SEPARATE OPINION OF PRESIDENT SCHWEBEL

Reservations to declarations accepting the Court's jurisdiction under the optional clause may exclude measures and actions by the declarant that may be illegal under international law — Canadian reservation 2 (d), *not being a "self-judging" reservation inconsistent with Article 36, paragraph 6, of the Statute, has permitted the Court to freely consider whether it has jurisdiction — Contrary to argument of Spain's counsel, the Canadian reservation cannot be interpreted as a "nullity" applicable to "nothing" — However,* arguendo, *were it so interpreted, the result would be that reservation 2* (d), *but for which Canada would not have introduced a new declaration, cannot be severed from the declaration as a whole — If reservation 2* (d) *falls or fails, so does the whole of the Canadian declaration, thus depriving the Court of any basis of jurisdiction in the case.*

1. I am in agreement with the reasoning as well as the conclusion of the Court's Judgment. I feel bound, however, to add the following observations, in view of arguments which have found a place in Spain's exposition.

2. A principal contention of Spain in these proceedings is that the reservation set out in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994, as interpreted by Canada to be, in Spain's words, "the sole authentic interpretation of its reservation" (Memorial of Spain, para. 39), is incompatible with the Statute of the Court. In its Memorial, Spain concludes that there are or may be "not just *anti-statutory* reservations; there are also *anti-statutory interpretations* of certain reservations" (para. 39). A counsel for Spain in the oral hearings thus maintained that the Court

> "would only need to find that there is incompatibility with . . . Article 36, paragraph 6 [of the Statute], . . . Article 2, paragraph 4 [of the Charter], to reject not the validity of the reservation, which we have never called for, but the strictly unilateral interpretation Canada makes of it" (CR 98/13, p. 64 *[translation by the Registry]*).

Another counsel of Spain at the same sitting argued that,

> "Canada's subjective intent does not have to correspond with the objective requirements of international law. If those requirements indicate that acts of interference with the freedom of the seas can never properly be classified as being 'conservation and management measures', it follows that the Canadian reservation is *pro tanto* a

nullity. It did not achieve what it had set out to achieve — for the simple reason that the words it used are impossible to use in their context consistent with international law." (CR 98/13, p. 37.)

Spain's counsel continued:

> "*(2) The Canadian reservation has no objective reality or validity under international law, and should not be given effect by the Court to block Spain's application unless such objective validity or reality can be given to it*
>
> The 'conservation reservation' therefore excludes nothing, since it can apply to nothing. It is inappropriate for Canada to demand that its subjective intent control the Court. That intent may be important if not conclusive on the question of the object and purpose of a reservation in the 'mind' of a declarant State. But to follow Canada's argument so far as to make that subjective intent controlling . . . would . . . violate Article 36, paragraph 6, of the Statute." (CR 98/13, p. 48, para 61.)

3. I find the foregoing arguments of Spain — which may not be wholly consistent — unpersuasive for the following reasons.

4. If Spain means to maintain that a reservation is ineffective in so far as it excludes measures or actions by the declarant State that are illegal under international law, I cannot agree. As the Court's Judgment acknowledges, the very purpose, or one of the purposes, of States in making reservations may be to debar the Court from passing upon actions of the declarant State that may be or are legally questionable. If States by their reservations could withhold jurisdiction only where their measures and actions are incontestably legal, and not withhold jurisdiction where their measures or actions are illegal or arguably illegal, much of the reason for making reservations would disappear.

5. For the reason also stated in the Judgment of the Court, the contention of Spain that Canada's reservation as Canada interprets it deprives the Court of the authority to decide whether the Court has jurisdiction, and hence violates Article 36, paragraph 6, of its Statute, is without merit. The proceedings in the Court and the resultant Judgment more than amply demonstrate that the Court has freely considered whether it has jurisdiction. The Court has concluded, for the reasons meticulously set out in the Judgment which have nothing to do with "self-judging" reservations, that it has not.

6. Nor can I agree that reservation 2 *(d)*, as interpreted by Canada to apply (as its terms provide) to "disputes arising out of or concerning con-

servation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined . . . and the enforcement of such measures" can, as a counsel for Spain contended, "apply to nothing". Those measures, as explained in the Court's Judgment, are no less measures of conservation and management because they are meant to apply, and by their terms and the regulations implementing those terms, do apply, "in the NAFO Regulatory Area . . ." not only to vessels that are stateless or flying flags of convenience but to other foreign vessels.

7. But if it were to be accepted, *arguendo*, that the foregoing contentions of Spain are correct, and that, by reason of Canada's interpreting its reservation to apply to any vessel fishing in the NAFO Regulatory Area, the reservation lacks validity and is "a nullity" and "can apply to nothing", it does not follow that the Court has jurisdiction over Spain's cause of action. On the contrary, it follows that the Court is altogether without jurisdiction since the nullity or ineffectiveness of reservation 2 *(d)* entails the nullity or ineffectiveness of the Canadian declaration as a whole.

8. Before filing its current declaration of 10 May 1994, Canada was bound by an anterior declaration of 10 September 1985. That declaration contained the following clause, which is reproduced in the declaration of 10 May 1994:

> "(3) The Government of Canada also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added."

9. In implementation of the foregoing reservation, Canada added to its declaration of 10 September 1985 what appears in its declaration of 10 May 1994, namely and solely, reservation 2 *(d)*. But it did not do this by way of transmitting an amendment to the earlier declaration which remained in force. Rather, in paragraph 1 of its declaration of 10 May 1994, Canada gave notice of termination of its acceptance of the Court's compulsory jurisdiction made on 10 September 1985. In paragraph 2, it declared the acceptance by Canada of the Court's jurisdiction over all disputes other than those specified in subparagraphs *(a)*, *(b)*, *(c)* and *(d)*. Since subparagraphs *(a)*, *(b)* and *(c)* are found in exactly the same terms in the 1985 declaration, it is clear that the only reason of Canada for terminating that declaration, and for making a new declaration, was to add the provisions of subparagraph *(d)*. Moreover, those provisions do not comprise routine recitations, such as "without special agreement"

and "on condition of reciprocity", which duplicate those of the Statute. Subparagraph 2 *(d)* introduces an entirely new, specific and purposeful reservation. It follows that the reservation contained in subparagraph 2 *(d)* is not only an important but an essential provision of Canada's declaration, but for which, or without which, no new declaration would have been made.

10. The Court has accepted "the close and necessary link that always exists between a jurisdictional clause and reservations to it" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 33). Yet there may be cases of jurisdictional adherence where that link may be severed. One such has been suggested above, where a provision is redundant. Severability has been applied by other courts or committees in respect of certain human rights conventions. While venturing no opinion on the tenability of severability in such circumstances, those are not the circumstances now before the Court. When, as in this case, the reservation has been treated by the declarant State as an essential one but for which — or without which — the declaration would not have been made, the Court is not free to treat the reservation as invalid or ineffective, while treating the remainder of the declaration to be in force. If reservation 2 *(d)* falls or fails, so must the Canadian declaration of 10 May 1994 fall or fail. If the Spanish argument is accepted on the results to be attached to Canada's interpretation of the reservation, it follows that there is no basis whatever in this case for the jurisdiction of the Court.

(Signed) Stephen M. SCHWEBEL.