DISSENTING OPINION OF JUDGE BEDJAOUI

[Translation]

Subject-matter of the dispute — Tripartite determination by Applicant, Respondent and the Court — Different role of each "actor" — Inviolability of Applicant's status — Applicant's right to have the Court rule on the subject of the dispute referred to it by the Applicant and on that alone — The Court cannot substitute another subject of the dispute for the one submitted by the Applicant — That would amount to deciding a quite different case.

Validity of the Canadian reservation — Sovereign, undisputed power of a State to maintain or amend, whether by restricting or by extending it, a declaration of acceptance of the Court's jurisdiction, or to withdraw it altogether whenever it wishes — Power to attach any reservation — Such freedom nonetheless conditional on compliance with the Statute and the Rules of Court, the Charter of the United Nations, and more generally, with international law and "ordre public international" *— Rights and obligations of the declarant State with regard to the clause "system", to those currently or potentially participating in it and to the ultimate addressee of the clause, the International Court — Declarant State free to withdraw from the "system" but not to compromise its existence or functioning and yet remain within it.*

Definition of "conservation and management measures" — A new concept — Pressing need for the international community to clarify, rationalize and harmonize conservation and management measures — Need for co-operation — Definition of such measures in light of international law — Their compatibility with international law a sine qua non *— Elements of the international definition of such measures — Technical and scientific aspects — Legal elements — Issue of legality — Legality as a built-in element of the definition — International law cannot supply a definition which is confined to technical aspects and which, if taken literally, would apparently authorize the violation of the most firmly established principle of international law, freedom of the high seas.*

I. General Introduction

1. Continuing its long and estimable tradition of respect for the *primacy of law*, both internal and external, Canada has for 70 years placed full confidence, first in the Permanent Court of International Justice and then in its successor, our present Court. Thus, its first declaration of acceptance of the jurisdiction of the Permanent Court of International Justice dates from 20 September 1929. And since then it has always held our jurisdiction in great respect and has not hesitated to have recourse to it, as for example in the *Gulf of Maine* case.

2. On two occasions, however, in 1970 and 1994, Canada made reservations imposing specific restrictions on the Court's jurisdiction. In 1970 it amended its declaration of acceptance of the Court's jurisdiction so as

to enable it to take measures to prevent pollution and protect the marine environment of its northern coast, over an area extending more than 100 miles towards the polar zone. At that time, however, the United States, at which these measures were aimed, did not bring the matter before the Court.

3. Canada's reservation, contained in its declaration of 7 April 1970 (see *I.C.J. Yearbook 1975-1976*, p. 54), had a certain resemblance, at least as regards the manner in which it was formulated, to that of 1994 and read as follows:

> "(2) I declare that the Government of Canada accepts as compulsory . . . the jurisdiction of the International Court of Justice . . . over all disputes . . . other than:
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> . . . . . .
>
> *(d) disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea*, or in respect of the prevention or control or contamination of the marine environment in marine areas adjacent to the coast of Canada." (Emphasis added.)

4. Disregarding the 1985 declaration, which contained no equivalent reservation, it will be noted that the 1970 reservation quoted above has been replaced by another, situated in the same place, allowing Canada to exclude the jurisdiction of the Court in regard to

> "(2) . . .
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> . . . . . .
>
> *(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.)

5. These similar reservations formulated by Canada on two separate occasions would appear to reflect its hesitation, or reluctance, to submit to the sanction of the International Court issues which it regarded as vital, and in relation to which it considered the applicable law to be, in the words of the Canadian Foreign Minister, "inadequate, non-existent or irrelevant". The point was that Canada was not entirely satisfied with the Montego Bay Convention of 10 December 1982 on the Law of the Sea, which for this reason it has not ratified and which, in its view, failed to settle fully the problem of overfishing, thus jeopardizing fisheries resources for future generations.

6. Canada has frequently expressed its dissatisfaction and invoked the "emergency", or even "state of necessity", which it is facing in this regard. Its declarations in international fora have been as clear as they have been numerous. One writer has described one of them in the following terms:

> "The (Canadian) Minister of Fisheries, Mr. John Crosbie, had told the Rio de Janeiro Conference that foreign overfishing was one of the subjects which Canada intended to address as a matter of urgency and that it had a dual aim in this regard: to obtain approval from the world leaders meeting at the Earth Summit for certain principles and measures on the one hand, and to seek a follow-up conference to examine these questions in greater detail on the other hand . . . Mr. Crosbie stated in barely veiled terms that legislative action by the Canadian Federal Government *with regard to fishing on the high seas* was being considered as a real alternative in response to the urgent appeals that he had been getting from the Atlantic Provinces, and in particular from Newfoundland, asking him to deal with the problem of foreign overfishing on the 'Nose' and 'Tail' of the Grand Banks by unilaterally extending his fisheries jurisdiction beyond the 200-mile limit." [1]

7. Statements of this type give us an insight into the real background to the present case. The Court had to rule on its jurisdiction by examining the meaning and scope of Canada's reservation, but it could not ignore the fact that, if it accepted such a reservation, it was leaving the author of that reservation free to combat foreign overfishing by unilaterally giving itself powers *over the high seas* for as long as no settlement had been reached between itself and the States concerned. This account of the background to the case was necessary, inasmuch as, where reservations have been formulated *ratione materiae,* prima facie they cannot be construed without at least some reference to the substantive issues involved.

8. The case would have been perfectly simple if the duty of the Court had been to confine itself to ascertaining the meaning of the expression "conservation and management measures" contained in the reservation, and to affirming that "the enforcement of those measures" against the Spanish fishing vessel *Estai* was precisely covered by the terms of that reservation, thus preventing the Court from entertaining any claim in this regard. It is absolutely essential, however, that attention be focused on another, far more important term of the reservation, that which places Canada's action, in geographical terms, "in the NAFO Regulatory Area", that is to say *outside the 200-mile limit.* And indeed the *Estai* was

[1] Paul Fauteux, "L'initiative juridique canadienne de la pêche en haute mer", *Canadian Yearbook of International Law*, 1993, Vol. XXXI (pp. 33-87), p. 58. *[Translation by the Registry.]*

boarded some 245 miles off the Canadian coast. If in the Canadian reservation we simply substitute for the words "in the NAFO Regulatory Area" the expression "beyond Canada's 200-mile exclusive economic zone", then it immediately becomes clear that the Court is dealing here with a reservation of an *unusual*, not to say audacious, nature. Hence it became incumbent upon the Court to verify whether such a reservation could be accepted without difficulty under the optional clause system.

9. Article I (2) of the NAFO Convention contains a crystal-clear definition which leaves no doubt in this regard when it provides that:

> "The area referred to in this Convention as 'the Regulatory Area' is that part of the Convention Area *which lies beyond the areas in which coastal States exercise fisheries jurisdiction.*" (Emphasis added.)

It is in no sense a distortion of the Canadian reservation to recast it in terms of its true meaning, making it accessible to the reader, who may not be aware of the precise significance of the expression "NAFO Regulatory Area" and will certainly be in a better position to understand the object of the reservation, whose field of application is *"the high seas"*. The object of the reservation is to signal *urbi et orbi* that Canada claims special jurisdiction over the high seas. The Court cannot interpret or accept this reservation in the same way as it would interpret or accept an ordinary reservation, since, without any need for a consideration of the merits, its terms prima facie disclose a violation of a basic principle of international law. This is an issue which the Court cannot simply ignore by restricting itself to an external and superficial interpretation of the reservation. It cannot be right for the Court to content itself in this case with a purely *formal* view of the reservation, disregarding its *material* content — a content which does not require an investigation involving examination of the merits, since it is abundantly clear that the reservation affects a traditionally established right. This is the real flavour of this fascinating case.

10. Without going further into the merits than is permissible at this jurisdictional stage, the Court is bound to take account of the efforts by Canada over more than a decade to obtain recognition, in the context of its "preferential right" as a coastal State, of its special jurisdiction to act *on the high seas* by means of measures for the conservation and management of fisheries stocks in the interests of the entire international community. But, however estimable this aim, it would be over-facile to hold that we must "answer a simple question: were the measures taken by Canada and enforced against the Spanish vessel *Estai*, conservation and management measures? If the answer is yes, the Court is without jurisdiction" (CR 98/14, p. 51, para. 10). It is over-simplifying the question to empty the reservation of its sole veritable substance, for which Canada has been campaigning for so many years, namely the purported preferential right of coastal States to take conservation and management meas-

ures *in respect of the high seas*[2]. The precise scope of the Canadian reservation, and hence the question whether or not the Court's jurisdiction is excluded, *thus depends basically on the issue of the meaning of the "conservation and management measures" contemplated by that reservation*. Depending on whether such measures fall to be interpreted by reference to Canadian law — or even simply by reference to the generally accepted meaning of that expression — or on the contrary on the basis of international law, given already that there is nothing to prevent them being applied on the high seas, impugning the traditional principle of the freedom of that area, the Canadian reservation takes on quite different aspects. At this stage it is already clear that the Court cannot just content itself with stating that the boarding on the high seas of a foreign fishing vessel merely represents the enforcement of conservation and management measures taken by Canada, and thus hold that that incident is covered by a reservation entirely depriving it of jurisdiction, for this would be to shelter behind the notion of "conservation and management measures", interpreted in an artificial manner, without any concern for what such measures involve in terms of the violation of a well-established principle of international law.

11. It follows that the only proper attitude is to interpret and evaluate those "conservation and management measures" by reference to international law. It is in the corpus of the law of nations that a definition of such measures must be sought. And two options, and two only, accordingly present themselves to the Court at this stage of the proceedings: either, at the very least, to state that it cannot readily find any well-established international definition of such measures applicable to the case before it, and is accordingly obliged to touch on the merits of the case by going further in its examination of the facts and of their implications in terms of the international practice of States, and in consequence to declare that Canada's objection to jurisdiction is not of an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court; or, on the contrary, to declare that it does have available to it an undisputed international definition of conservation and management measures, which, applied to the facts of this case, obliges it to interpret the Canadian reservation as invalid or not opposable in so far as it purports to cover acts occurring on the high seas, and is accordingly not capable of constituting a bar to the Court's jurisdiction to proceed to an examination of the merits.

12. Without dealing with all the points which appear to me disputable in the Judgment — in particular the theoretical and practical implications of the methods of interpretation adopted therein, or at least the manner in which the Judgment formulates a number of these points (see in par-

[2] Laurent Lucchini, "La loi canadienne du 12 mai 1994: la logique extrême de la théorie du droit préférentiel de l'Etat côtier en haute mer au titre stocks chevauchants", *Annuaire français de droit international*, 1994, pp. 864-875.

ticular paragraphs 46 to 54 of the Judgment) — I shall restrict myself to raising three important questions on which, to my great regret, I find myself obliged to express my disagreement with the majority of the Court:

— the subject-matter of the dispute;
— the validity of the Canadian reservation;
— the definition of conservation and management measures.

* * *

II. The Subject-Matter of the Dispute

13. What makes this case so unique and at the same time gives it its *great legal interest*, is the persistent disagreement between the applicant State and the respondent State with regard to the actual subject-matter of the dispute — a disagreement now extended by another, just as far-reaching, between the majority of the Court and the minority on the same point. This is hardly an everyday occurrence in the Court's jurisprudence.

14. Determination of the subject-matter of the dispute appears to me to be a *"tripartite operation"*, involving first the applicant State, then the respondent State and finally the Court. But I would hasten to add that in this operation the distribution of roles among the various actors is necessarily unequal or, more precisely, different, since the principle of equality has no part to play here. In a case before the International Court the allocation of tasks is necessarily dependent upon the *status* of each of the actors. And to accord to each of them an equal say in the determination of the subject of the dispute is to call into question the intrinsic status of Spain as *Applicant*, the equally specific status of Canada as *Respondent*, and finally the status of the Court as *forum* rather than *party*.

15. For it stands to reason that within any judicial order, whether domestic or international, it is naturally the applicant who has the initiative and who defines — at his own judicial risk — the subject-matter of the dispute which he wishes to bring before the court. In this regard he enjoys a clear procedural right, deriving from his *status as applicant*, to seek and to obtain from the court a ruling on the subject of the dispute which he has submitted to it and *on that alone*, to the exclusion of all others (subject of course to any supervening incidental proceeding). The principle of the equality of the parties is by its nature completely irrelevant to this question, for it cannot render "equal" those who, procedurally, are "different". It cannot turn the "respondent" into a *"second applicant"*, purportedly endowed with some concurrent power to reformulate the subject-matter of the dispute as defined by the applicant. Nor, by the same token, can it transform the court into an applicant "party" (a third one!), with the power to set aside the subject of the dispute as defined in the application and replace it with an entirely different one.

16. In international proceedings, as indeed in domestic litigation, the respondent State, by virtue of its very status as respondent, does not have a power to intervene in the definition of the subject as presented by the applicant. It could only have such a right if *it changed its status*, which can happen in two cases: first, where the proceedings are instituted not as in this case by an application, but by means of a special agreement, thus making each State simultaneously applicant and respondent, and secondly where, in proceedings instituted by an application as in this case, the respondent State lodges *a counter-claim*, of which there is no question here.

* * *

17. What then happened in this case?

I shall do my best to avoid compounding the semantic confusion which has rendered still more complex a problem thought to be simple, and I shall in particular endeavour to avoid using the word *"claims"*, which in my view has a somewhat narrow scope, giving my preference to what I consider to be the more appropriate term here, namely the *"dispute"*, which has a wider sense. Thus it appears to me that the word *"claims"* denotes legal acts whereby one party to the proceedings makes *"requests"*, which it seeks to have upheld by the court by means of arguments of fact or law (the *"grounds"*), presented by it in support of those requests in order to enable the court to settle the *"dispute"*.

18. How, *as Applicant*, did the complainant here indicate to the Court what it was complaining about? Spain clearly stated the precise matter over which it was bringing Canada before the Court. In both its written and its oral pleadings, it *consistently* complained of "a very serious infringement of a right deriving from its sovereign status, namely exclusive jurisdiction over vessels flying its flag on the high seas" (CR 98/9, p. 20), and stated that the subject of the dispute, which constituted "the crux of the case", was the issue of Canada's *legal title* to act on the high seas against vessels flying the flag of a foreign State. And in its final submissions Spain again emphasized that *"the subject-matter of the dispute is Canada's lack of title to act on the high seas against vessels flying the Spanish flag, the fact that Canadian fisheries legislation cannot be invoked against Spain, and reparation for the wrongful acts perpetrated against Spanish vessels"* (emphasis added).

19. In setting out in clear and precise terms the subject of its dispute, both from the outset in its Application, and then in its Memorial, oral argument and final submissions, Spain had satisfied the requirements of the Statute and the Rules of Court. Thus at no time was there any suggestion by the Court that Spain had failed to comply with the requirements of Article 40 of the Statute or of Article 38, paragraph 1, of the Rules of Court, both of which obliged it to state the precise nature of "the subject of the dispute" from the outset, when it filed its Application.

20. It should be noted in passing that *this same dispute* also involved not just Spain, but the entire European Community. And it is not without relevance to observe that Spain, whose concern was matched by that of the other member States, both of the European Community and of NAFO, had already raised the same subject of dispute, and consistently posed the same problem in the same terms, by protesting vigorously against the Canadian legislation, even before the filing of its Application with the Court some ten months later following the boarding of the *Estai* and the harassment and inspection of other Spanish vessels. *Spain could not have demonstrated greater consistency*. The same dispute was already in existence even before the incident. The conflict between Spain and Canada over the alleged *entitlement* to a "right" over the high seas was already in existence and had indeed become quite serious, before it dramatically came to a head ten months later as a result of the effective *exercise* of such a "right" against a Spanish vessel. Canada's purported "right" to act on the high seas under certain conditions laid down in its new legislation remained the same. It had finally provided Spain with the opportunity to bring it before the Court. That was the subject of the dispute, declared and indeed *reiterated* with rare perseverance by Spain.

21. In sum, in this case, for Spain *acting in its capacity as Applicant*, the subject of the dispute was clearly constituted by the issue of the *legal title* to act on the high seas, in the light of the principles and rules of international law which uphold the freedom of the seas (*"grounds"* of law) and which Spain claims to have been violated by Canada (*"arguments"* of fact), as a result of which Spain has asked the Court to declare the Canadian legislation unopposable to it and to order that Canada refrain from any repetition of the acts complained of and make appropriate reparation for those acts (*"claims"* and *"requests"*).

* * *

22. It was an *altogether different* subject-matter that Canada — notwithstanding its status as *respondent State* — raised against Spain. It invoked issues of fishing and of the conservation and management of fisheries resources within the NAFO Regulatory Area, and consequently contended that this was the true subject of the dispute, and that it was excluded from the jurisdiction of the Court by virtue of reservation *(d)* inserted by Canada in its new declaration notified on 10 May 1994 (two days before the adoption of Bill C-29 amending the Coastal Fisheries Protection Act). It is worth noting that the definition of the subject of the dispute given by Canada in this case was not "objectively" substantiated in submissions on the merits. Spain, on the other hand, did present submissions on the merits in its Application. Canada's definition may therefore appear to have been "tailored to suit the occasion", inasmuch as it was intended to support the Canadian position concerning jurisdiction.

Thus Canada stated that

> "this case arose out of and concerns conservation and management measures taken by Canada with respect to Spanish vessels fishing in the NAFO Regulatory Area and the enforcement of such measures" (Counter-Memorial of Canada, para. 229).

* * *

23. We are faced here with two entirely different subjects of the dispute: one put forward in Spain's Application, and the only one which — because it emanated from the Applicant — the Court was required to settle (having, of course, first "processed" it, i.e., given the dispute its *"legal characterization"*); the other submitted by Canada, which the Court could not have entertained unless Canada had itself lodged a counter-claim. This was not the case. *The Court should therefore, at most, have focused the proceedings on the true subject of the dispute, as presented and defined by the applicant State, while asking Canada to concentrate its defence on this subject and no other, although at the same time allowing Canada* to submit, as one of its *"grounds"* of law, what it had presented as a *"subject of the dispute"*. In this way, the Court could have *"adjusted the focus"* of the proceedings while remaining on firm legal ground. None of this occurred, despite the desperate attempts by Spain, which simply reiterated its contention that *the dispute was confined to events on the high seas and that the other, prior, matters did not relate to the dispute* stricto sensu *and did not in any case concern Spain, which, in its capacity as Applicant, was free to refer to the Court the dispute of its choosing, albeit, obviously, at its own judicial risk.*

24. There is of course a connection between the subject-matter of the dispute, as defined by the Applicant for the purposes of the claim which it instituted, but which regrettably was not heard, and that alleged by the Respondent to be the true one, which the Court did indeed settle and dispose of. However, that connection in no way justified the substitution by the Court of the second subject for the first one as defined by the Applicant.

25. And even allowing, on an extreme view, that the Canadian legislation, together with its implementing regulations, had given rise to a *general dispute*, and that, on that basis, such a general dispute could be regarded as comprising a number of aspects or involving a number of levels, this was still no justification for refusing, as the Court did, to recognize an applicant State's right to refer to it *only one aspect* of that general dispute, despite its connection with other aspects. As the Court was at pains to point out in the case of the *United States Diplomatic and Consular Staff in Tehran*, "no provisions of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute had other aspects".

26. Notwithstanding all of this, the Court took the view that the proper course in law was to relocate the subject of the dispute so as to bring it far closer to that proposed by Canada. In my view the Judgment conferred upon the respondent State and the Court powers so wide as to distort the essential nature of the subject of the dispute as set out in the Application. Determination of the subject-matter of the dispute is admittedly, as I have already said, a "tripartite" or triangular operation, involving, *in various degrees and with different roles and powers*, first the Applicant, then the Respondent, and finally the Court. The applicant State is free to submit such dispute as it wishes to submit, but has a duty under the Statute to "specify" and "define" the subject-matter of that dispute. The scene is set. The play to be acted out has been freely chosen by the Applicant. The proceedings have been initiated, *on the terms desired* by the Applicant. The respondent State now has the option of casting its legal "grounds", *whatever they be*, in the mould thus prepared for them. It is, however, well accepted that the Respondent may in practice opt for an alternative judicial strategy and may seek to escape the definition of the dispute given by the applicant State by invoking *grounds* and arguments, which it is for the Court to evaluate. But the Court can in no way modify the "decor" or change the subject-matter of the dispute. For, if it did so, it would be rendering judgment in a case altogether different from that brought before it by the Applicant. *The Court's role is to give an appropriate legal characterization to those claims of the applicant State which properly come within the framework of the subject-matter of the dispute as that State has defined it in its Application.* This does not mean that the Court has the power to alter the subject-matter put before it. Still less can the respondent State propose a different subject-matter to the Court. That would be to *hear a different case.*

* * *

27. I find it regrettable that the Court allowed such a metamorphosis to occur. The Respondent argued that the only possible subject-matter of the dispute was "the conservation and management measures" taken by it, in respect of whose enforcement it had been at pains to protect itself through its reservation. And the Court accepted this, allowing the real dispute submitted to it by the applicant State, which concerned its exclusive and sovereign jurisdiction on the high seas over vessels flying its flag, to be subsumed — in desolating fashion for the Applicant — in a non-existent dispute about fisheries conservation and management. Thus, while Spain proclaims its sovereignty on the high seas over its vessels, Canada speaks of conservation and management measures. Whereas Spain invokes a "conflict of jurisdiction" on the high seas, Canada opposes to it a "conflict over fisheries conservation and management".

28. There is a suggestive parallel to be drawn between these two situations. Spain asked the Court to settle a dispute *which had arisen between itself and Canada in 1995* concerning the legality and opposability to

Spain of a Canadian internal enactment which, when implemented on the high seas, affected vessels flying its flag. The Court, won over by Canada's claim to alter the clear subject of the dispute, proceeded to settle a dispute — *one which moreover no longer exists, having arisen in 1994 between Canada and the European Community*. In place of the dispute properly submitted to it by the applicant State, which concerned respect for the international limits of national jurisdiction, the Court proceeded, in quite surprising fashion, to direct its attention to a dispute regarding measures for the conservation and management of fisheries. In short, *Spain talked of State sovereignty, Canada of fisheries conservation and management.*

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29. As Judge Fitzmaurice so aptly put it in the separate opinion which he appended to the two *Fisheries Jurisdiction* Judgments,

> "agreed measures of conservation *on the high seas* for the preservation of *common* fisheries in which all have a right to participate, is of course *a completely different matter* from a *unilateral* claim by a coastal State to prevent fishing by foreign vessels entirely, or to allow it only at the will and under the control of that State. *The question of conservation has therefore no relevance to the jurisdictional issue now before the Court, which involves its competence to adjudicate upon a dispute occasioned by Iceland's claim unilaterally to assert exclusive jurisdiction for fishery purposes up to a distance of 50 nautical miles from and around her coasts.*" (*I.C.J. Reports 1973*, pp. 26-27; emphasis added.) (N.B. At the time there was no exclusive economic zone and the distance referred to here actually takes us onto the "high seas".)

30. A glimmer of hope nevertheless emerges on reading paragraphs 34 to 35 of the Judgment. We note that the Court accepts that the subject of the dispute is what the Applicant states it to be:

> "34. The filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law. These acts were carried out on the basis of certain enactments and regulations adopted by Canada, which Spain regards as contrary to international law and not opposable to it. It is in that context that the legislative enactments and regulations of Canada should be considered.
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> 35. The specific acts (see paragraph 34 above) which gave rise to the present dispute are 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 Fisher-

ies Protection Act and implementing regulations. The essence of the dispute between the Parties is whether these acts violated Spain's rights under international law and require reparation. The Court must now decide whether the Parties have conferred upon it jurisdiction in respect of that dispute."

31. But hope is rapidly extinguished. I thus find it astonishing that, on the pretext of placing a legal characterization on the dispute submitted to it by the applicant State, the Court so far overstepped the limits of the operation whereby it sought to "clarify" the subject of that dispute as to veer away towards a subject altogether different from that submitted to it, notwithstanding that Spain, as a *sovereign* State and as *applicant* State, had an uncontested procedural right — obviously at its own judicial risk — to seise the Court of whatever subject it considered legitimate, and an inalienable *interest at law* in seeking and obtaining judgment on the specific dispute whose subject it had indicated with perfect clarity. Such a decision represents a regrettable departure from the traditional general view of the respective roles of applicant State, respondent State and the Court.

* * *

32. I have already said enough about the respective roles of Applicant and Respondent. It remains to be more specific about that of the Court. According to the Judgment, the Court is empowered *"to determine on an objective basis the dispute dividing the parties"* (para. 30). I am afraid this is not altogether correct. Adding the words "on an objective basis" cannot lend acceptability to this power of "definition", whose result here has been to substitute one dispute for another. The Court can do no more than attribute a *"legal characterization"* (and not a "definition") to the subject of the dispute. Where an act takes place on the high seas, the Court must verify factually what that act is (in this case the "boarding" of a fishing vessel), in what area it took place ("the high seas"), and who the author is ("Canada"). Those are facts. After that, it has to ascertain whether the author of the act possesses *a title*, or *legal ground*, on which to base its act, in order finally, in this phase of the proceedings, to be in a position to rule on the question whether or not the title or legal ground invoked is covered by Canada's reservation *(d)*.

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33. In the *Nuclear Tests* cases (1974), the Court rejected certain arguments put forward by one party as part of its submissions because it considered them "not as indications of what the party was asking the Court to decide, but as *reasons* advanced why the Court should decide in the

sense contended for by that party". In support of its decision, it cited the *Fisheries* case, in which it had said that nine of the thirteen points making up the Applicant's submissions "[were] elements which might furnish *reasons* in support of the Judgment, but cannot constitute *the decision* (*I.C.J. Reports 1951,* p. 126)" (*I.C.J. Reports 1974,* p. 262; emphasis added).

In 1974 the Court considered itself legitimately entitled — and indeed obliged — "*to isolate* the real issue in the case and to *identify* the object of the claim" (para. 29; emphasis added), but not, at least according to the intention there expressed, to proceed *proprio motu* to *"the reformulation of submissions"*. In the same paragraph it made it clear, citing the case-law of its predecessor (*P.C.I.J., Series A, No. 7,* p. 35), that it had no power to "*substitute itself* for [the parties] and formulate new submissions".

34. So aroused was the judges' vigilance that, despite the majority's precautions in this regard, it was strongly criticized by the minority on this issue. There is no better way of defining the limits upon the Court's duties than that set out by Judges Jiménez de Aréchaga, Dillard, Onyeama and Sir Humphrey Waldock in their joint dissenting opinion in those *Nuclear Tests* cases:

> "11. In a case brought to the Court by means of an application the formal submissions of the parties define the subject of the dispute, as is recognized in paragraph 24 of the Judgment. Those submissions must therefore be considered as indicating the objectives which are pursued by an applicant through the judicial proceedings.
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> While the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations. The Permanent Court said in this respect: '. . . though it can construe the submissions of the Parties, it cannot substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced' (*P.C.I.J., Series A, No. 7,* p. 35, case concerning *Certain German Interests in Polish Upper Silesia*). The Judgment (para. 29) refers to this as a limitation on the power of the Court to interpret the submissions 'when the claim is not properly formulated because the submissions of the parties are inadequate'. If, however, the Court lacks the power to reformulate inadequate submissions, *a fortiori* it cannot reformulate submissions as clear and specific as those in this case.
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> 12. In any event, the cases cited in paragraph 29 of the Judgment to justify the setting aside in the present instance of the Applicant's first submission do not, in our view, provide any warrant for such a summary disposal of the 'main prayer in the Application'. In those cases the submissions held by the Court not to be true submissions were specific propositions advanced merely to furnish reasons in support of the decision requested of the Court in the 'true' final submission. Thus, in the *Fisheries* case the Applicant had summarized

in the form of submissions a whole series of legal propositions, some not even contested, merely as steps logically leading to its true final submissions (*I.C.J. Reports 1951,* pp. 121-123 and 126). In the *Minquiers and Ecrehos* case the 'true' final submission was stated first and two legal propositions were then adduced by way of furnishing alternative grounds on which the Court might uphold it (*I.C.J. Reports 1953,* at p. 52); and in the *Nottebohm* case a submission regarding the naturalization of Nottebohm in Liechtenstein was considered by the Court to be merely 'a reason advanced for a decision by the Court in favour of Liechtenstein' on the 'real issue' of the admissibility of the claim (*I.C.J. Reports 1955,* at p. 16). In the present case, as we have indicated, the situation is quite otherwise. The legality or illegality of the carrying out by France of atmospheric nuclear tests in the South Pacific Ocean is the basic issue submitted to the Court's decision, and it seems to us as wholly unjustifiable to treat the Applicant's request for a declaration of illegality merely as reasoning advanced in support of its request for an Order prohibiting further tests.

13. In accordance with these basic principles, the true nature of the Australian claim, and of the objectives sought by the Applicant ought to have been determined on the basis of the clear and natural meaning of the text of its formal submission. The interpretation of that submission made by the Court constitutes in our view not an interpretation but a revision of the text, which ends in eliminating what the Applicant stated is 'the main prayer in the Application', namely the request for a declaration of illegality of nuclear atmospheric tests in the South Pacific Ocean. A radical alteration or mutilation of an applicant's submission under the guise of interpretation has serious consequences because it constitutes a frustration of a party's legitimate expectations that the case which it has put before the Court will be examined and decided . . .

14. The Judgment revises, we think, the Applicant's submission by bringing in other materials such as diplomatic communications and statements made in the course of the hearings. These materials do not justify, however, the interpretation arrived at in the Judgment. They refer to requests made repeatedly by the Applicant for an assurance from France as to the cessation of tests. But these requests for an assurance cannot have the effect attributed to them by the Judgment. While litigation is in progress an applicant may address requests to a respondent to give an assurance that it will not pursue the contested activity, but such requests cannot by themselves support the inference that an unqualified assurance, if received, would satisfy *all* the objectives the applicant is seeking through the judicial proceedings; still less can they restrict or amend the claims formally submitted to the Court. According to the Rules of Court, this can only result from a clear indication by the applicant to that

effect, through a withdrawal of the case, a modification of its submissions or an equivalent action. It is not for nothing that the submissions are required to be presented in writing and bear the signature of the agent. It is a *non sequitur*, therefore, to interpret such requests for an assurance as constituting an implied renunciation, a modification or a withdrawal of the claim which is still maintained before the Court, asking for a judicial declaration of illegality of atmospheric tests. At the very least, since the Judgment attributes intentions and implied waivers to the Applicant, that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination *inaudita parte*." (*I.C.J. Reports 1974,* pp. 316-317.)

35. In relying in the present case on the 1974 French *Nuclear Tests* cases, the Court seems to me, moreover, to have invoked a precedent which is not apt to justify the faculty here accorded to Canada, the respondent State, since France — the respondent State in 1974 — having failed to appear, did not put forward any argument for a definition of the subject of the dispute different from that formulated by the Applicant.

* * *

36. In the present case, the Court has relied on jurisprudence which seems either not fully relevant, or to have been interpreted incorrectly. In this respect I would first cite what I think is a particularly appropriate passage from the *Société Commerciale de Belgique* case, which was itself cited by the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

"It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute . . . it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute." (*P.C.I.J., Series A/B*, No. 78, p. 173; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 427, para. 80.)

It will be evident that this highly cautious piece of jurisprudence *limits even the power of the applicant State*, the reason being to avoid prejudice

to third States which might wish to avail themselves of their right to intervene in the proceedings.

37. Jurisprudence of a similar kind was again applied by the Court, and *with a similarly cautious approach*, in the case concerning *Certain Phosphate Lands in Nauru*:

> "Article 40, paragraph 1, of the Statute of the Court provides that the 'subject of the dispute' must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires 'the precise nature of the claim' to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:
>
> > 'under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein . . .' (*P.C.I.J., Series A/B, No. 52,* p. 14)." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp. 266-267, para. 69.)

Obviously, such vigilance on the part of the Court, in requiring even the applicant State to remain within the specific confines of the subject of the dispute submitted by it to the Court, is all the more appropriate in relation to the respondent State and indeed to the Court itself, since not only does it preclude the possibility of third States being deprived of their right of intervention, but also — more crucially — it enables the Court properly to adjudicate on its jurisdiction in light of the subject as defined by the Applicant, and not of some other subject adduced subsequently by the Applicant or by anyone else.

38. It would seem to me prudent in any event to preclude any notion of placing the Respondent on a precisely equal footing with the Applicant in relation to the definition of the subject of the dispute. Quite apart from the infringement of procedural requirements, to allow the Respondent an identical power in the determination of the subject of the dispute would be to deny the possibility under the Statute of instituting proceedings unilaterally by way of application, thus engendering the belief that the Statute and the Rules of Court allowed parties no means of instituting proceedings otherwise than by special agreement. However, what has occurred in the present case strikes me as even more disturbing, inasmuch as the Court's reasoning has led it willy-nilly to place the Respondent not

merely on an equal footing with the Applicant but indeed above it, permitting the former to substitute itself for the latter in "defining" the subject of the dispute submitted to the Court by the applicant State.

* * *

39. As regards the *Right of Passage over Indian Territory* case, also cited in the Judgment, one should of course bear in mind that this was a case *on the merits,* settling a dispute concerning a condition *ratione temporis* in India's declaration of acceptance of the optional clause — a condition which in the preliminary phase had been referred for final consideration to the merits stage. A decision on that condition had thus been joined to the merits because, *in the light of the subject-matter of the dispute, as established by Portugal, the applicant State*, it was not exclusively preliminary in character. The situation today is quite different, since neither Canada nor Spain has submitted a memorial to the Court on the merits. And the two cases differ in many other respects, to the point at which any comparison becomes artificial. Spain has not altered the subject of the dispute since it filed its Application. Canada has not undertaken, either directly to Spain, or by making a unilateral declaration as France did in 1974, to cease in future applying its domestic legislation to vessels on the high seas. The subject of the dispute as set out in the Spanish Application has remained as it was and no further element whatsoever has emerged on either side. The Court should therefore have decided the question of its jurisdiction in the light of that subject and none other.

40. Turning now to the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* mentioned in paragraph 31 of the Judgment, it is not difficult to see that here too the situation was in no way comparable with that of the present case. As the Court made it perfectly clear in its Judgment of 1 July 1994 (*I.C.J. Reports 1994,* pp. 123-125, paras. 33-38), there was already a text — called the "Bahraini formula" — *which described the whole of the dispute* which the parties had agreed to bring before the Court. Since the Application by Qatar, at whose instance the Court was seised, contained only its own claims, the Court had still to be seised effectively of the *whole* of the dispute. There was no question in the Court's approach of its remodelling a "subject of the dispute", which had already been clearly demarcated by the parties *in a joint agreement*; yet that is what the Court is doing in the present case, under pretext of "*itself* determin[ing] the real dispute that has been submitted to it" (para. 31; emphasis added). In short, in the *Qatar* v. *Bahrain* case, the Court simply ensured that the subject of the dispute, as agreed between the parties, was respected in its entirety. The present case bears absolutely *no* relationship with the *Qatar* v. *Bahrain* case.

* * *

41. Lastly, as regards the Court's power to determine its own jurisdiction under Article 36, paragraph 6, of the Statute, that is to say, within the limits of its sovereign discretion in relation to its own jurisdiction, it must, as I have already pointed out, interpret the subject of the dispute, but without in any way changing it, as the Respondent did. On this point, the jurisprudence of the present Court's predecessor demonstrates admirable caution. The Permanent Court of International Justice did not permit itself either to alter, or even merely to *"correct"*, the subject of the dispute where the applicant State had formulated it inadequately, but merely asked the Applicant itself to correct the subject of the dispute; on its failing to do so, the Court simply refrained from determining the claim. This is what occurred in the case concerning *Certain German Interests in Polish Upper Silesia, Jurisdiction* (*P.C.I.J., Series A, No. 7,* pp. 34-35).

* * *

III. The Validity of the Canadian Reservation

42. It would be absurd to cast doubt, in any degree, on the sovereign power of a State to maintain or amend, whether by restricting or by extending it, a declaration of acceptance of the Court's jurisdiction, or to withdraw it altogether whenever it wishes — always subject, of course, to compliance with the procedure (and in particular any prior notice) established by that State itself in its declaration. Doctrine and jurisprudence are unanimous on this point. As Sir Arnold McNair wrote: "A state, being free either to make a Declaration or not, is entitled, if it decides to make one, to *limit the scope* of its Declaration in any way it chooses" (quoted in the Counter-Memorial of Canada, p. 24, para. 50; emphasis added). The language used by Canada in paragraph 3 of its most recent declaration of 1994 clearly expresses, moreover, the undisputed right of a State "to . . . at any time . . . add to, amend, or withdraw any of the foregoing reservations, or any that may hereafter be added" and, one might add, to do likewise in respect of any declaration it has made.

43. However, a State's freedom to attach reservations or conditions to its declaration must be exercised in conformity with the Statute and Rules of Court, with the Charter of the United Nations, and more generally with international law and with what I may venture to call *"l'ordre public international"*. Just as the acts of a State, and more generally its conduct, in whatever area of international relations, must conform to existing international legal norms, so the formulation of a reservation, which is no more than one element of such conduct, must also comply with these norms.

44. Accordingly,

— I do not see why the Court should hesitate to reject, or to declare

inadmissible, or not opposable, or even invalid or null and void, a reservation the purpose or effect of which is to nullify or distort one or more of the provisions of the Statute or Rules of Court which govern international judicial proceedings, and to establish some sort of *ad hoc* judicial procedure suiting or benefiting the author of the reservation alone;

— I do not see why the Court should hesitate to declare null and void and invalid *ab initio* any reservation that prevents it from hearing proceedings concerning genocide, slavery, piracy, or any other international crime;

— I do not see why the Court should accept any "automatic" reservation so formulated that only the State making it is empowered to decide whether or not its conduct, or an act done by it, is covered by that reservation, thus depriving the Court of the "power to determine its own jurisdiction" provided for by Article 36, paragraph 6, of its Statute;

— I do not see why the Court should allow itself to consider a reservation which, while appearing to set specific limits to the Court's jurisdiction, is in the final analysis incompatible with respect for the integrity of the declaration as a whole, since, while international law undeniably confers freedom of consent and the declaration implies recognition of the Court's jurisdiction, a reservation made within this framework must also respect the consistency and the integrity of the optional clause "system".

* * *

45. Under the optional clause "system", as currently structured within the framework of the *"international legal corpus"* — that is to stay, neither total chaos nor an absurd *"bric-a-brac"* (Jean Combacau) — which we call *"international law"*, a State's freedom is immense, but cannot be regarded as boundless. Anyone is free to join a club or not, but he who does so must accept the rules governing the club's activities.

46. In joining the optional clause "system" through its declaration, a State enters freely into a network of specific rights and obligations. It is perfectly clear that its declaration is not totally devoid of implications for the scope of its rights and obligations. In this respect the declarant State will obviously enjoy vis-à-vis the Court — to which the declaration is addressed — and as regards the other declarant States less freedom than a State which has not accepted the Court's jurisdiction. *In short, it has obligations vis-à-vis the clause "system" — those currently or potentially participating in it — and also to the party to whom that clause is ultimately addressed, namely the International Court.* It is not entitled to provoke the implosion of a "system" to which it now owes duties, the counterpart of which are the rights it derives from it. The possibility of withdrawing from the system remains fully open to it, but what is not

acceptable is that the declarant State should distort or pervert the system, or compromise its existence or its functioning, and yet remain part of it.

* * *

47. This case inevitably engenders a certain unease. These were events which occurred over a specific period of two days, 10 and 12 May 1994, during which, almost simultaneously, Canada formulated its reservation — thus barring any action by the Court — lodged a Bill with Parliament and had it adopted. There is every reason to think that, in so acting, Canada wished to protect itself in advance against any application to the Court, so as to be completely free to follow a particular line of conduct, over whose legality it had certain doubts. Without any consideration of the merits of the case — something we are not entitled to do at the present, jurisdictional phase of the proceedings — it is clear that this hypothesis is a reasonably credible one. Canada itself, in an official news release dated 10 May 1994, the day on which the new declaration with its reservation *(d)* was deposited, stated the following:

> "Canada has today amended its acceptance of the compulsory jurisdiction of the International Court of Justice in the Hague to *preclude* any challenge which might *undermine* Canada's ability to protect the stocks." (Emphasis added.)

As the Spanish Memorial states, Canada's purpose in this reservation was to "secure itself against any judicial rejection of . . . such measures". What is more, one of Canada's counsel gave a particularly clear description of this *"special period"* when he said:

> "The *exact coincidence in timing* of Bill C-29 and the new declaration demonstrates that the reservation was *deliberately* designed to *exclude* Bill C-29 and everything done in or in connection with it *from judicial settlement"* (CR 98/11, p. 44, para. 63; emphasis added.)

And the same counsel reiterated:

> "Canada amended its declaration . . . [on] *exactly the same day* it introduced into Parliament an Act on . . . [fisheries] . . . The *intimate link between these two instruments was and is absolutely transparent.*" (CR 98/14, p. 51, para. 7; emphasis added.)

48. In short, the Canadian Government — the discussions in Parliament on Bill C-29 made this clear — wished to have a free hand and sought to avoid the risk of losing a case before the Court in respect of action in the NAFO Regulatory Area, i.e., on the high seas. There is little doubt that the legislation adopted had the specific purpose of enabling Canada to intervene beyond the boundary of its national maritime juris-

diction. This is the main objective of the Act of 12 May 1994, as Article 1 of the Act states. Another Canadian counsel stated:

> "The measures are perfectly ordinary conservation and management measures, and the *only* thing that makes them different is *where* Canada applied them, in the NAFO Regulatory Area and therefore, *beyond two hundred miles*. But that of course is *the whole rationale for the reservation*." (CR 98/12, p. 14, para. 66; emphasis added.)

And the Agent of Canada was clear and specific, before the Court, on this crucial point. This leaves no doubt that Canada knew that, in the absence of any appropriate reservation in its declaration, it ran the risk of condemnation by the Court for any intervention on the high seas against a foreign vessel, since apparently it had doubts as to the legality of such intervention. So much so that one of Spain's counsel asserted:

> "[It is a wrongful act] *'with premeditation'*! A State may prepare [for it]. Then it may take the necessary steps to escape the court; and, thus [it acts] *assured of impunity*." (CR 98/10, p. 37, para. 1; emphasis added.)

49. *This is not what one might have expected of a country like Canada, which for the last 70 years has set an example of its attachment to the Court's jurisdiction and its respect for international law. Nor is it a welcome situation for Canada's traditional NAFO partners, or for the international community or, indeed, for the optional clause "system" and the Court itself.*

The latter has, most regrettably, failed to recognize that reliance on a reservation, in circumstances where a State wishes to undertake specific acts of doubtful international legality, risks seriously damaging the credibility of the optional clause "system".

50. I therefore regret that the Court did not reject, or even hold null and void, a reservation whose obvious purpose, when read together with a piece of domestic legislation, was to permit encroachment upon an essential freedom of international law, both past and present, without fear of judicial intervention. Canada — admittedly with legitimate concern for the conservation of fishery resources — unfortunately yielded to temptation and *took a regrettable legislative initiative with a view to an operation on the high seas, believing it could escape judicial sanction by simultaneously notifying the international community of a new reservation adopted for purposes it feared might be* illegal.

Such a reservation could not and should not be accepted by the Court.

51. *The Canadian reservation* (d) *is damaging to the optional clause "system"*. A better and perfectly clear position would have been as fol-

lows: *either Canada should have withdrawn its declaration completely in 1994*, provisionally and for the period required for its fisheries conservation policy, *or the Court should now*, in its present Judgment, in 1998, *have rejected reservation* (d). The situation created by the maintenance of the declaration subject to the reservation represents the least satisfactory solution for all concerned: Canada, other declarant States and the International Court of Justice.

52. The backbone of the optional clause "system" consists in good faith among declarant States. Upon this principle depends the freedom of a State to formulate a reservation. If, for reasons of domestic or international policy, which may of course be perfectly legitimate, a declarant State finds itself in difficulty as a result of the terms of its declaration, *it should temporarily withdraw that declaration for the period required by the political action which it contemplates, rather than attach to the declaration — I am tempted to say encumber and undermine it — a reservation intended to cover a purpose which might very well be regarded as unlawful.* It may not on the one hand set out to accept the Court's jurisdiction for a wide variety of disputes, given the broad terms of its declaration, while on the other seeking *simultaneously* to escape judicial scrutiny (which its declaration has clearly demonstrated that it wishes to accept) in respect of a specific class of acts protected by its reservation where it doubts their legality.

53. First, this situation — stemming directly from reservation *(d)* — places the *consistency* of the declarant State's conduct under internal *"strain"*. Next, it undermines the optional clause "system" from within, risking its implosion, since it robs the system of the good faith which is its very life-blood. According to a maxim of French civil law, *"donner et retenir ne vaut"* (you cannot both give and take back). A declarant State cannot take away with one hand what it has given with the other. It cannot swear fealty to international justice by submitting itself to the latter's verdict in respect of those acts where it considers it has behaved correctly, while shunning that same justice in the case of those acts whose legality it fears may be questionable. It is not possible for a declarant State to remodel the philosophy of the clause "system" in this way, still less to bend the "system" to suit its own conflicting requirements, or to mix two incompatible aims.

54. But Canada is not the only victim of its own choice — a choice which tarnishes the bright image of a State committed for the last 70 years to the ideal of international justice. Nor is it only the clause "system" which suffers. The Court itself, in holding that it lacks jurisdiction, lays itself open to a degree of damage. The saying is that *"lack of jurisdiction does not imply legality"*, i.e., the Court in no way endorses Canada's conduct by declaring that it lacks jurisdiction in regard to that conduct. That is true, but psychologically the impact is disastrous. Was there really no other way than to embarrass the Court, which clearly discerns illegality in Canada's conduct on the high seas, but must nonetheless play Pontius Pilate and wash its hands of the case? This is an unwelcome

situation for a court which knows that it must render justice but cannot do so.

55. This is not the end of the harm caused by reservation *(d)*. Declarant States also suffer. A State is of course free to formulate reservations; from this the Court proceeded to the conclusion that, had it refused to recognize the reservation — on the basis of which it accepted the Respondent's claim that it had no jurisdiction — the clause "system" would have been severely prejudiced. To disregard a declarant State's inviolable right to make reservations would be to undermine the structure of the system and discourage States wishing in the future to make a declaration of acceptance. This, it was said, would be the speedy ruin of the clause "system".

56. This argument fails on two accounts. First, the idea that States will be discouraged — stopped in their tracks in their rush to make a declaration — because, for once, a judgment of the Court has rejected an incompatible and potentially hazardous reservation, seems to me pure fantasy. Unfortunately, more than two thirds of today's States, for reasons which I to some extent understand, flatly reject the idea of making a declaration and, whatever the Court does, will probably never accept its compulsory jurisdiction, despite the blessing bestowed by the Court — to a quiet unreasonable degree — upon the right to make reservations, and the overwhelming enthusiasm displayed by the Judgment for the Canadian reservation in particular.

The second point is even more important: we should not consider merely the position of States which have yet to accede to the optional clause "system". We must not forget those States which have already made a declaration and which participate in the clause "system". Is it right for these States, which through the "system" are working for stability, foreseeability and security in legal relations, that other declarant States should hastily formulate a reservation whenever they encounter a problem? Is this the best they can hope for in their legitimate expectations for the security of their relations with other declarant States? Does this not jeopardize the stability of the entire optional clause "system"?

57. Nor should we forget that this is the second time Canada has introduced a reservation in order to escape the Court's jurisdiction in situations involving the freedom of the high seas. This time, however, it is to be feared that the Court has endorsed Canada's action, given that, in holding that the Court lacks jurisdiction, the Judgment has failed to take adequate precautions or to issue any kind of caveat.

58. In concluding these remarks on the issue of the validity of the Canadian reservation *(d)* — and bearing in mind that in my opinion Canada would have been better advised to withdraw its 1985 declaration entirely rather than replace it by the declaration of 1994 with its reservation *(d)*, which is incompatible with the declaration itself — I would

point out that in the present case the Court has found itself the focus of a somewhat sensitive combination of circumstances. It is no secret that Canada, which has always played a major part in the milestone international conferences on the road to the creation of the *new legal order of the sea*, and which pursues a very active, some would even say aggressive, fisheries policy, is dissatisfied with the law of the sea as it stands and wishes to press on with reforming it, notably with a view to the enjoyment by coastal States of "preferential rights" in matters of fisheries conservation and management. It has then proceeded, while invoking in certain *fora* the idea of a "state of need", or simply of "emergency", to the point of *breaking* the existing law in order to secure "progress" in this regard on the part of other States. The Court has of course no bounden duty either to encourage or to discourage this strategy. The formative process of a new international legal norm need not involve wrongful conduct designed by its author to induce other States to negotiate a new law. The decision by the majority that the Court lacks jurisdiction must not be taken to mean that the Court, the guardian of international legality, offers any encouragement whatever to this strategy.

* * *

59. It seems to me that the Applicant was reluctant to take its criticism of the Canadian reservation *(d)* to its logical conclusion. In its final submissions it did not go so far as to claim that the reservation was a "nullity". Should we welcome this caution, on the argument — as is sometimes proposed — that nullity of the reservation would have entailed that of the entire declaration, which would have confirmed even more forcefully the Court's lack of jurisdiction in this case?

60. Let me begin by saying that, all in all, I would have preferred a situation in which the Court had taken the clearer — and possibly sounder — course of founding its lack of jurisdiction on the nullity of the declaration as a whole, rather than on reservation *(d)* alone.

In any case, it is far from certain that the nullity of a reservation entails *ipso facto* that of the entire declaration; common sense, for one thing, tells us otherwise. A reservation restricts the field of consent given by the declaration. A field with ill-defined boundaries is still a field. But most importantly, case-law, doctrine and State practice are in accord that, looking beyond the *sui generis* nature of a declaration, the principles and rules peculiar to bilateral or multilateral acts, i.e., to treaties, should be applied *mutatis mutandis* to this unilateral act. And treaty law, as codified in 1969, enshrines in Article 44 of the Vienna Convention — admittedly with certain exceptions — the *principle of separability* of the various provisions contained in a treaty. I really cannot see why a declaration should wholly escape this principle.

61. This issue has in fact been raised in a number of cases, including

the *Norwegian Loans* and *Interhandel* cases, and some judges have evoked and accepted the principle of separability (cf. *Norwegian Loans, I.C.J. Reports 1957,* p. 55-59; *Interhandel, I.C.J. Reports 1959,* pp. 57, 77-78, 116-117).

At the regional level too, the European Court of Human Rights, for example, has found occasion to apply the principle of separability by striking down reservations in respect of certain provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms, without invalidating in their totality declarations of acceptance of the jurisdiction of the Strasbourg Court in respect of disputes concerning the Convention (cf. *Loizidou* v. *Turkey, Preliminary Objections*, Judgment of 23 March 1995).

By way of comparison, it should also be observed that the principle of separability is fully accepted in international commercial arbitration, in so far as treatment of the arbitration clause is deemed to be independent of that of the other provisions in the agreement.

* * *

IV. The Definition of "Conservation and Management Measures"

62. The question of the "applicable law" for purposes of defining the expression "conservation and management measures" has taken on great importance in this case.

63. Spain argues that there is no dispute between itself and Canada about fishing, rather that the case concerns Canada's legal entitlement to take "measures" on the high seas against Spanish vessels, on the pretext of enforcing "conservation and management measures". The applicant State doubts whether the Respondent has any such entitlement and asks the Court to consider the merits of the case in order to answer the question. Moreover, Spain considers that reservation *(d)* does not constitute a bar to the Court's jurisdiction, since it excludes only "conservation and management measures" from such jurisdiction, and not the issue of Canada's title to act on the high seas. For Canada, on the other hand, such measures include all conservation and management measures, whatever the geographical location where their impact is felt, which is ultimately to say, whether or not they are in accordance with international law.

64. The extent of this conflict of views between the parties is evident, as is the significance of the definition of "conservation and management measures". In short, Canada takes the view that this expression has a purely *technical*, common-sense meaning, whereas Spain contends that it must be given the meaning now attaching to it under international law.

65. For my part, I remain convinced that the term can be interpreted only within the framework of international law. And since, in these circumstances, the definition and content of the phrase can be fully ascertained only at the merits stage, it follows that only then would the Court be in a position to determine whether the Canadian legislation and the resultant actions against Spanish vessels come within the international definition of such measures and their enforcement, and hence are excluded from the Court's jurisdiction by virtue of reservation *(d)*. *In other words, this is a case where Article 79, paragraph 7, should have been applied, with the result that examination of the definition and precise content of "conservation and management measures" would have been postponed to the merits stage, these being matters not having an exclusively preliminary character.*

* * *

66. I welcome the statement by the Judgment, in paragraph 69, that the expression must be defined "in the light of international law". Unfortunately, having said this, the Judgment then falls back on a definition based on technical characteristics, as propounded by Canada, thus returning us to the starting-point. I regret that the Court felt able to take the view that it was entitled, at the jurisdiction stage of the case, to arrive at *hasty* conclusions concerning the "factual and scientific criteria" said to characterize the expression "conservation and management measures", and to do so on the basis of widely differing sources, including legislation from various countries which was neither presented systematically nor analysed in any depth. The Court's purpose here was to seek to satisfy its minority with a mere form of words, confining itself to a technical definition that allowed it, at this stage of the proceedings, to dispose of the issue of the exclusion from the Court's jurisdiction of the measures taken against the *Estai* and other vessels. Paragraph 70 of the Judgment states that for a measure to be a *"conservation and management measure"* within the meaning of the Canadian reservation *(d)*, *"it is sufficient"* that the purpose of the "measure" is to conserve and manage living resources and that it satisfies various technical requirements. This, in reality, is not a legal approach but a purely *"factual"* one, that has little to do with international law, which the Court is pledged to apply.

* * *

67. Canada's reservation *(d)* refers to *"conservation and management measures"* taken or enforced by it in relation to fishing vessels in the "NAFO Regulatory Area". The Court thus had to interpret this expression in order to define the scope of reservation *(d)*. It may be helpful to recall that in 1970 Canada made a similar albeit not identical reservation

in relation to the Arctic, which referred to the "conservation, management or exploitation of the living resources of the sea".

68. In defining the expression "conservation and management measures" contained in its reservation *(d)*, Canada did not refer to its newly amended domestic legislation. Admittedly, that legislation was adopted two days after Canada had deposited its new declaration containing the reservation. This however posed no technical obstacle, had Canada genuinely wished to refer to this legislation — which in Bill form was tabled *simultaneously* with its notification of the new declaration. In fact, the reservation contains *no definition* of the measures in question. By contrast, in defining the geographical scope of the reservation, Canada referred to an *international treaty*, the NAFO Convention. This was already an indication that the expression "conservation and management measures" — a vital objective of the Convention — should in the interests of consistency be construed in the light of international law.

69. It should also be noted in this regard that a *"Fisheries Commission"*, set up under the NAFO Convention, operates within the Regulatory Area defined in that Convention. Hence the "conservation and management measures" adopted by Canada in that same geographical area are additional to those adopted by this international body. It therefore cannot be right to have recourse to Canadian law — which is not mentioned at all in the reservation — in order to define such measures where they have been taken by Canada, whilst identical measures in the same area fall to be interpreted by reference to international law when they result from the activity of the NAFO Fisheries Commission. We may note in passing — although this is an issue whose solution is for the merits of the case — that here too Canada's legal title to take such measures appears to be in question, since this is a matter apparently entrusted by treaty to an international body. The NAFO Convention, which gives States the right to object to any measures to be adopted by the Commission, does not in any way encroach upon the rights of flag States in the NAFO Regulatory Area, since such measures are taken in co-operation with the States concerned. This is a clear indication that it is not possible to interpret the "conservation and management measures" taken by Canada in a manner totally different from that applicable to similar measures taken in the same zone by NAFO bodies.

70. Moreover, as I have already pointed out, Canada did not specify in reservation *(d)* what it meant by "conservation and management measures". If we accordingly look simply to the *objective* intention of the declarant State, it would not be unreasonable to take the view that it wished this expression to have the meaning that it has in international law — all the more so, we must remember, in that this reservation by Canada was addressed to the community of those other declarant States participating in the optional clause "system". Furthermore, in seeking to

give this expression the meaning which it claimed for it, Canada itself cited the decision in the *Aegean Sea Continental Shelf* case, in which the term "territorial status" was interpreted not by reference to Greek domestic law but in accordance with international law.

* * *

71. Contrary to what the Judgment states, the notion of "conservation and management measures" cannot be confined to simple "factual" or "technical" matters, but has to be taken to refer to those types of measure which the *"new legal order of the sea"* has been gradually regulating, with the result that such measures now constitute *an objective legal category* which cannot be other than part of international law. The expression "conservation and management measures" of the living resources of the high seas was the accepted one throughout the Third United Nations Conference on the Law of the Sea and was enshrined in the final text of the Montego Bay Convention of 10 December 1982, specifically in Articles 116 to 120, and also in Article 63 on straddling stocks and Articles 64 to 67. The expression "conservation and management measures" thus received international recognition in what the preamble to the Montego Bay Convention calls the new *"legal order for the seas and oceans"*. And it is this new order which, through the 1982 Convention and its supplementing instruments, has been treated by international jurisprudence and by State practice as the current expression of the *opinio juris*.

72. The Montego Bay Convention, which admittedly has not yet been ratified by Canada but to which it nonetheless referred before the Court (which itself also referred to it, in particular in paragraph 70 of the Judgment) provides in Article 62, paragraph 4, that the "laws and regulations" enacted by a coastal State for conservation purposes *in its exclusive economic zone* must respect the rules of the Convention itself. Thus the international law of the sea does concern itself with the nature of "conservation and management measures", even in relation to a fishing zone which is under the jurisdiction of a coastal State. Such a provision would lack consistency if, on the high seas, a coastal State remained free to take "conservation and management measures" which conflicted with international law. Articles 117 to 119 of the Montego Bay Convention do in fact contain detailed rules for *co-operation* among States in establishing such measures for the high seas and for promoting its organization and functioning. It is therefore by reference to the international law of the sea that we must view the "conservation and management measures" of the Canadian reservation *(d)*.

* * *

73. A definition of "conservation and management measures", or

essential elements of it, appears in numerous *international* instruments subsequent to the Montego Bay Convention of 1982.

74. However, before I cite them to illustrate my point, we must not forget that the definitional elements of these *measures* and the conditions for their *enforcement* (through co-operation) were already present in 1978 — at a time when freedom of fishing on the high seas was less restricted — in the NAFO Convention itself, whose object, as stated in Article II (1), is *"to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area"*.

75. I would refer first to the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, adopted by the FAO Conference on 24 November 1993 at its twenty-seventh session in resolution 15/93. Article I *(b)* provides that:

> "'international conservation and management measures' means measures to conserve or manage one or more species of living marine resources that are adopted and applied *in accordance with the relevant rules of international law* as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or subregional fisheries organizations, subject to the rights and obligations of their members, or by treaties or other international agreements" (emphasis added).

76. This provision thus not only supplies both the definitional elements and the content of such measures, but also states who may adopt them. Arguing *a contrario*, this provision would appear to preclude a State altogether from taking such measures itself on the basis of its own domestic law, where it intends them to be applied on the high seas, which is governed by the Agreement. A State may *"receive"* such internationally defined measures into its domestic law and must provide for their enforcement. It is interesting to note, for purposes of the present case, that this position finds confirmation in the second paragraph of the preamble to the Agreement, which provides that it is *"under international law"* that "*all* States" are to take "such *measures . . . as may be necessary* for *the conservation of the living resources* of the high seas" (emphasis added).

77. In Article IX of the Agreement, "Settlement of Disputes", there is an express reference in paragraph 3 to the *"rules of international law relating to the conservation of living marine resources"*. Moreover, scattered references throughout the Agreement describe the measures which concern us here as "*international* conservation and management measures" (see the sixth and eighth recitals of the preamble and Articles V (1), VI (8) *(a)* and *(b)*, VIII (2) and VIII (3).

78. As regards the *Code of Conduct for Responsible Fisheries*, adopted by the FAO Conference at its following (twenty-eighth) session on 31 October 1995, a reading of the text reveals the following characteristics:

79. *(a)* The entire Code is built around the guiding principle that the State cannot take conservation and management measures except in areas under its jurisdiction; in the case of the high seas, such measures are described as *"international"* and they are not to be construed by reference to a State's domestic law. It is the international Code which defines such conservation and management measures. The following quotations from the Code — *inter alia* — clearly demonstrate this:

— "This Code *sets out principles* and *international standards* of behaviour . . . with a view to ensuring the effective *conservation, management* and *development* of living aquatic resources." (Preamble.)

— "This Code is voluntary. However, certain parts of it are based on *relevant rules of international law*, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . . [and in] *other . . . legal instruments* . . . such as the *Agreement* to Promote Compliance with *International Conservation and Management Measures* by Fishing Vessels *on the High Seas, 1993,* which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code" (Art. 1.1).

— "The Code is *global in scope*" (Art. 1.2) and "provides *principles* and *standards* applicable to the . . . management and development of *all* fisheries" (Art. 1.3).
— More generally, the *objectives* of the Code are to "establish *principles, in accordance with the relevant rules of international law*, for . . . fishing" (Art. 2.1) and "serve as *an instrument of reference* to help States to establish or to improve the legal and institutional framework required for the exercise of responsible fisheries" (Art. 2.3). (Emphasis added in each case.)

80. *(b)* The Code states on numerous occasions that measures for "conservation and management of fisheries resources" are *"international measures"* established *"in accordance with international law"*.

— The measures concerned are "*international* conservation and management measures" (Art. 7.8).
— In regard to co-operation among States, the Code speaks of "*international* standards for . . . living aquatic resources conservation" and of their "effective implementation" (Art. 11.2.11). It provides that "States should, *in accordance with international law,* . . . cooperate to establish systems for monitoring, control, surveillance and enforcement of applicable measures . . ." (Art. 8.1.4).

— Article 6, "General Principles", contains an illuminating and helpful provision in relation to the present Judgment:

"6.10. *Within* their respective competence and *in accordance with international law* . . . States should ensure compliance with and

enforcement of conservation and management measures and establish effective mechanisms, as appropriate, to monitor and control the activities of fishing vessels . . ."

And in Article 6.12 the Code invites States to co-operate subject to the same limits of the law, and in particular recommends them to curb their power to take domestic measures, so as to ensure their compatibility with international measures for the high seas:

> "6.12. States should, *within* their respective competence and *in accordance with international law*, cooperate . . . to promote conservation and management . . . of living aquatic resources *throughout their range* of distribution, taking into account *the need for compatible measures* in areas *within and beyond national jurisdiction*." (Emphasis added.)

The same notion governs the special issue of "straddling stocks", "highly migratory" fish stocks and "high seas" fish stocks:

> "7.3.2. . . . conservation and management measures established for such stocks *in accordance with the respective competence of relevant States* . . . should be *compatible. Compatibility* should be achieved in a manner consistent with the rights, competence and interests of the States concerned." (Emphasis added.)

81. *(c)* The Code even specifies the means to be employed in its interpretation (and also in its application), which, it states, is to be that resulting from *"international law"*:

— "3.1. The Code is to be *interpreted* and *applied* in conformity with the relevant rules of international law . . ."
— "3.2. the Code is also to be interpreted and applied:
  (a) in a manner *consistent with the relevant provisions of the Agreement* for the Implementation of the [Montego Bay] Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks;
  (b) *in accordance with other applicable rules of international law . . .;*
  (c) in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21 adopted by the United Nations Conference on Environment and Development (UNCED) . . . and other . . . *declarations and international instruments.*" (Emphasis added.)

Hence the entire arsenal of legal weapons employed in interpreting (and equally in applying) the notion of so-called "international" conservation and management measures derives from international law.

82. *(d)* It now remains to be seen how the Code *defines such conservation and management measures* in practice and how it *interprets* them. Obviously, it refers to the *technical* characteristics whereby such measures are defined *internationally*, but it also includes in the definition matters of a *social, economic* or *institutional* nature, which go beyond the purely technical aspects, thereby necessarily making the definition an international one, having regard to the diversity of social, economic and institutional factors in the various States concerned, which it then supplements with the standardized technical elements. Not until Article 7.6.9 is there any mention of "*technical* measures related to fish size, mesh size or gear, discards, closed seasons and areas and zones reserved for selected fisheries", protection of "juveniles and spawners", and in more general terms the "performance of . . . fishing gear, methods and practices" (Art. 7.6.4), the use of which must be "selective, environmentally safe and cost effective". And even these technical measures cannot be defined unilaterally, since they are the outcome of State practice and co-operation (see Article 8.5 on fishing gear selectivity). It is this co-operation among States that has been instrumental in defining and agreeing these *internationally standardized technical norms* (see Article 8.5.4 relating to research programmes for fishing gear selectivity and "fishing methods and strategies", and to "dissemination of the results of such research programmes and the transfer of technology").

83. Before referring to these various technical aspects — these being natural components of any definition of "conservation and management measures", a definition which can only be *international*, given its gradual emergence out of State practice and co-operation — the Code, in Article 7.2.2, which deals with resource management objectives, sets out the other aspects of the definition of such measures: *"economic considerations"* (Art. 7.2.2 *(b)*), *"interests of fishers"* (7.2.2 *(c)*), *"biodiversity of aquatic habits and ecosystems"* (7.2.2 *(d)*), *"adverse environmental impacts on the resources"* (7.2.2 *(f)*) and *the need to minimize "pollution, waste"* etc. (7.2.2 *(g)*); while Article 7.4.5 lays emphasis on the *"social and economic objectives"* and the *"social, economic and institutional"* factors.

84. In other words the definition of "conservation and management measures" — which are in any event *international*, whether or not expressly described as such — has two aspects: one technical, gradually developed internationally through State practice and standardized in systematic fashion through State co-operation; the other "social, economic and institutional", taking account of the particular characteristics of the various States concerned; and the whole combines to produce a necessarily international approach to such conservation and management measures.

85. It may be noted in passing that exactly the same spirit governs the

Kyoto Declaration and Plan of Action of 9 December 1995 on the sustainable contribution of fisheries to food security, which reads:

> "We the 95 States meeting in Kyoto from 4 to 9 December 1995 . . .
>
> Declare that we should, without prejudice to the rights and obligations of States *under international law* . . .
>
> . . . . . .
>
> 5. Take steps for effective application of the FAO Code of Conduct for Responsible Fisheries, and consider becoming parties to the . . . Agreement to Promote Compliance with *International* Conservation and Management Measures by Fishing Vessels on the High Seas, and enact, correspondingly, appropriate domestic legislation and regulations in a timely manner."

86. The Declaration calls on States, in defining the measures in question, to increase "respect and understanding of social, economic and cultural differences among States and regions in the use of living aquatic resources, especially cultural diversity in dietary habits, consistent with management objectives". And, moving well away from the purely technical element in the definition of such measures, the Declaration calls for attention to be given to "(iii) improvement in economic and social well-being" and "(iv) inter- and intra-generational equity".

87. Numerous other international and regional instruments might be cited. For example, the diplomatic conference held in Crete from 12 to 14 December 1994 on co-operation among States for the conservation of resources in the Mediterranean referred to what it called a harmonized system of conservation and management, something which cannot be envisaged under a definition solely in terms of the domestic law of a particular State. And the Barcelona declaration of 28 November 1995 on Euro-Mediterranean co-operation itself referred to that system in a provision for "appropriate follow-up action in the legal sphere". I shall confine myself to citing only one further regional instrument, the solemn declaration of 27-29 November 1996 by the European Union on the conservation and management of fisheries resources in the Mediterranean, which itself refers to a very large number of international conventions and declarations, revealing the wealth of efforts being made towards international regulation. This solemn declaration of the European Union considered it "essential to secure respect for *international* measures for conservation and management of fisheries resources taken by competent regional management organizations" and, in paragraph 6, it too referred to the development "of a *harmonized system* for conservation and management" at the Mediterranean level, and for that purpose it set up "a group of *legal* and technical experts".

88. The various international instruments discussed above are evidence that the international community has increasingly felt the need to rationalize and harmonize conservation and management measures in order to ensure that those taken by a State in respect of its maritime zones are compatible with those adopted by the international community in respect of the free zones of the high seas. These instruments appeal to all States to see to it that their legislation conforms to *common criteria*, identified and harmonized by those instruments.

89. The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on 4 August 1995, has not of course entered into force, but it was signed by both Spain and Canada, on 3 December 1996 and 4 December 1995 respectively. Article 1, paragraph 1 *(b)*, of the Convention defined conservation and management measures as *"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"*.

90. Thus once again we find that the definition is not confined to technical elements but also incorporates the very important element of *conformity with international law*, which constitutes the prerequisite for the legal characterization of conservation and management measures. In paragraph 70 the Judgment divorces the technical aspects from the element of conformity with public international law, dismissing the latter on the pretext that it raises the problem of the legality of such measures, which the Court cannot consider in the present phase. This reductionist approach is totally unjustified. The element of conformity does indeed raise the problem of the legality of the measures, but that is absolutely no reason for excluding it from the definition, at a time when a very substantial body of international instruments, including the 1995 United Nations Convention mentioned above, demonstrates that the international legislator recognizes such conservation and management measures — which are moreover referred to as *"international"* — in light of various factors, both technical and *legal*. The fact that the latter raise an issue of legality is totally irrelevant to whether or not they should be included in the definition, which here serves simply *to identify* the measures in question.

91. What is more, the Court's approach to this issue consists in a simple assertion — and this is undoubtedly the weakest point in its Judgment — that *"the authority from which such measures derive, the area affected by them, and the way in which they are to be enforced do not belong to the essential attributes intrinsic to the very concept of conservation and management measures"*. In this way the Court quietly disposes of the entire subject-matter of the dispute.

92. In emptying of all legal content a definition which it seeks nonetheless to present as a "legal" one, the Court appears to be saying that the Canadian measures are routine technical measures which are accepted and adopted worldwide. That is a serious assertion. For if this is what

they are, any State, whether coastal or not, in order to be able to act as and wherever it wishes, whether on the high seas or in areas under national jurisdiction, will merely have to satisfy the technical requirements which are identified in the Judgment (type of nets, regulation of catches, etc.). What will then be left of the freedom of the high seas? For, once the Court finds that it lacks jurisdiction, it will never have the opportunity to move on to the merits stage, the issue of legality. If there is any sphere of law in which the *ratione loci* aspect is of the greatest importance, it is the law of the sea. It is not the issue of legality as such that I seek to raise here; that would lay me open all too easily to the charge of pre-empting an examination of the merits. What concerns me rather is the *ratione materiae* aspect, that is to say, the definition of conservation and management measures.

93. The Judgment gives an incomplete and partial definition of conservation and management measures which is contradicted by the international practice of States in which it sought its basis. Nor does the Judgment take sufficient account of the new approach embodied in the *international* concept of "conservation and management measures", an approach which was already evident at the First United Nations Conference on the Law of the Sea and resulted in the Convention on Fishing and Conservation of the Living Resources of the High Seas; it was then formalized in the Montego Bay Convention, and had in fact been described as early as 1974 in the Court's Judgment in the fisheries case:

> "*It is one of the advances in maritime international law*, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the *needs of conservation for the benefit of all.*" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 31, para. 72; emphasis added.)

94. It is perfectly clear that this new approach could only be — and indeed has been — an international one; otherwise the chaos created by overfishing would have been replaced by chaos of a different kind — that produced by each State taking, as and wherever it thought fit, whatever conservation and management measures it wished. To limit this advance to a simple harmonization of the technical aspects of fishing, as the Judgment has done, is to ignore the entire development, both now and over the last two or three decades, in the law on conservation and management measures, a process *which gives judicial expression to a profound need on the part of States for clarification, harmonization and co-operation.* Such measures cannot therefore simply be reduced to any act done by a State with regard to its choice of conservation techniques, whilst ignoring the fact that these measures now have to be incorporated into an international network of rights and obligations which States have created for themselves. *Here, economic logic and legal logic have to combine*

— as indeed they do in all international instruments — in order to avoid the chaos both of uncontrolled overfishing and of illegal regulation. Compatibility with international law is an integral part of the international definition of conservation and management measures; it is *"built in"*. This is not to adjudicate on the merits or to make any ruling on responsibility; it is simply to state that, on a true interpretation of the expression "conservation and management measures", the reservation cannot be upheld.

95. Paragraph 70 of the Judgment sets out to give the definition to be found in "*international* law" of the concept of "conservation and management measures", since it begins with the words: "According to international law, . . .". But, strangely, it ends with a paragraph in which the Judgment removes from that definition — notwithstanding its claim to be a definition under *"international law"* — all references to the *legal* elements (such as the status or identity of the author of the measures or the nature of the maritime area affected by them), retaining only the *technical and scientific* aspects. *How could international law possibly supply such an incomplete definition, which, taken literally, would appear to authorize the violation of the most firmly established principle of this same international law, namely freedom of the high seas? I cannot be persuaded that I am touching here upon an issue going to the merits, that of legality. In reality I have stopped short of that, and would simply point out that, on the basis of the Judgment, international law is bent on a course of self-destruction in supplying a definition which allows it to be so directly violated. How is it possible to turn international law against itself in so flagrant a manner?*

96. It is this kind of approach which flaws the Judgment, including all those paragraphs in which the issue of legality is so conveniently dismissed, and especially paragraphs 54, 56, 79, 80, 85 and 87. Even confining myself to paragraph 79, I find regrettable the Court's assertion that "there is no rule of interpretation which requires that reservations be interpreted so as to cover only acts compatible with international law . . . [T]his is to confuse the legality of the acts with consent to jurisdiction . . .". That would be perfectly correct if interpretation alone had been involved. Here, though, it should not be the case that one *constituent* element of an international definition is interpreted to the exclusion of another, when an international legislator has made the latter a part of the definition. All these elements *are prerequisites* for the process of interpretation, which must look at them all, without exception.

97. It follows, therefore, that the Canadian measures relating to the high seas cannot be interpreted on the basis of Canada's own internal legal order — for this in effect is what the Judgment has done — since the definition of conservation and management measures which the Judgment claims to draw from international law has ultimately been reduced to a commonplace technical definition — the very same that underlies the Canadian legislation and its implementing rules — without any regard for respect of the principle of freedom of the high seas. On the basis of its

reservation as thus interpreted by the Judgment, Canada is protected against judicial scrutiny. In reality, however, conservation and management measures fall to be assessed solely by reference to international law. If this is so — and it cannot be otherwise — then the Court was bound to declare itself competent at this stage and to undertake an examination of the merits in order to determine whether the measures taken against the Spanish vessels were in fact conservation and management measures (see Article 79, paragraph 7, of the Rules of Court).

(Signed) Mohammed BEDJAOUI.