DISSENTING OPINION OF JUDGE RANJEVA

[Translation]

Summary — Risk of jeopardizing the optional clause system — Distortion of the subject-matter of the main dispute.

Subject-matter of the dispute — Judicial restatement of the subject of the dispute as submitted by Respondent constitutes an action ultra petita.

Lack of relevance of the case-law relied on by the Judgment — Interpretation of the subject of the dispute by reference to the act of seisin — Absence of legal grounds for restatement of the subject of the dispute submitted in the Application — Article 40, paragraph 1, of the Statute of the International Court of Justice — Obligation on the Court to respect the integrity of the petitum — *Claims on the merits and objections to jurisdiction — Legal impossibility of defining the final subject of the substantive dispute.*

Distinction between real dispute and arguments or purported submissions to be operated at the final phase of the proceedings — Difficulty of ruling on the causa petendi — *Preliminary proceedings and status of the subject of the dispute.*

Interpretation of the Canadian reservation — Historical background to the negotiations on the definition of "conservation and management measures" under the 1995 Agreement — Canada co-author of the first proposed amendment incorporating the reference to international law for the purpose of defining conservation and management measures — Acceptance and scope of the amendment co-sponsored by Canada — Analysis of the concept of "conservation and management measures" — Absence of any international practice inconsistent with the requirements of Article 1 (b) *of the 1995 Agreement.*

Twofold purpose of the reference in the definition of "conservation and management measures" to the 1982 Convention: legality element relevant both at merits stage and for purposes of definition in the preliminary phase — Role of law in the general legal definition of a concept — Reference to international law in the definition of terms used in a unilateral instrument — Dual nature of the unilateral act of reservation — Network of jurisdictional links between the parties to the optional clause — Acceptance when filing the Application of the conditions stipulated by the author of the reservation — Creation of conventional relations between Respondent and Applicant — International law as common frame of reference for the two litigating parties.

Question raised in the context of the preliminary dispute? Respondent's objection not specifically preliminary in character.

The esteem in which I hold the Court and my colleagues and the requirements of a sound administration of international justice have led me, to my great regret, to deliver a dissenting opinion, in which I give the reasons for my negative vote on the operative part of the Judgment.

1. I sincerely hope that the present Judgment by the Court will not be interpreted by commentators and readers as sounding the death-knell of the optional clause system under Article 36, paragraph 2, of the Statute

of the International Court of Justice. The approach adopted by the Judgment is open to criticism and could damage the integrity of the system of international jurisdiction, which is built on a consensual foundation.

2. *In the first place*, it would have been more appropriate in my opinion, as far as the subject of the dispute was concerned, to have omitted certain lengthy, autonomous arguments which have resulted in the nature of the subject-matter of the substantive dispute being changed: in effect, in place of the subject as it was defined by the Applicant, the Judgment has substituted a different subject, without the support of relevant case-law. To my mind, it mattered little whether the subject of the dispute was interpreted broadly as the Applicant wished, or narrowly as the Respondent contended; what needed to be determined at the preliminary stage was whether or not the dispute came within the terms of the reservation formulated in the declaration by the respondent Party.

3. *In the second place*, the respondent Party's interpretation of the reservation is plainly unacceptable in so far as, even for preliminary purposes, it confines its definition of "conservation and management measures" to the material aspect, excluding any reference to the international law component included in the definition of such measures in various relevant treaty instruments; the definition of "conservation and management measures" which is employed in the Judgment for purposes of the interpretation of the Canadian reservation lacks an effective basis. The Judgment invokes national practices, which are necessarily circumscribed by the 200-mile area of sovereign jurisdiction; on the other hand, it is unable to cite a single example of international practice inconsistent with the generally agreed definition of such measures and constituting an *opinio juris*.

I. Subject of the Dispute

4. Contrary to the reasoning of the Court in paragraphs 29 to 33, I consider that none of the case-law cited to justify a judicial restatement of the subject of the dispute as presented by the Applicant is relevant. The finding set out in paragraph 35 is without precedent in the Court's case-law: the Court has never declared itself competent to change the subject-matter of a dispute, and if it had ever sought to do so, such a decision would have been without legal foundation and *ultra petita*.

5. Although I consider this a subsidiary question for purposes of a decision on the present preliminary issue, I consider it my duty to explain why I am in disagreement, in view of the conclusions reached in the Judgment on this point.

1. Lack of Relevance of the Case-law Cited

6. The Judgment cites a number of previous decisions of the Court to justify its restatement of the subject of the dispute in relation to the sub-

ject of the substantive dispute as formulated by the Applicant. Analysis of the precedents relied on shows that the conclusion reached in the Judgment is open to question: there is no precedent which authorizes the Court to change the nature or terms of the subject as defined by the applicant; the Court has, according to the specific circumstances of individual cases, adjusted the parameters of the dispute, but it has never substituted a new subject for that submitted by the applicant in the substantive dispute. The Court has never before taken such a categorical stand as in paragraph 29 of the Judgment, where it states that: "the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant". To facilitate understanding of the present paragraph, I shall follow the order adopted by the Judgment.

(1) Territorial Dispute (Libyan Arab Jamahiriya/Chad)

7. The Court, contrary to what was stated in paragraph 29, was not seised of a Special Agreement *stricto sensu*. The two Parties "agreed . . . that the proceedings had in effect been instituted by two successive notifications of the Special Agreement constituted by the Accord-Cadre of 31 August 1989" (*I.C.J. Reports 1994,* p. 11, para. 8). However, it had been agreed between the two Parties to describe as *territorial* the dispute between them over the Aouzou strip. The respective claims of the Parties (concerning the size of the disputed area) were so divergent that the Court was obliged to define the area in dispute.

> "18. The Court has been seised of the present dispute between Libya and Chad by the notifications of the special agreement constituted by the Accord-Cadre of 31 August 1989 . . .The Accord-Cadre described the dispute between the Parties as 'their territorial dispute' but gave no further particularization of it, and it has become apparent from the Parties' pleadings and oral arguments that they disagree as to the nature of the dispute . . .
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> . . . . . .
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> 19. Thus Libya proceeds on the basis that there is no existing boundary, and asks the Court to determine one. Chad proceeds on the basis that there is an existing boundary, and asks the Court to declare what that boundary is. Libya considers that the case concerns a dispute regarding attribution of territory, while in Chad's view it concerns a dispute over the location of a boundary." (*I.C.J. Reports 1994,* pp. 14-15.)

In reality, however, there was no substantial difference between the Parties on the merits. Indeed, whether the dispute concerned the location of the boundary or whether it concerned attribution of territory, the real issue was to establish the precise limits of the territory of each of the two States. The Court acknowledged in principle that that was the case.

(2) Nuclear Tests (New Zealand *v.* France)

8. In the *Nuclear Tests* cases, the Court held that it was entitled to interpret the submissions of the Parties in order to ascertain the true subject of the dispute and the object and purpose of the claim, taking into account not only the submissions of the Applicant, but the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention and public statements made on behalf of the applicant Government. "If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected."[1] The Court also made it clear that it had the power

> "to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, 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"[2].

9. In the first Judgment, *Australia* v. *France*, the Court's findings are to be understood in the light of the following two points:

— as France failed to appear in the proceedings, the Court of its own motion and on the basis of Article 53, paragraph 2, of its Statute, had to satisfy itself that the submissions — that is to say the statements of what the Applicant was asking it to decide — were correct in law and in fact. There was an element of doubt in this regard, because the submissions in the Application contained two separate paragraphs, the second of which sought a declaration on the law;
— it was on the basis of the persistent conduct and consistent statements of Australia, and nothing else, that the Court defined the subject-matter of the dispute, distinguishing between the Applicant's claims and the elements of the submission: contentions, arguments and reasons.

10. In the second Judgment, *New Zealand* v. *France,* the terms of the problem are apparently somewhat different, taking into account the specific nature of New Zealand's submissions. The Judgment set out to analyse the entire subject-matter of the dispute, making a distinction between the origin of the dispute and the original and ultimate objective in the following passage:

> "However, it is clear that the *fons et origo* of the dispute was the

[1] *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 263, para. 30, and *Nuclear Tests (New Zealand* v. *France)*, p. 467, para. 31.
[2] *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 262, para. 29, and *Nuclear Tests (New Zealand* v. *France)*, pp. 466-467, para. 30.

> atmospheric nuclear tests conducted by France in the South Pacific region, and that the *original and ultimate objective* of the Applicant was and *has remained* to obtain a termination of those tests." (*I.C.J. Reports 1974,* p. 467, para. 31; emphasis added.)

It is thus on the basis of the continuity and consistency of the attitude and claims of the applicant Party that the Court founded its interpretation of the subject of the dispute, without, however, going so far as to restate the original subject. The Judgment interpreted the submissions of New Zealand as formulated in the Application, confirmed by the constant and consistent conduct of the Applicant and finalized in the submissions.

(3) Right of Passage over Indian Territory

11. In this case, the Court, in order to avoid being misled by a passage in the Application entitled "Subject of the Dispute", which gave a restrictive description of the subject-matter of the dispute, defined the subject-matter by recapitulating the various claims already formulated in the Application, the oral arguments and the submissions of the Parties.

(4) Maritime Delimitation and Territorial Questions between Qatar and Bahrain

12. By agreement between the Parties, the subject of the dispute had been defined in accordance with the "Bahraini" formula; Qatar, which had seised the Court by application, presenting only its own claims, was not thereby deprived of its procedural rights, notwithstanding that it had failed to submit the dispute in its entirety; in an interlocutory Judgment, the Parties were requested to present the subject of the dispute in its entirety. In that case, the Court confirmed that the dispute submitted by Qatar on 30 November 1994 was in exact conformity with the previous agreements and decisions.

> "As a consequence, it appears that the form of words used by Qatar accurately described the subject of the dispute. In the circumstances, the Court, while regretting that no agreement could be reached between the Parties as to how it should be presented, concludes that it is now seised of the whole of the dispute, and that the Application of Qatar is admissible." (*I.C.J. Reports 1995,* p. 25, para. 48.)

It is thus clear, on the one hand, that the jurisprudence cited deals with the interpretation of the subject of the dispute by reference to the terms used in the act of seisin and, on the other hand, that such interpretation has consisted in defining that subject in its entirety, without thereby restating its terms.

2. Absence of Legal Grounds for a Restatement by the Court of the Subject of the Dispute Submitted to the Court by the Applicant

Neither Article 40, paragraph 1, of the Statute nor the incidental nature of preliminary proceedings authorizes the Court to restate the subject of the dispute.

(1) The provisions of Article 40, paragraph 1, are unambiguous

13. *(a)* The indication of the subject of the dispute in the document instituting proceedings is a direct requirement under the Statute. This requirement is independent of the means used to initiate the proceedings. The most cogent interpretation of the notion of the subject of the dispute is provided in two passages of the work by Stauffenberg, where he deals with the notion of the subject of the dispute in relation to the text of Article 40 of the Statute of the Permanent Court of International Justice:

> "This application determines the subject of the dispute. It was felt that the word 'subject', a legal term, should be used as being more precise and more useful, from the point of view of the *res judicata*, than the term 'nature' used in Article 30 of the five-Power plan" (Report of the Advisory Committee of Jurists, p. 734, and *Statut et Règlement de la Cour permanente de Justice internationale — éléments d'interprétation*, Carl Heymanns Verlag, Berlin 1934, p. 294);
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> "at the preliminary session, the deletion of the words 'an indication of the claim' was proposed. They were deemed either redundant, since reference was already made to an indication of the subject of the dispute, or erroneous, since there were cases in which there was no claim but simply a request for a statement of the law" (*Statut et Règlement de la Cour permanente de Justice internationale — éléments d'interprétation, op. cit.*, p. 301).

The subject of the dispute is closely bound up with the "claim", the *petitum*, that is to say, the judicial recognition of a substantive right claimed by the applicant party in a unilateral application.

14. *(b)* When proceedings are instituted by application, it is the applicant who has the principal responsibility for defining the original subject of the dispute. The *petitum* is formally set out in the application and constitutes the only description of the subject of the dispute available to the Court. As long as the respondent party has not itself formulated its claims and its own *petita* on the merits, either in a counter-memorial (Art. 43, para. 2, of the Statute) or by way of counter-claim (Art. 80, Rules of Court), it is with the subject of the dispute as described in the application that the Court must deal. Until it makes a definitive determi-

nation of the subject of the dispute, which it will do after the respondent has filed its *petita*, the Court is bound to accept that it cannot change the original subject of the substantive dispute: the Court can rule only on the basis of that definition and may not alter its terms or, in particular, violate the integrity of the *petitum*. In the exercise of its power to clarify implicit claims, it is not entitled to modify the *petitum* of the applicant. At the very most, it can find that there is no dispute on the subject as set out in the application, or on certain aspects thereof; but in stating that the real dispute is that presented in paragraph 35 of the Judgment, the Court has altered the *petitum* of the Applicant and gone outside the framework of the express terms of the Application, without attempting to justify its reasoning on the basis of the actual actions and conduct of the applicant Party. It is thus on the basis of an incomplete, and therefore inaccurate, interpretation of the above-mentioned jurisprudence that the Court reached the unacceptable conclusion that "more generally, [it could not] regard itself as bound by the claims of the Applicant" (see paragraph 29).

(2) It is the incidental character of preliminary proceedings on jurisdiction and admissibility which, through the operation of paragraphs 5 and 6 of Article 79 of the Rules of Court, determines the scope and extent of the relevant facts at the current stage of the proceedings

15. The Respondent relies upon the acts against the *Estai* as arguments and grounds to establish the Court's lack of jurisdiction and the inadmissibility of the Spanish Application. Those acts constitute neither claims nor submissions on the merits; they are invoked in order to have the substantive claim dismissed without consideration of the merits of the dispute, by means of a challenge to the Court's power to adjudicate upon the dispute submitted to it.

16. Not having before it the Respondent's *petita* on the merits, or its submissions in defence, the Court cannot, at this stage, make a final determination as to the subject of the dispute. At the present stage of the proceedings, it is the combined effect of the substantive claim and the Respondent's objection which determines the subject of the preliminary dispute; the latter dispute is both distinct from and incidental to the substantive dispute; this determination of the subject-matter is carried out solely for the purpose of settling the preliminary dispute pursuant to Article 79, paragraph 7, of the Rules of Court. Here, the Court has before it only one claim, that of the Applicant as expressed in the initial Application. This statement of the subject of the substantive dispute remains binding upon the Court, which cannot, without affecting the substance of the dispute, restate the *petitum* of the Applicant. In this case, however, the Court has redefined the subject, citing, in paragraph 32, a distinction between "the [real] dispute . . . and arguments used by the parties to sustain their respective submissions on the dispute".

(3) Real dispute and arguments used to sustain the Parties' submissions (paragraph 32 of the Judgment)

17. On analysis, it is clear that the argument used in paragraph 32 to justify the distinction between the real dispute and arguments used to sustain submissions lacks probative force, having regard to the practice of the Court and to the nature of the cause of action.

18. *(a)* It has been the consistent practice of the Court that the distinction between the real dispute and arguments, or between submissions and purported submissions, is made at the final stage of the proceedings, during consideration of the merits of the dispute or at the time of a preliminary decision to terminate the proceedings. This practice is readily explicable on grounds of common sense and procedural considerations. Obviously, one cannot speak of a dispute, in the true sense of the term, as long as only the unilateral claims on the merits of one of the parties, the Applicant in this instance, have been placed before the Court. Moreover, it is only once the subject of the dispute has been conclusively and fully defined that it is possible to extract, from the mass or totality of contested issues, the precise subject-matter of the litigation: the points of fact and law submitted to the Court for decision; in effect, it is on the basis of the subject of the dispute that the Court must determine the precise points upon which it may adjudicate. In the two *Nuclear Tests* cases of 1974, the Court had to rule first on a question essentially preliminary in character: whether or not a dispute existed. A decision that there was no dispute would have made a ruling on jurisdiction pointless. The Court distinguished true submissions from purported submissions by examining the logical nexus between the Parties' various formal submissions. In those 1974 cases, in order to determine which of the submissions was not a true submission, the Court had to consider the request for a declaratory judgment in light of the subject of the substantive claim, which was the cessation of atmospheric nuclear tests; it took the view that, in the circumstances of the case, that claim had been met. Having regard to the substance of the claim, the request for a declaratory judgment was rejected.

19. *(b)* In its exposition, in paragraph 34, of the relationship between the factual and legal elements of the case, the Judgment stated what it considered to be the cause or causes of Spain's claim. On closer analysis, however, the problem can be reduced to the following question: in order to give a ruling on jurisdiction or admissibility, should consideration be given to the reasons for the applicant's claim? In reality, it is difficult to determine precisely which of all the aforesaid elements would be capable of supporting the claim brought by the applicant party, that is to say, the *causa petendi*, when the adversarial proceedings on the merits have not even commenced. This logical and procedural constraint explains why possible causal links are discussed only in the context of the formal submissions, these being the only definite data expressing the basic thinking of the parties which can be known with certainty. In proceeding, at this

preliminary stage of the case, definitively to characterize the contentious events and acts (see paragraph 34) in a manner at variance with that put forward by the applicant Party in its Application, the Court changed the Applicant's *petitum*. That is unacceptable.

20. At the close of the preliminary proceedings, the situation with regard to the subject of the dispute could be described in the following terms. The Court had before it, on the one hand, the major component of the subject-matter of the dispute as defined in the claim set out in the Application and, on the other hand, a set of facts and actions constituted by "diplomatic exchanges, public statements and other pertinent evidence" and relied on to support an objection by the respondent Party (see paragraph 31 of the Judgment). On the basis of this information, the Court, in its Judgment, reached a finding which encompassed the dispute in its entirety. However, as the final outcome of the proceedings in this case was the definitive rejection of Spain's claim, the Judgment must be considered to have examined the claim in terms of all possible characterizations and hypotheses. This is not what it did here; instead, the Court restated the subject-matter of the dispute *proprio motu*, without having completed its preliminary examination of all possible hypotheses.

It follows that, in restating the subject of the dispute by comparison with that set out in the Application, the Court ruled *ultra petita*.

21. In concluding this first section, I should like to draw attention to the risks inherent in a decision of this kind:

(1) abandonment of the Court as a judicial forum, since there would be no guarantee for States against the risk of a restatement, at the preliminary stage, of the subject of disputes submitted by them to the Court;
(2) uncertainty as to the consequences for the rights of the litigating parties: what, for example, is the measure of the *res judicata* in this case?

II. Interpretation of the Canadian Reservation

In interpreting the Canadian reservation, the Court *proprio motu* defined the Canadian legislative measures as measures for the protection and management of fisheries resources. The real issue to be determined is whether that definition is adequate from the standpoint of international law.

1. Method of Interpretation of the Definition of "Conservation and Management Measures"

22. The method followed by the Court in interpreting the reservation clause was to give priority to the intention of Canada, which is perfectly proper provided that intention is placed in the context of the system of

optional declarations of acceptance of compulsory jurisdiction. In order to do that, the Court accepted as correct in law the definition and interpretation presented by the author of the reservation, notwithstanding the various other legal instruments to which the two litigating States are *inter alia* parties. At this stage in the proceedings, the task of the Court was not to establish a prima facie definition of conservation measures, but to ascertain whether all the conditions for what Canada characterizes as conservation and management measures are satisfied.

23. Paragraph 70 of the Judgment restricts the definition of "conservation and management measures" to their technical and factual dimension, resulting in the Court giving its own definition, one at variance with that expressly provided in the only two directly relevant international instruments: the United Nations Agreement on Straddling Stocks of 1995 and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. This approach is unacceptable: the Court did not confine itself to interpreting positive law, but created law.

2. *International Instruments Containing a Definition of Conservation and Management Measures*

(1) Historical background to the 1995 Straddling Stocks Agreement

24. The relevant international provisions are constituted by Article 1

— of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, hereinafter "the United Nations Straddling Stocks Agreement of 1995";

— and of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, hereinafter "the FAO Fishing Vessels Agreement of 1993".

Article 1 of each of these instruments, which contains definitions, provides respectively as follows:

(a) United Nations Straddling Stocks Agreement of 1995:

> "'conservation and management measures' means 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".

(b) FAO Fishing Vessels Agreement of 1993:

> "'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 . . . organizations . . . or by treaties or other international agreements".

25. A comparative examination of these two provisions is not without interest in several respects. *In the first place,* the decisive influence of the 1993 FAO Agreement on the Straddling Stocks Agreement when it came to deciding whether to include the legal component in the definition. The relevant law, as reflected in the 1982 Montego Bay Convention and in each individual agreement containing a definition, is an intrinsic part of the definition. *Secondly*, both agreements are treaty instruments for the implementation of the 1982 Convention on the Law of the Sea. Finally, although neither instrument was yet in force at the date of the present Judgment, both Canada and Spain are parties to the Straddling Stocks Agreement, having signed it on 4 December 1995 and 3 December 1996 respectively.

26. A review of the drafting history of Article 1 *(b)* of the Straddling Stocks Agreement reveals the importance of the role played by Canada in securing the express recognition, in the future agreement, of international law as a component of the legal definition of "conservation and management measures". On 14 July 1993, Canada was co-author of the first proposed amendment, which provided for the inclusion of international law as a component of the definition of "conservation and management measures". The initial version of the draft Convention (A/CONF.164/L.22), presented at the fourth session, contained no provision defining "conservation and management measures". It was on 14 July 1993, in proposal A/CONF.164/L.11, that the delegations of Argentina, Canada, Chile, Iceland and New Zealand introduced the reference to international law for purposes of the definition of "conservation and management measures", in the following terms:

> "*(a)* 'international conservation and management measures' means measures to conserve or manage one or more straddling fish stocks or highly migratory fish stocks on the high seas that are adopted and applied in accordance with the principles of international law as reflected in the United Nations Convention on the Law of the Sea and, in particular, such measures adopted or approved by regional or subregional fisheries conservation organizations or under regional fisheries conservation arrangements".

The joint proposed amendment did not receive sufficient support to be immediately included in the revised version of the draft; this reluctance on the part of the negotiating conference explains why Japan pushed to have the issue reopened, in March 1995, with the following formal amendment:

> "Article 1, paragraph 1.
>
> Add the following subparagraphs to the Chairman's text:
>
> *(c)* 'international conservation and management measures' means measures to conserve or manage one or more species of straddling fish stock(s) and highly migratory fish stock(s) that are adopted and applied in accordance with the relevant rules of international law as reflected in the Convention. Such measures may be adopted either by global, subregional or regional fisheries management organizations or arrangements, subject to the rights and obligations of their members".
>
> (This subparagraph was drafted drawing on Article 1, paragraph *(b)* of the FAO Compliance Agreement)." (Mimeographed text with no symbol.)

27. Document A/CONF.164/CRP.6 dated 6 April 1995 includes for the first time a positive-law definition of conservation and management measures in Article 1 of the revised draft:

> "*(a)* 'conservation and management measures' means 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".

The final version followed the wording of the revised text (doc. A/CONF.164/22/Rev.1), subject to a minor amendment, and ran as follows:

> "*(a)* 'conservation and management measures' means measures to conserve or 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".

28. Following this historical review, two points are worthy of note. *First*, Canada's role in securing inclusion of the reference to international law in the definition of the concept of conservation and management measures; this was no mere standard clause, for 22 months had elapsed between formal submission of the proposal and its incorporation in the

draft agreement. *Secondly*, the notion of "international measures" of conservation and management on the "high seas" had progressively retreated from view as an autonomous concept; it was not included in Japan's proposed amendment or in the final and definitive versions of the text of the Agreement; once reference was made to the 1982 Convention, it had effectively become redundant.

(2) Analysis of the concept of conservation and management measures, Article 1 (b) *of the United Nations Agreement on Straddling Stocks*

29. In formal terms, the fact that both Parties to the present dispute signed this instrument is evidence of their acceptance in principle of its provisions, at least as regards the legal definitions. Thus, the definition contained in Article 1 of the Straddling Stocks Agreement represents a common, reasoned expression of the current state of the provisions considered to be most widely acceptable to subjects of international law. Canada's own interpretation of the concept of "conservation and management measures", dating back to July 1993, regards the reference to international law as an intrinsic part of the definition; moreover, this Canadian interpretation was given well before the events relating to the present dispute: the amendment to the Canadian Coastal Fisheries Protection Act (12 May 1994), the incidents involving the *Estai* (9 March 1995), and indeed the deposit of the new declaration of acceptance of compulsory jurisdiction (10 May 1994). Contrary to what might have been expected from Canada, in view of the sequence of events in connection with the "halibut war", there was no sign of a change in the attitude of the Respondent in this case during the negotiations on the Straddling Stocks Agreement as far as the definition of "conservation and management measures" was concerned.

30. Notwithstanding what is stated in the Judgment, there is no evidence of any contrary international State practice or international treaty that invalidates the definition given in the 1995 Straddling Stocks Agreement, which was itself based on that in the 1993 FAO Agreement. In support of its reasoning, the Judgment cites provisions of national or European law which are held to define conservation and management measures exclusively in material and factual terms. These examples are not relevant, for they provide an insufficient basis for the characterization of the measures concerned in terms of international law. They are simply elements of fact, which must be treated as such.

On the other hand, no *opinio juris* based on an exclusively material definition of conservation and management measures was either put forward by the Parties or identified by the Court. In view of this deficiency, it is necessary to undertake a detailed analysis of the definition contained in Article 1 of the 1995 Agreement.

3. Analysis of Article 1 (b) *of the 1995 Agreement*

31. An analysis of this definition, which is cited in the Judgment, reveals the two components of the concept: a descriptive element and a reference to the rules of international law.

Confronted with a composite definition, the Judgment deliberately opted for a characterization of conservation and management measures based solely on the descriptive element, excluding the second component. This approach is criticizable and unacceptable, in that the only justification for it put forward in the Judgment is a statement of the risks inherent in a reference to the legal component: the risk of a decision *ultra petita*. The Court considers that a preliminary decision involving the international law aspect would impinge on the merits.

32. I have no difficulty in agreeing with the majority of the Court that no ruling on legality is required at the present stage. However, my disagreement is over the question whether an explanation of the relationship between the two components of the definition was needed in order to justify the Court's decision. The Judgment, citing the factual nature of conservation and management measures, takes the view that it was not. This approach is unacceptable, for it ignores the second element of the definition, which has to be examined in terms both of its purpose and of its scope, whereas the Court considered only the latter. Notwithstanding any question as to the legality of the measures, the Court had a duty to state whether the legal component is intrinsic to the definition or merely an operative element. In other words, if the definition in Article 1 is deprived of its legal component, do the measures concerned remain conservation and management measures in the juridical sense of the term? Replies to this question are to be found both in domestic and in international law.

4. The Role of Law in Legal Definition

33. Let us consider the Swiss law of contract: if we examine the source of individual contractual obligations, we find that, in the absence of special legislative régimes, the determining factor in identifying the origin of the relevant rules "is what the parties *have validly agreed*". In order to determine the moment at which they become bound and whether their agreement is valid, recourse must be had to the principles embodied in the law of obligations (P. Tercier, *Les contrats spéciaux*, 2nd ed., 1995, p. 3, para. 19). When the Swiss law of contract contemplates "placing a legal characterization upon the facts as found and ascertaining whether the parties have sufficiently manifested their intention", it considers this to be a matter pertaining to the law (see S. Cyboz and Gillieron, *Code civil suisse et code des obligations annotés*, C.O., 1993, p. 1).

It follows that the fact that the parties are *ad idem* with regard to the normative element, that is, the subject of their reciprocal obligations, is

not in itself sufficient to characterize this mutual and concordant manifestation of a common intent. That intent must be tested in the crucible of the law, in order to be certain exactly what that subject-matter is and whether the parties are of one mind in every respect.

34. In treaty law, before an intended agreement between States can be characterized as an international treaty, it must by definition incorporate the element of international law. It is well known that, without that reference to international law, concurrence of intentions does not constitute a treaty within the meaning of the law of treaties. This subordination to international law is not necessarily exclusive in character, and at the same time implies a distinction between the notion of a sanction and the existence of a rule.

35. At this stage, the fact that a treaty is subject to international law precludes any notion of sanction or, more precisely, any issue of compatibility with that law; the question of legality under international law does not arise. The problem is to determine whether or not the contracting parties intend to make their agreement subject to international law; if the reply is affirmative, then it is with a treaty that we are dealing. However, the fact that a treaty is subject to international law does not mean that it is exclusively subject to such law. Thus we are dealing here with an area of mixed jurisdiction, where international law and domestic law co-exist and are applied in their respective spheres. Canada was perfectly entitled to enact domestic maritime legislation for the conservation and management of fisheries resources. However, from the standpoint of international law, the problem takes on a slightly different aspect.

36. The reference to international law is not expressed *in general terms,* as in a standard clause analogous to those found in private contracts. It is a restrictive or "qualified" reference. The 1982 Convention, by its universal character, establishes the legal framework for all activity relating to the law of the sea. It is thus common practice in a United Nations context to interpret any rule or instrument of international law concerned with the law of the sea as necessarily and particularly envisaging the 1982 Convention and the specific agreement in question.

37. The reference to the Montego Bay Convention for purposes of the definition of legal concepts means not only that the normative aspects of definition have to be taken into account, but also that consideration of the territorial aspect of the law governing maritime areas is required. The latter element is essential to an understanding of the general scheme of the Convention, in view of the significance attached to the "package" concept at the Third United Nations Conference on the Law of the Sea. It follows that, in the Straddling Stocks Agreement, only conservation and management measures subject to and in conformity with the rules of the 1982 Convention may be characterized as such — irrespective of their legality — although it is has to be admitted that the distinction between the definition of such measures in international law and their legality is an extremely fine one.

38. We may accordingly conclude that in the above examples — drawn admittedly from legal relationships based on contract or treaty — reference to law is an intrinsic requirement for the characterization of a legal instrument.

5. The Role of Law in Legal Definition in the Case of a Unilateral Instrument

39. In the present case, the problem derives from the unilateral nature of the reservation in the declaration; the Judgment concludes that in these circumstances the intention of the author of the declaration is paramount and, hence, that substantial, not to say exclusive, importance should be accorded to the respondent Party's domestic legislation. As a result, the definition is restricted to its material aspect, even for purposes of characterization of the facts in international law.

From the standpoint of international law, domestic legislation is of the same juridical nature as the facts submitted for consideration by the international forum, which is bound by the law of the parties. It was therefore necessary for the Court to establish the pertinent facts with precision for the purpose of settling the preliminary dispute; but it was not enough to consider that aspect alone, for this was to misconstrue the unilateral nature of a reservation to compulsory jurisdiction. The reservation is unilateral in origin but international in its effects, and in consequence pertains both to domestic law, as the Judgment sufficiently demonstrates, and also to international law, an issue which the Judgment avoids resolving or even contemplating; and that is unacceptable.

40. A declaration to which a reservation is attached, while perfectly valid under the Court's Statute — as is the Canadian declaration in this case — cannot have the effect of conferring upon the author of the reservation sole responsibility for determining whether the condition for the Court's exercise of its jurisdiction is met. The provisions of Article 36, paragraph 6, prohibit the Court from affording one of the parties unfettered discretion to interpret a declaration made by that party in the free exercise of its discretion.

In endorsing a unilateral interpretation of the reservation and espousing a material definition of conservation and management measures, the Court has failed to appreciate the nature of the network of relationships constituted by the various declarations of acceptance under Article 36, paragraph 2, of the Statute. The relations between the litigating parties come into being at the time when the conditions formulated by the respondent — including any reservation — are accepted by the applicant when it files its application. From that point in time, we are no longer dealing with a single, unilateral intention, that of the respondent, but with the common intention of the two parties, as formed at the moment when the intention of the author of the reservation meets that of the applicant State, an event which creates the jurisdictional link between the litigating parties. Consequently, when faced with a common intent con-

cealing an underlying divergence of views with regard to the meaning of conservation and management measures, the Court cannot lightly lay aside the traditional rules for the interpretation of treaties.

41. A common intent is not, however, in itself sufficient to create legal obligations. This would be the case where the parties to an agreement did not intend to establish a mutual legal relationship and sought to exclude their common intent from the area governed by the law. For purposes of legal characterization, how can the existence of a common intent as to the generally accepted meaning of a particular concept be established, otherwise than by reference to the accepted means of expression of international *opinio juris* — international law? Thus, a common intent can have effectively been formed only if each party has shaped its consent to fit the definition of conservation and management measures in international law. Consequently, it is by reference to its definition in international law that this notion must be interpreted for the purpose of settling the preliminary dispute in this case. That definition comprises two elements, one *ratione materiae*, the other *ratione loci*.

The nature of the issue would have been different if the Canadian reservation had provided for the exclusive competence of the author of the declaration to interpret international law, but there is no such provision. It is accordingly for the Court to define the conservation and management measures in question on the basis of international law.

However, the Court cannot answer the fundamental question raised by the preliminary dispute (Is the dispute presented by the Applicant in its Application covered by the terms of the Respondent's declaration and reservation?) until it has examined the merits of the dispute. Thus it is necessary to examine the content of the measures and the practice of States in order to ascertain whether these were conservation and management measures within the meaning of the 1982 Convention. It follows that the objection does not possess an exclusively preliminary character. In answering the above question in the affirmative, the Judgment accepts the hypothetical claims on the merits of a respondent which seeks immunity for the measures it takes and the acts it performs, irrespective of their legality.

In conclusion, I consider that:

(1) the passages in the Judgment concerning the subject of the dispute have no direct connection with the question with which it is for the Court to deal at this preliminary stage of the proceedings;
(2) Canada's objection does not possess an exclusively preliminary character and should be joined to the merits.

(Signed) Raymond RANJEVA.