DISSENTING OPINION OF VICE-PRESIDENT WEERAMANTRY

Validity of Canadian reservation — Interpretation of reservation — Importance of conservation of maritime resources — Need for legality of measures taken to this end — Spanish allegations unproved at this stage — Rejection for want of jurisdiction at this stage requires Court to hold that even if all Spanish allegations are proved, Court still has no jurisdiction — Such a conclusion cannot be reached having regard to Spanish allegations of breach of fundamental principles of international law — States subscribing to jurisdiction cannot opt out of applicability of fundamental principles of international law — Cases originating in excepted area but involving fundamental breaches of international law not covered by reservations clause — Inability of State to make any reservation it pleases — Need for reservation to be construed in accordance with legality — Reservations clause to be construed in context of entire declaration — Reservations clause a hard-won haven of legality in midst of conflicting sovereign claims — Historical overview — Expectation that consensual jurisdiction would grow through experience — Danger of progressive contraction of consensual jurisdiction — Strengthening effect on consensual system of independent interpretation by Court of reservations clauses — Canadian objection not of exclusively preliminary character.

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ISSUES RAISED IN THIS CASE

1. The issues raised in this case offer an opportunity for an examination of some important aspects of the optional clause, the foundation of the Court's contentious jurisdiction.

2. The Court is faced in this case with the difficult task of determining whether the issues raised by the assertions of Spain are to be considered as falling within reservation *(d)* of the Canadian declaration, or under the general part of that declaration which submits to the Court's jurisdiction "all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration".

3. Reservation *(d)* takes away from the Court's jurisdiction

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

4. Spain's contentions are that the alleged actions of Canada, which occurred on the high seas outside Canada's exclusive economic zone, violated fundamental principles of international law relating, *inter alia,* to the freedom of the high seas, the sovereign rights of Spain, safety at sea, and the prohibition of the use of force, which last is a principle enshrined in the United Nations Charter. Canada contends that its actions fall within the ambit of reservation *(d)*, and are thus not subject to scrutiny by the Court.

5. The Court's decision in this case will therefore have the effect of determining whether alleged factual situations, which may amount to breaches of international law extending even to Charter violations, are covered by the general portion of a declaration and hence justiciable, or whether they are rendered non-justiciable by the fact that the situation out of which the claim arises takes its origin in an activity specified in a reservation clause.

6. This is a question fundamentally affecting the entire scheme of optional clause jurisdiction, and is thus one which merits close attention from both a procedural and a conceptual point of view.

PRELIMINARY OBSERVATIONS

7. Before examining these questions I would like to make a few preliminary observations regarding some of the arguments that were urged before the Court.

8. It is to be noted, in the first place, that, though Canada acted as it did in terms of certain Canadian legislation, the Court can determine the

issues before it at the present stage of these proceedings without needing to pronounce upon the compatibility of Canada's legislation with international law. Even the more limited question of the non-opposability of Canadian legislation to Spain is not essential to the determination of the issues before the Court at this stage. This opinion does not therefore deal with this question.

9. Secondly, this opinion proceeds on the basis that the Canadian reservations clause is a perfectly valid clause, which Canada was well within its rights in introducing into its declaration. The question before the Court is the interpretation of that valid reservation. Problems arise in relation to the extent to which the applicability of that clause can be extended. This aspect is more fully dealt with later in this opinion.

10. There have been cases in the Court's jurisprudence in which the Court has been called upon to examine the scope of a reservation and its impact upon the entire declaration[1]. There can indeed be reservations which are contrary to the very purpose of the optional clause, and thus invalidate the entire clause. However, the Canadian reservation is far removed from this category, for a reservation relating to conservation measures is one which Canada was well entitled to insert in its declaration. The Court's task in the present case is to interpret that reservation in accordance with international law and the applicable canons of legal interpretation. It must also be viewed in the context of the totality of the declaration of which it forms a constituent part.

11. Thirdly, this opinion proceeds entirely upon the basis that Canada undoubtedly acted with the object of conserving maritime resources — a purpose to which modern international law attaches the greatest importance. This objective is inextricably linked with such seminal principles as the common heritage of mankind and the rights of posterity, which need to be strengthened as international law progresses into the next century. However, it goes without saying that such action as may be taken for these pre-eminently laudable purposes must be taken in compliance with legality, and not by means conflicting with basic principles of international law. The Court cannot, at this stage, reach any conclusion as to whether the action taken by Canada conflicts or not with such basic principles. The Spanish assertion to this effect remains completely unproven at this stage.

12. Fourthly, it is necessary to stress that the question before the Court at this preliminary stage is whether, even on the assumption that all of Spain's allegations will eventually be substantiated, the Court can still reach the conclusion that it has no jurisdiction in consequence of the reservations clause. These allegations include the wrongful use of force,

[1] See *Certain Norwegian Loans, I.C.J. Reports 1957*, p. 9; *Right of Passage over Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, p. 125; and *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6.

the violation of the principle of the freedom of the seas, the violation of Spanish sovereignty, the endangering of the safety of its vessel and crew, the unilateral use of coercive measures, the adoption of harassing manœuvres by patrol boats, and a wrongful act of arrest of its national ship. It is only if the Court can pronounce that, granted the correctness of all these allegations, there is still a lack of Court jurisdiction, that Spain's Application can be dismissed on the preliminary objection of want of jurisdiction. If not, the Court would be constrained to hold, in accordance with Article 79, paragraph 7, of the Rules of Court, that the objection does not possess an exclusively preliminary character.

13. It is true the Court's jurisdiction is consensual. It is true that States alone determine whether they will or will not submit to the Court's jurisdiction, and that it is entirely within their power, through reservations, to carve out exceptions to the area of their submission[2]. It is true also that the jurisprudence of the Court has laid down that reservations clauses cannot be framed so as to undermine the declaration of which they form a part. These are well-beaten trails in international law. The present case requires us to travel beyond the beaten track in order to examine the reach of a valid reservations clause, and the balance that must be struck between its operation and that of the general portion of the declaration.

14. In order to determine the limits of the reach of a restrictive clause, we need to examine a variety of legal questions. How does one categorize a given activity which, while falling within the reservations clause, also constitutes a violation of basic international obligations which reach far beyond the limited compass of the reservations clause? Are the words in such clauses to be given a meaning consistent with international law, or are they to be given an unrestricted meaning, irrespective of whether the activities they cover conflict with international law or not? Would any measures, however illegal, be brought within the reservation merely because they purport to be taken within the area of activity covered by the exception?

15. A further consideration to be borne in mind is the possible impact upon States of giving to a reservations clause a narrower construction than the full literal meaning it would bear had it existed by itself, and was being construed as a self-contained document. Would such a construction have an adverse impact on the willingness of States to consent to the jurisdiction of the Court, and thus constitute a threat to the viability of the optional clause system?

[2] The idea of reservations was accepted in principle as far back as 1924, and was so well established in 1945 that it was considered unnecessary at the San Francisco Conference to make express provision for it. (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, 1997, Vol. II, pp. 767-768.)

16. These questions are of great consequence to the entirety of the Court's judicial activities, having regard to the fact that a substantial number of declarations by consenting States do in fact incorporate reservations couched in a variety of forms. They also touch the core of the concept of submission to the Court's jurisdiction, and therefore warrant some extended consideration of the nature of that jurisdiction and the hopes attendant on its creation.

Limitations on Freedom of States to Make Any Reservations They Please

17. Once a State has entered the consensual system, submission to the basic rules of international law inevitably follows, and there can be no contracting out of the applicability of those rules. Once within the system, the rules of international law take effect, and apply to the entirety of the matter before the Court, irrespective of State approval. It has been argued before us that the greater power of total abstention or total withdrawal always includes the less. That proposition is unimpeachable, but at the same time can make no difference to the dominance of international law within the system once it is entered.

18. Though, regrettably, there are still many areas of international activity which are not reached by the writ of international law, one area where legality rules is within the consensual system.

19. It scarcely needs emphasis that the basic principles of international law permeate the entirety of that limited domain, and that the natural freedom to make reservations to the acceptance of that jurisdiction cannot extend to excluding the operation within it of the fundamentals of international law. The preservation of the integrity of that legal territory, within the limits in which it functions, imposes upon those who enter it certain constraints in the best interests of all users, and in order to preserve the inviolability of international law.

20. Illustrations of the proposition that, once within the system, the declarant State must submit to the rules and procedures prevalent therein, are not difficult to find. Examples include the undoubted principle that it is for the Court, and not for litigating States, to decide on its jurisdiction. That *compétence de la compétence* is a matter exclusively for the Court to determine is a principle which is well entrenched in the Court's Statute (Art. 36 (6)) and jurisprudence[3]. Indeed, the principle that an international tribunal is the master of its own jurisdiction can be described as a

[3] See, for example, *Nottebohm, Preliminary Objection, I.C.J. Reports 1953*, p. 119.

fundamental principle of international law[4], and as the Court observed in *Nottebohm*, "Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration."[5]

21. Likewise, it is the Court that determines its rules of procedure, and not the States that appear before it. Parties coming before the Court must accept the Court's rules of procedure and must submit to them, for the act of submission to the Court's jurisdiction implies a submission to the Court's procedural rules, and to the principle that the Court, and not the parties, is the master of its own procedure.

22. So, also, any matter that arises for adjudication within optional clause territory would be governed strictly by the rules of the United Nations Charter and the Statute of the Court. One cannot contract out of them by reservations, however framed. The basic principles of international law hold sway within this haven of legality, and cannot be displaced at the wish of the consenting State.

Categorization of Activity Which Falls within Both General Submission and Reservations Clause

23. A central question arising in this case is whether an activity originating in an area reserved from the jurisdiction of the Court can run its course into violations of Charter principles or fundamental principles of international law, free of judicial scrutiny merely because it originated in the excepted area. For example, are incursions into another State's territory to be free of judicial scrutiny merely because the initial action originated in a measure of conservation? Are acts of violence against a vessel of a sovereign State on the high seas free of judicial scrutiny merely because they originated in enforcement measures? Is there rather a point at which, upon a reasonable construction of the reservations clause, its applicability ceases or begins to be shrouded in doubt, and the action in question moves into the territory of the general part of the declaration? Would it be a more reasonable interpretation of such a clause that it precludes scrutiny of activities within the ambit of the exempted area, but not transgressions extending well beyond its natural scope? These are important questions pointedly raised by this case, which go to the core of the concept of submission to the Court's jurisdiction.

[4] See Rosenne, *op. cit.*, pp. 846-852.

[5] *I.C.J. Reports 1953*, p. 119.

24. Where, as in this case, there is a general submission to the Court's jurisdiction, followed by particular exceptions, the general part states the principle underlying the declaration, namely, the principle of submission. That general part sets the framework within which the Court's jurisdiction is accepted. It constitutes, *inter alia*, a submission to the general corpus of international law and, in particular, to its ruling principles. The reservations constitute exceptions — in this case *ratione materiae* — to that jurisdiction. They do not constitute exceptions to the ruling principles of the corpus of international law.

25. If, then, a State should assert that another State has sought to impose upon the applicant State a submission to the unilateral exercise of its penal jurisdiction on the high seas, to violate the basic principle of freedom of the high seas, to violate the peremptory norm of international law proscribing the use of force, to violate thereby a fundamental principle of the United Nations Charter, to violate the well-established principle of the complainant State's exclusive sovereignty on the high seas over vessels carrying its national flag, to endanger the lives of its seamen by a violation of universally accepted conventions relating to the safety of lives at seas — can all these alleged fundamental violations of international law, which would engage the jurisdiction of the Court under the general principle of submission, be swept away by the mere assertion that all these were done as a measure of conservation of fisheries resources? Reservations do not constitute a vanishing point of legality within the consensual system.

26. It is true it is entirely within the Court's discretion to determine whether a given cause of action must be placed within the receptacle of the general principle or of the particular exception. That discretion must, however, be exercised and not abdicated merely owing to the presence of the exception. Moreover, when it is exercised, it must be exercised with a due sense of balance regarding the claim of each receptacle to contain it.

27. In illustration of this sense of proportion that must be maintained between the two repositories, and of the primary values underlying a choice between them, Spain offered the Court a telling example of the exclusion of commercial disputes under a hypothetical reservation. Could any application concerning the commercial exploitation of children be excluded under the reservation, on the argument that this constituted "a commercial issue"[6]? Or, again, could the Court refrain from asserting its jurisdiction regarding the bombing or torpedoing of a fishing vessel on the basis that it related to a measure of fisheries conservation?

28. A comparable situation can be envisaged which even infringes upon the territorial integrity of a sovereign State. For example, legal

[6] CR 98/9, p. 52, para. 35 *[translation by the Registry]*.

action within one country to protect a herd of elephants that straddles national boundaries cannot obviously be pursued into the territory of another. If wildlife rangers should, in protection of the elephants, move into the neighbouring State's territory and use force against the nationals of that State, this action would clearly travel far beyond the confines of a reservations clause relating to conservation measures for the protection of wildlife. So, also, would a move to jam all radio frequencies to poaching fishing vessels. This may well be described as an enforcement measure as it cripples the operation of the poaching vessel. Yet, at the same time, it would breach a series of State obligations in relation to safety at sea, as well as obligations under various treaties and conventions.

29. To hold that a breach of such basic obligations is removed from the Court's jurisdiction by the reservation would be to denude the Court of an essential part of the basic jurisdiction conferred upon it by the declaration of the States concerned.

30. To approach this problem in another way, if a reservations clause should expressly state that any act which originates as a conservation measure is free of Court jurisdiction, even though it amounts to an unauthorized use of force against a sovereign State, one can be in little doubt that such a clause would be held to be incompatible with the declaration. Quite clearly, a result which cannot be achieved by express declaration, cannot be achieved by judicial interpretation of terms which are less than express, and I do not think a reservations clause can be so construed as to achieve such an unacceptable result. To borrow the language Sir Hersch Lauterpacht used in *Certain Norwegian Loans*, regarding another reservations clause[7], this result would be "both novel and, if accepted, subversive of international law"[8].

31. There may in some circumstances be difficulty in determining the classification of a particular piece of conduct which, while literally falling within a reservations clause, also amounts to such a violation of basic international law principles as to fall within the general consensual jurisdiction granted to the Court. However, there are cases which clearly fall within one category or the other, such as a violation of the peremptory norm against aggression. In such cases, the result must follow inexorably that parties who have consented to a régime of legality cannot opt out of the very foundations of that régime of legality to which they have consented. In my view, the present case is one such, which falls clearly

[7] One which excluded from the jurisdiction of the Court "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic".

[8] Separate opinion, *I.C.J. Reports 1957*, p. 37.

within the ambit of the general submission rather than the particular reservation.

32. Speaking in general terms, and not in the context of this particular case, a State may not, therefore, be able, under cover of a reservation relating to a specified kind of activity, to exempt itself from the scrutiny of basic illegalities that occur within that area of action.

33. A contrary view would mean that if any dispute brought before the Court has even a slender connection with the subject-matter of a reservation, the Court could deny itself (and, even more importantly, the complainant State) of jurisdiction. It is of the nature of every dispute that it has multiple implications and, if the Court were to take the view that a connection, however slender, with such a reservation would deprive it of jurisdiction, the Court would greatly attenuate the jurisdiction conferred upon it by the general part of the declaration.

34. In this context, it is useful to recall the observations of this Court in *United States Diplomatic and Consular Staff in Tehran*, where the Court remarked that:

> "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important"[9].

and that

> "if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in peaceful solution of international disputes"[10].

35. The Court will always have the discretion to determine whether a particular situation falls within the reservations clause or the general submission. "Automatic" reservations, which leave no discretion to the Court, but take effect of their own motion, would be contrary to the principle that the Court is the ultimate arbiter of this question. To quote a distinguished former President of this Court, writing extrajudicially:

> "The arguments that an automatic reservation is void are compelling whenever it is indeed the case that they operate in such a way as to leave no scintilla of jurisdiction to the Court."[11]

36. For these reasons, I do not think actions originating from an exempted area of activity can be considered to be still subsumed under

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[9] *I.C.J. Reports 1980*, p. 19, para. 36.

[10] *Ibid.*, p. 20, para. 37.

[11] R. Y. Jennings, "Recent Cases on 'Automatic' Reservations to the Optional Clause", *International and Comparative Law Quarterly*, Vol. 7, 1958, p. 349, at p. 361.

the head of the excepted activity when it has far transcended the reasonable limits of that activity. Whether it has transcended those limits can only be decided when the facts are known, but I cannot subscribe to the proposition that, before those facts are known, the Court can pronounce that it has no jurisdiction, merely because the actions complained of originated under that head.

INTERPRETATION OF RESERVATIONS CLAUSE IN CONFORMITY WITH LEGAL MEANING OF TERMS USED

37. There is a presumption of good faith in all State actions and, hence, in regard to the declarations which a State may make under Article 36. Consequently, if one were interpreting the intention of Canada in making this declaration, one would attribute to Canada the intention of using terms in conformity with their legal meaning.

38. Another approach to the question is to apply the usual rule of interpretation that, in interpreting a legal document, one must construe its terms in accordance with legality rather than in violation thereof. The conservation and enforcement measures which Canada contemplated must therefore be interpreted to mean such measures as are in accordance with the law, and not measures which are in violation thereof. I cite in this connection an observation from *Oppenheim's International Law* which sets out the law applicable to the interpretation of treaties in a manner no doubt equally applicable to the interpretation of other international legal documents:

> "Account is taken of any relevant rules of international law not only as constituting the background against which the treaty's provisions must be viewed, but in the presumption that the parties intend something not inconsistent with the generally recognised principles of international law, or with previous treaty obligations towards third states." [12]

Even more explicitly, and in reference to texts emanating from Governments, this Court observed in *Right of Passage over Indian Territory*:

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it." [13]

39. One would thus, even without the benefit of treaty definitions, tend

[12] R. Y. Jennings and A. Watts (eds.), 9th ed., 1992, p. 1275.
[13] *Preliminary Objections, I.C.J. Reports 1957*, p. 142.

to construe "conservation and management measures" as those taken in accordance with law. Reference may usefully be made in this connection to such treaty definitions as that contained in Article 1 (1) *(b)* of the United Nations Agreement on the Conservation and Management of Straddling Fish Stocks of 1995, which expressly defines the expression "conservation and management measures" as meaning

> "measures to conserve and manage one or more species of living marine resources that are adopted and applied *consistent with the relevant rules of international law* as reflected in the Convention and this Agreement" (emphasis added).

Such definitions reinforce the natural conclusion that when expressions such as "conservation and management measures" occur in a legal document, they must be given a meaning which is consistent with legality. Such expressions in other publications, such as a scientific or environmental journal, may well carry other connotations but, in a solemn legal document emanating from a State, they can carry only such a meaning as is consistent with law.

40. If legality be a requisite of the meaning of the expression, at least a prima facie case exists that such assertions as breach of essential parts of the modern law of the sea (such as the freedom of fishing and navigation, and the principle of exclusive State jurisdiction over ships flying the national flag), and of the peremptory norm of international law against the threat or use of force, are assertions which, if substantiated, take this case out of the ambit of the reservations clause. This is not to speak of assertions of a series of specific acts committed outside Canada's 200-mile zone, including the use of water cannon and the cutting of trawl net cables which, according to Spain, have had the effect of endangering the safety of life at sea in violation of international regulations and covenants. These Canadian actions were, moreover, the subject of a Note Verbale by the Delegation of the European Commission in Canada, protesting, *inter alia*, at the arrest of a vessel in international waters by a State other than the flag State — an act which they alleged is illegal, both under the NAFO Convention and under customary international law, and "goes far beyond the question of fisheries conservation"[14].

41. I stress that there is no finding as yet on any of these matters. Yet, so long as the possibility is open that they may be proved, it seems to me that the Court cannot hold that it is manifestly without jurisdiction. That situation may well be reached when the facts are known. Then and only

[14] Note Verbale of 10 March 1995, Memorial of Spain, Ann. 11.

then would the Court be able to pronounce that it lacks jurisdiction to hear the dispute before it. Until such time, the Court must hold itself available to determine the dispute if the circumstances which bring it into operation are satisfied.

42. The foregoing considerations make it clear that a proper construction of the reservation relates it to legal and not illegal actions taken in pursuance of conservation and enforcement measures.

INTERPRETATION OF RESERVATIONS CLAUSES WITHIN CONTEXT OF ENTIRE DECLARATION

43. The problem before the Court involves the balancing of two portions of one integral document. The mistake must be avoided of concentrating on the reservations clause, as though it contains the only words under construction. The Court is faced with the task of construing the entire document, under which Canada:

> "accepts as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over *all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration*, other than:
>
> *(a)* disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement;
>
> *(b)* disputes with the Government of any other country which is a member of the Commonwealth, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;
>
> *(c)* disputes with regard to questions which by international law fall exclusively within the jurisdiction of Canada; and
>
> *(d)* disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures." (Emphasis added.)

44. This opinion has already pointed out that there are two categories of questions covered by this declaration — broader questions of general international law arising from the submission of "all disputes", and the narrower category of conservation and management measures. We have already noted that, while a matter may fall within both categories, cardinal rules of international law, such as non-aggression or the sanctity of

treaties, do not vanish into a black hole in the Court's jurisdiction merely because their violation occurs under the cover of an exempted activity.

45. A similar result follows also from the general principle of legal interpretation that clauses in a document must be treated not in isolation, but in the general context of the meaning and purport of the document in which they occur. Together they form an integral whole, and no one part may be compartmentalized and brought into exclusive operation at the expense of the other. In the special context of reservations clauses, the Court observed, in the *Aegean Sea* case, that there is a "close and necessary link that always exists between a jurisdictional clause and reservations to it" [15]. I respectfully agree with the view so well expressed by the Court that the general acceptance of the Court's jurisdiction and the reservations included in it are to be considered as an integral whole.

46. Taken in its totality, the interpretation that actions involving the use of force or danger to life are taken out of the declaration by the mere fact that they arise literally out of measures relating to conservation and management seems to me to be at odds with a consideration of the declaration as one integral whole. Such an interpretation would seem to give undue weight to the exemptions clause in a manner which detaches it from its context.

47. It is necessary also to address the principle *ut res magis valeat quam pereat* which was the subject of much argument during the hearings. The principle that a document must, as far as possible, be given validity applies not merely to the reservations clause, taken in isolation, but to the document taken as a whole. The purpose of the entire document is to subscribe to the jurisdiction of the Court, in accordance with the principle of reciprocity, in *all* matters, other than those which are specifically excepted. The application of this principle to the document read as a whole means that effect should be given to this general intention as far as is reasonable. To hold that vast areas of possible international wrongdoing are withdrawn from the Court's jurisdiction merely because they occur in the context of an operation which can be described as a conservation or enforcement measure is to denude the consensual document of a vital part of its meaning. It is indeed a negation of the *ut res magis valeat* principle when applied to the document as a whole. I do not think it would be reasonable to give to reservations clauses such an extended and all-comprehensive meaning.

48. At the same time it needs to be observed that, granted the meaning that the reservations clause does not include actions that are illegal at international law, there are still a great many situations to which the res-

[15] See *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 33, para. 79.

ervations clause could validly apply. Even within the context of legal conservation measures, there could be situations giving rise to claims at law such as abuse of rights, lack of proportionality, problems of characterization or definition, or problems of the scope of the reservation (e.g., does it apply only to private vessels?).

49. Furthermore, no right is absolute and, correspondingly, no reservation clause is absolute in the sense of exempting all conduct that is in any way related to it.

50. There has been much argument addressed to the Court on the meaning of the word "measure". Any action aimed at conservation and management could well be described as a "measure" directed to that end. Yet this construction must again be in the context of the totality of the document and, while literally being such a measure, a given action could yet conceivably fall within the general clause rather than the particular exception. Even if one moves into the realm of intentions, it seems far-fetched to conclude that it was in the contemplation of Canada to exclude from its submission to the jurisdiction a violation of basic principles of international law or to disregard such time-honoured rules as those relating to the safety of lives at sea.

51. It is not necessary to delve into the various learned arguments advanced before us in regard to such questions as burden of proof of jurisdiction and presumptions in favour of jurisdiction on which we were addressed at some length. Whether the burden lies upon the party asserting jurisdiction or the party seeking exemption matters little. The Court's task is to construe the document as a whole in the light of a reasonable and objective interpretation, aided where necessary by such insights as may become available through a perusal of the parties' intentions, if *travaux préparatoires* should be available. Such a reasonable and objective construction would, in my view, lead to the broad overall interpretation which I have indicated above.

52. It is in the nature of things impossible to define where the reach of a reservation clause ends, but it is clear that there will be cases which are manifestly so far beyond its ambit that one can be in no doubt that its applicability has yielded to the applicability of the general part of the Declaration. The present case, provided the allegations of Spain are substantiated, is one such. There is therefore no violation of the principle *ut res magis valeat quam pereat*.

Effect of Court's Independent Interpretation on Integrity of Consensual System

53. Much was made in argument of the negative effects that would ensue to the optional jurisdictional system if the Court were to hold that

the reservations clause does not exclude the matter in question from the jurisdiction of the Court. It seems to me, however, that apart from the non-judicial nature of this argument, it is the Court's mission to uphold the integrity of its jurisdiction so far as has been entrusted to it by the optional clause system. I have referred earlier to this area of judicial jurisdiction as a haven of legality within the international system. Within that protected area, it is important that the rule of law should prevail, irrespective of such considerations as the favourable or unfavourable reception of the Court's determinations in relation to its jurisdiction.

54. It may indeed be argued, on the contrary, that the preservation of legality within the system would strengthen rather than undermine its integrity. I do not think it is open to the Court, if a violation of a bedrock principle of international law is brought to its attention, to pass by this illegality on the basis that it is subsumed within the reservations clause. Such an approach could well weaken not only the authority of the Court, but also the integrity of the entire system of international law, which is a seamless web, and cannot be applied in bits and pieces. It is within this seamless fabric of international law that the entire optional clause system functions, and that consent to the Court's jurisdiction must be construed.

* * *

Philosophy Underlying Creation of Optional Clause

55. I am fortified in reaching this conclusion by the circumstance that it accords with the philosophy underlying the creation of the optional clause. A brief historical excursus into this area will help to place the present problem in its overall context.

56. The optional clause system, it will be remembered, was the international community's answer, after the agonies of World War I, to the hitherto intractable problem of carving out an area for the judicial settlement of international disputes, amidst the welter of conflicting claims of State sovereignty[16]. These interests had for several centuries of recorded thought in many cultures eluded all attempts at the creation

[16] After a failure to achieve such an international agreement at the Peace Conferences of 1899 and 1907, the Statute of the Permanent Court of International Justice was approved by a unanimous vote of the Assembly of the League of Nations on 13 December 1920, at Geneva, after lengthy debates during which the entire idea was at many stages in danger of total rejection. (*Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, p. 205.)

of such a jurisdiction. At long last a working formula was devised, in terms suggested by the Brazilian delegation to the Peace Conference (and in particular Mr. Raoul Fernandes), so as to create, in the midst of the clash of opposing sovereign interests, a comparatively small haven in which disputes would be resolved by a supra-national judiciary in accordance with international law. The words come to mind of Sir Eric Drummond, Secretary-General of the League of Nations, at the official opening of the Permanent Court of International Justice on 15 February 1922: "The path of world progress lies at the present time enshrouded in fog, but here and there glimpses of light are breaking through and illuminating the way." [17]

57. The judicial territory covered by the optional clause was one such illuminated area into which the light of international justice had at last broken through.

58. In this area, a panel of regular judges — as opposed to *ad hoc* arbitrators — would administer justice among the nations, as domestic tribunals had traditionally administered justice among the subjects of a State. This totally unprecedented creation of a system of truly international adjudication was described on the same occasion as "the most remarkable step forward that humanity in its upward struggle has accomplished in the realm of law" [18]. Though now upwards of 70 years in operation, it is still of tender growth when compared with the thousands of years of domestic adjudication which had preceded it.

59. I cite these statements because in the administration of this hard-won jurisdiction the high idealism that attended its birth needs to be kept in constant view. As this jurisdiction gathers strength through its continued exercise, the tendency is to be resisted of limiting it within the confines of circumscribed interpretations, when other interpretations more consistent with its spirit and purpose are equally available within its governing Statute. That interpretation should, in my view, be preferred which tends to strengthen that jurisdiction, provided such interpretation is available within the parameters of the consenting State's declaration.

60. It is also to be recalled in this context that the universal expectation of the time was that the creation of this jurisdiction was only the first step towards the gradual enlargement of that jurisdiction in the light of the experience of its administration. In the words of the British delegate, Mr. Balfour:

[17] *P.C.I.J., Series D, No. 2*, p. 320.

[18] By Mr. van Karnebeek, Minister for Foreign Affairs of the Netherlands, *ibid.*, p. 322.

> "we are convinced, as the eloquent speaker who has just preceded me [Mr. de Aguero (Cuba)], and others, have pointed out, that if these things are to be successful they must be allowed to grow. If they are to achieve all that their framers desire for them, they must be allowed to pursue that natural development which is the secret of all permanent success in human affairs . . ."[19]

Mr. Bourgeois (France) said:

> "*Natura non fecit saltus*, said one of our colleagues. Between the anarchic state of international law in which the world has hitherto lived and the state of organised international justice upon which we are about to enter, there are necessary intermediate steps."[20]

61. The creation of this optional clause jurisdiction was one of these necessary intermediate steps.

62. I appreciate that two views are possible as to how an increasing confidence in the system of international adjudication can be fostered.

63. One view is the use of extreme caution in the assumption of jurisdiction, striking down every situation where, upon the literal meaning of the declaration, there is room for the interpretation that the State in question has not expressly granted its consent. This approach, while quite rightly basing itself on the principle of consent, can apply that principle somewhat too literally, thus resulting in a progressive diminution of that hard-won area of international jurisdiction that has been entrusted to the custody of the Court.

64. Another view is that the jurisdiction granted to the Court must be exercised in the context of the broader responsibility of developing that jurisdiction in the light of the right of both States to seek from the one international court that is in existence a resolution of their dispute in accordance with the overall scheme of international justice — based always, of course, on the presence of consent.

65. There could well be a range of possible interpretations of a declaration, and it seems to me that the interests of justice are best served by taking a broader view where that is consistent with the terms of the declaration. Thus construed, these submissions to the jurisdiction can afford the Court the basis for building up a growing body of jurisprudence, as well as for increasing the confidence of States in the reach and the value of international adjudication. Decisions which tend to diminish that jurisdiction in its formative stage may well inhibit the growth of the potentially vigorous sapling of international adjudica-

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[19] Mr. Balfour (British Empire), Twenty-first Plenary Meeting of the First Assembly, League of Nations, *Documents, supra*, p. 247.

[20] *Ibid.*, p. 253.

tion[21], and deter parties, who might otherwise approach the Court for a resolution of their disputes, from doing so.

66. All of these principles make no encroachments whatsoever on the undoubted right of every sovereign State in its own unfettered discretion to determine whether it will or will not enter the judicial enclave created by the Statute. The discussions attending the acceptance of this clause show how careful the drafters were to ensure the preservation of State autonomy in this regard, for the imposition of compulsory jurisdiction, in however small a measure, was seen as a significant encroachment upon State autonomy.

67. The entire architecture of the scheme points, however, to the preservation of the international rule of law within that judicial haven once entered. It was important to ensure that those who so entered had the assurance of the unimpeded reign of international law within that haven. Least was it under contemplation that a State could, while being within the system, disengage itself from the operation of Charter rules or basic principles of international law.

68. Such disengagement from the ruling principles of international law is different in quality from the exclusion of Court jurisdiction in respect of specified categories of cases or areas of activity. Disengagement of jurisdiction from the latter is just as manifestly within the power of a State as disengagement from the former is not.

69. Fundamental breaches of international law, if committed in the course of a particular activity, could clearly fall into the area over which the Court has been granted a general jurisdiction by a State's declaration. All the more would they tend to attract jurisdiction where, as in the present declaration, the general part submits *all* disputes arising after the declaration to the jurisdiction of the Court. Acceptance of the proposition that actions diverging fundamentally from the basics of international law can escape Court scrutiny, because they also fall literally within a reservations clause, could amount to an abdication of a portion of that hard-won jurisdiction which the Court was designed to exercise.

70. The progressive contraction of that jurisdiction which could result could weaken the prospects for its continuing development, which were envisaged when it was launched. As Justice Cardozo has so eloquently reminded us in regard to the judicial process, "the inn that shelters for the

[21] Cf. the observations of Mr. Loder of the Netherlands, at the Twentieth Plenary Meeting of the First Assembly on 13 December 1920, at which the Statute of the Permanent Court of International Justice was adopted: "The slip that we are planting in the ground to-day will develop, will increase and become a lofty tree with great branches and thick foliage under the shadow of which the peoples will rest." (League of Nations, *Documents, supra*, p. 231.) (Mr. Loder was later elected the first President of the Permanent Court of International Justice.)

night is not the journey's end"[22] and, if the long and difficult road towards the goal of judicial settlement of international disputes is to be made easier, each stop along the way must offer the maximum judicial shelter it can provide.

* * *

Conclusion

71. Upon the interpretation of the reservations clause which is indicated above, the Court is not in a position to reject the Spanish Application *in limine* on the basis of manifest lack of jurisdiction. There may well be no jurisdiction, and there may just as well be jurisdiction. The issue can only be determined once it is known whether the facts bring the case within the general submission to jurisdiction, or within the reservations clause. Until these are known, the Court is not entitled to reject Spain's Application.

72. It is scarcely necessary to observe that the resulting procedures will involve expense and delay, as they will require a survey of facts as a prerequisite to determining whether the Court has jurisdiction. Yet, this is the price that must be paid for a decision of this matter in accordance with law and justice. It is true that the unqualified power of joining the objections to the merits, which the Court enjoyed under Article 62, paragraph 5, of the 1946 Rules, has been formally dropped, but the reformulated principle contained in Article 79 of the 1978 Rules does not abolish the option of joining an objection to the merits[23], and this is precisely the situation for which Article 79, paragraph 6, is intended to provide. No doubt such situations are exceptional and are to be kept to a minimum[24], but the present case seems to me to be eminently one in which the demands of justice require such a course.

73. One need go no further at this stage. Sufficient has been alleged to show that, assuming the existence of the facts alleged, a justiciable dis-

[22] Benjamin N. Cardozo, *The Growth of the Law*, 1931, p. 20.

[23] Rosenne, *op. cit.*, pp. 924-928.

[24] For cases which have already adopted this course, in whole or in part, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, pp. 425-426; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, pp. 29-31; *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 18; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), I.C.J. Reports 1998*, p. 24; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 23; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), I.C.J. Reports 1998*, p. 57.

pute which is within the Court's jurisdiction could well exist between the Parties regarding the violation of basic rules of international law. This matter cannot, in my view, be treated as involving a jurisdictional objection of an exclusively preliminary character. I believe the Court is left with no alternative but to proceed to the next phase of this case, in order to determine whether it has jurisdiction.

(Signed) Christopher Gregory WEERAMANTRY.