CR 98/14

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNEE 1998

Audience publique

tenue le mercredi 17 juin 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Schwebel, président

en l'affaire de la Compétence en matière de pêcheries (Espagne c. Canada)

COMPTE RENDU

YEAR 1998

Public sitting

held on Wednesday 17 June 1998, at 10.00 a.m., at the Peace Palace,

President Schwebel presiding

in the case concerning Fisheries Jurisdiction (Spain v. Canada)

VERBATIM RECORD

Présents : M. Schwebel, président
M. Weeramantry, vice-président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek, juges
MM. Lalonde
Torres Bernárdez, juges *ad hoc*

M. Valencia-Ospina, greffier

Present:

President	Schwebel
Vice-President	Weeramantry
Judges	Oda
	Bedjaoui
	Guillaume
	Ranjeva
	Herczegh
	Shi
	Fleischhauer
	Koroma
	Vereshchetin
	Higgins
	Parra-Aranguren
	Kooijmans
	Rezek
Judges *ad hoc*	Lalonde
	Torres Bernárdez
Registrar	Valencia-Ospina

Le Gouvernement de l'Espagne est représenté par :

M. José Antonio Pastor Ridruejo, chef du service juridique international du ministère des affaires étrangères d'Espagne, professeur de droit international à l'Université Complutense de Madrid,

comme agent et conseil;

M. Pierre-Marie Dupuy, professeur de droit international à l'Université Panthéon-Assas (Paris II),

M. Keith Highet, conseil en droit international, vice-président du comité juridique interaméricain de l'Organisation des Etats américains,

M. Antonio Remiro Brotóns, professeur de droit international à l'Université autonome de Madrid,

M. Luis Ignacio Sánchez Rodríguez, professeur de droit international à l'Université Complutense de Madrid,

comme conseils et avocats;

M. Félix Valdés Valentín-Gamazo, ministre-conseiller de l'ambassade d'Espagne aux Pays-Bas,

comme coagent;

M. Carlos Domínguez Díaz, secrétaire d'ambassade, sous-directeur général aux organisations internationales de gestion de pêcheries au ministère de l'agriculture et des pêcheries d'Espagne,

M. Juan José Sanz Aparicio, secrétaire d'ambassade, membre du service juridique international du ministère des affaires étrangères d'Espagne,

comme conseillers.

Le Gouvernement du Canada est représenté par :

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comme agent et avocat;

M. Blair Hankey, avocat général délégué, ministère des affaires étrangères et du commerce international,

comme agent adjoint et avocat;

M. L. Alan Willis, c.r., ministère de la justice,

comme conseil principal et avocat;

The Government of Spain is represented by:

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as Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of International Law, University of Paris II (Panthéon-Assas),

Mr. Keith Highet, Counsellor in International Law, Vice-Chairman, Inter-American Juridical Committee, Organization of American States,

Mr. Antonio Remiro Brotóns, Professor of International Law, Autonomous University of Madrid,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Complutense University of Madrid,

as Counsel and Advocates;

Mr. Félix Valdés Valentín-Gamazo, Minister-Counsellor, Embassy of Spain to the Netherlands,

as Co-Agent;

Mr. Carlos Domínguez Díaz, Embassy Secretary, Assistant Director-General for International Fisheries Management Organizations, Ministry of Agriculture and Fisheries of Spain,

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as Advisers.

The Government of Canada is represented by:

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as Agent and Advocate;

Mr. Blair Hankey, Associate General Counsel, Department of Foreign Affairs and International Trade,

as Deputy Agent and Advocate;

Mr. L. Alan Willis, Q.C., Department of Justice,

as Senior Counsel and Advocate;

M. Prosper Weil, professeur émérite de l'Université de Paris,

comme conseil et avocat;

Mme Louise de La Fayette, Université de Southampton,

M. Paul Fauteux, ministère des affaires étrangères et du commerce international,

M. John F. G. Hannaford, ministère des affaires étrangères et du commerce international,

Mme Ruth Ozols Barr, ministère de la justice,

Mme Isabelle Poupart, ministère des affaires étrangères et du commerce international,

Mme Laurie Wright, ministère de la justice,

comme conseils;

M. Malcolm Rowe, c.r., Gouvernement de Terre-Neuve et du Labrador,

M. Earl Wiseman, ministère des pêches et des océans,

comme conseillers;

Mme Manon Lamirande, ministère de la justice,

Mme Marilyn Langstaff, ministère des affaires étrangères et du commerce international,

Mme Annemarie Manuge, ministère des affaires étrangères et du commerce international,

M. Robert McVicar, ministère des affaires étrangères et du commerce international,

Mme Lynn Pettit, ministère des affaires étrangères et du commerce international,

comme agents administratifs.

Mr. Prosper Weil, Professor Emeritus, University of Paris,

as Counsel and Advocate;

Ms Louise de La Fayette, University of Southampton,

Mr. Paul Fauteux, Department of Foreign Affairs and International Trade,

Mr. John F. G. Hannaford, Department of Foreign Affairs and International Trade,

Ms Ruth Ozols Barr, Department of Justice,

Ms Isabelle Poupart, Department of Foreign Affairs and International Trade,

Ms Laurie Wright, Department of Justice,

as Counsel;

Mr. Malcolm Rowe, Q.C., Government of Newfoundland and Labrador,

Mr. Earl Wiseman, Department of Fisheries and Oceans,

as Advisers;

Ms Manon Lamirande, Department of Justice,

Ms Marilyn Langstaff, Department of Foreign Affairs and International Trade,

Ms Annemarie Manuge, Department of Foreign Affairs and International Trade,

Mr. Robert McVicar, Department of Foreign Affairs and International Trade,

Ms Lynn Pettit, Department of Foreign Affairs and International Trade,

as Administrative Officers.

The PRESIDENT: Please be seated. I call on the Deputy Agent for Canada.

Mr. HANKEY:

1. Mr. President, distinguished Members of the Court, in opening Canada's reply in this second round of oral argument, I wish to place on the record Canada's apology for the absence of its Agent, Ambassador Philippe Kirsch. For reasons which have been explained to you, Mr. President, he has had to leave The Hague unexpectedly on business for the United Nations.

2. Let me begin briefly by repeating what Ambassador Kirsch said last week. This case is about Canada's reservation. The issue, at this stage, is simply whether, under the terms of that reservation, as part of Canada's Declaration of 10 May 1994, the Court has jurisdiction (CR 98/11, p. 8, paras. 3-4). The Court itself in its Order of 2 May 1995 directed the Parties to confine themselves to that issue in these proceedings. The Order, in turn reflected an agreement between the Parties reached at a meeting of the two Agents with President Bedjaoui on 27 April of that year.

3. Accordingly, questions of admissibility, including the exhaustion of local remedies, of mootness — that is, whether the dispute has been settled — and, of the *locus standi* of Spain to bring this case: those questions are not in issue at this stage. Canada therefore has taken no position on those questions.

4. Last week we heard Counsel for Spain pose the question: "Why are we all here?" (CR 98/10, p. 16). It may have been good theatre, but, as a question, it was extremely naive. The question ought properly to have been addressed to Spain's own lawyers, rather than to the Court.

5. The answer — the *honest* answer — is that we are here for a very simple and obvious reason. That reason is that, faced with the clear language of Canada's reservation excluding the jurisdiction of the Court in this dispute, Spain has gone to truly extraordinary lengths to avoid that clear language, and to evade that clear conclusion. The contradictions and confusion introduced by Spain are truly astonishing.

6. In the first round we were told that the 1994 legislation was not a conservation and management measure. We were told that the seizure of the *Estai* was not enforcement (CR 98/9,

p. 16, para. 7, *et passim*). We were told that this present dispute is about "title", or jurisdiction, and not about conservation and management (CR 98/9, p. 12, para. 2 *et passim* throughout the Spanish pleadings up to CR 98/13, p. 65). We were even told that the seizure of the *Estai* violated the United Nations Charter (CR 98/10, pp. 51-56, paras. 33-37; CR 98/13, pp. 60-64, paras. 21-28).

7. In fact Spain's arguments — though they take various forms — all amount to one rather simple proposition. This is that Canada's reservation can only cover *lawful* measures of conservation and management, and *lawful* acts of enforcement.

8. That is the purpose of the emphasis on title. It attempts to persuade the Court that Canada's reservation does not cover the question of Canada's *right* — its legal right — to take such measures. That is the purpose of Spain's argument that measures taken on the high seas, beyond 200 miles, cannot be "conservation and management measures". Why? Because they would not be lawful. That is the purpose behind Spain's attack on Canada's enforcement powers, describing them as unlawful because in violation of the prohibition of the use of force under the United Nations Charter. And that is the purpose behind Spain's attempts to show that the techniques of conservation and management are not those authorized by treaties. Spain's conclusion is that they are unlawful, and therefore not covered by the reservation.

9. The several variations on this one, simple theme were fully covered by Mr. Willis last week (CR 98/12, pp. 11-17). I won't attempt to restate his arguments, but his conclusion is worth repetition. Spain's simple, single theme is patently wrong!

10. It is wrong because it invites the Court to decide on the *legality* of the measures taken by Canada as a preliminary, jurisdictional decision; in other words: the merits precede jurisdiction. And, in addition, it makes the reservation meaningless — for measures in the NAFO Regulatory Area must, by definition, be beyond 200 miles. And it makes nonsense of the reservation: for it would make unlawful measures subject to the Court's jurisdiction, and exclude only lawful measures.

11. Now it is true that throughout the oral proceedings, Spain has put forward many new arguments. So many in fact that Canada has been forced to choose between those that merit an answer and those that do not. I make no complaint about this. But the Court should not take as an admission or acquiescence, Canada's silence with respect to any of those Spanish arguments. We have seen before how, in the first round, Spain's arguments have changed quite radically from what was in their Memorial. Now they have changed yet again. It does, of course, make it difficult to join issue, when the issues keep changing, but let me take one or two of the new arguments to be found in Spain's second round.

12. There is this new reference to "nullity" which figured not at all in Spain's Memorial or in the first round of oral pleadings (CR 98/13, p. 37, para. 8). Now Mr. Highet argues that Canada's reservation is to be regarded as a "nullity". Now my understanding is that a State's act is a nullity when it is not merely illegal, but illegal because by reference to a rule of law so fundamental, so peremptory, that it is not only illegal but void *ab initio*.

13. Now by reference to what fundamental, peremptory norm is the Canadian reservation a nullity? Spain, alas, does not tell us. What Spain does tell us is how Canada ought to have drafted its reservation, in order to achieve its object, its purpose, which of course Spain knows very well what it is. Mr. President, can you really avoid a nullity simply by the way you draft, by a different choice of words? I very much doubt it. My impression is that this is just one more form of the same old allegation: that Canada has acted unlawfully. My colleague Mr. Willis, will address this latest Spanish innovation.

14. It is true that Spain has invoked Article 2, paragraph 4, of the United Nations Charter to challenge Canada's enforcement on the high seas of its legislation. And Canada agrees that the Charter's prohibition of the use of force — Article 2, paragraph 4 — is a peremptory norm. But the argument is defective for at least two reasons.

15. *First*, Article 2, paragraph 4, does not prohibit law enforcement by States. As Mr. Willis will demonstrate, the degree of coercion authorized under Canada's law is well within the limits of general State practice.

16. *Second*, even if Spain were correct in maintaining that Canada's measures of enforcement are excessive, and therefore illegal, that would be surely an issue for the merits. It would be a challenge to Canada's actual conduct in arresting the *Estai*. It has nothing to do with the interpretation of Canada's reservation. For enforcement would still be "enforcement" under the terms of the reservation, whether lawful or not.

17. In fact there is only one point at which Spain's nullity arguments are addressed directly to the reservation. This is when Professor Dupuy argues (CR 98/13, pp. 56-57, paras. 12-15) that the Canadian reservation is a nullity because it contravenes Article 36, paragraph 6, of the Court's Statute. The argument is based essentially on Sir Hersch Lauterpacht's attack on so-called "automatic reservations" in the *Norwegian Loans* case.

18. Now, Mr. President, I am by no means sure that the Court as a whole would share this view of the incompatibility of "self-judging" or "automatic" reservations with Article 36, paragraph 6. But, be that as it may, the whole Spanish argument on this point is misconceived.

19. Canada does not say "These are conservation and management measures — because we say so." We do not define "conservation and management measures" simply by reference to Canadian law. We readily concede to the Court the power to decide whether the Canadian measures are conservation and management measures — by reference to general practice. And we can also concede the Court's power to decide whether the Canadian enforcement actions are "enforcement" actions — also by reference to general practice. That is why, in our written pleadings and in our oral arguments, we go to great lengths to show that the Canadian measures are exactly what international practice understands by "conservation and management measures". The only special feature about the Canadian measures is that they apply beyond 200 miles. But,

Sir, that goes to legality, to merits. They are nonetheless "measures" within the meaning of the Canadian reservation.

20. Then, as another "new" argument, Mr. Highet tells us that Spain has three other claims that have nothing to do with the *Estai* (CR 98/13, pp. 49-50, paras. 67-70). These are the claims that Canada has unlawfully asserted jurisdiction over the high seas; that Canada has unlawfully used force; and that Canada has violated Spain's sovereignty on the high seas.

21. Frankly, Mr. President, I have great difficulty in following the relevance of all this. Canada's reservation is not limited to the *Estai*. These three "other" claims invoked by Spain prove absolutely nothing. They are all claims which arise out of, or concern, the 1994 legislation and its enforcement. The legislation and the regulations issued under it are "measures" covered by the reservation. So just what is Spain's point? I see no substance to it whatsoever.

22. It is because of arguments of this kind, Mr. President, that we are here to answer Spain's question. But, since we are here, let me redirect the argument to the real issue. What is the proper interpretation of Canada's reservation and, as applied to the facts of this case, does it exclude jurisdiction? So let me turn to that.

1. The Interpretation of Canada's Reservation

(a) Rules of, and approach to, interpretation

23. Mr. President, I need say very little about the rules governing the interpretation of optional clause declarations. As the Court will have noted in the oral argument of Professor Remiro Brotóns (CR 98/9, pp. 54-59, paras. 1-15) there was a good deal of agreement with the principles I outlined myself on Thursday, during the first round (CR 98/11, pp. 24-35, paras. 4-39).

24. But there remains one important difference. Despite Spain's apparent acceptance of the unity of the declaration and the reservation, and despite its denial that it proposes a restrictive interpretation of reservations (see CR 98/9, p. 57, para. 8), Spain in fact does the exact opposite. For the essence of Spain's approach to interpretation lies in two propositions.

25. *First*, that the purpose of a declaration under Article 36, paragraph 2, is to confer jurisdiction on the Court, and this should be given full effect.

26. *Second*, that a reservation should be viewed as an exception, or derogation, from this primary purpose, and thus requires a *restrictive* interpretation.

27. In the words of Professor Brotóns *"il faut donner aux réserves la portée la plus limitée permise par leur interprétation . . ."* (CR 98/9, p. 58, para. 11).

28. Now, Mr. President, that is wrong. As I explained in the first round (CR 98/11, p. 28, para. 14), if the declaration, including any reservations, is a unity, the same principles of interpretation apply to the whole of it. You can't be "liberal" as regards the declaration, and then "restrictive" as regards the reservation. The whole declaration, including the reservation, must be treated as one. And if there is an overriding principle — and there is — it is that the words used must show real consent to jurisdiction. You cannot start from a *presumption* of jurisdiction based on the fact that a declaration has been made, and treat reservations as derogations from consent, to be given a restricted interpretation, as Spain continues to insist.

(b) Application of the reservation to the present dispute

29. Mr. President, distinguished judges, I want, now, to address what seems to be the core of this dispute. What, exactly, does the Canadian reservation cover?

30. It may help the Court to visualize a mirror image of the Canadian reservation, to consider the wording of the Canadian reservation, not as a reservation from jurisdiction, but as a *grant* of jurisdiction. In other words, suppose Canada had *conferred* jurisdiction in the same terms as in its reservation: what would have been the extent of the jurisdiction granted?

31. Let me begin with the central phrase: "disputes arising out of or concerning conservation and management measures . . .". Logically, as I said last Thursday (CR 98/11, p. 36, para. 45), one would think that covered *four* elements.

32. *First*, the right or "title" to take such measures. I cannot believe that a dispute over that question would not be a dispute "arising out of or concerning" such measures. In other words, had Canada used the same words in a Special Agreement or compromissory clause to *grant* jurisdiction, to the Court, Spain would certainly have argued that the conservation covered any dispute over Canada's right — *"titre"* to use the word Spain uses — to take the measures. And, on that hypothesis, Spain would be right. For if a State undertakes any form of conduct, including a legislative measure, a dispute over the right of the State under international law to act in that way is patently a dispute "arising out of or concerning" that conduct.

33. *Second*, the need for such measures. This would require proof — largely scientific — that a genuine need for conservation existed. It is obvious that any dispute over such matters would fall within a grant of jurisdiction over "conservation and management measures".

34. *Third*, the demonstration that the actual conservation and management measures taken were appropriate to meet that need, another matter requiring scientific proof. Again, it is apparent that any dispute over such questions would be a dispute "arising out of or concerning" those measures.

35. *Fourth*, the enforcement or execution of such measures. In my submission this fourth issue would involve, not only the question whether the means of enforcement used were appropriate to enforce the particular measure, but, in addition, whether the measures were excessive or unlawful. Thus, a dispute over any act of enforcement or execution would rightly be regarded as a dispute "arising out of" the State's acts. In short, I am saying that the phrase "arising out of or concerning" would embrace a dispute over enforcement even without the last phrase of Canada's reservation, which expressly covers the "enforcement of such measures".

36. Now if a *grant* of jurisdiction in the terms used by Canada would include all those four elements — as it clearly would — it necessarily follows that an *exclusion* of jurisdiction — a reservation — would equally cover all four elements.

37. The wording means one thing. You can't alter the meaning of the words according to whether they were used in a grant or a reservation. Thus, I repeat, the natural meaning of the words would cover all four elements: disputes over legality, disputes over scientific need, disputes over the appropriateness of the measures, and disputes over their enforcement.

38. Now, clearly that is not Spain's view. First, as I have pointed out, Spain says that the issue of title *("titre")* is not included. So any dispute over a State's legal right to take such measures — a dispute which could involve reference to some of the basic principles of law covering coastal State jurisdiction — is excluded. The conclusion is astonishing! Just think of it, Mr. President! If this were a *grant* of jurisdiction, the Court would be competent to hear the basically scientific disputes over whether a conservation need existed, and whether Canada's measures were appropriate — those are the second and third issues — but the Court would have no competence to deal with the *first* and primary issue of whether Canada had a legal right to take such measures.

39. I can imagine the Court's reaction to that. If this were a *grant* of jurisdiction, surely the Court would say it was competent to consider any dispute over the right, the "title" of Canada to adopt such measures. By the same token, because this is a reservation and not a grant, the issue of Canada's legal right, or title, must be excluded from the jurisdiction.

40. It was Professor Weil who, in the first round, explained that, if a court has competence over a defined subject-matter, it necessarily has competence over the principles and rules of law that govern it (CR 98/12, p. 41, para. 38). Spain's reply, in the words of Mr. Highet (CR 98/13, p. 43, para. 36), is that Canada ignores the distinction between *(a)* legal principles; and *(b)* substantive legal rules. Mr. President, I am baffled. What exactly is this distinction we are said to have forgotten? It really is no answer at all to the argument by Professor Weil.

41. Mr. President, it is also clear that Spain regards Canada's enforcement of its conservation and management measures as falling outside the reservation, despite the express words of the final phrase — "and the enforcement of such measures".

42. The Court will forgive me if I am less clear about *why* Spain does not regard the relevant provisions of the 1994 legislation or the actual steps used to arrest the *Estai* as enforcement measures.

43. On one view Spain seems to be saying that the measures authorized by the legislation or used in relation to the *Estai*, were not "enforcement" because they were not "lawful". Now that really is an extraordinary argument. Imagine a *grant* of jurisdiction, allowing the Court to deal only with disputes over *lawful* measures. What could be the dispute? Or imagine a reservation excluding the Court's jurisdiction over *lawful* measures of enforcement, but leaving it with jurisdiction over *unlawful* measures. The absurdity of both results suggests that Spain's argument is unsound. The sensible interpretation is that enforcement means just that. Whether that "enforcement" is lawful or unlawful is a different issue. And, if the Court takes jurisdiction, it can decide it, but if "enforcement" is excluded from the Court's jurisdiction, it cannot.

44. Now the other view is that Spain's argument is that the "enforcement" authorized by Bill C-29, and used against the *Estai*, cannot be true enforcement because the measures involve the use of force and therefore cannot be described as "enforcement" in any real sense as the term is understood in international practice. This was the argument made by Mr. Highet (CR 98/10, pp. 17-20).

45. Mr. President, I'm not sure that this argument is really any different from the argument that "enforcement" means "lawful enforcement". In any event, as my colleague Mr. Willis will show, Canada's techniques of enforcement are really quite standard, and similar to those used by many States for the protection and conservation of their fisheries. Spain may not like them, but they are "enforcement" measures nonetheless.

46. Mr. Highet's argument (CR 98/10, p. 18) that the use of force on the high seas can never be the enforcement of a conservation or management measure shows both a lack of understanding and confusion.

47. It lacks understanding because it ignores the fact that it is common practice for the fishery protection vessels of States to require vessels to stop and be boarded under the threat that, if they refuse, force will be used. To say that such vessels cease to enforce conservation and management measures the moment they threaten or use force is simply unreal. The fact of the matter is that getting a vessel to stop, and be boarded, at sea is no easy matter. It is for this reason that many States entrust fisheries protection to their naval vessels, or to armed patrol vessels. The threat of force is often the only means of stopping a vessel.

48. In the case of the *Estai*, this was not a helpless, innocent row boat. This was a large, powerful vessel, of almost 65 metres, which had in the past violated NAFO regulations and which was refusing to stop in order to permit boarding and inspection for violating Canada's conservation and management measures. In the circumstances, the threat of force used to compel it to stop — warning shots fired ahead of the *Estai* — was not at all excessive.

49. I know Mr. Highet invited the Court to postulate that the *Estai* might have been bombed or torpedoed (CR 98/10, pp. 19-20). But no one bombed or torpedoed the *Estai*. If the Court recalls what actually happened, the methods of coercion used by Canadian vessels were eminently reasonable. They were typical of routine "enforcement" against a vessel of this type.

50. Certainly a dispute may arise over whether the force was justified, or necessary, or excessive. And the use of force may, in some cases, be held to be illegal. But then the proper conclusion is that it was an *unlawful* conservation measure. Mr. Highet's argument that it was never enforcement at all is quite different, and clearly wrong. It is contradicted by the routine practice of States in arming their fishery protection vessels.

51. The argument is confused in the sense that it focuses on the fact that the arrest occurred on the high seas. Evidently, Spain regards the seizure of the *Estai* as illegal on that basis alone, with or without the use of force. But again, that would be an argument for Spain to make *on the merits*. The argument would be that, because it took place on the high seas, the arrest was an *unlawful* act of enforcement. But Spain, and Mr. Highet, would have the Court believe that,

because *unlawful*, the arrest could not be enforcement. In short they claim that "enforcement" can only mean "lawful enforcement".

52. Mr. President, this is quite unrealistic. "Enforcement" is what it is: it depends on the nature and purpose of the action taken. Whether it is lawful or unlawful is quite a different issue: and it is an issue of *merits*.

2. Spain's arguments not only invite the Court to proceed to the merits, but they are essentially unsound

53. The weakness of Spain's argument does not lie solely in the fact that they invite the Court to decide issues of merits as a preliminary to deciding on jurisdiction. The arguments have the additional weakness that they are unsound.

54. Take Spain's initial argument that the measures authorized by the 1994 legislation are not conservation and management measures. My colleague, Mr. Willis, demonstrated last week that the argument is manifestly unsound (CR 98/11, pp. 54-61). The terms of the Statute make it clear that its essential purpose is "conservation and management". The substance is typical of conservation and management legislation: the vessels it applies to, the fish stocks it protects, the conservation measures authorized. And, finally, it deals with enforcement. Mr. President, it is difficult to imagine a legislative measure that is more obviously a measure of conservation and management.

55. To say that this cannot be so, because the legislation applies beyond 200 miles — and this is Spain's argument — is clearly unsound. Locality is irrelevant to the nature of the measures. The measures are what they are. One looks to their nature or, subject-matter, their function, and their intended purpose. And by those criteria the measures are clearly "conservation and management measures". The only purpose behind Spain's objection that they apply beyond 200 miles is to challenge their legality. And that, as I have said, Mr. President, is an issue of *merits*.

56. So, too, with the Spanish argument that the enforcement authorized cannot be regarded as true enforcement, covered by the reservation. Spain's only argument is that the enforcement authorized involved the use of force. As we have shown, the argument is groundless. Article 2, paragraph 4, of the United Nations Charter has absolutely no relevance. The suggestion that, in State practice and the general usage of international law, "enforcement" of conservation measures can never involve the use of force is simply wrong. The only possible relevance of Spain's argument would be, at the merits stage, if Spain wished to argue the use of force was excessive, or unlawful because it occurred beyond 200 miles.

57. This proceeding is about jurisdiction, not the merits of the case. Nonetheless, since these hearings are publicized in the world-at-large, let me digress for a moment to correct some of the more obvious missstatements of fact made by Spain. These are not matters relating to jurisdiction, but they do call for reply. All of these are instances dealt with clearly in Canada's Counter-Memorial and documents before the Court.

58. On Monday, Professor Sánchez Rodríguez asked how, since Minister Tobin said Spain was fishing legally in the NAFO Regulatory Area in 1994, Canada could now assert that Spain had suddenly transformed itself into a dangerous predator and pirate State in 1995 (CR 98/13, pp. 17-18, para. 5).

59. The answer is set out in part in the Regulatory Impact Statement Analysis published by Canada at the time that Spain and Portugal were added to the Regulations in March 1995. The relevant quote which appears in both Spain's and Canada's written pleadings reads as follows:

> "The primary threat to the recovery of Greenland halibut stocks is . . . posed by vessels of Spain and Portugal, which, unless stopped, will fish significantly over the EU quota of 3400 tonnes. As an additional and significant problem, *Spanish and Portuguese vessels have, starting in 1994, significantly increased the rate at which they are violating NAFO regulations* . . . The [Canadian] regulations are essential now to deter overfishing of groundfish stocks by Spanish and Portuguese vessels." (Emphasis added.)

So that was contemporaneous with the addition of Spain and Portugal to the list on 19 March 1995.

60. Apparently, not content to leave this matter with a rhetorical question, Professor Sánchez Rodríquez went on to say in his presentation that, *"l'Espagne a toujours respecté les limites de capture juridiquement établies dans le système OPANO"* (CR 98/13, p. 20, para. 6).

61. As noted at paragraph 24 and outlined in more detail in Annex 12 of Canada's Counter-Memorial, on close to fifty occasions the European Union either ignored the NAFO quotas or set quotas for itself unilaterally that were higher than those set by NAFO. This resulted in overfishing and depletion of straddling stocks.

62. There is yet a further error. Professor Sánchez Rodríquez has suggested that Canada admits that only 10 per cent of the stock of Greenland halibut is found outside the 200-mile limit (CR 98/13, p. 19). The purpose of this "information" is to suggest that, if 90 per cent of the stock was found *inside* Canada's 200-mile zone, the collapse of the stock could scarcely be blamed on Spain for fishing the 10 per cent *outside*. Mr. President, the very least we can expect is that Spain's counsel quote the documents accurately, and do not misinform the Court. Canada's Counter-Memorial, at pages 10 and 11, makes it absolutely clear that it is 10 per cent of the Grand Banks, not the stock, that lies outside the 200-mile limit. Moreover, since this is a "straddling" stock, one that migrates inside and outside the 200 miles, its depletion on either side of the 200-mile limit depletes the entire stock.

63. It may be doubted whether Spain really misunderstands the position. If Spain really believed it fished only 10 per cent of the stock, why then, why was a quota of 69 per cent of the Total Allowable Catch (TAC) set by the European Union for Spain and Portugal in 1995? Sixty-nine per cent, that is not anywhere close to 10 per cent!

64. In addition, there were the chronic problems of under-reporting of catches and misreporting of species to hide further overfishing and depletion of straddling stocks. For example, contrary to Professor Dupuy's assertion (CR 98/10, p. 50, para. 31), the *Estai* itself was fined by

Spain for similar offences in 1994 (Canadian Counter-Memorial, Ann. 20). These problems of lack of control flared up dramatically during the fall of 1994 and early 1995. (See paragraph 34 and Annexes 20 to 23 of the Counter-Memorial for more detail.)

65. In 1995, when Greenland halibut was the only major straddling groundfish stock still left to fish, and when Canada had taken the most stringent conservation and management measures with respect to its own fleets, Spain reverted to its bad old overfishing ways. Through the European Union, a unilateral quota many times higher — five times higher in fact — than that set by NAFO was established, and once more, Spain failed to control overfishing by its vessels.

66. As the Agent for Canada stated last Thursday, Canada has recognized its share of responsibility for the Northwest Atlantic conservation crisis (CR 98/11, p. 10, para. 11). Canada has taken and continues to take the most stringent conservation and management measures with respect to our vessels to protect and allow rebuilding of the stocks.

67. What is disappointing and truly astonishing is that Spain to this day refuses to accept that it overfished for many years and that its actions were a major contribution to the decline of several straddling stocks. It is as if the Spanish Government, like the Bourbons, *"n'ont rien oublié, ni rien appris"*, or, in English, "have forgotten nothing and learned nothing."

68. Mr. President, we are not at the merits stage. The only question, *now,* is whether the 1994 legislation, together with its regulations, and the arrest of the *Estai*, were "conservation and management measures" and their "enforcement" within the meaning of Canada's reservation. And that they clearly were.

3. Article 79, paragraph 7, of the Rules of Court: "exclusively preliminary character"

69. Mr. President, distinguished Judges, I now turn now to my final point. Although it makes no formal submission to this effect, Spain has argued that the issues before the Court do not have an exclusively preliminary character, and that the Court should therefore exercise its power under Article 79, paragraph 7, of its Rules to order that the arguments on jurisdiction and the merits be heard together (CR 98/13, p. 12, para. 13; p. 41, para. 27; pp. 57-58, paras. 14-15). As the basis

for this argument, Spain claims that a consideration of the merits is necessary to determine whether the measures taken by Canada were truly "conservation and management measures".

70. In Canada's view, Sir, the question of the application of its reservation is clearly preliminary. The Court already has before it all the material it needs to make a determination on jurisdiction. Indeed, the Court said so itself in its Order of 8 May 1996, when it rejected Spain's request for a second round of written pleadings, holding that it was sufficiently informed of the contentions of the Parties on the facts and the law with respect to jurisdiction; that was the Court's holding.

71. Since the change in its Rules in 1978-1979, the Court has in fact very rarely determined that any objection to jurisdiction does not possess an exclusively preliminary character. All three cases in which it has joined preliminary objections to the merits were very different from the present case. In *Military and Paramilitary Activities*, the objection based upon the Vandenberg reservation required a determination of which States would be affected by the Judgment. Logically, this could not be known until the main lines of the decision on merits were clear. Our own case is very different. In the *Lockerbie* cases, the Court held that the arguments of the two Respondents had the character of a defence on the merits. In fact the question on the merits — the relationship between the Montreal Convention and the Security Council resolutions and the effect of the latter upon the former — was exactly the same question as the question on the third preliminary objection. Again, our case is clearly very different. In the *Cameroon* v. *Nigeria* case, the issue on the eighth preliminary objection was whether the maritime boundary between Cameroon and Nigeria would affect the rights of other States. This objection did not possess an exclusively preliminary character, because third States, whose rights or claims might be affected, had at this stage made no attempt to intervene and make their claims known, and the boundary had to be deliberated upon by the Court before it could be known whether or not the rights of such third States would be affected. Once again, our case is very different.

72. In our case, there are no third States potentially affected, so the decisions in *Military and Paramilitary Activities* and in *Cameroon* v. *Nigeria* are not relevant. Furthermore, the questions on jurisdiction and the questions on the merits are quite distinct, so the decisions in *Lockerbie* have no relevance.

73. Mr. President, the Judgment in *Oil Platforms* makes clear that in order to avoid going to the merits unnecessarily, the Court should fully examine the issue of jurisdiction at the preliminary phase. This is in accordance with Article 79, paragraph 6, of the Rules, which States that:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

74. Canada believes that the Court already has before it an abundance of fact and law regarding the general definitions of "conservation and management measures" and "enforcement", as well as sufficient information on the facts and law related to this case to determine that all the measures taken by Canada and all the matters — legal and factual — complained of by Spain arose from or concerned conservation and management measures and their enforcement.

75. In conclusion, Sir, in our view, Canada's objection possesses an exclusively preliminary character and the Court already has before it all the arguments on fact and law and all the evidence it requires to determine whether or not it does have jurisdiction in this case.

76. Mr. President, distinguished Members of the Court, that is all I have to say at this stage. Could I ask you to call on my colleague, Professor Weil?

The PRESIDENT: Thank you, Mr. Hankey. I call on Professor Weil.

M. WEIL : Monsieur le président, Madame, Messieurs les juges,

1. Au moment où cette procédure orale approche de sa fin, je ne peux m'empêcher de constater qu'une fois de plus la thèse de nos adversaires a été modifiée. Une fois de plus, nos amis espagnols nous condamnent à un tir sur cible flottante. Nous venons en effet d'assister lundi à la dernière étape d'une opération de prestidigitation qui s'est déroulée en trois étapes.

2. Dans un premier temps, l'Espagne s'est attachée à l'interprétation mot pour mot de chacun des termes de la réserve de manière à montrer que notre affaire n'est pas couverte par la réserve. On discutait du sens du mot «mesures»; on soutenait que les mesures, c'était la loi et non pas les règlements; on s'attachait au mot «navires» dont on disait qu'il ne visait que les bateaux apatrides et leurs équivalents. On prenait soin cependant de souligner que ce n'est pas la validité de la réserve que l'on contestait mais seulement «une certaine interprétation de celle-ci» (mémoire de l'Espagne, p. 68-69, par. 38-39).

3. Dans un second temps, plus précisément au cours du premier tour des plaidoiries orales, nous avons assisté à une première métamorphose. On nous a expliqué que l'affaire n'avait rien à voir avec la protection des poissons et avait tout à voir avec le titre du Canada sur la haute mer et avec le recours à la force. Nous étions tout simplement, nous a-t-on dit, en dehors du champ de la réserve. C'est cette thèse fondée sur la substitution de la nature et de l'importance des normes applicables à l'objet du différend, pierre angulaire de la réserve, que je me suis efforcé d'analyser et de dénoncer dans ma précédente plaidoirie.

4. Et voici maintenant la troisième étape, plus spectaculaire encore. Après avoir dénaturé la réserve sous prétexte de l'interpréter, après l'avoir mise de côté en la court-circuitant, l'Espagne vient tout simplement de la faire disparaître. La réserve canadienne, nous a-t-on dit, n'a aucun champ d'application, il n'y a rien auquel elle puisse s'appliquer, elle n'exclut rien de la compétence de la Cour, elle n'a aucune réalité objective, elle est une pure et simple nullité. Voici en effet ce que nous avons entendu avant-hier :

> «the Canadian reservation is *pro tanto* a nullity... The Canadian reservation has no objective reality or validity under international law... [It] excludes nothing, since it can apply to nothing.» (CR 98/13, p. 37, par. 8 et p. 48, par. 61.)

Apparemment l'Espagne a pensé que la meilleure manière de franchir la barrière de la réserve canadienne était tout simplement d'en nier l'existence et de suggérer à la Cour de faire comme si elle n'existait pas.

5. C'est bien à une opération de prestidigitation que ces mutations successives font penser : la colombe devient foulard, et à la fin, hop, le chapeau est vide !

6. Tout ceci, Monsieur le président, me paraît assez regrettable. Le demandeur a le devoir de placer le défendeur en face de thèses juridiques bien définies. Jouer, comme le font nos adversaires, de la polyvalence des thèses et de l'ambiguïté des argumentations n'est pas compatible avec les exigences d'une procédure judiciaire internationale. Ce ne serait encore rien si, à chaque stade de l'évolution, la thèse nouvelle remplaçait la thèse précédente. Mais non, elles coexistent, se superposent et s'entrecroisent à l'infini.

*

7. Cette remarque faite, le moment me semble venu de revenir à l'essentiel, à la simplicité de la vérité juridique, débarrassée de toutes les scories argumentaires. *Back to basics* en quelque sorte. Le problème auquel la Cour doit apporter une réponse se ramène à deux questions : Quelle réserve ? Quel différend ? En adoptant cette approche, je crois répondre au souhait exprimé par M. Highet de voir le Canada établir positivement l'incompétence de la Cour (CR 98/13, p. 36, par. 4), ainsi qu'aux préoccupations de mon ami Pierre Dupuy de confronter l'objet de la réserve à celui de la requête (*ibid.*, p. 55, par. 8).

Quelle réserve ?

8. Et tout d'abord, quelle réserve ? Le critère de la réserve — la ligne de partage entre ce qui relève de la compétence de la Cour et ce qui n'en relève pas — c'est l'objet du différend. Ce critère ne fait aucune place à des considérations étrangères à l'objet du différend. Comme j'ai essayé de le montrer dans ma précédente plaidoirie, lorsque la Cour est incompétente pour connaître d'un différend parce que celui-ci se rapporte à des mesures de gestion et de conservation ou à leur exécution, elle est automatiquement et nécessairement incompétente pour se prononcer sur les règles de droit applicables ou sur leur violation alléguée. Je ne reviendrai pas sur ce point.

9. Cette observation n'épuise toutefois pas le débat. Les rédacteurs de la réserve canadienne, qui connaissaient le concept et le terme d'«objet du différend» employé par l'article 40 du Statut de la Cour et par l'article 38, paragraphe 1, du Règlement, auraient pu exclure de la compétence de la Cour les différends *ayant pour objet* des mesures de gestion et de conservation, etc. Dans ce cas-là, seuls auraient été exclus de la compétence de la Cour les différends ayant *directement* pour objet des mesures de gestion et de conservation. Mais ce n'est pas ce qu'ils ont fait. Ils ont eu recours à une expression différente. En excluant de la compétence de la Cour les «différends *auxquels pourraient donner lieu* les mesures de gestion et de conservation» (*disputes arising out of or concerning conservation and management measures),* le Canada a conféré à sa réserve un champ d'application plus large que s'il s'était référé aux «différends ayant pour objet des mesures de gestion et de conservation». La volonté de définir les différends soustraits à la compétence de la Cour de manière générique, et non pas spécifique, est illustrée par la double formule de la version anglaise *(arising out of or concerning)* qui éclaire la formule unitaire de la version française : «différends auxquels pourraient donner lieu». Les deux versions faisant foi l'une et l'autre, elles s'éclairent mutuellement.

10. Une formule générique de ce genre figure dans nombre de déclarations facultatives, et n'est pas le fruit du hasard. Au fil des déclarations publiées dans l'*Annuaire* de la Cour, on relève maintes expressions tout aussi volontairement génériques : «*disputes relating to or connected with..., disputes concerning..., disputes with regard to matters which..., disputes concerning any question relating to or arising out of..., disputes arising out of..., disputes arising under..., disputes with regard to...*, différends relatifs à des questions qui...» (j'ai cité les versions originales des déclarations, sans les traductions du Greffe).

11. Que ces expressions soient plus larges que l'expression : «différend ayant pour objet», cela est illustré de manière décisive par l'affaire du *Plateau continental de la mer Egée*, à laquelle il faut une fois de plus revenir. Saisie d'une requête tendant à la délimitation du plateau continental entre la Grèce et la Turquie, et en présence d'une réserve excluant les «différends ayant trait au

statut territorial de la Grèce» «*disputes relating to the territorial status of Greece*», la Cour a indiqué que

> «la question à trancher ... n'est pas de savoir si les droits sur le plateau continental sont des droits territoriaux ou s'ils sont compris dans l'expression «statut territorial»... La vraie question à trancher est de savoir si le différend *a trait* [*relates* dans le texte anglais faisant foi de l'arrêt] au statut territorial de la Grèce.» (Les mots *a trait* en français et *relates* en anglais sont en italiques dans le texte de l'arrêt; *C.I.J. Recueil 1978*, p. 34, par. 81.)

La vraie question est de savoir, a expliqué la Cour un peu plus loin,

> «si le différend a «trait au statut territorial de la Grèce» et non de savoir si les droits contestés doivent être du point de vue juridique considérés comme des droits «territoriaux»» (*op. cit.*, p. 36, par. 86).

En conséquence, a estimé la Cour, alors même qu'un différend portant sur la délimitation du plateau continental ne peut être regardé, il ne le peut pas, comme ayant pour *objet* des droits territoriaux, parce que le plateau continental ne fait pas partie du territoire de l'Etat côtier, il doit néanmoins être considéré comme ayant *trait à* des droits territoriaux, parce que les droits de l'Etat riverain sur le plateau continental dérivent de la souveraineté de l'Etat sur son territoire.

12. Il est incontestable, on le voit, qu'en soustrayant à la compétence de la Cour les «différends auxquels pourraient donner lieu» *(arising out of or concerning)* des mesures de gestion et de conservation, la réserve canadienne s'est référée à un concept plus large que celui de «différend ayant pour objet des mesures de gestion et de conservation». Le texte est clair, et l'intention qui se trouve derrière ce texte ne l'est pas moins, à savoir : pour être couvert par la réserve, il n'est pas nécessaire que le différend ait pour objet direct, spécifique et exclusif des mesures de gestion et de conservation; il suffit qu'il ait été occasionné par de telles mesures, qu'il soit en relation avec de telles mesures.

13. Je note en passant que le professeur Sánchez Rodríguez m'a accusé d'avoir «habilement», par une «ambiguïté calculée», gardé un «silence scrupuleux» (toutes ces expressions sont de lui) sur le terme «exécution» (CR 98/13, p. 15-16, par. 3) et de n'avoir parlé en général que de mesures de gestion et de conservation. Je voudrais immédiatement le rassurer, en même temps que la Cour.

Si j'ai parlé la semaine dernière, et si je continue à parler aujourd'hui, de mesures de gestion et de conservation, sans ajouter à chaque fois «ou de leur exécution», c'est uniquement par souci de brièveté. Derrière ce raccourci, il n'y a ni ambiguïté, ni calcul, ni stratagème. Qu'il soit donc bien entendu que lorsque je parle de mesures de gestion et de conservation, je me réfère en même temps à l'exécution de ces mesures.

14. Monsieur le président, une fois acquis que, pour être soustrait à la compétence de la Cour, il faut et il suffit que le différend ait trait à des mesures de gestion et de conservation, le problème est réglé et l'incompétence de la Cour établie, tant il paraît évident que le différend soumis à la Cour par la requête espagnole a trait, se rapporte à des mesures canadiennes de gestion et de conservation. S'il faut pousser la réflexion plus loin, c'est parce que l'Espagne, dans sa recherche d'une échappatoire, a entrepris une opération de disqualification des mesures canadiennes. Cette opération tend à dénier aux mesures canadiennes — loi C-29, règlements d'application, exécution de la loi et des règlements vis-à-vis de l'*Estai* — la qualité de mesures de gestion et de conservation sur un double plan.

15. *Ratione materiae* — si je puis employer cette expression — soutient la partie adverse, les mesures canadiennes ne peuvent pas recevoir le label de mesures de gestion et de conservation. Nous avons montré, tout au long de nos plaidoiries, à quel point cette vue est erronée. Comme vient de le rappeler M. Hankey et comme M. Willis le démontrera plus en détail, les mesures canadiennes sont de celles qui sont classiquement et couramment prévues par les conventions internationales et les législations nationales pour la protection des ressources halieutiques dans les zones sous juridiction nationale. On nous a reproché d'invoquer à cet égard l'article 73 de la convention de 1982 et de faire mine d'oublier que ce texte définit les pouvoirs de l'Etat côtier à l'intérieur de la zone de 200 milles alors que dans notre affaire il s'agit de mesures appliquées en haute mer. C'est là, Monsieur le président, confondre le *contenu* des mesures avec le *lieu de leur mise en oeuvre*. Ce que nous voulions montrer en nous référant à ce texte, c'était simplement que, par leur contenu, par leur nature, les mesures critiquées étaient de celles qui peuvent

raisonnablement être regardées comme des mesures de gestion et de conservation. Je dis «raisonnablement» parce que ceci n'est de toute évidence pas le cas des hypothèses extrêmes dont la Partie adverse a continué à faire usage. Dois-je rappeler que, dans un passage souvent cité, la Cour a déclaré que dans tous les domaines «le droit international exige une application raisonnable» (*Barcelona Traction, C.I.J. Recueil 1970*, p. 48, par 93) ? Quant à déterminer si une mesure de gestion et de conservation licite à l'intérieur de la zone des 200 milles l'est également dans la haute mer, c'est là une tout autre question. La nature d'une mesure est une chose, sa licéité en fonction de son lieu d'application en est une autre. Nos adversaires ont confondu les deux notions.

16. Les motifs derrière cette confusion ne sont pas difficiles à déceler. N'ayant sans doute pas une confiance très grande dans la disqualification des mesures canadiennes en tant que mesures de gestion et de conservation sur le plan de leur contenu, nos adversaires ont soutenu que les mesures canadiennes ne peuvent pas en tout état de cause — c'est-à-dire indépendamment même de leur contenu — être qualifiées de mesures de gestion et de conservation en raison de leur lieu d'application *ratione loci*, si je puis dire. Les Etats côtiers, ont-ils répété sur tous les tons, ne peuvent prendre aucune mesure de gestion et de conservation en haute mer, au-delà de la limite extérieure de leur zone des 200 milles. Il n'existe tout simplement, ont-ils affirmé, aucune mesure de gestion et de conservation en haute mer. De telles mesures, ont-ils énoncé, «*do not and cannot exist*» (CR 98/10, p. 7), sont une «*non-existent rubric*» et «*do not exist in international law*» (CR 98/13, p. 38, par. 12). Parler de mesure de gestion et de conservation, utiliser le mot de mesure de gestion et de conservation au-delà des 200 milles, ont-ils proclamé, est un non-sens, une contradiction dans les termes (CR 98/10, p. 17).

17. Nous avons montré, mes collègues et moi-même, que la notion de mesures de gestion et de conservation est neutre en ce sens qu'elle est indépendante du lieu où ces mesures s'appliquent. Une mesure donnée garde la même nature, qu'elle s'exerce dans une zone de juridiction nationale ou en haute mer. La question de savoir si elle est licite ou non est une autre question, c'est une question de fond.

18. Monsieur le président, selon ses propres termes, la réserve canadienne vise les mesures de gestion et de conservation prises par le Canada pour les navires pêchant «dans la zone de réglementation de l'OPANO, telle que définie dans la convention sur la future coopération multilatérale dans les pêches de l'Atlantique du Nord-Ouest». Et comment cette convention définit-elle la zone de réglementation de l'OPANO ? Dans son article II, paragraphe 2, nous lisons très exactement ce qui suit : «La zone ci-après appelée «zone de réglementation» désigne la partie de la zone de la convention qui s'étend au-delà des régions dans lesquelles les Etats côtiers exercent leur juridiction en matière de pêche.» (Annexe 21, mémoire de l'Espagne, p. 323.)

19. Selon ses propres termes, la réserve s'applique donc à la zone de réglementation de l'OPANO, donc en haute mer. Ceci est illustré graphiquement sur la carte qui figure sous l'onglet 7 du dossier remis à la Cour. L'argument de l'Espagne selon lequel parler de mesures de gestion et de conservation est un non-sens parce que de telles mesures «*do not and cannot exist*», cet argument, Monsieur le président, Madame, Messieurs les juges, s'effondre comme un château de cartes parce qu'il résout la question par la question. C'est pour échapper à cette constatation toute simple, qui condamne sans appel leur tentative d'échapper à la réserve, que nos adversaires sont allés dans leurs dernières plaidoiries à la limite extrême du négationnisme juridique. Il n'existe pas de réserve excluant des mesures de gestion et de conservation canadiennes dans la zone de réglementation de l'OPANO, il n'en existe pas, dit à présent l'Espagne, il n'en n'existe pas, parce qu'il ne peut pas y en avoir et qu'il ne doit pas y en avoir. La réserve conclut l'Espagne est réputée non écrite, elle est nulle et non avenue.

20. Quant à l'accusation, répétée avec insistance par les conseils de l'Espagne et reprise jusque dans ses conclusions finales, selon laquelle le Canada prétend à la maîtrise de la définition des mesures qu'il entend protéger par la réserve et cherche ainsi à priver la Cour de son pouvoir souverain d'appréciation de sa propre compétence, je ne m'y attarderai pas : M. Willis reprendra ce point en détail. Permettez-moi simplement de dire que la réserve canadienne n'a rien d'une réserve automatique par laquelle le Canada prétendrait imposer ses vues à la Cour. La situation est très

simple, l'Espagne a exposé ses vues sur le sens et la portée de la réserve; le Canada a exposé les siennes. La Cour tranchera dans la plénitude de son pouvoir en vertu de l'article 36, paragraphe 6, de son Statut. Rien de plus, rien de moins.

Quel différend ?

21. J'en arrive ainsi, Monsieur le président, à ma seconde question. Quel différend ?

Nos adversaires ont revendiqué lundi «le droit et le privilège» de définir librement et discrétionnairement l'objet du différend. L'agent de l'Espagne a déclaré ce qui suit :

> «Dans une procédure devant la Cour, ce n'est pas l'Etat défendeur, en l'occurrence le Canada, qui définit l'objet du différend. C'est le demandeur, en l'occurrence l'Espagne, qui a ce droit et ce privilège.» (CR 98/13, p. 8, par. 1.)

22. Le professeur Sánchez Rodríguez a répété cette affirmation :

> «c'est le demandeur qui fixe l'objet [du différend] même si cela ne plaît pas au défendeur; mais il n'appartient jamais à ce dernier de remplacer le demandeur dans la définition de l'objet du différend. L'objet est celui décrit par l'Espagne...» (CR 98/13, p. 15, par. 2.)

Et c'est en vertu de cette prérogative auto-proclamée que l'agent et les conseils de l'Espagne ont décidé que l'objet du différend, c'est «le défaut de titre du Canada pour agir en haute mer... Voilà l'objet du différend», a déclaré l'agent de l'Espagne (CR 98/13, p. 8, par. 1) — et cette définition, ont-ils laissé entendre, fait droit et s'impose à la Cour.

23. Cette approche, Monsieur le président, est inacceptable. La Cour a posé le principe que c'est essentiellement dans les conclusions du demandeur «qu'il faut rechercher l'expression des demandes sur lesquelles la Cour doit statuer» (*Droit de passage sur territoire indien, C.I.J. Recueil 1960,* p. 27). Mais si le demandeur est maître de ses conclusions, et si ces conclusions déterminent la nature de la demande, l'objet du différend, quant à lui, est déterminé objectivement par la Cour elle-même. C'est à la Cour qu'il appartient — dit-on dans les arrêts sur les *Essais nucléaires* — «d'analyser de façon précise la demande que [l'Etat requérant] lui adresse dans sa requête», et «c'est par rapport à la requête que la Cour doit examiner la nature ... du différend porté devant elle» (*Essais nucléaires, C.I.J. Recueil 1974*, p. 260, par. 24 et p. 463,

par. 24). L'objet du différend se détermine objectivement sur la base de la demande de l'Etat requérant, mais c'est à la Cour qu'il appartient de déterminer ce qu'elle a appelé la «vraie question soumise à la Cour» (*Nottebohm, C.I.J. Recueil 1955*, p. 16), le «véritable problème en cause» (*Essais nucléaires, C.I.J. Recueil 1974*, p. 262, par. 29 et p. 466, par. 30). L'Espagne est ainsi prise, je le note au passage, en flagrant délit du péché qu'elle reproche si injustement au Canada : le péché d'atteinte au pouvoir de la Cour d'apprécier sa propre compétence au titre de l'article 36, paragraphe 6, du Statut.

24. Quelle est donc, dans la présente affaire, la «vraie question» soumise à la Cour par la requête espagnole ? Je viens de le dire, c'est à la Cour qu'il appartient de la déterminer. Et, conformément à sa jurisprudence, elle le fera *objectivement* sur la base et au vu des conclusions de la requête, autrement dit de la «nature précise de la demande», *the precise nature of the claim*, pour reprendre le vocabulaire de l'article 38 de son Règlement.

25. Les conclusions de la requête espagnole demandent à la Cour de déclarer que la législation canadienne, dans la mesure où elle s'applique en haute mer, «est inopposable au royaume d'Espagne». L'agent et les conseils de l'Espagne ont souligné que si l'Espagne demande que la législation canadienne lui soit déclarée inopposable, c'est parce que cette législation et son exécution constituent, à ses yeux, des actes internationalement illicites qui engagent la responsabilité internationale du Canada envers l'Espagne en qualité d'Etat lésé. L'agent et les conseils de l'Espagne ont été à ce sujet d'une clarté parfaite : l'Espagne demande que la Cour déclare que la législation canadienne et son exécution sont des faits internationalement illicites engageant la responsabilité internationale du Canada envers l'Espagne. L'agent de l'Espagne a déclaré en toute lettre :

> «Les lois canadiennes ... constituent des faits illicites internationaux... [L]'application de la législation canadienne aux navires de pêche espagnols en haute mer constitue un fait illicite international, engageant la responsabilité du Canada envers l'Espagne.» (CR 98/9, p. 19-20, par. 9.)

Nos contradicteurs se sont abondamment référé aux concepts et termes de responsabilité internationale, de faits illicites internationaux, d'Etat lésé, etc. (CR 98/9, p. 31, par. 12; p. 32, par. 15; p. 20, par. 9; p. 40, par. 2; p. 46, par. 20; p. 47, par 22; p. 49, par. 27; p. 51, par. 32;

CR 98/10, p. 27). Ce que l'Espagne demande à la Cour par la première de ses conclusions, c'est une déclaration judiciaire d'illicéité. De manière plus précise, la loi C-29 constitue, selon l'Espagne, un fait illicite continu au sens où l'entend l'article 41 du projet d'articles sur la responsabilité des Etats adopté par la Commission du droit international en 1996 (CR 98/9, p. 20, par. 9; p. 37, par. 19).

26. L'Espagne, nous a-t-on expliqué, ne se contente cependant pas de demander à la Cour une simple «déclaration judiciaire sur la condition délictueuse de la législation et des actes du Canada» (CR 98/9, p. 51, par. 32). Elle demande certes que la violation par le Canada de ses obligations internationales fasse l'objet de ce qu'elle a appelé une «déclaration réparatoire» (CR 98/9, p. 12, par. 2), mais à ce jugement de caractère déclaratoire elle demande à la Cour d'ajouter un jugement «à caractère plus normatif» (CR 98/9, p. 51, par. 32; voir aussi CR 98/10, p. 35). Elle demande à la Cour de tirer les conséquences de la déclaration d'illicéité demandée. Ces conséquences, l'agent et les conseils de l'Espagne les ont décrites de manières diverses en recourant aux concepts et au vocabulaire du projet d'articles de la Commission du droit international. Ils ont parlé de satisfaction judiciaire, de cessation, d'assurances et garanties de non-répétition, de réparation du préjudice d'ordre moral et d'ordre matériel (CR 98/9, p. 12, par. 2; p. 20, par. 9; p. 32, par. 15; p. 40, par. 2; p. 41, par 4; p 46, par. 20; p. 47, par. 22; p. 49, par. 27; p. 50, par. 30; p. 51, par. 32).

27. Tout est clair à présent. La demande espagnole est une demande en responsabilité internationale du Canada en raison de la prétendue violation par le Canada des obligations internationales qui lui incombent en vertu des principes et règles du droit international général. La «véritable question» à laquelle la Cour est invitée à apporter une réponse, le «véritable problème» sur lequel la Cour est invitée par la requête espagnole à statuer, c'est de déterminer si les mesures canadiennes et leur exécution — loi C-29, règlements, action vis-à-vis de l'*Estai* — constituent, ou ne constituent pas, des faits internationalement illicites susceptibles d'engager la responsabilité internationale du Canada envers l'Espagne. Et la réponse à cette question, la Cour n'a pas compétence pour la donner, et ce problème, la Cour n'a pas compétence pour en connaître, parce

que la réserve canadienne exclut de sa compétence les différends auxquels pourraient donner lieu les mesures litigieuses. Je tiens à le répéter, même si la réserve excluait, de manière plus étroite, les différends *ayant pour objet* — c'est-à-dire ayant directement et exclusivement pour objet — des mesures de gestion et de conservation et leur exécution, le différend entrerait déjà dans le champ d'application de la réserve. A plus forte raison le différend entre-t-il dans le champ d'application de la réserve dès lors que celle-ci exclut, de manière large et générique, les différends *auxquels pourraient donner lieu (arising out or concerning)* des mesures de gestion et de conservation ou leur exécution.

28. Monsieur le président, la question de savoir si le Canada a, ou n'a pas, un titre pour agir en haute mer à l'encontre de navires battant pavillon espagnol; la question de savoir si la législation canadienne prévoit, ou non, un usage licite de la force; la question de savoir si dans l'incident de l'*Estai* les autorités canadiennes ont fait, ou n'ont pas fait, un usage licite de la force; la question de savoir si la loi canadienne C-29 constitue, ou ne constitue pas, un délit contenu au sens du projet d'articles de la Commission du droit international; la question, en un mot, de savoir si le Canada a commis, ou n'a pas commis, des actes internationalement illicites, susceptibles d'engager sa responsabilité internationale envers l'Espagne : ces questions-là, Monsieur le président, la Cour aurait à les examiner *si elle était compétente* pour se prononcer sur la requête de l'Espagne. Mais n'étant pas compétente pour se prononcer sur la requête de l'Espagne, elle n'est pas compétente pour se prononcer sur les problèmes de fond que cette requête soulève : titre, usage de la force, juridiction pénale, etc.

29. La conclusion s'impose avec la force de l'évidence. La Cour n'a pas compétence pour se prononcer sur les conclusions de l'Espagne. La Cour n'a pas compétence pour se prononcer sur la licéité internationale et l'inopposabilité à l'Espagne de la loi du 12 mai 1994 et de ses règlements d'application. La Cour n'a pas compétence pour se prononcer sur la licéité internationale du comportement du Canada dans l'incident de l'*Estai*. La Cour n'a pas compétence pour ordonner la cessation et la non-répétition des «actes dénoncés» par l'Espagne. La Cour n'a pas compétence

pour condamner le Canada à une réparation. En un mot, je le répète, la Cour n'a pas compétence pour statuer sur aucune des trois conclusions de la requête de l'Espagne.

30. Monsieur le président, Madame et Messieurs les juges, j'achève ici mes observations. Je vous remercie de votre patience et vous redis l'honneur et le plaisir que j'ai eus à prendre la parole devant vous. Et je vous prie, Monsieur le président, après l'intervalle, de donner la parole à M. Alan Willis. Je vous prie aussi d'excuser le retard que j'ai pris à terminer mon exposé.

The PRESIDENT : Thank you, Professor Weil. The Court will rise for fifteen minutes.

The Court adjourned from 11.25 to 11.40 a.m.

The PRESIDENT: Please be seated. Mr. Willis, please.

Mr. WILLIS: Mr. President, distinguished Judges,

1. The Reservation is Valid and Therefore Must be Given a Useful Effect

1. I begin, Mr. President, with the most remarkable development in the second round. I refer to Mr. Highet's contention that the reservation is for all practical purposes a nullity, indeed "a legal solecism of historic proportions" (CR 98/13, p. 37, para. 8; p. 38, para. 14). It need be given no useful effect because, he said, "one cannot make something effective that is, in law, ineffective" (CR 98/13, p. 38, para. 13).

2. The Court will recall how Spain reaches this position. For Spain there is no such thing as a conservation and management measure on the high seas. Spain says, therefore, that the Canadian reservation "excludes nothing, since it can apply to nothing" (CR 98/15, p. 48, para. 61).

3. The notion that the Canadian reservation applies to nothing and is totally ineffective, whatever the circumstances, represents a dramatic change of position. The Spanish Memorial conceded the validity of the reservation (paras. 38-39). It also conceded the need to give a useful effect to the reservation, and devoted no less than 13 pages to that very issue (paras. 124-162). All

that has now been abandoned in favour of a far more radical position — that the reservation is a nullity with no effect whatsoever.

4. It is a change of position, but at the same time it should occasion little surprise. Spanish counsel have simply taken the basic elements of the Spanish case to their logical conclusion. If conservation and management measures *by definition* cannot apply to the high seas, then indeed the reservation would become a nullity that could never have any effect. The conclusion is implicit in the premises of the Spanish argument.

5. What Spain has failed to recognize, however, is that its conclusion is nothing more than a *reductio ad absurdum*, demonstrating conclusively that the whole argument from start to finish is flatly wrong. If the essential postulates of the Spanish case lead inevitably to the conclusion that the reservation can never apply, and meant absolutely nothing from the day of its adoption, something must be fundamentally wrong with the whole argument. In short, if the conclusion is logically absurd, then the premises of the argument simply have to be wrong.

6. And it should be obvious what is wrong. One only ends up in this logical impasse on the basis of the astonishing proposition that there is no such thing as a conservation and management measure on the high seas — even for the purposes of this reservation. Because the conclusion to which all this leads is patently absurd, the reasoning has to be wrong.

7. I have been speaking so far in terms of common sense and logic. Not surprisingly, the Spanish argument that the reservation can never apply to anything is condemned by elementary legal principles as well. In the terms of the Vienna Convention on the Law of Treaties, it is an interpretation that is "manifestly unreasonable or absurd" (*Vienna Convention on the Law of Treaties*, UN Doc. A/CONF. 39/27 (1969)). Quite obviously it contradicts the object, purpose and intention of the reservation. Equally obviously it rules out any effect, useful or not. This, in short, is not interpretation in good faith.

8. It is not hard to see how Spain gets so far off the track. Its interpretation confuses the definition with the right. It confuses whether something has the characteristics of a conservation

and management measure with the issue of whether the measure was based on a proper right or title. These are two separate and distinct issues. Spain of course denies this. They say that the existence of a right or title is an essential definitional characteristic of a measure. But, Mr. President, I submit this *cannot* be so for at least three reasons. First, as a matter of ordinary language, conservation and management measures is a purely factual category — a measure is not simply a legal concept; it is, as Spain said, any "act, step or proceeding" (Spanish Memorial, para. 70). Second, the interpretation requires a wholesale importation of the merits into the jurisdictional phase, and thus defeats the basic purpose of the reservation. And third, it turns the principal conclusion of the Spanish argument — that Canada acted without legal right — into the essential premise of its argument on jurisdiction.

9. Let me recapitulate by saying that Spain sees the key to the reservation in the notion of title, which is simply a different way of saying that the measures are not conservation and management measures because Canada had no right to take them. This approach is unsound because it confuses definitions and rights — the nature of the measures with the right to take the measures — and it is demonstrably wrong because it ends up with a manifestly unreasonable or absurd result.

10. There was some discussion again on Monday about different ways of drafting the reservation, and in particular the drafting of Canada's 1970 reservation (CR 98/13, p. 9, para. 3; p. 34, paras. 36-37; p. 49, para. 64). But it should be obvious that no possible form of words would have satisfied Spain. No form of words would have got around its false premise that Canada has no title, and if there is no title the measures cannot be measures, the rights claimed could not be rights, the jurisdiction exercised could not be jurisdiction. Spain's false premise is a catch 22, it is a black hole that is designed to nullify any exclusion of jurisdiction relating to the high seas. And I come back to my point about the wording Canada chose: that it is functional, concrete, specific and deadly accurate — and above all it is infinitely better than the sweeping exclusions of jurisdiction that Spain seems to prefer.

11. I note, as has the Deputy Agent, that Mr. Highet has identified three new so-called claims on behalf of Spain (CR 98/13, pp. 49-50, paras. 67-70). But they all arise out of the Canadian legislation and regulations respecting conservation and management measures in the NAFO Regulatory Area, and their subsequent enforcement against Spanish vessels.

12. Mr. President, changing the labels will get Spain nowhere when the underlying reality is still what is described in the reservation. Calling it an extension of jurisdiction, or a violation of high seas freedoms changes nothing, when the measures are still exactly what is referred to in the text of the reservation. One can refer to the title as a *"prius"* or a *"préalable"*, but again it changes nothing, because an exclusion of jurisdiction with respect to a measure not only includes but is above all an exclusion of disputes about the legal right to take those measures (CR 98/10, p. 12, para. 26; CR 98/13, p. 9, paras. 3-4; p. 33, para. 34). Here, as elsewhere, Spain assumes that giving the subject-matter of the dispute a new and somewhat grander label will take it out of the reservation. But it will not — not so long as the measures remain what they are, conservation and management measures taken and enforced by Canada with respect to vessels fishing in the NAFO Regulatory Area.

2. Canada has Never Treated the Reservation as "Automatic" or Self-Judging

13. Last week and again on Monday, Spain conjured up the spectre of an automatic, self-judging reservation inconsistent with the Court's sovereign power to adjudicate upon its own jurisdiction, pursuant to Article 6, paragraph 6, of the Statute (CR 98/10, pp. 51-53, paras. 33-36; CR 98/13, pp. 58-60, paras. 16-20). This, Mr. President, is a false issue and a diversion because it rests upon a fundamental misrepresentation of the Canadian position. Spain has knocked over a straw man of its own invention.

14. The thrust of the argument was that Canada was attempting to determine unilaterally, through its own domestic legislation, what is and what is not a conservation and management measure. Professor Dupuy said that on the Canadian view, anything *defined* as a conservation and management measure by Canada in its legislation would *inevitably* come within the terms of the

reservation, and give Canada absolute dominion over the jurisdiction of the Court, contrary to the Statute.

15. There is one basic problem with this argument. It is untrue. There is no hint of any such position in the Canadian arguments. We have never suggested that anything Canada or Canadian legislation unilaterally defines as a conservation and management measure is *ipso facto* a conservation and management measure for the purposes of the reservation. We did not include in the text of the reservation the words "in the opinion of Canada", or "as defined by Canadian legislation". And, we have never suggested that the reservation should be interpreted as if those words were there.

16. Last week my own pleading was substantially devoted to a detailed examination of the substantive terms of the relevant Canadian legislation and regulations. The whole point was to satisfy the Court that when the actual content of all these measures is considered, they are clearly conservation and management measures in terms of their subject-matter, purpose, and function. That entire demonstration would have been pointless, indeed, self-contradictory, if Canada's position was that the mere designation of something as a conservation and management measure by Canadian legislation automatically brings it within the reservation.

True, there is a unity of purpose between the legislation and the reservation — they are both concerned with conservation and management in the NAFO Regulatory Area, and clearly the reservation was intended to cover the legislation and everything done under the legislation. But that falls far short of the extravagant position imputed to Canada by Professor Dupuy.

18. Mr. Highet put the same argument in slightly different terms. His contention was that the "heart of Canada's defence" is an appeal to subjectivity in the interpretation of reservations (CR 98/13, pp. 44-45, para. 45; p. 48, para. 61). Specifically, his point seemed to be that Canada's approach was wrong because it placed the emphasis in identifying conservation and management measures on the end sought by Canada, not on the means we used.

19. But again, Mr. President, this was not our position. Last week I said the legislation and regulations were conservation and management measures in the light of their subject-matter, function and purpose (CR 98/12, pp. 17-18, paras. 80-83). The objective is important, but the subject-matter and function are even more so. There is nothing inherently subjective about this approach. Spain's arguments again are aimed at positions that Canada has never adopted.

20. We thought we had laid this issue to rest in paragraph 62 of the Canadian Counter-Memorial. Our position, as we stated it there, is that what counts is the declaring State's intention *when the declaration was filed*, and that such intention must be *objectively* determined through the text and all the surrounding circumstances. It is for the Court to interpret the reservation. That has always been our position. There is accordingly no genuine issue under Article 36, paragraph 6, to be considered in this proceeding.

3. The Measures are "Conservation and Management Measures"

21. The Court is now familiar with the Canadian conservation and management measures whose enforcement triggered this dispute. I said last week they were the most ordinary conservation and management measures that could be imagined (CR 98/12, p. 14, para. 66). The only thing that makes them different is the fact that they were applied by Canada to a zone just beyond the 200-mile limit, the NAFO Regulatory Area.

22. The Court will recall the seven specific measures applied to Spanish vessels by Table V of the Canadian regulations (Tab 9 of the material provided to the Court by Canada last week). It was the first measure on the list, the prohibition on fishing Greenland halibut, that led to the dispute. And in paragraph 75 of its Memorial, Spain made an important admission about the character of this measure. In translation, the relevant passage reads, "There can be no doubt that the prohibition concerning, for example, the fishing of Greenland halibut is a 'measure' constituting a 'conservation and management measure'." A remarkable admission; and a conclusive admission. True, in the following paragraph Spain qualifies its concession by saying that conservation and management measures can only be considered as such when taken in the areas where the coastal

State has jurisdiction. But that of course is simply one more way of stating the central fallacy of the Spanish case that the reservation does not apply because Canada acted illegally, which on the one hand is a statement about the merits, not jurisdiction, and on the other leads to the logical impasse of a reservation that can never apply to anything at all.

23. I referred last week to Article 62, paragraph 4, of the 1982 Law of the Sea Convention (UN Doc. A/CONF. 62/122 and Corr. 1 to 11 (1982); CR 98/11, pp. 60-61, para. 40). This is a list, but only an illustrative list, of conservation measures and other coastal State laws and regulations pertaining to fisheries. It applies to the exclusive economic zone, and I cite it *only* to show what such measures are generally understood to mean in terms of substance and content, as opposed to *where* they apply geographically. Measures "determining the species which may be caught" are referred to in paragraph *(b)* of this paragraph. Measures relating to "areas of fishing" are referred to in paragraph *(c)*. Both provisions describe the subject-matter of the measure that gave rise to this case: it was a prohibition on fishing a species — Greenland halibut — in a specified area — NAFO Divisions 3L, 3M, 3N and 3O. The other six items in Table V of the Canadian Regulations, as well, are all clearly covered in the list of Article 62, paragraph 4 — paragraph *(c)* on gear specifications, paragraph *(d)* on the permissible sizes of fish, paragraph *(e)* on information and statistics, which is what our fishing log requirement is all about, and paragraph *(k)* on enforcement procedures.

24. International conventions show that conservation and management measures like these also apply to the high seas. The 1995 United Nations Straddling Stocks and Highly Migratory Species Convention is merely the latest of a long line of such instruments, and it uses the expression "conservation and management measures" throughout — and of course the whole subject-matter of the Convention is the high seas.

25. Consider, as I suggested last week, the list of NAFO measures set out in Canadian Annex 10 — measures that also apply to the high seas. They are, through and through, the very same kind of measures as the conservation and management measures Canada applied to the

Spanish fleet — species and area closures, gear specifications, size limits of fish, enforcement procedures, etc. On Monday, Professor Remiro Brotóns said the whole reservation should be interpreted on the basis of the NAFO Convention (CR 98/13, pp. 32-33, paras. 30-33). This is clearly wrong, because the reservation singles out one and only one element of this Convention, which is the definition of the "Regulatory Area". It provides no basis for importing the entire Convention into the text of the reservation — but it is unclear where the point could lead in any event, since the character, subject-matter and purpose of the Canadian measures is exactly the same as that of the NAFO measures?

26. I open a parenthesis here. Spanish counsel have suggested our measures have to be based on the NAFO measures, and that ours were not. We could simply respond that this a *non sequitur* and irrelevant, because it makes no difference to jurisdiction. That would be a complete and a correct answer. But in the interests of clarity, I must add that Spain is quite wrong on this. The reason, and the only reason, we imposed a prohibition on fishing Greenland halibut from 3 March 1995 for the remainder of the year is that the European quota adopted by NAFO had already been caught, *and in fact overfished* by that date. Spain questions this, by confusing the quota set by NAFO and the quota set unilaterally by the European Union (CR 98/13, pp. 17-18, para. 5). By 3 March 1995, Canada had estimated that Spanish vessels had caught well over the NAFO quota of 3400 tons — an estimate later confirmed by EU statements as well as the fishing statistics for 1995 as published by NAFO (Northwest Atlantic Fisheries Organization, *Provisional Nominal Catches for 1995*, NAFO SC Working Paper 97/12; Canadian Counter-Memorial, Ann. 31). So the suggestion that the Canadian conservation and management measures were not directly related to the NAFO measures is plainly wrong. But more important, Mr. President — it is irrelevant to the issue of jurisdiction.

27. The *bona fides* and conservation objective of the measures can hardly be in doubt. The NAFO Scientific Council had issued warnings on the state of the stock (Canadian Counter-Memorial, paras. 33-35). NAFO had called for action — in fact, had taken action

(Canadian Counter-Memorial, paras. 37-38). It is public knowledge that the conservation crisis led to the virtual closure of an entire industry, historically the leading industry of Atlantic Canada. The crisis was only too real. And as the Agent for Canada said last week, the ecological devastation and the human impact on both sides of the Atlantic is a continuing tragedy (CR 98/11, pp. 9-10, paras. 9-10).

28. Mr. President, where does all this lead us? The measures are conservation and management measures as obviously as carrots are vegetables, and Greenland halibut are fish. The Spanish argument does not deny that, in form and substance, the Canadian measures are typical conservation and management measures. It is therefore driven to a completely untenable position — the position that there is *no such thing* as a conservation and management measure beyond 200 miles; with the further consequence that the reservation is a contradiction in terms that applies to nothing at all.

4. The Methods of Enforcement

29. I explained last week that the Canadian legislation and practice on the use of lawful force is designed to ensure that force is used only as a last resort; that the purpose of the legislation is to restrict the use of force, not to encourage it; and that force likely to lead to death or serious injury can only be used under Canadian law if necessary to protect human life (CR 98/12, pp. 9-10, paras. 47-50). But Spain has returned to the issue, and I must address it once again.

30. One can only wonder what the word "enforcement" could possibly mean, in this context, if it does not include a potential use of force. This is the very essence of law enforcement in situations where suspected offenders will not co-operate, and where they do everything in their power to evade arrest — as did the *Estai*.

31. I will not go back to Mr. Highet's parade of horrors, the torpedoes, the bombs, and the summary executions. I will simply remind the Court that all this is as remote from the terms of our laws as it could possibly be. And as remote from the facts. In order to avoid any possible controversy about this, I draw the Court's attention to the facts as alleged in the Spanish Memorial.

Paragraph 13 of the Spanish Memorial makes it clear that the *Estai* would *not* allow the Canadian authorities to board voluntarily. It refers to *successive attempts* — successive attempts — at boarding. Only then were warning shots fired, in accordance with the Canadian Regulations (Spanish Memorial, Ann. 17). Contrary to what was said last week, no one fired at the vessel. Warning shots by their nature are warnings — they are shots in the vicinity but not at the vessel, and under the Canadian Regulations they have to be "at a safe distance".

32. Any forcible arrest of an unwilling vessel or party implies a possible use of force. This is pure common sense. If the crew of the vessel thinks it can get away, and if they are knowingly in violation of the law, they will try to escape as fast as they possibly can. Especially in the case of a distant-water fishing vessel from another continent. So enforcement without a potential recourse to coercion is inconceivable — it may even be an oxymoron.

33. Article 73 of the 1982 Law of the Sea Convention applies to the exclusive economic zone, not the NAFO Regulatory Area, but it is highly informative about what enforcement against distant-water vessels normally entails *(op. cit.)*. It refers to boardings, inspections, arrests, judicial proceedings, and the detention of vessels. It is clearly *not* assumed that all this will be voluntary and co-operative. Very few fishing vessels will voluntarily be arrested and detained by foreign authorities. And because voluntary compliance cannot *invariably* be expected, the use of some degree of force must be contemplated where there is active resistance, or attempted flight or evasion. And Article 22, paragraph 1 *(f)*, of the New York Agreement on Straddling Stocks and Highly Migratory Species, refers more explicitly to the use of reasonable force and confirms the point — that enforcement against foreign, distant-water vessels necessarily involves, on occasion, the threat or use of coercive measures (UN Doc. A/Conf. 164/37 (1995)).

34. The Canadian legislation and regulations on the use of force are based on the Bill C-29 amendments, but there is one important difference. These provisions apply to the 200-mile zone, even to territorial waters, and not just to the NAFO Regulatory Area. Canada simply uses the same

rules and procedures for the special case of the NAFO Regulatory Area as we do for the exclusive economic zone and territorial waters. There is nothing exceptional.

35. It is Sections 19-19.5 of our Regulations — in Spanish Annex 17 — that prescribe the detailed procedures on enforcement — the use of force only as a last resort, the requirement of warning shots, the use of signal SQ1. And it is highly significant Mr. President, that when Canada enacted the procedures in our Regulations, in May 1994, not one State objected to them. There were no protests. In particular, the protest note of the European Union and its member States of 10 June 1994, Annex 18 of the Spanish Memorial, sets out a long list of complaints about Bill C-29; but strikingly, and significantly, it makes no reference whatsoever to the provision on the use of disabling force. By implication they recognized that the provision was consistent with accepted international practice.

36. The common sense necessity of force in law enforcement is clear. The terms of the relevant international conventions are also clear. There is really no need to go further. But I would like to reassure the Court that Canada is in step with State practice. The publicly available legislation of many coastal States provides for the use of some force. A recent article published by the Second Legal Adviser to the UK Foreign and Commonwealth Office examines State practice internationally and affirms that "Boarding is effected as a matter of right on the part of the duly authorized fisheries officer and if necessary such officers may use reasonable force to carry out their duties in the face of obstruction" (Anderson, "Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements" (1996) 11 *Intl. J. of Marine and Coastal Law* 165 at pp. 170-171)

37. The reality is that Canadian practices are very moderate in comparison with those of many other States. The *Chronique des faits internationaux* in the *Revue Générale* is a rich source of information on the incidents that arise from time to time in the enforcement of fisheries legislation (e.g., *RGDIP*, Vol. 93, 1989, p. 150; Vol. 96, 1992, p. 643; Vol. 98, 1994, p. 202; Vol. 99, 1996, p. 415). There have been violence and deaths. There have been sinkings. I do not

say we should measure what is appropriate by the standard of the most unfortunate incidents. But I do suggest that if international practice is the yardstick, the Canadian practices and legislation easily pass muster. They are carefully designed to avoid violence and to preserve the safety of life at sea.

38. But let me distinguish what is relevant on this issue from what is irrelevant. What is *not* relevant at the jurisdiction stage is any assessment of whether the Canadian actions were excessive or disproportionate or consistent with international law. There can be no question of a judicial review or a judicial approval of the Canadian enforcement legislation or actions at this stage. All that, as I said in the first round, would be the very issue on which the *merits* would focus (CR 98/11, p. 60, para. 37).

39. What is relevant, on the other hand, is the natural way of reading the word "enforcement" in the context of the purpose and intention of this reservation. I submit it must, at the least, extend to the rather moderate enforcement procedures set out in the Canadian legislation and used against Spanish vessels in 1995. Any lesser form of enforcement would mean the foreign vessels would simply *ignore* the law enforcement authorities. They would treat them with derision, and go on fishing to their heart's content. And both parties have recognized that the intention of the reservation was to protect the integrity of the legislation — Bill C-29. It must follow, at a minimum, that the word "enforcement" in the reservation must cover the enforcement procedures in Bill C-29 — the enforcement procedures, in other, words used in this very case.

40. Spain argued that the legislation was somehow an extension of Canada's penal jurisdiction. But is Spain suggesting that there should be no penalties for violations of the conservation and management measures? That the legislation should allow the measures to be flouted with impunity? Mr. President, any regulatory legislation has to include offences and penalties. I was clearly unable to persuade Professor Sánchez Rodríguez that Bill C-8, which is not fisheries legislation but general police legislation, has an entirely humanitarian and commendable purpose. I remind the Court that the portion of Bill C-8 actually dealing with fisheries legislation

never entered into force. For the remainder of Bill C-8, I can only ask the Court to look at the legislation. It says, first, that force likely to cause death or serious injury is *not* justified *unless* it is necessary for self-preservation or the preservation of any other person — in brief, self-defence. And in the case of an arrest, such force cannot be used against a fleeing suspect except to protect other persons from imminent or future death or serious injury. Mr. President, we make no apologies for this legislation.

5. The Reservation Was Intended to Cover All Vessels

41. I turn finally to the issue of Canada's intentions. Spain persists in asserting there is a "divorce" between Canada's original intention and the use of the legislation against Spanish vessels in 1995 (CR 98/10, p. 47, para. 24). Spain says the original intention was to apply the legislation only to stateless and flag of convenience vessels; that this limitation can somehow be read into the reservation; and that Spain somehow had a legitimate expectation that it would never be made subject to the legislation (CR 98/10, pp. 50-51, paras. 30-31). Spanish counsel referred once again to the discussions of "pirate vessels" in Parliament — discussions, incidentally, on the legislation and not the reservation — and he even raised the issue of the good faith of Minister Tobin, the Minister of Fisheries and Oceans (CR 98/15, p. 59, para. 17; CR 98/10, pp. 48-51, paras. 25-31).

42. Without evidence, Mr. President, and without justification. The Court will remember what the Minister of Fisheries and Oceans said to Parliament during the debates on Bill C-29 — that any vessel of any nation fishing at variance with good conservation rules could be subject to the legislation and there are no exceptions (*House of Commons Debates*, 11 May 1994, p. 4216, Spanish Memorial, Ann. 15). This, Mr. President, was at the very time, almost to the day, when the reservation was filed. Senator Petten described stateless vessels as the *first* target — but not, clearly, the only possible target of the legislation (*Debates of the Senate*, 12 May 1994, p. 458, Spanish Memorial, Ann. 16). In the press release of 10 May 1994, the day of the reservation, the Minister of Foreign Affairs said and I quote, that "stateless and flag of convenience vessels *currently* constitute the major threat" (Canadian Counter-Memorial, Ann. 35). "Currently",

Mr. President, means at that time, not forever, not indefinitely. It also implies the situation could change and would be kept under review. The restrictive intention Spain imputes to Canada, at the time the reservation was filed, is a pure fiction, a figment of the fertile imagination of the Spanish team.

43. But then, Spain asks, how do we explain why Minister Tobin said that under the NAFO system, we board, inspect, issue citations, but leave the actual prosecutions up to the flag States (Spanish Memorial, para. 88; CR 98/10, pp. 48-49, para. 26)? And how do we explain why Minister Tobin, in these same 1994 debates, said that Spain and Portugal live within NAFO quotas and participate fully in the NAFO organization (Spanish Memorial, para. 117; CR 98/10, pp. 48-49, para. 26)? Mr. President, this has all been explained in paragraphs 24 to 27 and 158 to 160 of the Canadian Counter-Memorial. The Minister spoke with approval of Spain in May 1994 because the Spanish fleet was then respecting the rules, and as a result fisheries relations between the parties were very much improved. But no one in Canada had forgotten the years of confrontation and destructive overfishing. There was never any guarantee that the 1994 *détente* would last, and in fact it ended when the Greenland halibut crisis exploded not long after. This is why Ministers ensured, in 1994, that the legislation had to cover any vessel from any nation, and that the reservation also had to cover any vessel from any nation. And so they do.

44. In these same debates, as paragraph 159 of our Counter-Memorial explains, Minister Tobin said very clearly that he *hoped* and he *believed* that the NAFO self-policing system would continue to work. But he conveyed no assurance and he made no commitment. In the very same intervention I have just referred to, he also vowed to stop overfishing by agreement if possible but and — I quote — "by unilateral action if unilateral action is necessary" (Canadian Counter-Memorial, para. 160). So where, precisely, is the divorce between intention and reality?

45. Mr. President, there is no such divorce. Canada's intentions never changed. As Spain well knows. Spain and the member States of the European Union *knew*, in May 1994, that the legislation could be used against them; and they reacted accordingly. The Note Verbale of

10 June 1994 is a strongly worded condemnation of the Canadian legislation (Spanish Memorial, Ann. 18). This was no academic issue of principle for Spain and the European Union. They knew full well, when the legislation was passed and the reservation filed in 1994, from the very terms of those documents, that the legislation *could* be applied to them — that in the words of the Minister in May 1994, that it could be applied to the vessels of any nation fishing at variance with good conservation rules.

Mr. President, distinguished Judges. I have reached my conclusion. I am grateful for the opportunity to have taken the podium once again on behalf of my Government. I thank the Court for its courteous attention, and I request the Court to invite the Deputy Agent to the podium.

The PRESIDENT: Thank you Mr. Willis. I call on the Deputy Agent of Canada, Mr. Hankey.

Mr. HANKEY:

1. Mr. President, distinguished Judges, on behalf of the Government of Canada, I wish to thank you for your careful consideration of the issues raised in the course of these proceedings.

2. Over the past week you have heard numerous creative arguments from our colleagues on the Spanish side; arguments seeking to distort the text of Canada's declaration of acceptance of the Court's compulsory jurisdiction; arguments directed at subverting Canada's intention at the time the declaration was filed; and, ultimately, arguments intended to circumvent Canada's reservation, which is central to these proceedings. By these means, Spain has sought through sophistry and evasion to avoid the one obvious conclusion: that this case is outside the jurisdiction of the Court.

3. While we can and do credit Spain with considerable imagination, we must not mistake the products of their ingenuity for undisputed facts, good law and sound policy. As both Canada and Spain have asserted throughout these hearings, the consent of States is a fundamental precondition to the Court's jurisdiction. In order for the Court to have jurisdiction over a case the States parties must unquestionably have consented to that jurisdiction. But, in its 1994 declaration accepting the

Court's compulsory jurisdiction, Canada has excluded its consent over cases, like this, arising out of or concerning conservation and management measures taken against vessels fishing in the NAFO Regulatory Area and the enforcement of such measures.

4. Mr. President, I need hardly remind the Court that States are free to choose the means by which they will settle their disputes. The Charter of the United Nations lists the options: negotiation; mediation; conciliation; arbitration; or judicial settlement. All are equally available to States when disputes arise. Yet no one method is preferred or required. A number of States, like Canada, have chosen out of respect for the Court to submit to its compulsory jurisdiction a broad range of disputes that we consider amenable to judicial settlement. Canada has also, however, exercised its sovereign right to settle some types of disputes through other means. Foremost among this latter category, for the purposes of this case, are those disputes involving situations or facts arising out of or concerning conservation and management measures taken against vessels fishing in the NAFO Regulatory Area and the enforcement of such measures. Canada has chosen to address such disputes through negotiation and international agreement.

5. And I hasten to add that we have pursued these matters with considerable success. The Canada-European Union Agreement of 20 April 1995, which was the product of negotiations following the events of March of that year, contained stringent conservation, management and enforcement measures applicable to the Northwest Atlantic. The acceptance of these measures by all NAFO parties in September 1995 further strengthened their effectiveness in the defence of conservation. Multilaterally, and in realization of another Canadian initiative, 1995 also saw the conclusion of the United Nations Straddling Stocks Convention. This Treaty when in force, will also greatly improve the conservation of the world's shared fisheries resources.

6. Canada has thus chosen to settle differences concerning conservation and management measures through negotiation, which was the manner it deemed most efficacious in the circumstances. Its recognized intention in so doing is, of course, critical to the interpretation of our optional clause declaration and thus to the Court's jurisdiction.

7. Canada amended its declaration accepting the Court's compulsory jurisdiction on 10 May 1994, exactly the same day it introduced into Parliament an Act to Amend the *Coastal Fisheries Protection Act*, Bill C-29. The intimate link between these two instruments was and is absolutely transparent. Both ministerial statements and the Government press release announcing these two initiatives made it perfectly clear that the conservation and management measures to which the declaration referred were none other than the Act itself and the measures taken under it.

8. Spain has alleged that Canada has engaged in some form of auto-interpretation of its reservation, seeking to impose on the text a later intention that was not there — hence Spain's curious reference to automatic reservations. Nothing could be further from the truth. We have *not* argued for some unusual esoteric interpretation. We have argued for an interpretation according to the plain, ordinary meaning of the words to give *full effect* to Canada's objective intention. Throughout these proceedings, Canada has relied on contemporaneous evidence of its intention at the time the declaration was filed. We have no need for creative *ex post facto* rationalizations. In the words of the *Temple* Judgment, which I cited last week, our purpose in adopting the legislation "has never been in doubt" (CR 98/11, p. 34, para. 39).

9. Intention, Sir, is the touchstone for interpreting optional clause declarations. In some cases before the Court, States' intentions have been vague or tangential. But here, in the present proceedings, the facts are as clear as they could be. Canada intended to exclude from its acceptance of the Court's jurisdiction any disputes concerning the 1994 amendments to the *Coastal Fisheries Protection Act*, its regulations or its enforcement. And this is precisely what we did.

10. Interpreting Canada's reservation requires that we answer a simple question: were the measures taken by Canada and enforced against the Spanish fishing vessel *Estai*, conservation and management measures? If the answer is yes, the Court is without jurisdiction.

11. As we have shown throughout our pleadings, the *Coastal Fisheries Protection Act* and Regulations, pursuant to which the *Estai* was boarded, arrested and charged, are unquestionably conservation and management measures, directed at the protection of fisheries. All of Spain's

rhetorical fireworks cannot obscure that fact. Accordingly, the application of Canada's reservation to the present case is inescapable.

12. In its efforts to lead the Court away from the plain meaning and purpose of Canada's declaration, Spain has invented numerous interpretive methods. My colleagues have carefully addressed these various techniques and there is no reason for me to revisit them now. I will, however, note, with regret, that the aim of Spain's case has been one of dissimulation. Whether advocating, in effect, a restrictive interpretation of optional clause reservations or imposing specific definitions on generic terms, Spain has consistently sought to avoid the plain meaning of the words actually used in Canada's reservation. Simply reading the text of this reservation in a natural and reasonable way, and giving effect to its words and to Canada's known intention would not suit Spain's purpose, for this reading could only lead to the conclusion that the Court is without jurisdiction. Instead Spain has sought to create complication and confusion to obscure the absence of Canada's consent to jurisdiction in this case.

13. Through its various interpretive theories and factual inventions, Spain is thus seeking nothing less than to undermine the principle of consent. Canada has manifestly not consented to the adjudication of this sort of dispute. Its lack of consent is equally evident from the text of the reservation and from Canada's transparent intention at the time the 1994 declaration was filed. Indeed, Spain has even admitted that Canada's intention was to exclude this sort of case from the Court's jurisdiction (Spanish Memorial, p. 76, para. 55; pp. 94-96, paras. 107-110). Yet, despite that admission, Spain's counsel have insisted that Canada's reservation should be construed as narrowly as possible; that because of the incompetence of Canada's legal drafters the words contained in the text do not mean what they say; and that Canada's measures should be assumed to be illegal, and thus, *ipso facto*, within the jurisdiction of the Court. The variations on Spain's theme are infinite, but the theme remains the same: the Court should assume jurisdiction in spite of Canada's lack of consent.

14. If upheld by the Court, the result of Spain's reasoning would be significant, not only for Canada, but for all members of the international community that have chosen to declare their acceptance of the Court's compulsory jurisdiction under the optional clause. That is why Canada agrees with Mr. Highet when he calls this a "big little case". It would become bigger still if, as Mr. Highet wishes, it were to stand for the proposition that jurisdiction can be assumed by the Court, despite the clear text of a reservation and the equally clear intention of a State to exclude jurisdiction.

15. Mr. President, the jurisprudence of this Court and its distinguished predecessor, however, teaches us otherwise. This is a "big little case" because it is an opportunity for the Court to unambiguously reaffirm the jurisdictional principles that have guided over three-quarters of a century of its judicial practice. Where Spain proposes to undermine the consent of States, Canada asks only that the requirement for consent be respected.

Conclusion

16. Mr. President, distinguished Judges, in good faith and with full confidence in the Court, Canada like a number of other States, has accepted the Court's compulsory jurisdiction subject to a small number of clearly defined reservations. As even Spain would agree, reservations form a critical part of the optional clause system by encouraging States to participate in it to the extent they can. The jurisprudence of the Court has developed sound and reasonable principles of interpretation intended to give full and fair effect to the intention of States as expressed in optional clause declarations, including in particular their reservations.

17. If accepted, Spain's approach would change profoundly the manner in which the optional clause system functions. As Sir Gerald Fitzmaurice has observed, nothing undermines confidence in international tribunals "so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents" (Sir Gerald Fitzmaurice, *The Law and Practice of the International Court of Justice*, Vol. II (1986), p. 514).

18. Sir, Canada asks for nothing more than an interpretation of its declaration that respects the clear language and intended scope of the reservation set out in paragraph 2 *(d)*. On the basis of this reservation, I formally reiterate, on behalf of the Government of Canada, the following submission, which I shall read in English and in French:

May it please the Court to adjudge and declare that the Court has no jurisdiction to adjudicate upon the application filed by Spain on 28 March 1995.

Plaise à la Cour dire et juger qu'elle n'est pas compétente pour statuer sur la requête déposée par l'Espagne le 28 mars 1995.

19. Monsieur le Président, Madame et Messieurs de la Cour, je vous remercie de votre attention et patience.

The PRESIDENT: Thank you, Mr. Hankey. The Court takes note of the final submissions that you have read out on behalf of Canada, as it did those presented by the distinguished Agent of Spain. This brings us to the end of the hearings on preliminary objections. I wish to thank the Agents, counsel and advocates of both Parties for their very able arguments, as well as the courtesy they have shown throughout these proceedings. In accordance with the usual practice, I would ask the Agents of both Parties to remain at the disposal of the Court for any further information which it might need. And subject to this, I now declare closed the oral proceedings on the Court's competence to entertain the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*.

The Court will now withdraw to deliberate. The Agents of the Parties will be notified in due course of the date when the Court will give its Judgment. There being no other matters before it today, the Court will now rise.

The Court rose at 12.40 p.m.