SEPARATE OPINION OF JUDGE ODA

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I. Introduction

1. I voted in favour of the Court's finding that it has no jurisdiction to adjudicate upon the dispute brought by Spain's Application of 28 March 1995.

I am entirely in agreement with the Court when it states that it has no jurisdiction, in consequence of the terms of the reservation contained in paragraph 2 *(d)* of Canada's declaration of acceptance of the compulsory jurisdiction of 10 May 1994, to decide on the merits of the case submitted to it. I equally support the Court's view that Canada's objection to the jurisdiction of the Court is, in the circumstances of the case, of an exclusively preliminary character and that the Court has no reason to apply Article 79, paragraph 7, of the Rules of Court (see Judgment, para. 85).

2. I do not, however, share the view of the Court on what constituted the dispute presented by Spain in its Application to the Court and on what the issues were in respect of which the Court was requested to rule in the present case. I have difficulty in following the argument developed by the Court in order to reach the conclusion — although that conclusion appears to me to be quite correct — that the reservation contained in paragraph 2 *(d)* of the declaration deposited by Canada on 10 May 1994 excludes this dispute from the Court's jurisdiction.

II. The Dispute Presented to the Court

3. Since the Court, at this jurisdictional phase of the case, has not had the opportunity to deal with the issues on the merits and since it appears to me that the Court does not fully appreciate the essence of the dispute — and lest the real issues in the case should be buried in obscurity — I consider it appropriate for me to spell out what issues existed in the dispute between Spain and Canada at the time that it was unilaterally brought to the Court by Spain.

4. The subject of the "dispute" in the present case relates, according to Spain's Application (Section 3, "The Dispute"), to the *Estai* incident that took place on 9 March 1995 at a point approximately 245 miles off the coast of Canada. The Judgment states that "[t]he filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law" (Judgment, para. 34), namely:

> "the Canadian activities on the high seas in relation to the pursuit of the *Estai*, the means used to accomplish its arrest and the fact of its arrest, and the detention of the vessel and arrest of its master, arising from Canada's amended Coastal Fisheries Protection Act and implementing regulations" (Judgment, para. 35).

Certainly, Canada's legislative enactments in 1994-1995 are to be examined, *but only* in this context. It is important to note that Canada's legislative enactments are not themselves an issue in dispute in the present case.

5. The *Estai* incident occurred, in a geographical sense, within the "Regulatory Area" of the 1979 Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Convention).

In 1979, the NAFO Convention replaced the 1949 International Convention for the Northwest Atlantic Fisheries (ICNAF) after the North Atlantic coastal States extended, in accordance with relevant principles of international law, their jurisdiction over the living resources of their adjacent waters to limits of up to 200 nautical miles from the coast where they exercised sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources (Preface, NAFO Convention). The NAFO Convention was then signed by 14 States (including Canada and Spain) and the European Economic Commission, in accordance with their desire

> "to promote the conservation and optimum utilization of the fishery resources of the Northwest Atlantic area within a framework appropriate to the regime of extended coastal State jurisdiction over fisheries, and accordingly to encourage international co-operation and consultation with respect to these resources" (Preface, NAFO Convention).

The "Convention Area", to which the 1979 NAFO Convention applies, remains practically identical to the "Convention Area" under the 1949 ICNAF Convention. The "Convention Area" is divided into *scientific* and *statistical* sub-areas, divisions and subdivisions (NAFO Convention, Art. XX and Ann. III), as it was under the 1949 Convention, but these divisions have no bearing on the exercise of jurisdiction in the "Convention Area".

The "Convention Area" now consists, from a jurisdictional point of view, of two quite distinct areas, namely, the 200-mile exclusive economic zone — which is under the jurisdiction of the respective coastal States — and the "Regulatory Area", which "lies beyond the areas in which the coastal States exercise fisheries jurisdiction" (NAFO Convention, Art. I, para. 2). The *Estai* incident occurred in a part of the "Regulatory Area". The important point is that the *Estai* incident took place in the "Regulatory Area" of the "NAFO Convention Area" but *not* that it took place in any particular division of the "Regulatory Area" (cf. Judgment, para. 19).

6. Under the framework of the NAFO Convention, the Fisheries Commission established under this Convention (Art. II) is responsible for the management and conservation of the fishery resources of the "Regulatory Area" (Art. XI, para. 1). The Fisheries Commission may adopt

proposals for joint action by the contracting parties designed to achieve the optimum utilization of the fishery resources of the "Regulatory Area" (Art. XI, para. 2) and may also adopt proposals for international measures of control and enforcement within the "Regulatory Area" for the purpose of ensuring within that Area the application of this Convention and the measures in force thereunder (Art. XI, para. 5). Each proposal adopted by the Commission shall become a measure binding on all contracting parties (Art. XI, para. 7). Any Commission member may present to the Executive Secretary of NAFO an objection to a proposal (Art. XII, para. 1).

I would like to make it plain that, within the framework of the NAFO Convention, the management and conservation of the fishery resources in the *Regulatory Area* — which is an area that lies beyond the fisheries jurisdiction of any coastal State — is the responsibility of the Fisheries Commission.

The measures provided for in the national legislation of Canada enacted in 1994-1995 were not measures binding on all contracting parties adopted pursuant to the terms of the NAFO Convention (Art. XI, para. 7); the enforcement action taken on 9 March 1995 by the Canadian authorities against the *Estai* in the *Regulatory Area* could not have been taken within the framework of the NAFO Convention.

In order to understand the real issues in the dispute presented before the Court, these points cannot be overemphasized and I am certain that Canada must have been fully aware of the meaning of the NAFO Convention. I however take note of the provision of the NAFO Convention that reads:

> "Nothing in this Convention shall be deemed to affect or prejudice the positions or claims of any Contracting Party in regard to . . . the limits or extent of the jurisdiction of any Party over fisheries; or to affect or prejudice the views or positions of any Contracting Party with respect to the law of the sea." (NAFO Convention, Art. I, para. 5.)

7. On 3 March 1995, Canada made certain amendments to its Coastal Fisheries Protection Regulations, the effect of which was that all vessels registered in Spain were prohibited from fishing Greenland halibut in the NAFO Regulatory Area and that offenders were subject to arrest, seizure of vessel and catch and fines. The amendments were immediately notified to Spanish fishing vessels by radio. The *Estai* incident took place less than a week later. The whole chain of events unfolded totally outside the framework of the NAFO Convention.

Thus, the only issue in dispute at the time of filing of the present case on 28 March 1995 was whether Canada violated the rule of international

law by claiming and exercising fisheries jurisdiction (namely, the prescribing of fishery regulations — including the exclusion of fishing vessels flying the Spanish flag —, the enforcement of those regulations by Canadian government authorities and the imposition of penal sanctions on a Spanish vessel and its master) in an area of the high seas beyond the limit of its exclusive economic zone, or whether Canada was justified in exercising fisheries jurisdiction in that area, on the ground of its honestly held belief that the conservation of certain fish stocks was urgently required as a result of the fishery conservation crisis in the Northwest Atlantic — *irrespective of* the NAFO Convention, which neither provides for the unilateral adoption by coastal States of fishery regulations intended to apply in the Regulatory Area, nor entrusts coastal States with the enforcement of such regulations in that area of the high seas.

III. Exclusion from the Court's Jurisdiction of "Disputes arising out of or concerning Conservation and Management Measures Taken by Canada"

8. Pursuant to the Court's Order of 2 May 1995, the sole question to be decided by the Court at the present stage of the case is whether the dispute, as defined above, falls within the purview of the clause whereby Canada declared its acceptance of the Court's jurisdiction on 10 May 1994, or whether Canada is exempted from the Court's jurisdiction by virtue of paragraph 2 *(d)* of that declaration.

I agree totally with the following statements by the Court with regard to the interpretation of the reservation attached to Canada's declaration:

> "[i]t is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court . . . Conditions or reservations [attached to the declaration] . . . operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively" (Judgment, para. 44);
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> "there is no reason to interpret such a reservation restrictively" (*ibid.*, para. 45);
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> "[t]he Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court" (*ibid.*, para. 49);
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> "what is required in the first place for a reservation to a declaration

made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State" (Judgment, para. 52);

"declarations of acceptance of its jurisdiction must be interpreted in a manner which is in harmony with the "natural and reasonable" way of reading the text, having due regard to the intention of the declarant" (*ibid.*, para. 76);

"[i]t follows that this dispute comes within the terms of the reservation contained in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994" (*ibid.*, para. 87).

I wonder if the Court needed to add anything to what it said above.

9. It goes without saying that, for the sake of judicial certainty, the interpretation given by the declarant State to the scope of its acceptance of the Court's jurisdiction cannot be adjusted to suit the circumstances, but must be fixed so as to cover any case that may arise. The fact that Canada made its declaration containing the reservation set out in paragraph 2 *(d)* only a few days prior to enacting the amendments to its fisheries legislation clearly indicates the true intention of Canada in respect of those amendments and of any dispute which might arise as a result of their implementation.

10. It is clear, given the basic principle that the Court's jurisdiction is based on the consent of sovereign States, that a declaration to accept the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and any reservations attached thereto, must, because of the declaration's unilateral character, be interpreted not only in a natural way and in context, *but also* with particular regard for the intention of the declarant State. Any interpretation of a *respondent* State's declaration against the intention of that State will contradict the very nature of the Court's jurisdiction, because the declaration is an instrument drafted unilaterally.

There may well be occasions when a *respondent* State seeks to interpret restrictively the scope of an *applicant* State's acceptance of the Court's jurisdiction, especially if one considers that a *respondent* State's obligation to comply with the Court's jurisdiction greatly depends on the scope of the *applicant* State's acceptance of the Court's jurisdiction (cf. Article 36, paragraph 2, of the Statute), but this is, of course, not the situation in the present case.

11. Once Canada had excluded from the Court's jurisdiction certain disputes — namely, "disputes arising out of and concerning conservation and management measures" — the meaning of the reservation should, as I have explained above, be interpreted according to the intention of Canada. I am at a loss to understand why the Court should have felt it

necessary to devote so much time to its interpretation of the wording of that reservation.

In particular, I do not understand why the Court should have wished to consider whether the expression "conservation and management measures" in Canada's reservation 2 *(d)* ought to be interpreted according to an allegedly established and normative concept of "conservation and management measures". I feel particularly that paragraph 70 of the Judgment has been drafted under a misunderstanding of the subject, namely the law of the sea.

The first sentence of paragraph 70 makes no sense to me and I have no idea whether there is such a rule or concept in international law. I assume that this paragraph was included in the Court's Judgment in order to pay lip-service to some of my colleagues who dissent from the Judgment and who hold the view that the exercise of jurisdiction on the high seas does not fall within the bounds of "conservation and management measures". Their view is perfectly correct, but the matter is quite irrelevant and does not need to be mentioned in the Judgment. In my view, the references in the Judgment to certain international treaties or national legislation are quite meaningless and may even be misleading.

12. "Conservation" of marine living resources is a general concept of marine science which has been widely used since the time that the depletion of certain resources in certain areas began to be noticed due to the over-exploitation of those resources. In fact, as the need for international co-operation for "conservation" has long been recognized, certain international agreements were concluded even in the earlier part of this century (for example, the 1911 Convention for the Protection and Preservation of Fur Seals and Sea Otters in the North Pacific Ocean; the 1923 International Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean; the 1930 Convention for Protection of Sockeye Salmon Fisheries, etc.).

The Proclamation on "Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas" made by President Truman of the United States of America in September 1945, immediately after the end of the war, is regarded as far-sighted, in that it drew the world's attention to the pressing need for the conservation and protection of fishery resources, particularly in offshore areas (see S. Oda, *The International Law of the Ocean Development*, Vol. I, p. 342). Over the following years, a number of international conventions — both multilateral and bilateral — covering the conservation of certain marine living resources were concluded (I itemize, just as examples, some of the treaties made at that time: the 1946 Convention for the Regulation of Whaling; the 1949 International Convention for the Northwest Atlantic Fisheries (the predecessor of the NAFO Convention); the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission; the 1952 International Convention for the High Seas Fisheries of the North Pacific

Ocean; the 1957 Interim Convention on Conservation of North Pacific Fur Seals; the 1959 North-East Atlantic Fisheries Convention; and, the 1966 International Convention for the Conservation of Atlantic Tunas). The measures for conservation adopted in each case vary according to the treaty in which they appear and were enforced through the national legislation of the individual States parties to each treaty.

The International Technical Conference on the Conservation of the Living Resources of the Sea was convened by the United Nations in Rome in 1955, and that was the first worldwide conference to produce a report dealing with the issues of conservation of marine resources. That Conference did not provide for any particular measures for any particular stocks or in any particular region (see S. Oda, *The International Law of the Ocean Development*, Vol. I, p. 356).

13. The "conservation" of marine living resources was thus not a new concept and the object of conserving those resources had already been implemented in various measures and regulations at international and national levels according to the particular situation — namely, fish stocks and regions. Once measures for conserving marine resources were agreed upon internationally, they were then implemented through the national legislation applicable to the nationals of each individual State.

Another point should be noted, namely that fisheries regulations were adopted not only for the purpose of "conservation" but were also taken as part of the chain of "management" measures adopted by each State in pursuance of their respective national economic or social policies. Particularly when "conservation" could no longer be effected only through regulations limiting the mesh-size of fishing nets and the fixing of fishing seasons or fishing areas (which regulations were imposed in equal manner upon the nationals of the States parties), it became necessary to fix the total allowable catch of specific stocks in particular regions. Thus, "conservation" issues turned to the more political question of the "management" — namely, allocation and distribution — of marine resources.

In addition, the number of States who attempted — under the pretext of conservation of resources — to secure marine resources in their offshore areas and to exclude foreign fishing vessels from those areas increased. In this respect, it is important to take note of the concept of maritime sovereignty strongly advanced in the 1950s by some Latin American States (see, for example, the 1952 Santiago Declaration adopted at the Conference on the Exploration and Conservation of the Marine Resources of the South Pacific, in S. Oda, *The International Law of the Ocean Development*, Vol. I, p. 345). In this process there occurred, on a

number of occasions, incidents involving the arrest of foreign fishing vessels on the high seas, namely, beyond the area that falls under the national jurisdiction of coastal States (see S. Oda, "New Trends in the Regime of the Sea — A Consideration of the Problems of Conservation and Distribution of Marine Resources, I and II", *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Bd. 18 (1957-1958); and, S. Oda, *International Control of Sea Resources*, Leiden, 1962).

14. In these circumstances, marine living resources had become a matter of great concern to the international community and to the United Nations. At the First United Nations Conference on the Law of the Sea convened in Geneva in 1958, the Convention on Fishing and Conservation of the Living Resources of the High Seas was adopted to provide for "the right [of all States] to engage in fishing on the high seas, subject . . . to the provisions . . . concerning conservation of the living resources of the high seas" and "the duty [of all States] to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (Art. 1).

In the 1970s, by which time the monopoly of coastal fisheries far beyond the limit of the territorial sea had become more or less a general practice, the concept of the exclusive economic zone, to justify the exclusive control of coastal fisheries, was emerging. Bearing in mind that the fisheries regulations in offshore areas could no longer be a matter of exclusive concern to each coastal State, the Third United Nations Conference on the Law of the Sea, convened over the period 1973 to 1982, produced in 1982 at Montego Bay the United Nations Convention on the Law of the Sea. That Convention provides, on the one hand, for the duty of each coastal State to "determine the allowable catch of the living resources in its exclusive economic zone" (Art. 61, para. 1) and for the obligation of each coastal State to "promote the objective of optimum utilization of the living resources in the exclusive economic zone" (Art. 62, para. 1), and, on the other hand with regard to high seas fishing, contains certain provisions concerning "conservation and management of the living resources of the high seas" (Part VII, Sec. 2). However, that Convention certainly does not seek to define "conservation and management measures".

In 1995 at United Nations Headquarters in New York, the so-called Straddling Fish Stocks Convention was agreed upon to implement the provisions of the 1982 Law of the Sea Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks in order to ensure the long-term conservation and sustainable use of these stocks — which stocks, of course, have no awareness of the artificial boundary of the exclusive economic zone.

15. It is important to note that the 1958, 1982 and 1995 United

Nations Conventions covering marine living resources do not directly impose any concrete "measures" for conservation of any particular stocks or "management" of any particular fishing activities. Rather, each State party is obliged to adopt through its own national legislation various appropriate measures for the "conservation" of resources, designed to apply to fishing vessels, whether national or foreign, in its own area of the exclusive economic zone, and is also obliged to reach agreement with other States for joint measures of conservation on the high seas. It should be noted that there exists no fixed or concrete concept of "conservation and management *measures*".

16. It appears to me from the manner in which the Court referred in paragraph 70 of the Judgment to certain international treaties or national legislation, selected at random, that it has misunderstood the true nature of these instruments and has not dealt with the development of the law of the sea in a proper manner.

It is clear to me that Canada, having reserved from the Court's jurisdiction any "disputes arising out of or concerning conservation and management measures", had in mind — in a very broad sense and without restriction and showing great common sense — any dispute which might arise following the enactment and enforcement of legislation concerning fishing, either for the purpose of conservation of stocks or for management of fisheries (allocation of the catch), in its offshore areas, whether within its exclusive economic zone or outside it.

IV. The Question of Admissibility and the Necessity of Prior Diplomatic Negotiations

17. In so far as the Court now determines that it cannot entertain the Application submitted by Spain against Canada, there remains nothing more to discuss. However, I would like to add a comment on one aspect relating to the admissibility of the present case.

No diplomatic negotiations took place between Spain and Canada with regard to the enactment in 1994 and 1995 of Canada's national legislation or its amendment. Immediately after the *Estai* incident on 9 March 1995, there was an exchange of Notes Verbales between Spain and Canada (as reproduced in the Annexes to the Application and referred to in the Judgment, paragraph 20). This could have meant that there existed a "legal" dispute concerning the *Estai* incident between the two States. There was, however, no further diplomatic negotiation between the two countries over the boarding, seizure, detention, etc., of the *Estai* and the domestic judicial proceedings against its master. Spain's Application was suddenly submitted to the Court on 28 March 1995, without any prior notice or discussion.

18. It should be noted that, after Spain had filed its Application in the Registry of the Court, negotiations between the European Union and Canada came to a successful conclusion, with the initialling on 16 April 1995 and signature on 20 April 1995 of the "Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the Context of the NAFO Convention" (see Judgment, para. 21).

In parallel with this, on 18 April 1995, the proceedings in Canada against the *Estai* and its master were discontinued; on 19 April 1995 the bond was discharged and the bail repaid with interest; subsequently the confiscated portion of the catch was returned; and, on 1 May 1995, Canada's internal legislation was amended so as to satisfy the position of Spain (see Judgment, para. 22). The proposals for improving fisheries control and enforcement contained in the Agreement of 20 April 1995 were adopted by NAFO at its annual meeting held in September 1995 and became measures binding all Contracting Parties with effect from 29 November 1995 *(ibid.)*.

19. I am not suggesting that the dispute became *moot* or that the submissions lost their object, and I fully agree with the Court when it states that the Court "is not required to determine *proprio motu* . . . whether or not the Court would have to find [the dispute] moot" (Judgment, para. 88). I would, however, like to suggest that, prior to the submission of the dispute existing on 28 March 1995, not only were diplomatic negotiations not exhausted but they had not even begun, and that the dispute could have been solved if negotiations between Spain and Canada had taken place. The result of Canada's acts to remedy the situation, as explained above, indicate just that.

20. It is arguable whether a "legal" dispute may be submitted unilaterally to the Court only after diplomatic negotiations between the disputing parties have been exhausted, or at least initiated, but I shall refrain from entering into that discussion. However, I submit that it could have been questioned, even at this jurisdictional stage — separately from the issue of whether the Court had jurisdiction to entertain Spain's Application — whether Spain's Application of 28 March 1995 in the present case was really *admissible* to the Court at all.

V. Conclusion

21. I have no doubt that Canada believed that it had a legitimate right to adopt and enforce certain fisheries legislation, but that it also believed, in the light of the development of the law of the sea, that that right may belong to the area of *lex ferenda* and, in this belief, Canada wished to avoid any judicial determination by the International Court of Justice.

Conversely, Spain also was perfectly entitled to believe that any amendment by Canada of its fisheries legislation so as to make it applicable to Spanish vessels, thus excluding them from fishing for certain stocks in an area of the high seas, was not permitted under international law as it stands at present.

In conclusion, I should like to say that I appreciate the goodwill shown by Canada in the actions taken by it in May 1995 (after the *Estai* incident), as a result of which the practical difficulties between the two States were resolved.

(Signed) Shigeru ODA.