguments already submitted on this head in the Memorial of Spain[4].

9. Spain does not claim to rely upon the status of a third State in relation to the Canada-European Community Agreement *(res inter alios acta)* in order to distinguish between two disputes. As a member State of the European Community, Spain followed the negotiation of the agreement and voted within the Council to sign and consent to it, in the firm belief that multilateral co-operation is the appropriate method of resolving the serious problems of the conservation and management of what are called *straddling fish stocks*[5] and because such powers have been transferred to the Community by its member States[6]. Quite simply, the Agreement has one object and the Application another, being founded on a title specific to Spain.

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[2]See the instruments concerning the Agreement in the Memorial of Spain, Anns., Vol. I, No. 24; Counter-Memorial of Canada, Anns., Ann. 37.

[3]See Counter-Memorial of Canada, para. 209. See also para. 214.

[4]See Memorial of Spain, Chap. II, Sect. IX, para. 22, and Chap. IV, Sect. II, paras. 173-176 (particularly paras. 175-176).

[5]Stocks of fish which move around both within and beyond exclusive economic zones.

[6]See Memorial of Spain, paras. 21 and 176.

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10. This brings us to the crux of the matter. Canada is obliged to assert that the Agreement of April 1995 — an agreement on the conservation and management of fisheries — has resolved its dispute with Spain. Were this not so, the reservation to its acceptance of the Court's jurisdiction contained in paragraph 2 *(d)* of its declaration would be inoperative in this case. The scope of the Canadian reservation coincides with that relating to the conservation and management of fisheries. The scope of the Canadian reservation coincides with the scope of the powers on fisheries transferred to the Community by its member States. However if Spain is correct, namely if there is a dispute whose subject-matter is not the conservation and management of fisheries, both of Canada's objections to the jurisdiction of the Court collapse simultaneously.

11. If however, as Canada asserts, the Agreement of April 1995 resolved everything, how can we explain the fact that the Community institutions, so touchy on the subject of their powers and always ready to control the initiatives of member States which interfere in the Community's external relations, have filed no complaint against Spain before the European Court of Justice in Luxembourg, on the grounds that Spain has exceeded its powers? How are we to interpret the passivity of the Commission, which negotiated the Agreement, and of the Council, which approved it, faced with the initiative of a member State prepared to go beyond the obligations assumed by the Community in conformity with rule-making powers which are now exclusive powers? Quite simply because the dispute between Spain and Canada concerns another issue, the expression of the sovereign rights of States, which have not been transferred to the Community. The member States of the European Community have not surrendered their flags. Spain, like France, the United Kingdom, Germany, Italy and all the other countries belonging to the Community, retains exclusive jurisdiction over vessels flying its flag. Canada is aware of this. The Regulation of 3 March 1995 did not target vessels flying a non-existent Community flag, but vessels flying the Spanish and Portuguese flags. If the Court allows itself to be persuaded that the dispute relating to the sovereign right of a State to exclusive jurisdiction over vessels flying its flag on the high seas is subsumed in a dispute on the conservation and management of fisheries on the grounds that it is a Member

of the European Community, not only would the Spanish flag be reduced to nothing but also the flags of all the other member States of the Community. The Court would do federal Europe a good

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turn, but this would become difficult to understand in the context of the constituent power and the institutions of the Community. It is not for the International Court of Justice to curtail the powers of the member States of the European Community.

12. Let us not forget that the Agreement of April 1995 is not a *joint* agreement, i.e., an agreement involving both Community powers and national powers and signed not only by the Community in its own right but also by its member States. The latter, the member States, guard their powers jealously. They would never allow the Community to give a binding international undertaking in fields which are not within its province — you may be sure of that! However, I note that no member State of the Community has challenged the lawfulness of the Agreement with Canada of April 1995. If all accepted it without problem, it was indeed because there was no encroachment upon their respective national powers.

13. In conclusion, the Agreement proves that there is something else. If there is something else — as indeed there is — it remains outside the scope of the Agreement and, without doubt, outside the scope of the Canadian reservation to the Court's jurisdiction[7].

14. Spain was not and is not a direct party to a dispute with Canada over the enforcement of measures for the conservation and management of fisheries. In any event, it must be recalled that under paragraph D.1 of the agreed minute described by Canada as the main document comprising the Agreement of April 1995[8], the parties maintained their respective positions on the conformity of Canadian legislation with customary international law and the NAFO Convention; the paragraph adds that under the said document "nothing . . . shall prejudice their ability to preserve and defend their rights in conformity with international law . . ."[9].

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[7]See Memorial of Spain, para. 176.

[8]See Counter-Memorial of Canada, para. 210.

[9]Footnote applicable to French text only.

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15. Were such a reservation of rights — and consequently the continued existence of the legal dispute between the Community and Canada, tackled but not settled by the Agreement — to be expressly recognized, should not the reservation which affects Spain directly be recognized all the more? In no case could the Canada-European Community Agreement have disposed of the rights of Spain as a sovereign State in its own fields of jurisdiction.

16. Canada persists in converting the regulatory areas for fishing on the high seas into theatres of pursuit; in view of the harassment and aggressiveness shown by the Canadian coastguards and patrol boats, as my colleague Mr. Sánchez Rodríguez told the Court, the Spanish Government has had to send armed units into the NAFO Regulatory Area in order to protect and safeguard Spanish vessels and fishermen; all this has been communicated to the Secretary-General of the United Nations[10]. Canada has awarded itself the option of using force in order to impose its jurisdiction over vessels flying a foreign flag on the high seas and over their crews and it is precisely on that point that the dispute between Canada and Spain arises. It is not a dispute which may be termed a *green* one, even less a *blue* one. Canada is not entitled to hum and haw over the subject-matter of its dispute with Spain in order to bring it under the umbrella of a reservation to the acceptance of the Court's jurisdiction.

III. The object of the Spanish Application: (1) Cessation of and compensation for the unlawful act

17. The *Estai* incident led Spain to file an application before the Court and at the same time made it necessary to negotiate the agreement between the European Community and Canada. It is hardly surprising that several disputes have emerged from the same facts. In political terms, it was logical for the Agreement to be subject to the withdrawal of the accusation against the vessel and its master, to the refunding of the bond and bail, and to the return of the confiscated catch. The Agreement was even supposed to allow proceedings before the Court to take place in terms devoid

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[10]Letter from the Permanent Representative of Spain to the United Nations, dated 31 March 1995. Reproduced in the Bulletin on the Law of the Sea, United Nations, Office for Ocean Affairs and the Law of the Sea, No. 28, p. 23.

of undesirable attention. From that point of view the Agreement did mean, at the time, that Spain

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was not obliged to request the Court to adopt provisional measures. However, it cannot in any way be claimed that there is no longer a dispute between Spain and Canada or that the elements of the dispute, detailed in Spain's Application, have been substantially changed[11].

18. Canada must not distract the attention of the Court by referring to the action instituted by the owner and master of the *Estai* against the Canadian Government in the federal courts in order to brandish the rule of the prior exhaustion of local remedies in opposing the claim contained in submission (B) of Spain's Application[12].

19. At the moment Spain is not exercising diplomatic protection for its nationals who are victims of an unlawful act on the part of Canada; it is defending another sovereign right, a direct right which belongs to the State, the right for vessels flying its flag to enjoy the freedom of the high seas under its exclusive jurisdiction within the framework of Spain's international obligations[13], a right which has been infringed by Canada.

20. In fact, Spain's Application before the Court has been presented as a consequence of the breach by Canada of international obligations concerning Spain directly. Spain has exclusive jurisdiction over vessels flying its flag on the high seas. Canada has violated this right, usurping Spain's jurisdiction by duress and by the use of force. In return Spain demands satisfaction: namely a finding by the Court that there has been a violation of international law. Furthermore Spain asks for damages arising from the said violation. However its Application does not stop there.

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[11]See Memorial of Spain, paras. 174-175.

[12]See Counter-Memorial of Canada, para. 224. Submission (B) of the Spanish Application requests: "that the Court adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to the Kingdom of Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned".

[13]See Memorial of Spain, para. 181.

IV. Object of the Spanish request: (2) that the unlawful act should not be repeated

21. Even without the *Estai* incident, the dispute would exist. That incident is basically just a symptom of a much larger dispute, which has in no sense been settled. As regards its past conduct, Canada has failed to demonstrate any willingness whatever to recognize and make reparation for its errors. As far as the future is concerned, it has equally given no sign of any intention of changing its ways. There is no guarantee that its coastguards and patrol-boats will not again be instructed by their government to use force against Spanish vessels and their crews on the high seas. They did so before, and were congratulated on their actions: in 1996 the members of the *Greenland Halibut Task Force* were awarded the *Prix de l'Excellence en Politique Extérieure* for their defence of Canadian interests beyond the exclusive economic zone[14]. It is thus to be feared that they will once again seek to earn their patriotic spurs!

22. The fact that the names of Spain (and Portugal) have been removed from the regulations listing the States whose vessels are subject to Bill C-29 in no way affects conclusion *(A)* of Spain's Application[15]. Canada has never acknowledged that it acted in violation of international law. The domestic legislation which enabled Canada to commit the international violations of which Spain complains — Bill C-29 — is still in force, as are the amendments to the Penal Code; Canada applies that legislation to vessels flying other flags and it would only require a strictly governmental decision for it to start applying it again to Spanish vessels (or to those of other nationalities). It is open to Canada to reintroduce, at any time, the regulations of 3 March 1995, or any other measure capable of producing similar effects. It has given no undertaking not to do so.

23. The Canada-European Community Agreement does not denote an unconditional and irrevocable commitment on Canada's part which would prevent it from repeating any attempt to exercise jurisdiction, including if necessary a resort to force, over foreign vessels and their crews

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[14]See *News Release, Department of Foreign Affairs and International Trade*, 26 March 1996, N1 48.

[15]See Canadian Counter-Memorial, para. 217. Conclusion (A) of Spain's Application requests: "that the Court declare that the legislation of Canada, in so far as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada, is not opposable to the Kingdom of Spain".

on the high seas. It should be recalled that the second paragraph of Section C (1) of the Agreed Minute between Canada and the European Community does not specify the effects, consequences or sanctions which would follow any reinsertion by Canada of vessels from any European Community Member State into its legislation which subjects vessels on the high seas to Canadian jurisdiction; on the contrary, it limits itself to noting that "(it) will be considered as a breach of this Agreed Minute"[16]. No more than that. A statement of the obvious.

24. Canada seeks to trivialize the Court's decision when it states that: "What might or might not happen in the future is speculative", or that "the Court cannot render judgment on a speculative basis"[17].

25. We are not concerned here with speculation or hypothetical events. Canada continues to arrogate to itself the right to use force and to exercise jurisdiction unilaterally over vessels on the high seas flying a flag other than its own. This is moreover a long-standing tendency on its part, which it had already demonstrated in 1970 when it adopted the Arctic Waters Pollution Prevention Act. Its aspirations to the leadership of an oceanic policy[18] certainly have not involved any renunciation of the right to resort to the "big stick" as an instrument of diplomacy when others are not in agreement with its views. The Canadian draft Bill C-27, which is intended to amend Bill C-29, and to which Professor Sánchez Rodríguez has already alluded in his oral argument, retains unchanged those provisions which allow it to resort to force on the high seas against vessels flying a foreign flag. Or at least it did so until last year. This proposed legislation unequivocally confirms Canada's continuing intention to usurp its jurisdiction on the high seas and to resort to force where necessary to render that jurisdiction effective. In these circumstances the Court will readily appreciate the interest and object of an application which seeks a ruling calculated to lead to the cessation of a process of disruptive change fostered by continuing unlawful action and the resort to force. Canada's conduct inclines one to the belief that it is simply waiting for the Court to

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[16][Original English of citation.]
[17]See Canadian Counter-Memorial, para. 219 [original English text].
[18]See Canadian Counter-Memorial, para. 220, note 301 *in fine*.

declare itself incompetent in order to pursue its policy founded on unilateral extra-territorial jurisdiction and a readiness to use force, with all the risks and threats which that poses for the international order.

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26. When all is said and done, Canada tells you that the dispute is settled, yet it has not sought to make honourable amends or to undertake not to act in this way again. All it can offer is speculation that the new NAFO control measures will render any use of force on its part unnecessary.

27. A State which has suffered injury is entitled to reparation from the State which committed the unlawful act; but not only to reparation. The injured State must also be given assurances or guarantees that the act will not be repeated. And such a provision is accordingly included in the draft proposal of the International Law Commission on State Responsibility. Thus Article 46 not only emphasizes the need for these where there is a risk that the act may be repeated, but also makes it clear that their function is preventive rather than reparative. To this end, according to the Commission, the injured State may, *inter alia*, request the State which committed the unlawful act to adopt a specific mode of conduct considered apt to avoid the creation of conditions like those which allowed the unlawful act to occur; such conduct may, for example, consist in the adoption or amendment by that State of specific legislation[19].

V. The Court must exercise its judicial function

28. In a case like the present one a judgment by the Court declaring that Canada has no legal right to exercise jurisdiction or use force on the high seas against vessels flying a foreign flag — specifically the Spanish flag — would have a preventive and pacifying effect, particularly in the case of a Respondent with a democratic constitutional system.

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[19]See Report of the International Law Commission on the work of its forty-fifth session, comments on what was then Article 10*bis* of the draft proposal.

29. There has been talk of putting the cart before the horse. But it is surely Canada which is putting the cart before the horse when it relies on certain decisions of the Court[20] in the belief that it need only cite them in order to demonstrate that Spain's Application has become devoid of purpose, without establishing the necessary premises to support this.

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30. Those premises require that it be proved that there is currently no dispute between Spain and Canada. The *Northern Cameroons* decision does not constitute a relevant precedent. In that case the Applicant recognized that through its claim it was in a sense seeking historical satisfaction, looking entirely to the past. The Court accordingly took the view that it could not rule on the Application, because its Judgment must have some practical consequences in the sense that it can affect existing rights or obligations of the parties, thus removing uncertainty from their legal relations. By contrast, in the present case what is at issue is the protection of the existing rights of Spain and their guarantee for the future. Spain is not seeking to uphold a distant, abstract claim; it has a legitimate, quite specific, legal interest. It seeks recognition of its right to exercise exclusive sovereignty over vessels flying its flag on the high seas, condemnation of the party which usurped those rights by resorting to the use of force, and appropriate reparation for the past, the present and the future.

31. Nor do the decisions in the *Nuclear Tests* cases constitute relevant precedents. Quite the contrary. In those cases the Respondent had made declarations at the highest level — which were interpreted by the Court as legally binding commitments — in which it undertook not to carry out any atmospheric nuclear tests in the future, and it was those tests whose cessation the Application had sought to obtain. But, Mr. President, I ask you this: Where then is Canada's declaration, in which it states its willingness never again to resort to the use of force on the high seas against vessels flying a foreign flag, and in particular Spanish vessels? Where is the reparation for the unlawful acts already carried out? Where is the gesture — the least sign — of a *rapprochement* with

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[20]See Canadian Counter-Memorial, *Northern Cameroons*, notes 282, 284 (separate opinion of Judge Fitzmaurice), 296, 304, 305 and 307; *Nuclear Tests*, notes 283, 284, 285, 296, 297 and 308.

the Applicant? Could the Court now guarantee that Canada's actions subsequent to the *Estai* incident imply that she has assumed an obligation that there will be no repetition? That would partially settle the problem, particularly if the Applicant were to be recognized as having the right, like Australia and New Zealand in 1974, to request the Court to examine the situation in the event

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that such an obligation was not respected. In the *Nuclear Tests* cases the claims no longer had any object because the tests had ceased; in the present case, the claim does have an object, given that there are still vessels flying various flags within the NAFO zone, where Canada continues to have an enforcement scheme in place.

32. We do not, however, merely seek here a judicial declaration as to the unlawfulness of Canada's legislation and actions. It is also our concern that the Court should order the Respondent to conduct itself in a lawful manner in the future, that is to say that the Court should render a judgment normative rather than declaratory in character, in accordance with the distinction established by the Court itself in its recent decision of 25 September in the case concerning *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*[21].

VI. Final considerations and conclusion

33. In the light of recent history, it is difficult not to see, in the pretext put forward by Canada that it is acting with a view to the management and conservation of fisheries beyond its exclusive economic zone, a cover for a different agenda: namely a claim to the unilateral exercise of exclusive penal jurisdiction over still wider areas. The high seas have already suffered grievous insult, but if we allow Canada — or tomorrow some other country — to go on as she is doing, then they will continue to shrink like the glove in the *Peau de Chagrin* until there is nothing left of them. What we are really dealing with here is an extension of sovereignty at the expense of international waters by means of threats and the use of force — where the circumstances so require. It represents a defeat or retreat from peaceful co-operation with a view to the achievement of

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[21]See paras. 130-131.

common objectives or shared interests. The object of Spain's Application is specific to that country, for it is her ships which are affected, but it concerns the interests of all other States.

34. The use of force on the high seas against vessels flying the flag of another State is an unlawful act and cannot, on any pretext, be considered as a measure of fisheries management or of execution of a measure of fisheries management or conservation. Caligula may have appointed his horse Incitatus consul of Rome, but he could not make the animal rule the city in reality. You cannot use language to change the nature of reality. If a border guard fires on an individual attempting to cross the frontier line, fence or wall without papers, is that act to be regarded — and justified — as a measure of management and conservation of border security?

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35. The manner in which an issue is characterized must be proportional, and show proper respect for the scale of values. The primary values cannot be ignored for the sake of secondary objectives. If a State excludes commercial disputes from the Court's jurisdiction, will the latter then refuse to rule upon an application concerning the exploitation of children, on the pretext that "social dumping" is a commercial issue?

36. No thinking person can accept that a State which threatens and uses force on the high seas against a ship flying the flag of another State can seek to oppose the declaration requested of the Court in this regard on the totally inadequate pretext that the issue is one of fisheries management and conservation. In its Memorial, Spain warned that Canada's unlawful acts were part of a policy which, if allowed to continue, would provoke further violent incidents. It is surely desirable that we should not find ourselves faced, in the maritime context, with events similar to those sad occurrences a few years ago in the field of aviation which obliged the signatories of the ICAO Convention — meeting, pertinently enough, in Montreal — to add a protocol to that Convention inserting a new Article 3*bis*, which laid down an absolute prohibition on the use of force against civil aircraft, not only in international airspace but also in that of individual States.

37. The current phase of the proceedings instituted following Spain's Application concerns the Court's jurisdiction. However, a decision on this issue involves a finding that there still exists

a dispute between the Parties. According to the Respondent, there was a dispute but it has ceased to exist. In the Applicant's view this approach is fundamentally flawed, for it is based on a conceptual error. If there was a dispute between the Applicant — Spain — and the Respondent, Canada, it could in no sense have been with regard to the execution of measures of fisheries management and conservation. In this area Spain is ready to go further than Canada: at the individual level, there has never been any bilateral dispute between Spain and Canada over the management and conservation of fisheries. Such a dispute has manifested itself at the regional level, between the European Community and Canada within the NAFO structures. And here I pose a question, Mr. President: if Canada is so convinced that the Agreement with the Community of April 1995 has deprived the Spanish Application of any object, why, then, does it not dispute Spain's *locus standi*? No, Mr. President, Members of the Court! The bilateral dispute between Spain and Canada is of an altogether different nature. Hence, Spain not only has the right to bring proceedings but, further, the Canadian reservation to the Court's jurisdiction is irrelevant to this case. In logic, you cannot on the one hand assert that there exists a dispute between Spain and Canada and then deny jurisdiction on the basis of paragraph 2 *(d)* of the Declaration filed by Canada on 10 May 1994.

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38. In the *Lotus* case the Court stated: *"All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction"*[22] (emphasis added). In the present case, where is the right that can justify Canada's exercise of jurisdiction on the high seas — aggravated by the use of force — against vessels flying the Spanish flag and their crews? What will remain of the notion of order if the modest and minimal claim put forward here can be disregarded with impunity? Spain has every right to require that this Court rule upon the issue of respect for the international limits of territorial jurisdiction and in this regard it would be absurd to take the view that one might dissuade the Court from exercising its judicial function by brandishing a distorted image of fisheries management and conservation.

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[22]See *P.C.I.J. Reports, Series A, No. 10*, p. 19. [English text].

39. The Canada-European Community Agreement of April 1995 most definitely did not put an end to the dispute between Spain and Canada, nor did it render a ruling by the Court devoid of object or diminish its relevance. Spain's Application is not concerned with fishing on the high seas, nor with the management and conservation of biological resources within the NAFO zone. The object of the Application relates essentially to Canada's right in general, and in particular in relation to Spain, to exercise its jurisdiction on the high seas against ships flying the Spanish flag and their crews, and to enforce that right by using armed force. In Spain's view, Canada does not possess such a right, and the threats and use of force in which Canada has already engaged and claims to be entitled to continue to engage do not accord with international law or with the United Nations Charter.

40. It follows that, if the dispute has not been settled and the Application continues to have an object, the Court must exercise its functions, for the issue of jurisdiction is a matter of law not of desirability. If the Court fails to act, that would not only result in a denial of justice as far as Spain is concerned, but would also encourage a policy of intimidation, of the *fait accompli* and of the unilateral use of force in the service of the interests of the strongest. In this case, fisheries management and conservation are the setting; what is at stake is respect for the fundamental principles of a peaceful order founded on co-operation in relations between States. It is for this reason that many look to the Court today.

Mr. President, Members of the Court, this brings me to the end of my submission concerning the persistence of the dispute between Spain and Canada. If you so wish, I am now ready to commence my argument on the principles governing the Court's jurisdiction, which are relevant to this case.

Le PRESIDENT : Monsieur le professeur, pourquoi ne continuez-vous pas jusqu'à 13 heures.

Mr. REMIRO BROTONS:

I. Jurisdiction of the Court: principles

Mr. President, Members of the Court.

1. Spain will argue that the Court does have jurisdiction to entertain the Application filed against Canada because the dispute in question falls within the scope of the jurisdiction recognized by the Parties under Article 36, paragraph 2, of the Statute. The Respondent affirms the opposite and argues that the facts giving it grounds to act lie in the enforcement of the measures for the conservation and management of fisheries adopted by Canada in the NAFO Regulatory Area, and therefore fall within the terms of the reservation of 10 May 1994 to its declaration of acceptance of the Court's jurisdiction[23].

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2. According to Canada, Spain's interpretations violate the fundamental principles of interpretation on all counts[24]. Nothing is further from the truth. Spain on the other hand, like Canada, believes that jurisdiction must be based on a genuine consent, although the adjective is redundant; it also believes that consent can never be presumed, that optional clause declarations must be interpreted in a natural and reasonable way, giving full effect to the intention of the declaring State, that interpretation should be guided by the principle of good faith and that reservations are, of course, integral parts of an optional clause declaration. Nevertheless, on the basis of these principles, the Applicant is not prepared to follow the Respondent along a path littered with traps and inconsistencies.

3. Indeed, Canada invokes the indivisibility of the declaration, whereas in reality it interprets the reservation as a separate document; Canada transforms the strict assessment of consent into a presumption against the jurisdiction accepted in principle by the parties; Canada rejects a restrictive interpretation of the declaration for the sole purpose of promoting unlimited permissiveness in the interpretation of the reservation; Canada makes no distinction between the effectiveness of the

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[23]See Counter-Memorial of Canada, para. 6.

[24]See Counter-Memorial of Canada, para. 203.

declaration and the effectiveness of the reservation, or between the effectiveness of the reservation and its usefulness for circumventing the jurisdiction of the Court; Canada invokes good faith, but it does so in vain as it uses good faith to undermine the fundamental norm — the golden rule — governing interpretation of an international legal text, to which we shall refer later; Canada claims to be seeking the real intention of the declarant and finds it in the unconditional acceptance of its own points of view; Canada makes a distinction between the intention and the terms of the declaration; it even breaks down the sentence which gives meaning to those terms, thus in fact amending its reservation.

4. In the circumstances, my statement, which will be followed by those of Professors Highet and Dupuy, will be confined to establishing principles and drawing the conclusions applicable to the declarations of States under the so-called optional clause, including the Canadian declaration.

II. Indivisibility of the declaration and effectiveness

5. The declaration and the reservation form part of one and the same instrument which must be interpreted in comprehensive terms. To be more precise, we could — and should — say that the reservation constitutes a part of the declaration. However, after having acknowledged the indivisibility of the instrument[25], Canada concludes by replacing the principle — which is the acceptance of the Court's jurisdiction — with the reservation, which is an exception to such jurisdiction, although its declaration emphasizes this exceptional character by saying that it accepts as compulsory *ipso facto* the jurisdiction of the Court over "all disputes . . . other than . . ."[26].

6. The dissociation between the declaration and the reservation becomes clear when Canada calls for a high standard of proof of consent to jurisdiction or concerns itself with the principle of effectiveness.

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[25]See Counter-Memorial of Canada, paras. 72-75.

[26]See Memorial of the Kingdom of Spain, para. 10.

7. Canada asserts that there is a high standard of proof that consent has been given[27], while at the same time it rejects as a narrowly technical exercise in semantics any analysis which, in its view, would fail to reflect the full import of the language used and the underlying intention of the declaring State[28]. The Respondent would therefore have us acknowledge that we must be restrictive in the interpretation of the declaration but permissive in interpreting the reservations, despite the rhetorical assertion that they are indivisible.

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8. This line of reasoning becomes even more clear when it is claimed that there is no doctrine of restrictive interpretation of reservations to optional clause declarations[29]. However, despite what Canada asserts by simplifying what it calls the Spanish argument[30], Spain has never proposed a restrictive interpretation of the reservations. The criteria of interpretation are not, in themselves, either restrictive or expansive; at the very most, it is the results of their application that may be so.

9. According to Canada, the fact of taking the Spanish thesis into consideration would encourage States "to draft their reservations in far more sweeping terms than would otherwise be necessary, and would therefore undermine the ultimate goal of strengthening the optional clause system"[31]. Canada therefore now proposes, implicitly, that we be broad-minded in interpreting the reservations in order that their wording may be modest. This is a far cry from judicial reasoning. Spain does not think that these methods in respect of the declaration are the best way of setting the Court's jurisdiction on a firm basis. At all events, Spain encourages precision. While we have left States a great deal of freedom in formulating reservations to their declarations of acceptance of the Court's jurisdiction, it is logical to expect them to exercise it judiciously by stating as clearly as possible what disputes are excluded from the jurisdiction of this Court.

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[27]See Counter-Memorial of Canada, paras. 76-81.

[28]See Counter-Memorial of Canada, para. 75.

[29]See Counter-Memorial of Canada, paras. 190-201.

[30]See Counter-Memorial of Canada, para. 192.

[31]See Counter-Memorial of Canada, para. 198. In French: "à rédiger leurs réserves en des termes beaucoup plus généraux qu'il ne le serait autrement nécessaire et, par conséquent, nuirait à l'objectif ultime, qui est de renforcer le système de la clause facultative".

10. As regards the doctrine of useful effect, the problem lies in the fact that Canada forgets the declaration as such to concern itself solely with the reservation; it omits that the starting point is the useful effect of the declaration and confuses the useful effect of the reservation with its acceptance on account of the mere fact of its being relied on by the Respondent. Canada is of course still solely thinking of its reservation, which has to be profitable (useful effect) to avoid the jurisdiction of the Court in this case.

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11. On the other hand, Spain considers that the useful effect of the reservation cannot smother that of the declaration conceived for acceptance of the jurisdiction of the Court, which is its object and purpose. In this regard, the Spanish thesis considers that reservations must be given the most limited scope permitted by their interpretation in accordance with the general rules underlying the exegetical operation. Spain considers that this point of view not only is not illogical but is the only one of which logic will allow when it comes to ensuring that the principle of good faith is really present in the exegetical operation. Spain considers that States depositing a declaration in the exercise of their sovereignty do not do so in order to build up their image at the expense of a jurisdiction which, through reservations, becomes void of all substance and purely nominal[32].

III. The intention crystallized in the terms of the declaration

12. Spain considers that the real — veritable — intention of the party making the declaration at the time of its deposit must be sought. That intention must nevertheless be well established, which implies — having regard to the rules of the soundest hermeneutics — that the intention is objectified in the text, namely that its terms must be interpreted in good faith, in accordance with the ordinary meaning in its proper context, unless a special meaning is particularly envisaged therein, and taking account of its object and purpose[33]. This is the fundamental rule of interpretation sanctioned by the settled case-law of the Court.

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[32]See Counter-Memorial of Canada, para. 71.

[33]See Memorial of Spain, para. 34.

13. If this rule is duly applied, it is admittedly an unsettling spectre[34] for the Respondent. Indeed, as we shall be seeing, Canada claims to impose as real or veritable an intention not consistent with the ordinary (natural or reasonable, if you prefer) meaning of the terms used in their proper context.

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14. Canada recognizes the network of engagements or the consensual bond between States participating in the system of the optional clause[35], but is not interested in the consequences this implies for the interpretation of the declarations and their reservations on the basis of the principle of good faith; it prefers to adulterate the vital role of this principle in the interpretation in order to ruin the general rule which makes it an obligation to establish the ordinary meaning of the terms in their proper context.

15. Canada claims to discredit "attempts [— according to it —] to attach a narrow or technical meaning that would be inconsistent with their ordinary meaning" and, above all, to avoid "casuistry inconsistent with a conscientious effort to search for and give effect to the true intention" [of the declarant State][36]. Canada glosses over the fact that the ordinary meaning of a term can, in a specific case, be narrow or technical and it would be this meaning and no other which would guarantee the correct application of the principle of good faith. We do not see how what Canada calls casuistry could be incompatible with the conscientious effort to search for the true intention [of the declarant State] unless good faith is identified with the unconditional acceptance of the points of view expressed by the State concerned, case by case.

Mr. President, I still have a number of remarks to make, but in view of the time, you may perhaps wish us to pause at this point until tomorrow.

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[34]See Counter-Memorial of Canada, para. 62.

[35]Counter-Memorial of Canada, para. 67.

[36]See Counter-Memorial of Canada, para. 68.

Le PRESIDENT : Merci beaucoup, Monsieur le professeur Remiro. La Cour se réunira de nouveau demain matin à 10 heures.

L'audience est leveé à 13 heures.

Non-Corrigé
Uncorrected

Traduction
Translation

CR 98/9 Corr.
(English only)
15 June 1998

CORRIGENDUM

[Translation]

p. 6, line 4: instead of Spain, read Canada.