SEPARATE OPINION OF JUDGE KOROMA

The dispute as defined by Spain — Jurisdiction of the Court based on consent, Article 36, paragraph 2, of the Statute — Interpretation of a declaration and its reservation in order to ascertain declarant State's intention — Right of a State to exclude subject-matter from jurisdiction of Court — Consent and not applicable law decisive in determining whether jurisdiction conferred — Understanding of Court's determination of lawfulness of excluded acts in a reservation — Decision of the Court neither a licence for invalid reservations nor the abdication of its judicial function — Court reserves right to determine its inherent jurisdiction — Article 36, paragraph 6, of Statute.

1. For Spain, the core of this dispute is whether Canada is entitled under international law to exercise its jurisdiction over foreign vessels on the high seas. This, Spain claims, moves the dispute away from the domain of the reservation made by Canada when it accepted the compulsory jurisdiction of the Court, into the area of a major principle of international law. Spain further contends that the Canadian reservation, if accepted by the Court, will preclude the Court from determining whether Canada's measures of conservation and management and their enforcement violate the norms governing the international lawfulness of those measures, particularly the principle of freedom of the high seas and the prohibition on the use of force.

2. Although I voted with the majority of the Court in favour of the Judgment, I consider, nonetheless, that the points raised by Spain are so important and fundamental, both for the role of the Court as the principal judicial organ charged with the administration of justice between States, as well as in relation to its judicial function, that it is incumbent upon me to present certain views on the matter.

3. First of all, neither Party contests the principle that the jurisdiction of the Court is consensual and that its compulsory jurisdiction under Article 36, paragraph 2, of the Statute is predicated upon the existence of consent as expressed in a declaration of acceptance made by a State. This principle was not contested as such but, given its different interpretation by the Parties, it is both pertinent and worth repeating that the absolute and unfettered freedom to participate, or not participate, in the optional clause system is the basis on which reservations to a declaration are made under that system. And as a corollary, when a State attaches to its declaration of acceptance a reservation excluding disputes on a certain subject, it defines or limits the Court's jurisdiction to apply the principles and rules of international law which the Court would have applied, had that

subject-matter not been excluded from the jurisdiction of the Court; this is irrespective of the fact that the field of application of such principles and rules is wider than the specific subject-matter of the dispute concerned.

4. On the basis of these basic principles, I reached the conclusion that, since Canada excluded from the jurisdiction of the Court "disputes arising out of or concerning conservation and management measures", the question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter and not on the applicable law, or the rules purported to have been violated. In other words, once it is established that the dispute relates to the subject-matter defined or excluded in the reservation, then the dispute is precluded from the jurisdiction of the Court, whatever the scope of the rules which have purportedly been violated. Stated differently, once the Court has determined that the measures of conservation and management referred to in the reservation contained in the Canadian declaration are measures of a kind which can be categorized as conservation and management of resources of the sea and are consistent with customary norms and well-established practice, the Court is bound to decline to found jurisdiction on the basis of the principles and rules purported to have been violated or said to apply.

5. In accordance with the foregoing, I take the view that the Court properly advised itself, when, in order to determine whether or not jurisdiction had been conferred on it in this matter, it considered the following questions: whether Canada made a declaration under Article 36, paragraph 2, of the Statute on 10 May 1994 accepting the compulsory jurisdiction of the Court. Whether that declaration excludes disputes arising from or relating to conservation and management measures and their enforcement. Whether the acts complained of fall within the category of acts excluded.

6. In answering these questions in the affirmative, the Court not only correctly appraised and determined the scope of the Canadian declaration, but also reaffirmed that its jurisdiction to adjudicate on a dispute derives from the Statute and the consent of the declarant State, as defined in its declaration, and not from the *applicable law*. It is in this sense that I understand the conclusion reached by the Court in paragraph 85 of the Judgment when it stated that:

> "the lawfulness of the acts which the reservation to the Canadian declaration seeks to exclude from the jurisdiction of the Court has no relevance for the interpretation of the terms of that reservation . . .".

In this connection, I consider the Court's statement in paragraph 55 of the Judgment to be more appropriate to this issue that:

> "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular

> acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties."

Nor, in my view, could the decisive issue be whether various treaty régimes govern the subject-matter of the reservation, or whether the interpretation of the declaration should be governed by the régime established by the Vienna Convention on the Law of Treaties, or the application of general principles of international law, such as the principle that the exception to a rule should not negate the principal rule. As pointed out in the Judgment, these legal régimes and principles cannot be applied in an identical manner to an optional clause declaration, as that is *sui generis* and governed by its own rules. Were it otherwise, not only would the limit of a State's consent expressed in its declaration not be respected or not seen to be respected — contrary to the Statute — but also the procedural distinction between the jurisdictional and merits phases of a case would be extinguished, with all its implications.

7. However, be that as it may, the Court's finding should in no way be viewed, let alone interpreted, as a licence for a State to make a declaration or reservation under the optional clause system which is inconsistent with the Statute. Rather, the Court's finding should be interpreted as an affirmation and a restatement of the principle that reservations limiting the scope of compulsory jurisdiction is permissible under the optional clause system and that the Court cannot extend its jurisdiction beyond the scope of the consent given by the declarant State. Nor should the finding be regarded as an abdication of the Court's judicial function. As the Judgment confirms, the Court reserves its inherent jurisdiction in accordance with Article 36, paragraph 6, of the Statute, to decide in the event of a dispute whether jurisdiction has been conferred in a matter submitted to it. It is also within the power of the Court to decide that a reservation has been invoked in bad faith, and to reject the view of the State in question.

(Signed) Abdul G. KOROMA.