DISSENTING OPINION OF JUDGE TORRES BERNÁRDEZ

[Translation]

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INTRODUCTION

The differences of view between the majority and myself are so wide that to say that I dissociate myself from the Judgment now handed down by the Court is something of an understatement. Hence the length of this dissenting opinion, in which I have seen it as my duty to set out, in the necessary detail, my views on the various issues of law and fact which, in my opinion, arise in the present preliminary incidental proceedings on jurisdiction. I find that either these issues are not dealt with at all in the Judgment or the answers given are not, in my view, well founded, given the subject of the dispute submitted by Spain, the law applicable to the interpretation and application of the Canadian declaration of acceptance of the compulsory jurisdiction of the Court, and other relevant circumstances.

CHAPTER I. THE UNUSUAL PROCEDURE

1. The Application instituting proceedings filed by Spain against Canada on 28 March 1995 founds the jurisdiction of the Court in this case on Article 36, paragraph 2, of the Court's Statute, both countries being "declarant States" for the purposes of the optional clause system, Spain having deposited its declaration on 15 October 1990, Canada on 10 May 1994. The status of declarant State of the two Parties is not in question in the present proceedings, as is sometimes the case. For example, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, the existence or the validity of Nicaragua's declaration was at the very heart of the discussion on jurisdiction. Nothing of the kind arises in the present case.

2. Nevertheless, the Respondent's initial step was to object to the Spanish Application by contending in its letter of 21 April 1995 that the Court manifestly lacked jurisdiction. To invoke *in limine* the Court's manifest lack of jurisdiction as between declarant States under the optional clause system is an attitude which cannot, and should not, go unremarked, inasmuch as it represents a challenge within that system to the *"compétence de la compétence"* assigned to the Court by Article 36, paragraph 6, of the Statute and by international law.

3. Every State may choose whether or not to be a declarant State in accordance with Article 36, paragraph 2, of the Statute, but no declarant State is entitled to accept the compulsory jurisdiction of the Court with the mental reservation that, when the time comes, it may unilaterally exclude the *"compétence de la compétence"* of the Court. In any case the Canadian declaration does not do this. On the contrary, it contains a reservation of national jurisdiction the meaning of which must be interpreted objectively rather than subjectively. It follows that allegations of manifest lack of jurisdiction (which historically have their origin in cases

coming under Article 53 of the Statute) are out of place and to be condemned, since they are incompatible with the principles of good faith and mutual trust which govern relations between declarant States under the optional clause system.

4. What a respondent declarant State is supposed to do, if it objects *in limine* to an application by another declarant State, is to file a formal preliminary objection, under Article 79 of the Rules of Court, setting out the facts and the law on which that objection is based. This preliminary objection is the "missing link" in the present proceedings and the lack of it has had regrettable procedural consequences in both the written and the oral phases of the proceedings.

5. Canada's initial position on the issue of manifest lack of jurisdiction was modified as a result of the agreement reached between the Parties at a meeting of the President of the Court with their representatives on 27 April 1995, as is explained in the President's Order of 2 May 1995; it was that Order which opened the present incidental phase. Canada has thus accepted that it is for the Court, by virtue of Article 36, paragraph 6, of the Statute, to rule on the jurisdictional objection raised by it. The Canadian Counter-Memorial and oral pleadings also confirmed this.

6. The Order of 2 May 1995 states that "it was agreed that the question of the jurisdiction of the Court in this case should be separately determined before any proceedings on the merits", and that "at that meeting agreement was also reached on time-limits for the filing of written pleadings on that question". Taking into account that agreement, the Order accordingly fixed time-limits for the filing of a Memorial by Spain and a Counter-Memorial by Canada on the question of the Court's jurisdiction.

7. It is therefore clear that the Applicant, Spain, gave its agreement to the sequence of submission for the written pleadings fixed by the Order of 2 May 1995. However, by letter of 1 May 1995, transmitted to the Registry under cover of a letter of 3 May 1995 from the Ambassador of Spain to the Netherlands, the Agent of Spain, without seeking to re-open the agreed sequence for the filing of the written pleadings, proposed that Canada should be invited by the Court to submit in writing, no later than a specified date, a summary statement containing indications in general terms of the point or points on which Canada would rely in its contentions that the Court is without jurisdiction in this case or that the subject-matter of the Application is inadmissible. In support of that proposal, the letter of the Agent of Spain indicated that, otherwise,

> "maintenance of the equality of the Parties [would] be impossible and it might prove difficult to complete an orderly exposition of the views of the Parties in order to assist the Court in its duty to decide its jurisdiction under Article 36, paragraph 6, of the Statute".

In other words, the Agent of Spain proposed a procedure which *mutatis mutandis* offered certain analogies with the procedure subsequently adopted in the Court's Order in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case in regard to the documents alleged by Bahrain to be forgeries.

8. By letter of 15 May 1995, transmitted to the Registry under cover of a letter of 17 May 1995 from the Ambassador of Canada to the Netherlands, the Agent of Canada objected to the above proposal by Spain in the following terms:

> "This Order [of 2 May 1995] reflects accurately the Agreement on the sequence, filing dates and subject-matter of the written proceedings reached by the two Parties and the President of the Court at their meeting of 27 April 1995. The Spanish proposal is not acceptable to Canada. We believe that the procedure established in the Order should be respected."

In that letter the Agent of Canada again reverts to the manifest lack of jurisdiction of the Court "for reasons indicated" in the letter of 21 April 1995; he observes that the procedure agreed upon and set out in the Order of 2 May 1995 reflects "the principle that jurisdiction in the International Court of Justice cannot be presumed, but rather depends upon the consent of both Parties". He ends with a comment on questions of admissibility, pointing out that the Order of 2 May 1995 refers exclusively to the question of jurisdiction, and that accordingly

> "issues that do not involve questions of jurisdiction are not to be addressed at this time. It is understood that the Parties retain the right to raise questions of admissibility at an appropriate stage."

9. Having failed to get its proposal accepted, Spain prepared its Memorial without knowledge of the considerations of fact and law supporting Canada's objection to the Court's jurisdiction. All that it had at its disposal was Canada's letter of 21 April 1995 (one page), in which the Respondent stated that the Court manifestly lacked jurisdiction, quoting the terms of subparagraph *(d)* of paragraph 2 of the reservation to its declaration of 10 May 1994. The Spanish Memorial therefore proceeded on the basis of suppositions with regard to the grounds of Canada's objection, whereas, for it, applicant State, the Canadian declaration of 10 May 1994 did not raise an issue of jurisdiction, given its terms and the subject-matter of the dispute submitted to the Court by the Spanish Application. In its Memorial Spain was also obliged, in light of the concluding sentence of the above-mentioned letter of 15 May 1995 from the Agent of Canada, to deal with possible questions that might be raised with regard to the admissibility of the Application. By contrast, Canada was able to prepare its Counter-Memorial whist having available to it two formal procedural instruments filed by Spain, namely the Application and the Memorial on jurisdiction.

10. This removes much of the force from certain comments in Canada's Counter-Memorial, which, moreover, pretends ignorance of the subject and nature of the dispute submitted by Spain. It is not logical that Canada's Counter-Memorial on jurisdiction should contain no chapter or section on "the subject of the dispute", given that the Respondent's contention that the Court has no jurisdiction to entertain the dispute is based on a reservation contained in its declaration of 10 May 1994 which is formulated by reference to a specific category of disputes. Instead, Chapter I of Canada's Counter-Memorial on jurisdiction, entitled "Factual and Historical Background", deals with the conservation crisis in respect of fisheries stocks in the northwest Atlantic. The proper place for such considerations would be in a counter-claim or as a defence on the merits inasmuch as they might serve to establish some sort of state of necessity in the face of Spain's allegations of unlawful international acts committed against it by Canada but, in themselves, they are of no relevance to the issue of the definition of the subject of the dispute submitted to the Court by Spain's Application of 28 March 1995.

11. Furthermore, in its Counter-Memorial, Canada raised a new objection founded on admissibility ("mootness" according to the Court's very latest terminology), of which there was no mention either in its letter of 21 April 1995, or in the President's Order of 2 May 1995, or in Canada's letter of 15 May 1995. Thus Canada devoted an entire chapter of its Counter-Memorial, Chapter IV, to "drawing the attention" of the Court to the contention that the dispute had been settled since the filing of the Spanish Application on the ground that it had become devoid of purpose as a result of the agreement concluded on 20 April 1995 between Canada and the European Union. This is confirmation, if confirmation were needed, that Canada has constantly sought to redefine the subject of the dispute notwithstanding its position as Respondent in the proceedings.

12. Canada subsequently opposed Spain's request for a second round of written pleadings (Reply and Rejoinder). And the Court's decision (Order of 8 May 1996) not to order a second round of written pleadings did nothing to make good these flaws in the operation of the adversarial principle at the written stage.

13. It was therefore necessary to await the oral stage before the Parties' respective positions could be properly compared, and the beneficial effects of the adversarial principle on the conduct of the proceedings could thus make themselves fully felt. However, Article 43 of the Court's Statute requires that this should occur at both the oral and the written stage of the proceedings.

14. Thus it was only at the oral pleadings stage, which took place in June 1998, that Spain was able to reply to the Respondent's arguments of fact and law concerning jurisdiction. And what then was Canada's reaction? To complain that the manner in which Spain had argued its case did not accord with the requirements of international judicial proceedings. But whose fault was it that Canada had, as it claimed, been

taken by surprise in this way? A party which at the written stage of the proceedings has systematically opposed itself to the operation of the adversarial principle is not in the best of positions to make such comments on reaching the oral stage.

15. In this connection, counsel for Canada also contended that the Applicant is under a duty to confront the Respondent with clearly defined legal arguments. But, in that case, does not a Respondent who raises such an objection — a Respondent, moreover, who is a declarant State under the optional clause system — have a similar procedural duty at the written stage of the proceedings? Canada, which defends a position in this case based on a subjective, unilateral conception of the law, also apparently wishes to extend this approach to the judicial procedure of the Court itself.

16. But that is not all. Canada, having, in Chapter IV of its Counter-Memorial, "drawn the attention" of the Court to its contention that the dispute was settled, then retreated from this position at the oral pleadings stage. No doubt it realized that this argument enabled Spain's counsel to go into matters at that stage whose discussion Canada had at all costs wished to avoid, that is to say a detailed examination of the subject-matter of the dispute submitted to the Court by the Spanish Application. Thus at the oral pleadings the Deputy-Agent for Canada stated the following:

> "Accordingly, questions of admissibility, including the exhaustion of local remedies, and of mootness — that is, whether the dispute has been settled — and of the *locus standi* of Spain to bring this case: those questions are not in issue at this stage. Canada therefore has taken no position on those questions." (CR 98/14, p. 8.)

17. The statement that Canada took no position on the question as to whether the proceedings were moot, after devoting one whole chapter in its Counter-Memorial to asserting that the dispute had been settled, does not correspond to the facts. At the oral stage of the proceedings, Canada quite clearly abandoned the allegation of mootness. In its submissions in the present incidental proceedings, Spain took note of the fact that Canada had abandoned the allegation that the dispute between itself and Spain had become moot (see paragraph 12 of the Judgment).

18. It should also be emphasized here that Canada abandoned the allegation of mootness after Spain had finished its first round of oral argument, Canada being the second to speak. As a result, Spain devoted a considerable amount of time in the first round to refuting an allegation of mootness which subsequently disappeared from the proceedings. In properly conducted proceedings, it is unreasonable to have to wait until the second round of oral argument before being in a position to know the subject and scope of a preliminary objection under the terms of Article 79 of the Rules of Court.

19. The statement by the Deputy-Agent of Canada quoted in paragraph 16 above also refers to the exhaustion of local remedies and to the *locus standi* of Spain to bring the case. On the latter point, it should be emphasized that Canada has recognized in the present incidental proceedings that a dispute between itself and Spain indeed existed on the date the Spanish Application was filed — 28 March 1995 — and that, as I have just said, at the oral stage of the proceedings it abandoned its claim that the dispute was moot. In paragraph 88 of the Judgment the Court states that, in the circumstances of the case, it is not required to determine *proprio motu* whether or not the present dispute is distinct from the dispute which was the subject of the Agreement of 20 April 1995 between the European Community and Canada.

20. As for the reference to the rule of the exhaustion of local remedies (also mentioned in Canada's Counter-Memorial), the least that can be said is that this seems inappropriate, since, as is apparent from the Application instituting proceedings, the Applicant's Memorial and the oral arguments, Spain's action in lodging its Application is not an exercise in diplomatic protection arising out of injury to Spanish individuals, property or private interests caused by Canada's conduct.

21. The proceedings instituted by Spain on 28 March 1995 concern acts by Canada which, in the Applicant's view, directly violate the rights and interests of Spain as a sovereign State, and particularly its right to exercise exclusive jurisdiction over vessels flying its flag on the high seas and its right to see that Canada, too, respects the freedom of the high seas and complies with the norms governing the prohibition on the use of force in international relations. This is therefore not a dispute over international responsibility, which is subject to the rule of the prior exhaustion of local remedies.

22. It is true that the Government of Canada is currently the subject of civil proceedings before its own courts by the owners of the *Estai* for damage resulting from "trespass on the high seas", "endangerment on the high seas", "piracy", "unlawful seizure", etc. (see text of the statement of claim filed on 28 July 1995 in the Federal Court of Canada by the solicitors of the shipowners of the *Estai* relating to the actions by Canada against the vessel, Memorial of Spain, Vol. II, pp. 913-945). However, Spain's Application of 28 March 1995 was not an exercise in diplomatic protection arising from the damage caused to the owners of the *Estai*. But this in no way prejudices Spain's right to exercise such diplomatic protection in due course by lodging a fresh application. In the oral arguments, Spain reserved the right to do so.

23. In conclusion, I would take this opportunity to express my view on the need for judges' written notes, in particular in cases involving preliminary proceedings concerning the Court's jurisdiction. The experience in this case convinces me that in situations of this kind the preparation of written notes is the only acceptable working method. Written notes

afford both Parties the same objective guarantees, arguments denying the Court's jurisdiction being generally a great deal simpler to expound than those which seek to uphold it.

CHAPTER II. THE FACTS CONSTITUTING THE SOURCE OF THE DISPUTE

24. The facts constituting the source of the dispute submitted by the Spanish Application occurred at the beginning of March 1995. Thus on 3 March 1995 the Canadian Coastal Fisheries Protection Regulations, in their version of 25 May 1994, were amended so as, *inter alia*, to add to the existing "prescribed classes of foreign fishing vessels" laid down by the 1985 Canadian Coastal Fisheries Protection Act, as amended on 12 May 1994 (Bill C-29), a new category entitled, "foreign fishing vessels that fly the flag [of Portugal or Spain]" which are fishing in the NAFO Regulatory Area.

25. It should be recalled that the NAFO Regulatory Area is a region of the high seas situated outside Canada's 200-mile exclusive economic zone. Article I, paragraph 2, of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries of 24 October 1978 (to which both Canada and the European Union are parties) states:

> "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."

The words "beyond the areas in which coastal States exercise fisheries jurisdiction" do not feature in the definition contained in the Canadian Act. These are, however, words of great significance in the NAFO Convention!

26. This extension, on 3 March 1995, of Canadian legislation to cover vessels flying the Spanish flag on the high seas within the NAFO Regulatory Area — which, in itself, constituted a clear claim by Canada to jurisdiction over the high seas with respect to Spanish vessels and a violation of Spanish sovereign rights within such a maritime area — was followed a few days later by attacks by Canadian coastguard or fisheries patrol vessels on Spanish fishing vessels which were, at that time, fishing legally within the NAFO Regulatory Area. It was not until the beginning of May 1995 that the Regulations of 3 March 1995 were repealed by Canada.

27. A mere six days after the adoption of the Regulations of 3 March 1995, the *Estai*, a Spanish fishing vessel, was intercepted and boarded by the Canadian fisheries patrol vessel *Leonard J. Cowley* and the Canadian coastguard ship *Sir Wilfred Grenfell* on the high seas in the region of the

Grand Banks, some 245 miles from the Canadian coast. This act had been preceded by a pursuit which likewise began on the high seas, successive attempts at interception by high-speed patrol boats carrying personnel armed with automatic weapons, and by intimidatory manœuvres, including the firing of warning shots from a 50-millimetre gun mounted on board the patrol vessel *Leonard J. Cowley*. Having been boarded by force, the *Estai* was escorted by the Canadian patrol vessels to the port of St. John's (Newfoundland), where her master was arrested and charged before the Provincial Court of Newfoundland with having "resisted authority" under the Canadian Coastal Fisheries Protection Act in its amended version of 12 May 1994.

28. On the same day that the *Estai* was seized, 9 March 1995, the Spanish Embassy in Canada addressed two Notes Verbales to the Canadian Minister of Foreign Affairs and International Trade. Under the terms of the second of these Notes the Spanish Government categorically condemned the pursuit and harassment of the Spanish vessel by vessels of the Canadian navy, in flagrant violation of the international law in force, since these acts took place outside the 200-mile zone (see paragraph 20 of the Judgment).

29. In addition, on 10 March 1995, the Spanish Minister for Foreign Affairs addressed a Note Verbale to the Canadian Embassy in Spain in the following terms:

> "In carrying out the said boarding operation, the Canadian authorities breached the universally accepted norm of customary international law codified in article 92 and articles of the same effect of the 1982 Convention on the Law of the Sea, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. In the light of this serious incident, which has caused substantial damage to Spanish nationals, Spain lodges the most vigorous protest and at the same time demands the immediate release of the crew and the vessel and reserves the right to claim appropriate compensation.
>
> The Spanish Government considers that the wrongful act committed by ships of the Canadian navy can in no way be justified by presumed concern to conserve fisheries in the area, since it violates the established provisions of the NAFO Convention to which Canada is a party.
>
> The boarding of the vessel constitutes a serious offence against international law, not in keeping with the usual conduct of a responsible State, carried out under cover of unilateral legislation not opposable to other States. Consequently the Spanish Government demands the repeal of the legislation in question.
>
> The Spanish Government finds itself constrained, in the light of these events, to reconsider its relations with Canada, and reserves the right to take whatever measures it considers appropriate." (Memorial of Spain, Annexes, Vol. I, Ann. 8.)

(Paragraph 20 of the Judgment reproduces only part of the first paragraph and the second paragraph of the above Note Verbale.)

30. As can be seen from a simple reading of this Note Verbale, Spain did not initially raise any issues connected with the conservation or management of biological resources in the NAFO Regulatory Area (nor did it do so subsequently). Its dispute with Canada is concerned with questions of title, with the rights or jurisdiction of sovereign States on the high seas and, in particular, with the rule that the flag State has exclusive jurisdiction over its ships on the high seas and with the non-opposability to Spain of the Canadian legislation. Thus in this Note Verbale of 10 March 1995 one can already see all of the principal elements which were to form the basis of the Application instituting the present proceedings filed by Spain on 28 March 1995. In this regard, it is also important to bear in mind that none of the constituent elements of the dispute which Spain has submitted to the Court concern powers which have been transferred in whole or in part to the European Union by member States under the Community's common fisheries policy.

31. On 10 March 1995 the Canadian Minister of Foreign Affairs and International Trade in his turn addressed a Note Verbale to the Spanish Embassy in Canada, confirming "that Canada [had been] obliged to arrest a Spanish trawler, the *Estai*, at about 4.50 p.m. on 9 March" and stating that the *Estai* had resisted the efforts to board her made by Canadian inspectors in accordance with international practice and that the arrest of the *Estai* had been necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen (see paragraph 20 of the Judgment). This Canadian Note Verbale is also of interest for the insight that it affords us into certain other significant aspects of the facts which gave rise to the current dispute between Spain and Canada and into the subsequent course of events.

32. Thus in its final paragraphs (not reproduced either in the Judgment) the Canadian Note Verbale states the following:

> "The attached communiqué of 9 March expresses the disappointment of the Honourable André Ouellet, Minister of Foreign Affairs, *regarding the position of the European Union which has forced Canada to take measures of coercion for this purpose.*
>
> The Department would also point out that the Prime Minister of Canada *proposed to the President of the European Commission a 60-day moratorium on fishing for Greenland halibut* beyond Canada's 200-mile area, in order to facilitate the search for a negotiated solution. As a token of good faith, the Honourable Brian Tobin, Minister of Fisheries and Oceans, announced on 9 March that Canada would not allow its own fishermen to fish for Greenland halibut over a period of 60 days, both within and outside the 200-mile area. At the present time it is the Department's understanding

that no Spanish boat is fishing for Greenland halibut on the Nose and Tail of the Grand Banks. The Department requests the cooperation of the Embassy to ensure that this situation is maintained so as to make possible the resumption of negotiations." (Memorial of Spain, Annexes, Vol. I, Ann. 9, pp. 46-47; emphasis added.)

33. Thus it is the position adopted by the European Union which is stated to have forced Canada to take the measures of coercion which led to the boarding of the *Estai* on 9 March 1995, rather than the fishing activities of the Spanish vessel itself. It was a matter of taking the *Estai* hostage, and possibly the entire Spanish fishing fleet in the NAFO Regulatory Area at that time, with a view to putting pressure on the European Union to change its position in the dispute which then existed between Canada and the Union within NAFO.

34. Furthermore, still on 10 March 1995, the European Community and its member States addressed to the Canadian Minister of Foreign Affairs the Note Verbale mentioned at the end of paragraph 20 of the Judgment. The text of this Note Verbale read as follows:

"In relation with the violent arrest of the fishing vessel *Estai*, flying the flag of Spain, by Canadian Patrol and Coast Guard vessels in international waters on 9 March 1995, the Community and its member States wish to express their strongest condemnation of such an illegal and totally unacceptable act.

The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law, and cannot be justified by any means. With this action Canada is not only flagrantly violating international law, but is failing to observe normal behaviour of responsible States.

This act is particularly unacceptable since it undermines all the efforts of the international community, notably in the framework of the FAO and the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, to achieve effective cooperation through enhanced cooperation in the management of fisheries resources.

This serious breach of international law goes far beyond the question of fisheries conservation. The arrest is a lawless act against the sovereignty of a Member State of the European Community. Furthermore the behaviour of the Canadian vessels has clearly endangered the lives of the crew and the safety of the Spanish vessel concerned.

The European Community and its member States demand that Canada immediately release the vessel, repair any damages caused, cease and desist from its harassment of vessels flying the flag of Community member States and immediately repeal the legislation under which it claims to take such unilateral action.

The European Community and its member States are forced to reassess their relationship with Canada in the light of this deplorable situation and reserve their rights to take any action which they deem appropriate." (Memorial of Spain, Annexes, Vol. I, Ann. 11; the first and the last paragraph of this Note are not reproduced in the Judgment either.)

35. The Note Verbale from the European Community and its member States correctly makes the distinction between "the question of fisheries conservation" and that of acts "against the sovereignty of a State", thereby confirming that these are two quite separate issues. The Application instituting proceedings filed by Spain in this case is concerned only with those actions of Canada which, in the Applicant's view, constituted an attack in March and April 1995 on the sovereignty of Spain qua State. I would add that a few days after 10 March 1995 the *Estai* was released to Spain and negotiations between the European Community and Canada with regard to their dispute within NAFO could be opened in Brussels. On the other hand, the repeal of the Regulations of 3 March 1995 and the discharge of criminal proceedings against the master of the *Estai* did not occur until after the conclusion of the Agreement of 20 April 1995 between the European Community and Canada on fisheries in the context of the NAFO Convention.

36. Following the exhaustion of living resources in the Canadian 200-mile zone adjacent to the NAFO Regulatory Area in the 1980s — as a result of the excessive expansion in Canadian coastal fishing which followed the declaration of the Extended Fisheries Jurisdiction (EFJ) of 1977 (see, for example, the article by the Canadian author William E. Schruauk, "Extended Fisheries Jurisdiction, Origins of the Current Crisis in Atlantic Canada's Fisheries", in *Marine Policy*, 1995, Vol. 19, No. 4, pp. 285-299) — and as the crisis in the exclusive zone became increasingly serious, Canada has become more and more demanding in its claims concerning fisheries in the NAFO Regulatory Area, that is to say on the high seas. This has given rise to disagreements within NAFO between Canada and other parties to the NAFO Convention, notably the European Union.

37. It is also necessary to keep in mind the background to the conflict of February/March 1995 between Canada and the European Community within NAFO. In February 1995 Canada took steps within NAFO to reduce substantially the total allowable catch (TAC) of Greenland halibut in the NAFO Regulatory Area to 27,000 tonnes per year, whilst allocating to herself the lion's share of 16,300 tonnes, that is to say

10,300 tonnes more than in 1994. Some 60 per cent of the 1995 TAC within the NAFO Regulatory Area was thus reserved for Canada. At the same time Canada succeeded, still within NAFO and by a majority of one vote, in having the quota reserved for European Union fishermen fixed at some 12 per cent of the 1995 TAC, namely a mere 3,400 tonnes of Greenland halibut. According to Canada's own press the quota was stingy, non-viable, far smaller than the catch which European Union fishermen were accustomed to taking in the area and insufficient for their needs, whilst the volume allocated to Canada exceeded her fishing capabilities (see, for example, the editorial of 18 April 1995 in *The Globe and Mail*; Memorial of Spain, Annexes, Vol. I, Ann. 23). It can already be seen that in this 1995 crisis between the European Union and Canada the issue is not just one of "conservation" but quite clearly of "apportionment" of resources.

Faced with this situation, the European Community had recourse to the objection procedure as it was legitimately entitled to do under the NAFO Convention claiming that the NAFO quotas proposed by Canada were not acceptable, and, without altering the established TAC, itself fixed at 18,630 tonnes the quota of Greenland halibut designated for European Community fishermen (including Spanish fishermen) fishing in the area. Quotas fixed by NAFO are not applicable to a party which makes an objection under the relevant provisions of the NAFO Convention.

38. Canada's initial reaction to the position adopted by the European Union in the February/March conflict within NAFO was the adoption, on the pretext of overfishing, of the Regulations of 3 March 1995 extending the Canadian coastal fisheries protection legislation to Spanish and Portuguese vessels. This claim to jurisdiction on the high seas was followed by the proposal for a 60-day moratorium on fishing for Greenland halibut referred to in the Canadian Note Verbale of 10 March 1995 quoted at paragraph 32 above.

39. On 6 March 1995 the European Union agreed to enter into bilateral negotiations with Canada concerning its dispute within NAFO, but it did not consent regarding the proposed moratorium and reiterated its opposition to Canadian legislation controlling the fishing activities of non-Canadian vessels outside the 200-mile limit (Statement by the General Affairs Council of the European Union of 6 March 1995; Memorial of Spain, Annexes, Vol. I, Ann. 10). It was then that the second Canadian reaction took place, and that the *Estai* was forcibly boarded.

40. It is to this Statement by the European Union of 6 March 1995 that the Canadian Note Verbale of 10 March 1995 (see para. 32 above) makes reference when it speaks of the disappointment felt on 9 March 1995 by Minister Ouellet and of the position of the European Union which, in its words, had forced Canada to take measures of coercion against Spanish vessels fishing in the NAFO Regulatory Area; and, as we

have just seen, on 9 March 1995 the *Estai* had become the first target of those measures.

41. The above considerations (which are confirmed by other documents submitted to the Court and by publications in the public domain) give a sufficiently precise idea of what Canada was really seeking to achieve in February/March 1995, namely, to alter the ground rules in the NAFO Regulatory Area to the detriment of those rights enjoyed by the European Union and its member States in the said Area by virtue of the NAFO Convention and the general international law of the sea. Canada wished to modify in its own favour at least three aspects of the existing legal situation in the area: (1) to secure recognition by the European Union of preferential rights of jurisdiction and control over fisheries within the NAFO Regulatory Area; (2) to secure recognition by the European Union, by virtue of its position as a coastal State, of preferential rights in the apportionment of TAC quotas without any regard for the parities established in this respect by the NAFO Convention; (3) to amend the objection procedure provided by the NAFO Convention, or restrict its exercise to the detriment of the European Union. Bearing all this in mind, it becomes evident that the measures taken at the beginning of March 1995 against Spanish fishing vessels (adoption of the Regulations of 3 March 1995; boarding of the *Estai*; harassment of other Spanish fishing vessels) constituted, in truth, measures directed at the European Union with no other aim but to secure concessions from the latter for the purpose of achieving the objectives which I have just outlined. Thus what was at stake here was not *conservation* but *revision of the law* in the NAFO Regulatory Area.

42. The Note Verbale of the European Community and its member States of 10 March 1995 is correct when it refers to *"the Act under the cover of which Canada claims to take"* unilateral measures against Spanish fishing vessels. This fact is not without relevance to the Court's task in the present incidental proceedings and yet the Judgment totally ignores it. Here is a good example of a question which merited a response that we do not find in the Judgment.

43. During the days which followed the boarding of the *Estai*, other Spanish vessels (*Monte Agudo, Freiremar Uno, José Antonio Nores, Verdel, Arosas, Mayi Cuatro* and *Pescamaro Uno*) were subjected to various measures of harassment and control by a number of Canadian coastguard and patrol vessels. All of these acts of harassment took place within the NAFO Regulatory Area, that is to say on the high seas. In the face of increasing tension in the Area and in order to protect her fishing fleet, Spain despatched a certain number of ships of her own navy, which began to arrive in the Area from 17 March 1995. The document entitled "Reports on the Part Played by the Spanish Navy in the Fishing Grounds of the NAFO Area" observes in its concluding paragraph that:

"During practically the whole of our stay in the area [between 17 March and 4 April, approximately], the Spanish fishing vessels were harassed by Canadian patrol boats, with greater or lesser intensity. On certain occasions the patrol boats failed to respect the International Convention on the International Regulations for Preventing Collisions at Sea." (Memorial of Spain, Annexes, Vol. I, Ann. 5.)

44. In the case of the vessel *Pescamaro Uno*, the patrol boat *Leonard J. Cowley* cut its trawl-warps, an act which caused the loss of its gear and endangered the life of the crew members on board. The above-mentioned document describes as follows the harassment of the *Pescamaro Uno* on 26 March 1995:

"At about 21.30 hours on that same day, five Canadian patrol boats returned and, as they drew close to the Spanish fleet, dispersed and harassed different fishing vessels with their projectors. The *Pescamaro Uno* informs us that a tug boat and the *Leonard J. Cowley* both drew alongside it and a member of the latter vessel's crew addressed the Spanish trawler in Spanish, saying that 'it was violating regulations aimed at protecting Canadian coastal fishing. He ordered it to stop its engines at once and put down a ladder so that it could be boarded as, under Canadian legislation, it was not authorised to fish for Greenland halibut in that area'. We told him, from the *Vigia*, that they were in breach of the NAFO regulations and of international law; they answered that they were obeying the laws of Canada and not those of NAFO. Given the negative response from the Captain of the Spanish vessel, the *Leonard J. Cowley* gave it a period of time in which to clear its crew from the deck, saying that it was going to cut its trawl-warps. The Canadian tug boat shone powerful projectors on the *Pescamaro Uno* to light it up and, at the same time, sailed past it from stern to bow, just a few metres away from its side. After having sailed past the bow of the Spanish fishing boat, it took a 90 degree turn to pass at a right angle to its bow, at which time it loosed a cutting device (doubtless a grapnel) which sliced through the trawl-warps of the Spanish trawler, with the subsequent loss of all the gear and endangering the fishermen who were on deck at that time. After that incident the fleet and ourselves moved off in an easterly direction, leaving the Canadian patrol boats behind.

At no time did the patrol boats involved in the events of 26th hoist NAFO inspection flags; they only hoisted two flags and one other giving the number of the International Code SQ3 (meaning 'Stop or put your engines in neutral gear, I am about to board your vessel'), while at the same time they kept on repeating that they were acting in accordance with the coastal legislation of Canada." *(Ibid.)*

45. These acts of harassment subsequent to the boarding of the *Estai*,

committed by Canada against Spanish vessels fishing in the NAFO Regulatory Area, occurred both before and after the commencement of these proceedings, as is shown by the Notes Verbales addressed to Canada by Spain on 27 March and 7 April 1995 (Memorial of Spain, Annexes, Vol. I, Anns. 3 and 4). Canada did not respond to those Notes. Bilateral negotiations between Spain and Canada on matters concerning the subject-matter of this dispute were not possible in March 1995. The Judgment remains totally silent on the subject of all these developments subsequent to the boarding of the *Estai*, and indeed to the commencement of these proceedings.

46. Thus, on 28 March 1995, Spain, in reliance upon the fact that both States were declarant States under the optional clause system, filed in the Registry of the Court an Application instituting proceedings against Canada "with respect to a dispute concerning *certain aspects of the jurisdiction* exercised by Canada in relation to fisheries" (second paragraph of the Order of 2 May 1995; emphasis added) and the case received the title of *Fisheries Jurisdiction (Spain* v. *Canada)*. The Application makes it clear that the question submitted to the Court is not the conservation and management of fisheries resources [but] the right to exercise jurisdiction over the high seas and [its] opposability to Spain, and in particular the opposability to Spain of Canada's claim to exercise jurisdiction over vessels flying the Spanish flag on the high seas and Canada's responsibility by reason of the forcible boarding of the *Estai* on the high seas.

47. By a letter dated 31 March 1995 from the Permanent Representative of Spain to the United Nations, distributed as an official document of the General Assembly and the Security Council (doc. A/50/98, S/1995/252), the Spanish Government informed the United Nations Secretary-General of the dispute between Spain and Canada in the following terms:

> "On instructions from my Government, I have the honour to inform you that in recent weeks situations of tension have occurred on the high seas in the North-West Atlantic between fishing vessels flying the Spanish flag and Canadian patrol boats, and that these have involved the use of force on the part of the latter.
>
> In particular, I wish to refer to the fact that on 9 March 1995 the fishing vessel *Estai*, flying the Spanish flag, was arrested in international waters by Canadian patrol boats using armed force. Both the fishing boat and the crew were taken to the port of St. John's, where they were detained until their subsequent release on bail. It should be emphasized that when paying the bail, the owner of the detained vessel made an explicit statement of non-recognition of the jurisdiction of the Canadian courts.
>
> Subsequent to these incidents, various acts of harassment by

Canadian patrol boats of Spanish fishing vessels operating on the high seas have taken place, including a serious incident on 26 March in which the nets of the Spanish fishing vessel *Pescamar 1* were deliberately cut by a Canadian patrol boat.

These actions, which constitute a flagrant violation by Canada of international law and of the Charter of the United Nations, have caused serious harm to Spanish citizens and in some cases have endangered their lives and physical integrity, a situation to which the Spanish Government has reacted by immediately making the relevant protests through the diplomatic channel, while fully reserving its rights and its claim to the corresponding compensation for the damage and injury sustained.

As an additional means of defending its nationals, the Spanish Government has decided to send two units of the Spanish Navy to the area where the incidents took place to protect Spanish vessels engaging in their activities under the protection of the principle of freedom of the high seas and in conformity with the applicable regulations established by the competent international organizations.

In addition, as part of the Spanish Government's firm intention to resolve international disputes by peaceful means in accordance with the provisions of the Charter of the United Nations, on 28 March 1995 Spain filed the relevant complaint against Canada with the International Court of Justice, seeking its ruling and the restoration of the rights violated.

I should be grateful if you would have this letter circulated as a document of the General Assembly, under items 39 and 98 *(c)* of the preliminary list, and of the Security Council."

48. Given that the present incidental proceedings raise certain questions of interpretation in relation to the enforcement of the said conservation and management measures by coercive means, that is by the use of force against Spanish fishing vessels on the high seas, it is well to recall here that there were "threats to use force" by Canadian Government vessels during the period while Spanish ships continued to fish in the NAFO Regulatory Area after the boarding of the *Estai* (until about the beginning of April 1995). There were moments of considerable tension between the two countries, which were moreover not unrelated to the ups and downs in the negotiations being held simultaneously in Brussels between the European Union and Canada with a view to the resolution of their dispute within NAFO. Contemporary publications and reports in the press and other public media spoke of threats, intimidation, turbot war, "rules of engagement" of the Canadian Navy, etc.

49. A single example, which needs no comment, will suffice to illustrate the facts that I have just recounted. In an article published on 17 April 1995 in the Toronto *Globe and Mail*, under the headline "Naval Threat Brought Turbot Deal. Diplomacy Prevailed as Canadian Warships Sailed towards Confrontation with Spain", we read *inter alia* the following:

> "Ottawa set in motion a naval contingency plan that had been drawn up some time before, and was known to all Canadian officials to involve the risk of gunfire.
>
> Two heavily armed navy gunboats, the frigate *Gatineau* and the destroyer *Nipigon*, sailed for the disputed zone to back up six fisheries patrol and Coast Guard vessels on station in the north-west Atlantic.
>
> The Spanish fishing fleet of about 16 trawlers was protected by two of Spain's patrol boats, armed only with small-bore cannons. The Spanish could not match the firepower of the Canadian flotilla.
>
> Sources say the Canadian maritime command kept the Spanish military fully informed of the whereabouts of the Canadian gunboats so as to avoid an accidental confrontation.
>
> . . . . . .
>
> When Spain was told that the *Gatineau* and the *Nipigon* were being brought into play there could be no doubt in Spanish minds of the seriousness of Canada's intentions, a diplomatic source said.
>
> . . . . . .
>
> As the Canadian ships converged on the disputed zone, the senior Canadian officials in Ottawa and Brussels warned key European diplomats that the government's patience was exhausted.
>
> The ranking Ottawa-based diplomats of the EU, Spain and France were called into the Department of Foreign Affairs late Friday night and warned by deputy minister Gordon Smith that the clock was ticking and that Canada would 'shortly' resume fisheries enforcement action, such as the seizure of trawlers or cutting of nets." (Memorial of Spain, Annexes, Vol. I, Ann. 23.)

50. The account of the facts of the case given in the Judgment makes no distinction between the "facts which are the source" of the dispute and "other facts" that are also material to the present incidental proceedings, but for other purposes, and in particular for purposes of interpretation of the reservation contained in paragraph 2 *(d)* of Canada's declaration of

10 May 1994. These latter types of fact are set out in a sufficiently detailed manner in the Judgment. The same cannot be said of the account of the "facts which are the source" of the dispute before the Court. That is perhaps one of the reasons for the Judgment's surprising finding on the issue of the "subject of the dispute" submitted by Spain to the Court. It explains also why I have expatiated in this dissenting opinion on the "facts which are the source" of the dispute. After all, the Judgment deals both with the issue of the definition of the subject of the dispute and with the interpretation of Canada's declaration, and there are facts that are material as much to the first question as to the second.

51. In this case, moreover, particular attention needs to be paid to this factual distinction. Otherwise the underlying intention invoked by the Respondent could create still further confusion. The intention with regard to the "facts which are the source" of the dispute of March 1995 is not necessarily the same as that which the Respondent may have had, or claims to have had, in May 1994 when it deposited its declaration of acceptance of the compulsory jurisdiction of the Court. I now pass on to an examination of the issue of the subject of the dispute before the Court.

CHAPTER III. THE SUBJECT OF THE DISPUTE

A. The Notion of the Subject of the Dispute and its Constituent Elements

52. It is an accepted principle that:

> "Whether there exists an international dispute is a matter for *objective* determination. The mere denial of the existence of a dispute does not prove its non-existence." (*Interpretation of Peace Treaties, I.C.J. Reports 1950*, p. 74; emphasis added.)

In the present preliminary incidental proceedings, the "existence" of a dispute between the Parties at the date of the filing in the Court Registry of Spain's Application of 28 March 1995 is not questioned. The Parties are agreed on the matter. But they are far from being agreed on another issue also requiring "objective determination" by the Court, namely the "identification" of the dispute submitted by the Applicant and its "subject". How must the subject of the dispute be determined? The Court's jurisprudence leaves no room for doubt in this respect: "The Court would recall that the subject of the present dispute is indicated in the *Application* and in the *Principal Final Submission* of the Swiss Government . . .", Switzerland being the applicant State in the case (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 21; emphasis added).

53. Furthermore, Article 40 of the Statute requires the application to indicate the "subject of the dispute", and this is confirmed by Article 38, paragraph 1, of the Rules of Court. Paragraph 2 of Article 38 further provides that the application must in particular both specify "the precise nature of the claim", namely the thing requested or the *petitum*, and contain "a succinct statement of the facts and grounds on which the claim is

based", that is, the reasons of fact and law underlying the claim, the *causa petendi.* The "subject of the dispute" must therefore not be reduced to the "subject of the claim" (see, for example, G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 236). The "subject of the claim" is but one component of the "subject of the dispute".

54. As long ago as 1927, Judge Anzilotti stressed that, of the three traditional elements identifying a dispute submitted to the Court, namely *persona, petitum* and *causa petendi*, those determining the subject of the dispute were the latter two. As the eminent judge said, the expression "that particular case" in Article 59 of the Statute "covers both the object and the grounds of the claim" and:

> "It is within these limits that the Court's judgment is binding, and it is within these same limits that Article 60 provides that any Party shall have the right, in the event of a dispute, to request the Court to construe it." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 23.)

55. For its part, as has just been pointed out, the *causa petendi* comprises the elements both of fact and of law referred to in Article 38, paragraph 2, of the Rules of Court. In different language, the passages cited below, taken from opinions of Judges Anzilotti and Read, also confirm that the *causa petendi* of an Applicant is constituted by elements of fact and of law:

> "in such a claim [for legal redress] the specification of the subject of the dispute can only be a statement of that which the Applicant wishes to obtain from the Court and of the reasons of law or of fact on the basis of which he feels entitled to obtain it (*petitum et causa petendi*)" (*Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, p. 350, dissenting opinion of Judge Anzilotti);
>
> "the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed" (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 148, dissenting opinion of Judge Read).

56. It follows from the foregoing that the *causa petendi* of an application always consists of a set of originating facts or circumstances, *legally characterized* by the applicant by reference to certain general principles of law that it claims to have been breached by the respondent to its detriment. It is therefore very important always to bear in mind both the elements of fact and the elements of law of the *causa petendi* on which the applicant relies in its application in support of its claim, in order to be in a position to identify and determine the subject of the dispute in question. This is particularly true in the preliminary phase of a case, for the *petitum* may be the subject of submissions which, without exceeding the

overall scope of the subject of the dispute as reflected in the application, may be modified by the applicant up to the end of the oral phase on the merits. The *causa petendi*, for its part, cannot be modified without a change of case.

57. The Judgment of the Court in the case concerning *Certain Phosphate Lands in Nauru* provides confirmation of this view, if such be needed, when it deals with the question raised by Nauru's fresh claim concerning the overseas assets of the British Phosphate Commissioners (*I.C.J. Reports 1992*, pp. 264-267, paras. 62-71). As the Judgment reminds us, any additional claim must have been implicitly contained in the Application (*I.C.J. Reports 1962, Judgment*, p. 38) or must arise directly out of the question which is the subject-matter of that Application (*I.C.J. Reports 1974*, p. 203, para. 72). The jurisprudence of the Permanent Court also amply confirms this (see, for example, *P.C.I.J., Series A/B, No. 52*, p. 14, and *No. 78*, p. 173).

58. To the general requirement that account must always be taken of both components of the subject of the dispute in order to identify it, there must be added, in the present incidental proceedings, the actual language of the basis of jurisdiction in question, which uses the word *"disputes"* and not *"claims"* (see paragraph 2 of Canada's declaration of 10 May 1994). That paragraph of the Canadian declaration in fact uses the word "disputes" five times, including in the reservation contained in paragraph 2 *(d)*. It is therefore on the term "disputes" that the Court must concentrate and not on the word *"claim"*, which is a legally much narrower term not featuring in the Canadian declaration and which, without transforming the overall subject of the dispute to which the Application relates, is open to modification by the applicant up to the end of the oral phase on the merits.

B. The Subject of the Dispute in the Light of the Applicant's "Causa Petendi" *and* "Petitum"

59. As we have seen above in our examination of the facts constituting the source of this dispute, *the factual elements of Spain's* causa petendi are basically two in number, namely (1) the existence of Canadian coastal fisheries protection legislation authorizing, in the internal legal order of Canada, the exercise of certain acts of jurisdiction by that country over non-Canadian ships in the NAFO Regulatory Area (an area of the high seas), which legislation was made applicable (in March/April 1995) to Spanish ships fishing in that area by the Canadian Regulations of 3 March 1995; and (2) the forcible boarding in that area of the high seas, on 9 March 1995, of the Spanish ship *Estai* by Canadian coastguard vessels or patrol boats, after they had received "the necessary authorizations" from the competent Canadian authorities (which boarding was followed in March/April 1995 by the harassment of other Spanish vessels fishing in the area of the high seas in question).

60. The Canadian Coastal Fisheries Protection Act ceased to be applied to Spanish fishing vessels at the beginning of May 1995, when Canada repealed the Regulations of 3 March 1995, but the Act is still in force and therefore could again be extended by Canada to Spanish vessels as it was in March/April 1995. Furthermore, the Applicant considers that the mere *existence* of the Canadian legislation in question is illegal under international law, regardless of any specific measure of enforcement. This accords with the jurisprudence of the Court in the Advisory Opinion concerning *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 12). In that Opinion, which concerned the United States Anti-Terrorism Act, signed into law on 22 December 1987, the Court rejected the contention of the United States that the alleged dispute did not exist since the Anti-Terrorism Act in question had not yet been applied (*ibid.*, pp. 29-30, paras. 39-44)[1]. It goes without saying that the opposability of a national statute or other legislation may be challenged before the Court, as happened in fisheries jurisdiction cases in 1973 and 1974.

61. With regard to the *legal elements of the* causa petendi, Spain's Application (point 2 of the Application, pp. 7-9) relies on certain well-known principles of general international law, some of which have been codified. Basically, the principles involved are those relating to the régime of the high seas (legal status of the high seas as *res communis*; exclusive jurisdiction of the flag State over its vessels on the high seas; exercise by States of the freedoms of the high seas; co-operation in conservation and management of the resources of the high seas; safety at sea, etc.), together with principles of the United Nations Charter and of general international law concerning prohibition of the threat or use of force in international relations, good faith in the discharge by States of their international obligations, and the primacy of international law over internal law in international relations. The Application does not adduce as legal grounds in support of the claim the provisions of the 1978 NAFO Convention.

62. These legal grounds of Spain's Application are amply sufficient, in view of the factual elements cited, to establish the Applicant's *causa petendi*. It is on these legal grounds, and not on others which might also have been open to it, that the Applicant has chosen to base the claim contained in the Application. Of these grounds, the foremost are unquestionably those relating to the exclusive jurisdiction of the flag State over

[1] We observe here a modification in the jurisprudence of the Court. This is but one example; there are others in the present Judgment that concern matters of general relevance to international judicial decisions. The Judgment in fact abounds in jurisprudential innovations, reaching a number unprecedented in a single decision. Canada has been a remarkably fortunate litigant, for every one of these modifications and innovations has gone in its favour — a rare occurrence indeed.

its vessels on the high seas and the prohibition of the threat or use of force against foreign vessels exercising on the high seas the peaceful freedoms or activities accorded in respect of that part of the sea to all States by international law and international agreements.

63. In this respect, the Applicant asserts: (1) that these legal principles exist in international law; (2) that in this case they confer certain rights on Spain; and (3) that in this case these rights have been violated by Canada.

64. As to the *petitum*, Spain's Application (point 5) requests:

(A) that the Court declare that the legislation of Canada, in so far as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada, is not opposable to Spain;
(B) that the Court adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned; and
(C) that, consequently, the Court declare also that the boarding on the high seas, on 9 March 1995, of the ship *Estai* flying the flag of Spain and the measures of coercion and the exercise of jurisdiction over that ship and over its captain constitute a concrete violation of the principles and norms of international law mentioned in the Application (see legal elements of the *causa petendi*).

65. For the purposes of the present jurisdictional phase, the relevance of these claims by the Applicant lies in the fact that, like the *causa petendi*, they confirm the nature of the dispute on which the Applicant is requesting the Court to give judgment in the present case. It can readily be seen that the dispute is not one concerning fishing or measures of conservation and/or management of living resources of the high seas. As expressly stated in the Application (point 4), the dispute submitted to the Court by the Applicant:

> "does not refer exactly to the disputes concerning those measures, but rather to their origin, to the Canadian legislation which constitutes their frame of reference. The Application of Spain directly attacks the title asserted to justify the Canadian measures and their actions to enforce them, a piece of legislation which, going a great deal further than the mere management and conservation of fishery resources, is in itself an internationally wrongful act of Canada, as it is contrary to the fundamental principles and norms of international law; a piece of legislation which for that reason does not fall exclusively within the jurisdiction of Canada either, according to its own Declaration (para. 2 *(c)* thereof). Moreover, only as from 3 March 1995 has an attempt been made to extend that legislation, in a discriminatory manner, to ships flying the flags of Spain and Portugal,

which has led to the serious offences against international law set forth above. *The question is not the conservation and management of fishery resources, but rather the entitlement to exercise a jurisdiction over areas of the high seas and the opposability of such measures to Spain.*" (Emphasis added.)

This is quite clearly a claim in international responsibility on account of acts alleged by the Applicant to constitute breaches of international law imputable to the Respondent State, and committed to the detriment of the respect due to Spanish sovereignty and to Spain's exclusive jurisdiction over ships flying its flag on the high seas.

66. The first main claim (point A) of the *petitum* requests the Court to declare that the legislation of Canada is not opposable to Spain in so far as it has been invoked, and may still be invoked, to justify the exercise of Canada's jurisdiction over ships flying the Spanish flag on the high seas. However, the Court is not asked to declare that legislation invalid. All that is claimed is its non-opposability to Spain. The claim thus does not go as far on this point as those of the United Kingdom and the Federal Republic of Germany in the *Fisheries Jurisdiction* cases of 1973-1974. It should also be noted that the claim speaks of "ships", not of "fishing vessels" and that it refers to "the high seas" as a whole, with no restriction to any particular area thereof.

67. Having thus defined the Applicant's *causa petendi* and *petitum*, we are now in a position to determine the *subject of the dispute*, that is to say, the real issue before the Court, the true question submitted to it by the Applicant. This question is of the utmost relevance to the present incidental proceedings since, as the Court stated in 1960, in its Judgment in the case concerning *Right of Passage over Indian Territory:* "In order to form a judgment as to the Court's jurisdiction it is necessary to consider what is the subject of the dispute" (*I.C.J. Reports 1960*, p. 33). Why, then, does the Application state that there is a dispute between Spain and Canada,

> "which, going beyond the framework of fishing, seriously affects the very integrity of the *mare liberum* of the high seas and the freedoms thereof, a basic concept and category of the international order for centuries, and implies, moreover, a very serious infringement of the sovereign rights of Spain, a disquieting precedent of recourse to force in inter-State relations . . ." (point 3 of the Application)?

68. Because, according to the Applicant, the Canadian legislation relied upon by the Respondent to justify the exercise by Canada of its jurisdiction on the high seas over foreign ships and applied by it in 1995 to Spanish fishing vessels, with, moreover, recourse to force, cannot constitute a title in international law in relations between the two States, irre-

spective of the position under Canadian domestic law with regard to the characterization and scope of the measures adopted by Canada and the enforcement, within that legal framework, of such measures by its authorities and agents.

69. To this view of the Applicant with regard to the legal position, Canada opposes its own view; hence the emergence of a disagreement in this respect between the two States over the issue of Canada's title or lack of title to act on the high seas against Spanish ships. The Applicant has made it clear that it uses the word "title" in the sense of the decision in the *Frontier Dispute* case, where the Court stated that the concept of title:

> "may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right" (*Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 564, para. 18).

That it was Canada's title or lack thereof that was the subject of the dispute brought before the Court by the Applicant was confirmed in Spain's Memorial on jurisdiction and, in the absence of a Reply, amply addressed by the Agent and Counsel of Spain in oral argument.

70. Spain argues that Canada lacks international title, and that from this there flows a whole series of significant consequences for the task incumbent upon the Court in the present incidental proceedings, and *inter alia* contends that:

(a) the measures adopted by Canada in regard to Spanish vessels on the high seas, and the enforcement of such measures by the authorities and agents of Canada through the use of force, constitute internationally wrongful acts engaging Canada's international responsibility vis-à-vis Spain and cannot be regarded, in international law, as measures of management and conservation of resources or the enforcement of such measures by a State, whether or not it be a coastal State bordering on the area of the high seas in question;

(b) the dispute brought before the Court by Spain as the flag State concerns neither fishing nor the management or conservation of living resources in the NAFO Regulatory Area, but is in reality a conflict over sovereign jurisdiction on the high seas between Canada and Spain as a result of Canadian legislation, which is still in force and which has created a situation or continuing international wrongful act that underlies the serious violation by Canada in 1995 of the sovereignty of Spain on the high seas;

(c) by reason of its subject, the dispute laid before the Court by Spain does not fall within the scope of paragraph 2 *(d)* of Canada's declaration, for it concerns a logical and legal prerequisite, a fundamental premise, having in international law an existence so independent

of and separate from measures for the conservation and management of resources that it cannot be regarded as implicitly included in a reservation of this type, given the general structure of the declaration; and

(d) the subject of the dispute laid before the Court does not concern fisheries management and conservation, but the issue of the exercise of jurisdiction and control by the flag State over its ships on the high seas; this is furthermore not a matter covered by the powers transferred to the European Community by its member States, from which it follows that the Agreement concluded in 1995 between the Community and Canada in the framework of NAFO could not have rendered the present dispute moot, as Canada asserts in Chapter IV of its Counter-Memorial.

71. According to Spain, neither the exercise of fishing by vessels of Spain, Canada or a third country nor the conservation and management of living resources of the high seas in the NAFO Regulatory Area or elsewhere form part of the subject of the dispute it has laid before the Court. As just stated, it is Spain's contention that the dispute concerns Canada's international title or lack thereof to seek to exercise its jurisdiction on the high seas over Spanish ships and/or use force against such ships in that area of the sea without Spain's consent. For the Applicant, Canada possesses no such title; nor can the use of force against the *Estai* in reliance on Canadian legislation be in accordance either with general international law or with the Charter of the United Nations.

72. In this context the Agent of Spain recalled that, according to the Court's jurisprudence, natural adjacency did not create any international title over the high seas, as the Chamber of the Court made clear in the case concerning the *Gulf of Maine*:

> "it is therefore correct to say that international law confers on the coastal State a legal title to an *adjacent* continental shelf or to a maritime zone *adjacent* to its coasts; it would not be correct to say that international law recognizes the title *conferred on the State by the adjacency* of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 296, para. 103; original emphasis).

73. It should also be pointed out that the Canadian legislation in question (including the Regulations) does not indicate, whether by express reference or otherwise, any international title of Canada — or even a claim to such a title — as a basis for the measures envisaged (or for their enforcement) in regard to non-Canadian vessels on the high seas. The *Canadian legislation is silent on Canada's international title to act unilaterally in the NAFO Regulatory Area of the high seas.* The reservation

contained in paragraph 2 *(d)* of Canada's declaration is also silent on this. Thus any international title of Canada forms part neither of its coastal fisheries protection legislation nor of the declaration of 10 May 1994.

74. It should also be recalled that the rule of exclusive jurisdiction of the flag State over its ships on the high seas is a long-standing customary rule of international law, which the Permanent Court, in its Judgment in the *"Lotus"* case, stated in the following terms:

> "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory . . ." (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 25.)

C. Title as a Cause of Action in the Light of the Jurisprudence of the Court regarding the Law of the Sea

75. In order to be able to exercise jurisdiction over an area of the sea, States must be in possession of a title. The jurisprudence of the Court regarding the law of the sea abounds in passages devoted to this eminently legal question of title, one which is, moreover, a matter of international law and, as such, falls within the general jurisdiction of the Court and is also covered by the notion of "legal disputes" contained in Article 36, paragraph 2, of the Statute.

76. Furthermore, the title of States to exercise jurisdiction over an area of the sea is a question readily separable from other matters also pertaining to principles of the international law of the sea. It has the requisite existence and autonomy to be able to stand on its own as the subject of a claim for legal redress before the International Court of Justice. The jurisprudence of the Court amply bears this out.

77. In this connection, given that the present case involves the high seas and only the high seas, that is to say, a maritime area with the status of *res communis* in international law, it is appropriate to begin consideration of that jurisprudence by recalling what the Court said in its 1993 Judgment in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen:*

> "The coast of Jan Mayen, no less than that of eastern Greenland, generates *potential title to the maritime areas recognized by customary law*, i.e., in principle up to a limit of 200 miles from its baselines." (*I.C.J. Reports 1993*, p. 69, para. 70; emphasis added.)

It is therefore correct to assume, for the purposes of the present incidental proceedings, that the coasts of Canada geographically adjacent to

the "NAFO Regulatory Area" generate *potential title* to the maritime areas recognized by customary law up to a limit of 200 miles from their baselines. The *Estai* was boarded on 9 March 1995 — it should be recalled — some 245 miles from the Canadian coast. The Respondent has not denied this fact in the present incidental phase of the case.

It is likewise correct, given that we are dealing here with the high seas, to assume as our starting point that this maritime area is open to all States, that it is reserved for peaceful purposes and that no State may *validly purport* to subject any part of it to its sovereignty (Articles 87, 88 and 89 of the 1982 Convention on the Law of the Sea).

78. A few examples will amply serve to illustrate the contention that title as a legal category of the law of the sea can on its own provide a sufficient cause of action to support proceedings before the Court. In the 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, it is stated that:

> "There has . . . been much debate between the Parties in the present case as to the significance, for the delimitation of — and indeed entitlement to — the continental shelf, of State practice in the matter, and this will be examined further at a later stage in the present judgment. Nevertheless, it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law. In this context particularly, the Parties have laid some emphasis on a distinction between *the law applicable to the basis of entitlement to areas of continental shelf* — the rules governing the existence, *"ipso jure* and *ab initio"*, and the exercise of sovereign rights of the coastal State over areas of continental shelf situate off its coasts — and *the law applicable to the delimitation of such areas of shelf between neighbouring States."* (*I.C.J. Reports 1985*, p. 30, para. 27; emphasis added.)

It is evident that this passage of the Judgment draws a clear distinction between "the law applicable to the basis of entitlement" and "the law applicable to the delimitation" of the continental shelf. It regards them as two different legal categories.

Clearly, therefore, the question of the basis of Canada's title to exercise its national jurisdiction on the high seas over ships flying the Spanish flag — the subject of the dispute laid before the Court by Spain — is not a question that we are permitted, in law, to confuse with that of the rules of international law governing the conservation and management of the living resources of the high seas or with those of the measures adopted and/or enforced for such purposes by States. It has its own separate existence.

79. Title is, moreover, a legal prerequisite for action taken in respect of the sea; it is the title or right to the exercise of jurisdiction in a given maritime area that is decisive for the settlement of any questions arising in relation to other legal issues pertaining to that area, and not vice versa. And why? Because the international law of the sea constitutes a coherent legal order. Thus, in its Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case referred to above, the Court states:

> "The Court has little doubt which criterion and method it must employ at the outset in order to achieve a provisional position in the present dispute. The criterion is linked with the *law relating to* a State's *legal title* to the continental shelf. As the Court has found above, the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the coast or, to use the traditional term, on the principle of adjacency as measured by distance. It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result *should be made in a manner consistent with the concepts underlying the attribution of legal title.*" (*I.C.J. Reports 1985*, pp. 46-47, para. 61; emphasis added.)

80. The Judgments of 1974 in the *Fisheries Jurisdiction (Merits)* cases between the United Kingdom and Iceland and between the Federal Republic of Germany and Iceland also draw a clear distinction between the question of legal title (the disagreements over "Iceland's unilateral extension of its fisheries jurisdiction [up to 50 nautical miles]") and the question of the allocation of fisheries resources and measures to conserve those resources (the disagreements "as to the extent and scope of [the] respective rights [of the Parties] in the fishery resources and the adequacy of measures to conserve them") (*I.C.J. Reports 1974*, p. 21, para. 47).

81. The possibility of basing proceedings before the Court on the issue of title to act on the high seas is also accepted in the 1973 Judgments concerning *Fisheries Jurisdiction (Jurisdiction of the Court)*, where the Court states:

> "The exceptional dependence of Iceland on its fisheries and the principle of conservation of fish stocks having been recognized, the question remains as to *whether Iceland is or is not competent unilaterally to assert an exclusive fisheries jurisdiction extending beyond the 12-mile limit. The issue before the Court in the present phase of the proceedings concerns solely its jurisdiction to determine the latter point.*" (*I.C.J. Reports 1973*, p. 20, para. 42; emphasis added.)

It is precisely Canada's "competence" to "assert a jurisdiction" in the NAFO Regulatory Area of the high seas over Spanish vessels that constitutes the subject of the dispute laid before the Court by Spain, and it is on the jurisdiction of the Court to settle this issue that a decision must be reached in the present incidental proceedings, having regard to the reservation contained in paragraph 2 *(d)* of Canada's declaration.

In his separate opinion appended to those Judgments of 1973, Judge Fitzmaurice draws the necessary distinction, in the case of the high seas, between the issue of title on the one hand and, on the other, measures to conserve fisheries, thus:

> "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.)

82. Thus, even assuming for the sake of argument that Canada's contentions in the present incidental proceedings regarding interpretation of the reservation in paragraph 2 *(d)* of its declaration were correct, the Court would still have to determine whether the measures in question and their enforcement could by their very nature give rise, in international law, to a dispute whose subject concerns only the issue of the title to take or enforce such measures and whether, should the terms of the reservation make no mention of the matter, the reservation can nonetheless be interpreted as comprising within the category of disputes which it excludes those arising out of conduct by Canada prima facie lacking in title or contrary to a title held by Spain under international law.

83. What is, however, certain in the light of the above jurisprudence of the Court is that Spain, as Applicant, has a procedural right entitling it to bring before the Court a dispute whose subject is, in the final analysis, simply the title or lack of title of Canada to act as it did in regard to Spain on the high seas. Spain is entitled to institute proceedings against Canada concerning only this question of title as a distinct and autonomous legal category of the law of the sea. The legal interest of Spain, as a sovereign State, in securing a decision by the Court on a dispute having this alone as its subject is self-evident. It is indisputable and needs no comment. The Judgment, however, ignores this legal interest of the

applicant State. This is a serious thing — a very serious thing — for an international judicial body like the Court to do.

D. The Respondent's Position on the Subject of the Dispute

84. Canada has had difficulties with the subject of the dispute in Spain's Application. In the written phase of the present incidental proceedings it was evasive on the matter, while at the same time seeking to replace it with a different subject, namely fisheries conservation and management. However, Canada refrained from filing a counter-claim or a principal application against Spain on this other possible subject. As I have already pointed out in Chapter I of this dissenting opinion ("The Unusual Procedure"), the Canadian Counter-Memorial deals not with the exercise of State jurisdiction on the high seas but with the crisis in the conservation of fishery resources in the North-West Atlantic as the "factual and historical context" of the present dispute. Canada claims that the subject of the dispute with Spain is the conservation and management of fisheries in the area, a question, moreover, which according to the Counter-Memorial had already been settled (the mootness argument). These arguments of the Respondent well illustrate its refusal to recognize the *true subject* of the dispute laid before the Court by Spain.

85. Why has the Respondent sought to redefine or evade in its Counter-Memorial *the true subject of the dispute* before the Court? Quite simply out of lack of confidence in the scope of the reservation contained in paragraph 2 *(d)* of the declaration on which it relies. Canada has sought to replace the true subject of the dispute before the Court with a different subject, falling as such within the scope of that reservation. To do this, Canada was obliged to argue that the subject of the dispute submitted by Spain was the same as that of disputes covered by the reservation contained in paragraph 2 *(d)* of Canada's declaration.

86. Thus, as regards the written phase, it may be concluded that, for Canada, the dispute submitted by Spain was a dispute *over* the conservation and management of resources. However, that was asking rather too much of the Application and the reservation. Accordingly, during the oral phase, in the face of the Spanish arguments, Canada somewhat changed its ground with regard to *the identity of the subject of the dispute with that of the reservation,* while of course keeping in mind its aim of bringing the dispute laid before the Court within the scope of those excluded by paragraph 2 *(d)* of its declaration of acceptance of the compulsory jurisdiction of the Court.

87. Thus at the hearings Canada proceeded to formulate an argument on the subject of the dispute different from that in its Counter-Memorial. It was in this new context that counsel for Canada finally addressed the real subject of the dispute as laid before the Court by Spain. Evidently, for them, *the subject of the dispute contained in the Application* was a mere argument of the Applicant, "the Spanish thesis". It was but a step

from there for counsel to arrogate to themselves the right to put forward a different thesis, having a similar procedural function to that of the Applicant, and that step was duly taken. Thus at the oral proceedings the issue of the subject of the dispute became intertwined with that of the respective roles of applicant and respondent in defining the subject of a dispute. Nonetheless, at the hearings the Canadian counsel did finally address the subject of the dispute as set out in Spain's Application and acknowledge that: "The criterion of the reservation — the dividing line between what does and what does not pertain to the jurisdiction of the Court — is the subject of the dispute." (CR 98/14, p. 25.)

In effect, during the oral phase Canada relied on an argument that I call the "also" argument. It contended that the subject of the dispute submitted by Spain was concerned not exclusively with fisheries or the management or protection of living resources but also with these questions. From this, counsel for Canada concluded that the said dispute was excluded by the terms of the reservation contained in paragraph 2 *(d)* of the Canadian declaration. To get to this point, counsel simply ignored both the concept of *dispute* and that of the *subject of the dispute.*

88. Canada began by replacing the concept of *dispute*, the term used in the reservation contained in paragraph 2 *(d)* of the declaration, by *"factual category":*

> "The first point to note about the Canadian reservation . . . is that it refers to a factual category. It excludes from the Court's jurisdiction everything falling within a defined class of fact situations, namely: anything directly or indirectly related to fisheries conservation and management measures taken by Canada against vessels fishing in the NAFO Regulatory Area . . . any dispute involving this legislation [Bill C-29] or actions taken under it falls within the *factual* ambit of Canada's reservation and therefore outside the jurisdiction of the Court." (CR 98/11, p. 46; emphasis added.)

This initial operation thus consisted in reducing the notion of "dispute" to the factual elements of the *causa petendi.* It simply ignores the entire legal aspects of the *causa petendi* and the *petitum* of the Applicant. "Dispute" thus becomes equivalent to the "factual elements" of the *causa petendi.* Yet the case-law of the Court shows us that "the facts and situations which have led to a dispute must not be confused with the dispute itself" (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 22). Moreover, the case-law of the Court does not tell us that particular facts or situations can give rise to only one and the same dispute between two States, or that the Court can be seised of only one dispute by those States, or that the Court can have jurisdiction for one such dispute while not having it for another.

And why is it that the case-law does not and cannot say that? Because,

in international judicial proceedings, the factual elements relied upon to establish the right of action which is the legal embodiment of the claim or *petitum* must always be accompanied by references to law or to a legitimate interest, or by the indication of a relevant legal text or principle, in other words the legal grounds on which the *petitum* or claim rests.

89. The operation then continued with a reformulation of the notion of "subject of the dispute" in international proceedings. The *causa petendi* and the *petitum* of the Application were said to be insufficient to identify the subject of the dispute. Thus a third element was added, namely *the law applicable to the merits by the Court*. But how was this done? By contending that "a dispute is constituted by an indivisible whole comprising facts together with rules of law" and adding that "the Court cannot have jurisdiction with regard to one of these elements and not have jurisdiction with regard to the other" (CR 98/12, p. 40). Now these "rules of law", which on the Canadian argument would become one of the two constituent elements in determining the subject of an international dispute, are claimed to cover both the legal elements of the *causa petendi* and the law applicable to the merits by the Court! In this way Canada introduces a new additional general criterion for establishing the jurisdiction of the Court, one required neither by the relevant texts nor by the Court's jurisprudence, and which may have its place at the jurisdiction stage only when expressly provided for in the documents conferring jurisdiction in the case.

90. The legal elements of the *causa petendi* are not, whatever Canada may contend, the law applicable to the merits by the Court to settle the dispute between the Parties, but the principles of international law, the legal yardsticks relied on by the applicant in its suit to characterize in law the totality of the facts in order to found the claim *(petitum)* which it lays before the Court in its application. Granted, international law as a legal order, and indeed the term "international dispute" as it is properly understood (*persona, causa petendi* and *petitum*), entails the notion of unity, but the concept of the Court's "jurisdiction", which is based on the will of those subject to that jurisdiction, does not form part of that "indivisible whole" in the sense referred to by Canada. On the contrary, the Court's jurisdiction is fragmented and this is how international law wishes it to be. Canada's thesis is thus founded on a confusion between the legal elements of the *causa petendi* — which are elements in the definition of the dispute and of its subject-matter and which are accordingly relevant for the purpose of determining whether the Court has "jurisdiction" in a particular case — and the law applied to the merits by that same Court in order to settle the dispute in question.

91. The titles conferring jurisdiction may of course exclude or modify the law applicable to the merits by the Court, although this is not the case in the present incidental proceedings, but the law applicable to the merits can in no circumstances be an element in the definition or identification

of a dispute as such, or of its subject, in international proceedings. The purpose of the Canadian argument was of course not a purely theoretical one. It resulted from Canada's wish to extend as widely as possible the scope of the reservation in paragraph 2 *(d)* of its declaration of acceptance of the compulsory jurisdiction of the Court, although it was formulated in the declaration as "an exception" to compulsory jurisdiction otherwise accepted. I cannot accept an argument making of a reservation formulated in terms of the conservation and management of living resources of the sea a sort of "black hole" — to use the terminology of Spain's counsel — that would swallow up any dispute over the rules governing the high seas and the rights thereover enjoyed by States under the international law of the sea and — why not? — the entire corpus of international law and of the obligations set out in the United Nations Charter.

92. Spain opposed — rightly in my opinion — those attempts by Canada to intervene in the determination of the subject of the dispute to which the Application of 28 March 1995 related. I can only agree with the principle that the respondent cannot redefine or change the subject of the dispute laid by an applicant State before the Court in its application.

This is clearly a procedural right of the applicant. The procedural means open to the respondent are the preliminary objection, the counterclaim and the possibility of filing its own principal application in opposition to that of the original applicant. Canada did not avail itself of any of these three possibilities. Instead, it sought to disregard the subject of the dispute as defined in Spain's Application or to replace it with the subject of a dispute of the kind referred to in the reservation to its declaration. However, the respondent enjoys no such procedural right, subject of course to its right to put to the Court its view regarding the subject of the dispute as defined by the applicant in its application.

E. Does the New Definition of the Subject of the Dispute Contained in the Judgment Accord with the Applicable Law and with the Jurisprudence of the Court?

93. In paragraph 35 of the Judgment, the subject of the dispute before the Court is defined as follows:

> "The specific acts . . . 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 Fisheries 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."

However, this definition, apparently accepted by the majority, corresponds neither to that resulting from a natural and reasonable reading of the text of Spain's Application of 28 March 1995, having regard to the intention of the Applicant at the time when it filed that Application in the Court Registry, nor to its Memorial and oral arguments, nor indeed to the submissions lodged by Spain at the end of the present phase of incidental proceedings, in which its Agent confirmed 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" [including the forcible boarding of the *Estai* and the harassment of other Spanish vessels] (see paragraph 12 of the Judgment).

94. There is thus nothing new in those Spanish submissions confirming the subject of the dispute as defined by the *petitum* and the *causa petendi* of the Application of 28 March 1995. On the other hand, the definition set out in paragraph 35 of the Judgment is one presenting very serious problems, on account both of its new content (in relation to the subject of the dispute as set out in the Application) and of the fact that the Court thereby substituted itself for the Applicant.

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95. The Judgment arrives at its *definition* of the subject of the dispute in paragraph 35 on the basis of the following *finding* in paragraph 34:

> "The filing of the Application was occasioned by the 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."

96. Such a finding first raises the question of what the Judgment means in using this form of wording. It would seem that the intention was to avoid ruling on principles of international law *in abstracto*. If so, I fail to see the connection with Spain's Application of 28 March 1995. The Application speaks only of Canada's *acts*. That is to say, specific conduct or actions by Canada, of an actual concrete nature and *admitted* by the Respondent. It is this course of conduct by Canada that constitutes the source of the present dispute and, above all, the adoption of the Regulations of 3 March 1995 (extending to Spanish vessels fishing in the NAFO Regulatory Area the application of another act of Canada, namely the Coastal Fisheries Protection Act as amended on 12 May 1994) and the boarding of the *Estai*. It is this ensemble of Canadian con-

duct or acts — and not Canada's legislative, regulatory or other *texts* as such — that is at issue. We are concerned here not with the legislation as such, but in truth with the specific conduct by Canada of which Spain was the victim. For Spain, that conduct violated its rights on the high seas in March and April 1995 and could do so again in the future, since the Act as amended in 1994 is still in force in Canada. Those are the specific actions that Spain's Application requests the Court to make good by means of a Judgment. There is nothing abstract about them.

97. Moreover, inasmuch as the Application presented the issue in terms of the non-opposability to Spain of the relevant Canadian legislation, there can be absolutely no doubt that, as far as the Application is concerned, the subject of the dispute laid before the Court is Canada's *internationaltitle* to act vis-à-vis Spanish vessels on the high seas as it did in March and April 1995. The boarding of the *Estai* is but one specific aspect, a by-product of the principal subject of the Application. In defining the subject of the dispute, the Judgment reverses the natural order of things.

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98. The two categories of Canada's acts covered by the subject of the Application and by the Applicant's submissions are thus:

(1) the adoption of the Regulations of 3 March 1995 applying to Spanish vessels fishing in the NAFO Regulatory Area (of the high seas) the Canadian Coastal Fisheries Protection Act as amended in 1994; and
(2) the pursuit and forcible boarding of the *Estai* on 9 March 1995 and the subsequent harassment of other Spanish ships also lawfully fishing in the NAFO Regulatory Area, that is to say on the high seas.

Spain's Application denies that Canada possesses any international title to act as it did in either case.

99. The present dispute is thus a dispute between Spain and Canada over the exercise of certain State powers against Spanish ships assumed *proprio motu* by Canada in respect of the high seas without the consent of Spain *(conflict of jurisdiction)* and not a dispute concerning differences between the European Union and Canada or between Spain and Canada over the management and conservation of living resources in the NAFO Regulatory Area *(management and conservation conflict within NAFO)*. The Application is quite precise in this respect. One has only to read it or, rather, wish to read it.

100. The complaint in the Spanish Application is based on the two series of acts with which Canada is reproached and which, in the absence of any international title on the latter's part, the Applicant asserts to be internationally wrongful acts incurring Canada's international responsibility towards Spain. According to the Applicant, these acts violate rights that Spain, as a sovereign State, derives from general international law and, in particular, its right to respect for freedom of navigation and of fishing on the high seas for its ships and its right to exclusive exercise of jurisdiction over those ships on the high seas.

*

101. If we compare what I have just said on the subject of the dispute submitted by Spain's Application with the definition of the dispute according to paragraphs 34 and 35 of the Judgment, it can be seen that the differences are striking and surprising. It is clear that the Judgment presents the subject of the dispute in a manner radically different from the Application instituting proceedings, the Memorial and the oral arguments and submissions of the Applicant. The Court is thereby substituting itself for Spain in defining the subject of the dispute submitted by the latter on 28 March 1995!

102. Thus the first principal request set out in point 5 of the Application — request A — which governs the remainder of Spain's *petitum* or complaint, namely the non-opposability to the Applicant of the Canadian legislation in question, has quite simply disappeared from the subject of the dispute as reformulated by the Court. Hence there remains, in relation to the original subject of the dispute, only request C of the *petitum* or complaint set out in Spain's Application. But that is not all. Request C has also undergone a radical change by comparison with the Application. It now becomes a request solely concerning the "measures" taken by Canada in regard to the *Estai* without reference to the fundamental issue of "sovereignty" raised by the Application in terms of Canada's international title so to act. In effect paragraph 35 of the Judgment takes good care to avoid any reference to the rule of the exclusive jurisdiction of the flag State over its ships on the high seas and to the matter of Canada's international title to take the measures referred to in request C. Thus the aim of this redefinition by the Judgment of the subject of the dispute cannot be clearer. The majority ignores the principal *causa petendi* and *petitum* of the Application by suppressing any reference, direct or indirect, to Canada's international title, or lack thereof, to take the actions complained of by Spain, both as regards the opposability of the Canadian legislation to Spain and in relation to the boarding of the *Estai*.

103. This judicial transformation of the subject of the dispute is justified in the Judgment by the following argument, which in effect consists of two limbs:

> "It is for the Court *itself*, while giving particular attention to the formulation of the dispute chosen by the Applicant, *to determine* on an objective basis the dispute dividing the parties by examining the position of both Parties." (Judgment, para. 30; emphasis added.)

This is a justification accepted without question by the Judges making up the majority, but it is one which, in my view, lacks any basis in fact or in law. I reject it absolutely and without compunction, for in my view it is compatible neither with the relevant principles and rules of law nor with the case-law of the Court, or with the circumstances of the case. Let me make it clear at once that I cannot accept such a reformulation of the subject of a dispute brought under the optional clause system. In my view of the law it is unsustainable, in light of: the principles of the system; the general principles of law and logic which govern international judicial proceedings; the Statute and the Rules of Court; the sovereign status of the Applicant; and the Court's own case-law in the matter.

104. Defining the subject of disputes laid before the Court by application by sovereign States is not a function of the Court. To assert the contrary is to assume an extremely heavy responsibility in terms of the sound administration of international justice, for it is an elementary rule that one cannot be at the same time both judge and litigant. Moreover, should this Judgment one day come to constitute a precedent, declarant States under the optional clause system must be aware that they may henceforth find themselves going into the Peace Palace with a given dispute, only to emerge later bound by the *res judicata* of a judgment relating to a dispute having a different subject. What will they then have to say of the sovereign right that they possessed when they took the decision to bring a particular dispute before the Court? And what, more generally, will they have to say of their consent to the Court's jurisdiction? The future will bring us a reply to these troubling questions. It is the privilege of the applicant to "define" the dispute which it lays before the Court, while the latter is free to evaluate, clarify or interpret the subject of the dispute submitted to it. That is the limit of the Court's powers in the matter, for "defining" means having power to "change". The power of the Court to determine its own jurisdiction, under Article 36, paragraph 6, of the Statute, does not comprise any such power of change. I should be the last to deny the duty of the Court to isolate the real issue in the case and, hence, its power to evaluate, clarify or interpret the subject of an application. But to change the subject or to replace it with an entirely new one is quite another matter. That is to forsake the judicial settlement of international disputes and set off instead in some unknown direction.

105. My position of principle on this question of the "definition" by the Court of the subject of the dispute submitted in the Application (first limb of the argument in the Judgment) is developed, with all requisite precision, in the joint dissenting opinion of Judges Onyeama, Dillard,

Jiménez de Aréchaga and Sir Humphrey Waldock appended to the 1974 Judgments in the *Nuclear Tests* cases. I endorse it for the purposes of the present opinion. The relevant paragraphs read as follows:

> "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.
>
> 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.
>
> 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,* at 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 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.)

106. The present Judgment does indeed cite in support of its definition of the subject of the dispute the 1974 Judgments of the Court in the

Nuclear Tests cases. Those Judgments feature prominently in the present Judgment (see paragraphs 30, 31 and 32). Let us see then what they say on the question, without making any cuts in the relevant passage:

> "Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to '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), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised 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. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: 'These are 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*, pp. 262-263, para. 29; pp. 466-467, para. 30.)

On reading this passage one can see that there is no question of "definition" by the Court of the subject of the dispute. On the contrary, the 1974 Judgments distinguish very clearly between, on the one hand, "[the Court's duty] to isolate the real issue in the case and to identify the object of the claim" and, on the other, "the reformulation of submissions by the Court". It is even emphasized that *the Court has no power to substitute itself for the parties and formulate new submissions* when the submissions of the parties themselves are inadequate. The only power which the Court allows itself in this passage is that of distinguishing between "contentions or arguments" and "claims" in the "submissions" of the parties and, in regard to its Judgment, between elements pertaining to the "reasons" therefor and the "decision" itself.

107. It must also be recalled that, in the Judgments in the 1974 *Nuclear Tests* cases, the question then considered arose in the context of a possible "mootness *superveniens*" and not in connection with the determination of the Court's "jurisdiction" as in the present case. Furthermore, the Respondent had failed to appear before the Court. The procedure applied was therefore that of Article 53 of the Statute, which lays upon the Court special duties of vigilance. This is not the case either in the present proceedings. Even so, some of the dissenting judges in 1974 strongly criticized the manner in which the Court at the time exercised its

duty to evaluate, clarify or interpret the submissions of the parties, notwithstanding the very special circumstances of the case. Which only goes to show that even the exercise of a duty of this kind is not proof against subjective appreciations by majorities within the Court. The present Judgment is a classic example. In consequence the distinction drawn in the Judgment between, on the one hand, "the formulation of the dispute chosen by the Applicant" and, on the other, the definition by the Court itself "on an objective basis" of the subject of the dispute falls far short of securing my support in the present incidental proceedings.

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108. Nor can I subscribe to the conclusions of the Judgment with regard to the consideration to be given to the respective positions of applicant and respondent in a process the aim of which is the determination or clarification, as the case may be, by the Court of the subject of the dispute (second limb of the argument in paragraph 30 of the Judgment). The Judgment for all practical purposes places the positions of the Parties in this regard on an identical footing. Yet this is not what the Court's jurisprudence tells us. For example, in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* we find the following:

> "69. 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).
>
> In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:
>
> '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, 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; cf. *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.)" (*I.C.J. Reports 1992*, pp. 266-267.)

109. This jurisprudence confirms beyond any possible doubt that it is for the applicant to define the subject of the dispute, subject only to the proviso that the submissions cannot go beyond the limits of the claim as set out in the application. Why not? Because the dispute brought before the Court by application could then, by subsequent amendments of the submissions, be transformed into another dispute having a different character and subject-matter. This could then affect the right of intervention of third States. But also, and above all, because *a change in the subject of the dispute submitted may have repercussions on the jurisdiction of the Court*. This is just what has happened in the present case, as a result of the Court's redefinition in the Judgment of the subject of the dispute. In any event, if the Court ventures to produce "redefinitions"or "clarifications" which change the subject of the dispute as set out by an applicant in its application, is it not required, at the very least, to be guided by the criteria that it has itself applied in the past to applicant States, as in the case concerning *Certain Phosphate Lands in Nauru*? That is a question I am entitled to ask myself.

110. The respondent clearly has the procedural right to adopt a position on the subject of the dispute as formulated in the application, and the Court is clearly entitled to take account of the respondent's observations when evaluating, clarifying or interpreting the subject of the dispute submitted to it by the applicant; however, the respondent does not participate in the definition of the subject of the dispute by the applicant and cannot do so where, as in the present Judgment, the Court, substituting itself for the applicant, itself assumes the task of and responsibility for "redefining" the subject of the dispute or formulating a "new definition" thereof. In effect, the present case reduces the fundamental role of the applicant in defining the subject of the dispute to that of a mere participant in a tripartite process, while pacifying it with the statement that the

Court will consider its position with "particular attention" when undertaking its definition of the subject of the dispute! (See paragraph 30 of the Judgment.)

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111. In support of this extraordinary notion of a sort of round-table participation by applicant and respondent in a redefinition of the subject of the dispute by the Court, the Judgment cites a passage from the 1960 Judgment on the merits in the case concerning the *Right of Passage over Indian Territory* (paragraph 30 of the Judgment), and once more the 1974 *Nuclear Tests* Judgments. This latter jurisprudence is ill-chosen indeed for the purposes of the demonstration, since France, having failed to appear before the Court, had taken no part in the Court's self-appointed task of clarifying the subject of the dispute. The following passage could not be clearer:

> "the Court must ascertain the true object and purpose of the *claim* and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account 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" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; emphasis added).

112. Nor does the quotation from the *Right of Passage* case support what the present Judgment would have it prove. In that case, what was being interpreted was a condition *ratione temporis* of India's declaration *which had been joined to the merits in the preliminary phase in 1959, because it raised issues which were not of an exclusively preliminary nature, given the subject of the dispute set out in Portugal's Application.* The words "the Submissions of the Parties and statements made in the course of the hearings" (*I.C.J. Reports 1960*, p. 33) concern the merits phase of the case and they are cited in order to "confirm" the subject of the dispute in Portugal's Application. In the present preliminary proceedings, Canada has made no submission on the merits and Spain, because of the unusual nature of the procedure followed, did not submit a Memorial on the merits either.

113. It is true that when, in a given case, an applicant State accompanies its submissions with "contentions" or "arguments", not as indications of its *petitum* or claim (or as their ground or basis), but rather as considerations or reasons advanced in order to induce the Court to rule in its favour, the latter may disregard them as elements of the claim or the basis of the claim. In practice, however, the distinction is not easy to apply. The present Judgment is the clearest evidence of this. Moreover,

the 1974 *Nuclear Tests* Judgments cited in paragraph 32 of the Judgment are precisely those that have given rise to most controversy in this regard. And what do those 1974 Judgments say when examined closely? That the Court took account of certain public statements made by ministers of the Applicant Parties, though not of the Respondent, in ruling that one of the claims of the Applicants "would be only a means to an end [the other claim], and not an end in itself". In those Judgments the Court moreover added that it was "of course aware of the role of declaratory judgments, but [that] the present case [was] not one in which such a judgment [was] requested" (*I.C.J. Reports 1974*, p. 263, para. 30).

114. In the present case, following the filing of the Application of 28 March 1995, the Spanish authorities did not make any statements that could be regarded as amending the subject of the dispute laid by Spain before the Court. Nor did the Canadian authorities notify Spain that they undertook in future to cease applying their national coastal fisheries protection legislation to Spanish ships on the high seas, or make any unilateral declaration to that effect similar to the one issued by France in 1974. Canada did not make a declaration that it would never again invoke its coastal fisheries protection legislation against Spanish ships on the high seas. The issue of the opposability to Spain of that legislation therefore remains an open one. Furthermore, in the Agreement concluded in Brussels on 20 April 1995 between the European Community and Canada, it is stated that the two Parties:

> "maintain their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" (point D, 1, of the Agreed Minute which forms part of the Brussels Agreement).

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115. Requests A and C of the *petitum* of Spain's Application accordingly retain their raison d'être and it is simply for the Court to decide whether it does or does not have jurisdiction to adjudicate upon them. The Judgment fails to do this. That, in my view, is not an acceptable way of replying to the Applicant.

116. The jurisprudence of the Court in the Advisory Opinion concerning the case of the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* is particularly relevant to an understanding of the meaning and scope of request A of Spain's Application, and to establishing that, both subjectively and objectively, that request forms part of the subject of the dis-

pute[2]. Nor did that request become moot when the present Judgment was rendered. What, then, is the justification for the Judgment's removal of it from the definition of the subject of the dispute? Can it be seriously believed that the adoption, application and maintenance in force of the Canadian legislation are abstract questions of international law in the present case? Or again that there is any similarity — any at all — between the circumstances of the *Northern Cameroons* case and those of the present case?

117. In arbitral proceedings, questions regarding the subject of the dispute such as those to which I have just referred may be invoked as grounds for the annulment of an award. The fact remains that, so far as the Court is concerned, Article 56 of the Statute settles the matter: "The judgment shall state the reasons on which it is based." I would add that, in international judicial proceedings, domestic legislation constitutes an "act" and the question whether, in a given case, the legislation adopted by a State amounts to a violation of an international obligation of that State vis-à-vis another State is undoubtedly one capable of giving rise to an international dispute and of being settled by the Court on the basis of its Statute. Finally, as regards special agreements and other titles of jurisdiction of a conventional kind (paragraphs 29 and 31 of the Judgment), it should be observed that the reference is again misplaced. In such situations the subject of the dispute is not determined on the basis of the *petitum* and the *causa petendi* in the applicant's application, or of the submissions, but by the special or other agreement of the parties in question. The Court then indeed has to interpret the common will of the parties as expressed in the special or other agreement, should there be differences of opinion between them in this regard.

F. Conclusion to Chapter III

118. Having regard to the considerations set out in the present chapter as a whole, I come to the conclusion that the subject of the dispute is indeed that formulated in Spain's Application of 28 March 1995 and confirmed in its Memorial and in its oral arguments and submissions during the present preliminary incidental proceedings. I accordingly reject the definition of the subject of the dispute given in paragraph 35 of the Judg-

[2] As the Advisory Opinion states:

> "While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts." (*I.C.J. Reports 1988*, p. 30, para. 42.)

ment, along with all the considerations and conclusions relating thereto (paragraphs 29 to 34 of the Judgment).

119. It is my firm belief that the power of the Court to determine its own jurisdiction (Article 36, paragraph 6, of the Statute) does not allow it to "redefine" the subject of disputes that applicant States lay before it by application in the exercise of their sovereignty. True, in preliminary proceedings the Court may evaluate, clarify or interpret the subject of the dispute in an application, but it cannot change it or replace it with another subject. It is not for the Court to "redefine" the subject of the dispute. The same applies when, for example, a claim forming part of the subject of a dispute in the application is inadequately drafted. Here too, the Court is not entitled to substitute itself for the applicant in order to make the necessary correction. It invites the applicant to do so and, if the latter fails to do so, the Court will not adjudicate upon the claim in question (*P.C.I.J., Series A, No. 7*, pp. 34-35). This is a far cry from the jurisprudence established by the present Judgment, which does not even correct the subject of the dispute submitted by Spain; instead it replaces it with a new subject. The subject of the Application is thus denatured.

120. In the next chapter of this opinion, Chapter IV, I shall give my views on the Court's jurisdiction in the present case in light of the reservation contained in paragraph 2 *(d)* of Canada's declaration, bearing in mind the subject of the dispute that I consider to be the true subject of the dispute laid before the Court in the Application that Spain filed in the Registry on 28 March 1995.

CHAPTER IV. THE JURISDICTION OF THE COURT IN THE CASE

A. General

1. Manifestation of consent to jurisdiction under the optional clause system: declarations

121. The Court and its predecessor, the Permanent Court, have on many occasions confirmed the fundamental principle of consent to jurisdiction laid down in the Statute. For example, in this passage from the Judgment of 1928 in the case concerning *Rights of Minorities in Upper Silesia (Minority Schools)*:

> "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it." (*Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 22.)

The "compulsory jurisdiction" of the optional clause system is no exception to the principle of consent to jurisdiction. The types of jurisdiction accepted by the Statute are distinguished from one another only by the forms in which consent may be manifested and the time at which such

manifestation of consent takes place, but the consent of both parties is always needed in order for the Court to have jurisdiction in a given case, even under the optional clause system.

122. Under that system the consent of the parties must be manifested through the filing of unilateral declarations made in accordance with Article 36, paragraph 2, of the Statute. States are free to make or not to make such declarations and to draft, amend, withdraw, replace or terminate them, but *during their existence* the declarations in question have the legal effect of signifying acceptance by the declarant State of the compulsory jurisdiction of the Court in the terms expressed in the declaration, by virtue specifically of the conventional rule laid down in Article 36, paragraph 2, of the Statute of the Court.

One of the most characteristic features of the optional clause system is that the consent of the declarant State is manifested before the dispute comes into being. Between declarant States proceedings may be instituted by unilateral application. In proceedings under this system, there are accordingly an *applicant* and a *respondent*, which positions are occupied respectively by Spain and Canada in the present case.

123. Declarations under Article 36, paragraph 2, of the Statute must be deposited with the Secretary-General of the United Nations. They are also registered at the United Nations Secretariat, like treaties, and subsequently published in the United Nations *Treaty Series* and in the *Yearbook* of the Court. Declarations are unilateral acts involving on the part of the declarant State an international legal obligation towards other declarant States, an obligation contemplated by the Statute of the Court, which is an integral part of the United Nations Charter and of international law. In other words, they are international obligations incorporated in unilateral international instruments called "declarations", whose effects are governed by the Statute of the Court and by international law. Once it has been made and deposited, the declaration constitutes for the declarant State a *formal, written, international legal undertaking* to accept the compulsory jurisdiction of the Court. All such declarations have the object and purpose of producing specific legally binding effects in international relations regarding acceptance of the compulsory jurisdiction of the Court for the purposes of settlement of disputes between sovereign States, in accordance with international law.

124. However, the obligation assumed by the declarant State is not an obligation *erga omnes*. Its character is both mutual and reciprocal. It has an effect only in relations with other declarant States not excluded by the declaration itself *(mutuality)* and only, moreover, in cases where the dispute in question falls within the scope both of the consent expressed by the declaration of the applicant State and within that of the consent expressed by the declaration of the respondent State *(reciprocity)*. As stated in Article 36, paragraph 2, of the Statute, applicant and respondent must have accepted "the same obligation", an expression covering

both mutuality and reciprocity. In the present case there are no issues of mutuality, Spain having deposited its declaration on 15 October 1990 and Canada on 10 May 1994.

125. Spain's Application of 28 March 1995 having relied solely on those two declarations to found the jurisdiction of the Court, the present case is one which, as regards consent to the jurisdiction of the Court, pertains exclusively to the optional clause system of the Statute.

2. Do the present incidental proceedings raise any question relating to the principle of consent to jurisdiction or to the non-presumption of such consent?

126. The fact that Canada's Counter-Memorial has confused the principle of consent to jurisdiction with the quite different matter of the interpretation of its declaration of 10 May 1994 cannot create a problem where it would not otherwise exist. Unfortunately, it is clear from the Judgment that this strategy has succeeded in the present case. A majority of the Court has posed the question of jurisdiction, the subject of these preliminary proceedings, in terms of the principle of consent to jurisdiction rather than by reference to the interpretation of Canada's consent as expressed in its declaration of 10 May 1994. It is there that the real *ratio decidendi* of this Judgment is to be found regarding the interpretation of that declaration by the majority.

127. The argument used by Canada to convince the majority of its thesis consists in mixing together two elements that in themselves are quite distinct. From the outset it opposed the notion of "genuine consent" to that of "presumed consent". However, in these proceedings Spain has not relied on the "presumed consent" of Canada; nor has the objective question of mutuality between the Parties been at issue. Both Canada and Spain gave their "genuine consent" when they made their respective declarations of acceptance of the compulsory jurisdiction of the Court and deposited them with the Secretary-General of the United Nations.

The reality of a consent by Canada and of a consent by Spain is beyond doubt in the present case. The only issue facing the Court was that of the scope of the consent expressed by Canada in its declaration (given that it disputed jurisdiction) and the only way of resolving that issue was to interpret that declaration in accordance with international law. However, Canada's consent as such, as expressed in its declaration, has nothing presumed about it. It is so genuine that it was able to be deposited, registered and published.

128. Why then was Canada seeking to oppose to its "genuine consent" a purported "presumed consent"? All becomes perfectly clear when one

examines Canada's Counter-Memorial, particularly the section headed "Optional Clause Declarations Must Be Interpreted in a 'Natural and Reasonable Way', Giving Full Effect to the *Intention* of the Declaring State" (emphasis added). What Canada sought by that reference to the intention of the declarant State was that the Court should, through interpretation, assume the task of constructing *a posteriori*, to suit Canada's needs in the present incidental proceedings, a "presumed consent" of Canada taking the place of the "genuine consent" which it manifested in its declaration of 10 May 1994, and on which Spain relied when filing its Application!

129. This was nonetheless such an extraordinary claim on Canada's part that one might have supposed that it could not be countenanced by the Court, particularly bearing in mind that the above heading does not match the passage from the Judgment in the *Anglo-Iranian Oil Co.* case upon which it draws. That passage talks of "a natural and reasonable way of reading *the text,* having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court" (*Preliminary Objection, I.C.J. Reports 1952*, p. 104). That is to say, a natural and reasonable way of reading *the text* of the declaration, having due regard to the intention at the time of its deposit, and not a natural and reasonable way of reading a purported intention of the declarant State, one described, moreover, in the Counter-Memorial as an *"underlying intention"*. Canada in fact itself recognized this in other paragraphs of its Counter-Memorial and, above all, in its argument at the oral phase. Furthermore, the *Anglo-Iranian Oil Co.* decision was also systematically cited by Spain in support of its interpretation of Canada's declaration, but always in its entirety, that is, without playing hide-and-seek with the words *"the text"*.

130. The ambivalence that Canada maintained throughout the proceedings with regard to the natural and reasonable construction, whether of its purported underlying intention or of the text of its declaration, accompanied by the psychological argument of "genuine consent" as opposed to "presumed consent", certainly paid off within the Court. A majority accepted Canada's view by a sort of act of faith. In so doing, it introduced into the process of interpretation of Canada's declaration, as reflected in the Judgment, the contentions and arguments put forward by Canada that I have just cited. This to me is unacceptable, for those contentions and arguments are not elements applicable, under positive international law as it currently stands, in the interpretation of international instruments, whether multilateral or bilateral or, as with declarations, of unilateral origin. In accepting Canada's thinly-veiled invitation, the majority devoted its efforts in the reasoning of the Judgment to construing the consent expressed in the Canadian declaration in the sense sought by the Respondent in the present incidental proceedings, without greatly concerning itself with that country's intention in May 1994, when it filed

its declaration. However, consent to the jurisdiction of the Court is one thing, while the legal interpretation of a declaration is quite another. The purpose of interpreting a declaration is to ascertain the intention expressed in the declaration itself, and the act of interpretation must take place without any form of preconception. The interpretative process is conducted on the basis of the text of the declaration and is an inductive one. In no circumstances can it be a deductive process founded on legal, political or psychological preconceptions.

The principle of consent to jurisdiction and of the non-presumption of consent *is not a rule of interpretation of declarations made pursuant to Article 36, paragraph 2, of the Statute*. It is not regarded as having any part to play in the legal process of interpreting declarations properly so-called, a process governed by norms of international law, by logical considerations and by the systems of values recognized and protected by international law as a whole. I fear that the interpretation placed by the present Judgment upon Canada's declaration of 1994 is not only based on a deductive approach, starting from a premise external to the text, but is also a *free* interpretation, which takes scant account of the current rules of international law governing the interpretation of international instruments. In other words, the Judgment approaches the matter of interpretation as if we were still at a pre-normative stage in international law as far as interpretation is concerned.

131. Once a State has acquired the status of declarant State under the optional clause system, it makes no sense to invoke the principle of consent to jurisdiction and of the non-presumption of consent as a sort of *prior condition* governing the Court's interpretation of the declaration. Of what relevance is it, for purposes of the interpretation of a declaration, to declare that the Court derives its authority from the will of States, or that jurisdiction is never presumed, or again that States are absolutely free to participate, or not to participate, in the optional clause system? Neither the Applicant nor anyone else can dispute this, since the principle in question is an objective rule embodied in the Statute of the Court.

132. Under the optional clause system, when we speak of the consent of a declarant State to the compulsory jurisdiction of the Court, we are always, by definition, referring to the consent of that State embodied in its declaration given prior to the dispute and to the date of institution of the proceedings, that is to say, to a *prior consent given in solemn written form*. In the present case, the prior consent of Canada was manifested on 10 May 1994 when it deposited its declaration. It is now simply a matter of interpreting that declaration in accordance with the rules of international law relating to the interpretation of international instruments, rather than seeking to oppose to the prior consent contained in Canada's declaration a purported "underlying" consent by Canada, whether political or psychological — one claimed, moreover, to take precedence over that manifested in the declaration in question.

3. Are there any limits to the freedom of States to insert conditions and reservations in their declarations?

133. The freedom of States to insert conditions and reservations in their declarations under the optional clause system has been recognized since the 1920s, the era of the League of Nations, and was expressly confirmed at the San Francisco Conference as an *established practice*.

134. The Parties in the present case are clearly agreed on the general principle of the freedom of declarant States to insert conditions and reservations in their declarations under Article 36, paragraph 2, of the Statute of the Court. They have, moreover, exercised that freedom when formulating their current declarations. However, whereas Canada argues that the right to make reservations is the cornerstone of the optional clause system and that reservations to declarations are manifestations of the *absolute freedom* of States to accept or to restrict compulsory jurisdiction, Spain has spoken, with reference to the reservation contained in paragraph 2 *(d)* of Canada's 1994 declaration, of automatic, subjective, anti-statutory and anti-law *interpretations* and even of *interpretations* that are contrary to the Charter of the United Nations.

Thus the debate between the Parties on this issue relates rather to the manner of interpreting the reservations made by States than to their freedom to make such reservations in their declarations. The question of principle has nonetheless been raised. My position in this respect is that State sovereignty has little meaning except within the framework of that legal order which we call "international law" and that consequently there are no "absolute freedoms" of States, even in regard to the question under consideration here, but freedoms that must be exercised within the framework of that order. With regard to reservations in declarations under the optional clause system, that freedom is very broad but it is not boundless.

135. The first limitation derives from the Statute of the Court itself, the classic example being "subjective" reservations of national jurisdiction. However, it is possible to imagine others, such as reservations concerning incidental or derived powers of the Court arising exclusively from the Statute, or reservations relating to the binding force or the *res judicata* of judgments, or reservations concerning fundamental principles of judicial proceedings such as the equality of the parties, and so on.

On becoming parties to the Statute, States accept the general jurisdiction of the Court and the established principles and rules of the judicial process. No State is obliged to become a party to the United Nations Charter and the Statute of the Court. Thus, when they do so, they exercise their sovereign freedom. This entails both rights and obligations for them. It is therefore contrary to the most elementary legal principles, including that of good faith, subsequently to invoke those rights while ignoring the obligations assumed. It should be recalled in this connection

that the deposit of declarations under the optional clause system also flows from a free, sovereign choice and that such declarations are made pursuant to Article 36, paragraph 2, of the Statute and in accordance with that conventional provision.

136. I therefore consider that, when faced with a reservation contrary to the Statute, the Court is entitled to disregard it, for no State has the right either to distort the nature of the judicial process by inserting anti-statutory reservations in a declaration under the optional clause system, or to abuse the good faith and expectations of the other declarant States. There remains the less well-studied question of a possible restriction on the freedom to make reservations which breach fundamental principles or norms of the United Nations Charter or of general international law. I believe that, in this area too, there exist restrictions, but here my conclusions require qualification, given the principle of consent to the jurisdiction of the Court, which also forms part of the United Nations Charter and of the Statute of the Court.

137. It might be that in some instances a reservation of this kind ought to be disregarded but not in others. For example, would it be lawful to exclude by reservation a structural provision such as Article 103 of the United Nations Charter? Or the powers and attributions of the Security Council under the Charter? Or the principle of the sovereign equality of States? As to general international law, there might also be reservations which, by reason of their object or purpose, could be void. I am thinking, for example, of reservations made with the intention of promoting a war of aggression, genocide, the slave trade, or acts of piracy on the high seas, and so forth. There further remains the particular question that might arise on account of the existence of rules of *jus cogens*, for, in the final analysis, declarations amount to agreements on jurisdiction with each of the other declarant States.

138. Any State harbouring such an intention must refrain from making a declaration or do so only in respect of one or more specific categories of dispute to the exclusion of all others, as it is perfectly entitled to do. What it is not entitled to do in regard to the other declarant States is to undermine the optional clause system, that is to say, to commit an *abuse of rights* by depositing a declaration that is misleading in its scope and wording, while reserving the right, when the time comes, to invoke interpretations that are at variance with the Statute, with the United Nations Charter or with general international law. States are entitled to accept or not to accept the optional clause system and to insert conditions and reservations in declarations, but not to overstep the bounds of the principles of good faith and mutual trust underlying the system. In exercising its power to determine its own jurisdiction, the Court should have no hesitation in exercising such supervision. The present Judgment declines to do so. For me this is just as serious as its own redefinition of the subject of the dispute submitted to it by Spain on 28 March 1995.

139. The Judgment refers to the question of reservations being invalid

or inoperative by reason of their possible incompatibility with the Statute, with the United Nations Charter and with international law. As drafted, paragraph 2 *(d)* of Canada's declaration does not present me with any problem of incompatibility. Nor, moreover, does the reservation in paragraph 2 *(c)* contain any subjective or automatic reservation of national jurisdiction that would prevent the Court from exercising its power to determine its own jurisdiction pursuant to Article 36, paragraph 2, of the Statute of the Court. In my view, the reservation in paragraph 2 *(d)* of Canada's declaration does not fall *as such* within the category of those reservations which could be regarded prima facie as being excluded from the freedom to make reservations enjoyed by declarant States. The question raised by Spain concerned a different issue, namely the *interpretation* of a reservation in a manner contrary to the Statute, the United Nations Charter or to international law. Spain's argument, with which I agree, was that in the event of doubt as between two possible interpretations of a declaration, one must, as a general principle, interpret the declaration, including its reservations, in accordance with the Statute of the Court, with the United Nations Charter and with international law. The question of the incompatibility of the Canadian reservation as such, or even of its possible invalidity, was not raised by the Applicant and the Judgment does not deal with it. However, the Judgment falls into the trap of a self-judging approach to the interpretation of reservations, for it has effectively allowed Canada's purported *intended effect* to govern its interpretation of the reservation, inasmuch as, according to the Judgment, that intended effect is *the one which the Respondent claims in the present incidental proceedings to have had in mind when it made its declaration in 1994.*

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140. I should add that the possibility of applying the notion of *separability* to the various parts of a declaration of acceptance of the compulsory jurisdiction of the Court is in principle beyond question. The principle as such is accepted. Moreover, the commentary of the International Law Commission on Article 41 of its final draft articles on the Law of Treaties expressly acknowledges this in the following passage:

> "The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of separability to the invalidity or termination of treaties. However, if the jurisprudence of the two Courts does not throw much light on these latter questions, it is quite certain that judges in separate opinions in the *Norwegian Loans* [*I.C.J. Reports 1957,* pp. 55-59] and *Interhandel* [*I.C.J. Reports 1959,* pp. 57, 77, 78, 116 and 117] cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a

unilateral declaration under the Optional Clause, by reason of a reservation the validity of which was contested." (United Nations, *Official Records of the United Nations Conference on the Law of Treaties,* Documents of the Conference, p. 57.)

141. The Court did not rule on the effect of the established invalidity of a reservation on the declaration itself. However, in the *Norwegian Loans* and *Interhandel* cases certain judges (Lauterpacht and Spender) held that the declaration as a whole was invalid, while others (Klaestad and Read) were of the contrary opinion. Thus, in his dissenting opinion to the Judgment in the *Interhandel (Preliminary Objections)* case President Klaestad came to the following conclusion:

"These considerations have led me to the conclusion that the Court, both by its Statute and by the Charter, is prevented from acting upon that part of the Reservation which is in conflict with Article 36, paragraph 6, of the Statute, but that this circumstance does not necessarily imply that it is impossible for the court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute. Part *(a)* of the Fourth Preliminary Objection should therefore in my view be rejected." (*I.C.J. Reports 1959,* p. 78.)

As far as treaties are concerned, Article 44 of the 1969 Vienna Convention allows (with certain exceptions) for the separability of treaty provisions in the event of the invalidation, termination or withdrawal of one of the Parties or the suspension of the operation of the treaty, provided that the clause is separable from the remainder of the treaty and was not an essential basis of the consent of the parties to be bound by the treaty as a whole. To determine whether such a condition exists thus becomes a question dependent on the circumstances of the case, which must be resolved by interpretation. I believe that this solution is applicable *mutatis mutandis* to declarations. There can be no question of the declaration being automatically invalid. The intention of the declarant State has to be interpreted in the light of the circumstances of the case.

142. With respect to certain categories of reservations to declarations, for example those termed "subjective" or "self-judging", some modern writers avoid applying the sanction of nullity to the entire declaration and propose non-opposability or inadmissibility as alternative solutions. Finally, it should be noted that the European Court of Human Rights has held that certain declarations (reservations) relating to particular provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms were invalid while at the same time upholding as valid declarations accepting the jurisdiction of the Court in respect of disputes concerning the Convention (Judgment of 23 March 1995 in the case *Loizidou* v. *Turkey, Preliminary Objections*).

4. Good faith and mutual trust as essential principles of the optional clause system under the Statute of the Court

143. The Court's jurisprudence contains many decisions on good faith and mutual trust as essential principles of the optional clause system. For example, in the Judgment of 1984 on jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* which likewise concerned declarations under Article 36, paragraph 2, of the Statute, it is stated:

> "In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation . . . in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional Clause system, the principle of good faith plays an important role; *the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms . . .*" (*I.C.J. Reports 1984*, p. 418, para. 60; emphasis added.)

144. Article 36, paragraph 2, of the Statute establishes a veritable "system of jurisdiction", termed "compulsory jurisdiction", which is of an optional nature in that States parties to the Statute are completely free to participate in it or to refrain from doing so. Naturally, when the Court examines cases submitted to it, it is with States' declarations of acceptance of its compulsory jurisdiction that the Court concerns itself. But declarations are only the means by which States which so desire participate in the system, to a greater or lesser extent and for longer or shorter periods of time. Declarations, which are unilateral acts by States, are but a means of implementing a system founded on agreement, namely the Statute of the Court, which forms an integral part of the Charter of the United Nations. As Article 2, paragraph 2, of the Charter makes clear, all Members, in order to ensure to all of them the rights and benefits resulting from membership, "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter".

145. Consequently, if, through the deposit of a declaration, a State, acting freely and of its own deliberate choice, assumes solemn legal obligations vis-à-vis other declarant States in accordance with Article 36, paragraph 2, of the Statute, it follows that those are obligations which, by reason of their nature, their source and the fact that they are treaty-based, must be fulfilled by the declarant State in good faith. For example, it would not be consistent with the good faith of the system for a declarant State to engage in conduct which deceived other declarant States, or which served as a cloak of respectability enabling it to commit internationally unlawful acts. Any such objectives on the part of a declarant

State are incompatible with the optional clause system. Any State harbouring such intentions must abstain from participating in the optional clause system, for it is not entitled to betray the trust of the other declarant States, or to frustrate their expectations founded on the declaration which it has deposited. The principles of good faith and mutual trust are in no sense extraneous to the optional clause system. On the contrary, they are an integral part of that system, within which they act as controls upon the actions or conduct of declarant States and, as such, they have normative effects open to judicial appraisal.

146. As long as a declarant State participates in and remains within the optional clause system, it must comply — and must be presumed to be complying — with the principles of good faith and mutual trust which are the guiding principles of that system. The Judgment in this case fails to take into consideration the normative aspect of these principles in the context of the optional clause system. This is a serious omission, for, according to certain admissions, which have been confirmed by information in the public domain, the circumstances of the case raise worrying questions about the use which Canada sought to make of the clause system when it drafted its declaration and then deposited it on 10 May 1994 with the Secretary-General of the United Nations.

147. In other words, as we shall see further on in this opinion, in the present case good faith is a factor which not only has a part to play in the interpretation of the Canadian declaration; it also has a further role, related to the separate question of the admissibility or opposability to Spain, in the circumstances of the case, of the reservation contained in paragraph 2 *(d)* of Canada's said declaration.

5. *Rules and methods for interpreting declarations relied on by the Parties and general position adopted by the Judgment on the question*

148. As I said, these preliminary proceedings do not raise any real problem as regards the principle of the existence of Canada's consent to the Court's jurisdiction. Quite apart from the issue of the admissibility or opposability to Spain of the reservation to Canada's declaration, which is a separate matter, the real question here is to determine, by interpretation, the meaning and scope of Canada's said consent as expressed in its declaration. Thus, the Court must interpret this declaration in order to be in a position to decide whether it has jurisdiction in the dispute submitted by Spain, given that Canada contests the Court's jurisdiction on the basis of the reservation contained in paragraph 2 *(d)* of its declaration.

This difference between the Parties with regard to interpretation lies at the very heart of these preliminary proceedings. But "interpretation" necessarily implies rules, elements and methods of interpretation. It is therefore in the nature of things that the Parties should have debated these rules, elements and methods.

149. Generally speaking, it may be said that Spain was in favour of a text-based interpretation of Canada's declaration, through the application of objective rules, elements and methods of interpretation analogous *mutatis mutandis* to those of the system of interpretation embodied in the 1969 Vienna Convention on the Law of Treaties. In Spain's view, this approach would accord with the jurisprudence of the Court and of the Permanent Court regarding the interpretation of declarations made under the optional clause system. We would stress that Spain defends the objective approach to interpretation in accordance with the Vienna rules and with the jurisprudence of the Court, with all its interpretative elements, and does not support a purely *grammatical* or *literal* interpretation. Nor does it rule out recourse to supplementary means, provided that their role in the interpretative process is accepted by international law.

150. In contrast, in its Counter-Memorial Canada emphasized what it called the declarant State's "underlying intention". All the elements of the subjectivist schools of interpretation are to be found in the rules, elements and methods of interpretation proposed by Canada in its Counter-Memorial. I have no hesitation in calling Canada's interpretative system a "system of subjective interpretation". On closer inspection, it proves indeed to be a system of extreme subjectivity:

(a) it is subjective with regard to the *subject-matter* of the interpretative process, which is said to be not the declaration as deposited, but something which the Counter-Memorial calls Canada's "underlying intention" at the time when it deposited its declaration; that is to say, we are dealing here with a "psychological" intention or with reasons of a "political" nature (there is even a reference to a "free political choice"), as formulated by Canada in the present proceedings (rather than in its declaration at the time of deposit) and which are apparently to be sought by looking beyond the declaration and the fact of its deposit;

(b) it is subjective with regard to the *purpose* of the interpretative process in which the Court must engage, which it claims is not to give full effect to the consent expressed by Canada in its declaration, but to give full effect to an intention not manifested by Canada, namely the so-called "underlying intention" referred to above;

(c) it is subjective with regard to the general *method* to be followed in order to interpret the consent given by Canada, which is said to consist in seeking an interpretation according not with the "natural and reasonable way of *reading the text*", but with a "natural and reasonable" way of interpreting the "underlying intention" relied on by Canada in these proceedings;

(d) it is subjective with regard to the definition of the *instrument* which the Court must interpret, which is alleged not to be Canada's declaration in its entirety, but rather the reservation in paragraph 2 *(d)* taken in isolation, with the result that the declaration can be interpreted in a restrictive manner — though we are not told why —

whereas the reservation can be interpreted more widely or more liberally; and, lastly,

(e) it is subjective with regard to the *interpretative elements* which it is claimed should be used in the interpretative process, in that it gives at least equal interpretative value to the declaration and to "the surrounding circumstances" (various ministerial statements made during parliamentary debates on Bill C-29), that is to say without drawing the requisite distinction between the interpretative elements embodied in the general rules of interpretation (good faith, context, object and purpose, international law, etc.) and supplementary means (*travaux préparatoires*; circumstances).

151. In my opinion, this is all totally inconsistent with the Court's previous jurisprudence on the interpretation of declarations under the optional clause system, and with the rules of international law regarding the interpretation of written instruments embodying international obligations, which distinguish between, on the one hand, the text and other interpretative elements under the general rules of interpretation and, on the other, supplementary means. This is particularly true where unilateral declarations, such as those under Article 36, paragraph 2, of the Statute, are made in the context of a convention or treaty — or in application of provisions thereof — and deposited, registered and subsequently published in official international yearbooks and reports. I fail to see how the three case, referred to by Canada as "leading cases" (*Phosphates in Morocco, 1938, P.C.I.J., Series A/B, No. 74,* p. 10; *Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952,* p. 93; *Aegean Sea Continental Shelf, I.C.J. Reports 1978,* p. 3) can support a subjective approach to interpretation of the kind advocated in Canada's Counter-Memorial.

152. During the oral phase, Canada did not give up its attempts to persuade the Court to interpret the reservation in paragraph 2 *(d)* of the declaration by introducing into the interpretative process elements, criteria and methods of interpretation proper to subjective interpretation; it constantly referred to an underlying intention, of which there was no express mention in the declaration or in Canadian documents or instruments relating thereto prior to or at the time of deposit. Nor was there any such mention after deposit, notwithstanding the provisions of paragraph 3 of the 1994 declaration concerning amendments to the current declaration. However, during the oral phase, Canada presented general submissions on the matter which would appear to accept that the starting-point for the interpretative process is the declaration as deposited. It may therefore be concluded that, by the end of the oral arguments, the approach to interpretation advocated by Canada was an ambivalent one. It swung back and forth between the purported underlying intention and the declaration and text thereof, but its preference was always for the underlying intention.

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153. However, the Respondent's reliance on its underlying intention, whether in the form taken in the Counter-Memorial or in the watered down version put forward in oral argument, had certain adverse consequences for it, on which the Judgment ought not to have remained silent. I refer to the indirect, but nonetheless clear, admission that this implies, namely that the declaration of 10 May 1994, as formulated and deposited, might not suffice after all to support Canada's submission of lack of jurisdiction. Otherwise, Canada would certainly have urged the Court to interpret its declaration on the basis of the premises, rules, elements and methods of objective interpretation. It cannot reasonably be supposed that Canada, its counsel and lawyers would not be aware of these rules, elements and methods of interpretation. Canada was therefore far from certain about the manifest lack of jurisdiction which it asserted to the Court and to Spain in its first letter of 21 April 1995. This is an important fact to note. Yet the majority of the Court did not draw any conclusions from it when it came to interpret the Canadian reservation. On the contrary, the Judgment itself goes even further in the direction mapped out by the Respondent with regard to the application to the Canadian declaration of a subjective system of interpretation.

154. In fact, the Judgment succeeds in performing the amazing feat of adopting a system for the interpretation of the Canadian declaration which is even more subjective than that advocated by the Respondent in the written phase! However, this was not easy to do. Thus, paragraph 46 of the Judgment tells us that the Court *"observes that the provisions of that Convention may only apply analogously to the extent compatible with the* sui generis *character of the unilateral acceptance of the Court's jurisdiction"*. Here we are back to the extreme subjectivist and minority schools of interpretation which were to be found prior to the codification of treaty law in 1969. This is what the Judgment asserts, after the Court's jurisprudence since 1991 has stated on several occasions that the relevant provisions of the Vienna Convention are declaratory of general international law.

155. When the Judgment invokes the *sui generis* character of declarations (a unilateral instrument drawn up by its author with a view to participating in a system with an agreed statutory basis), it does so not with reference to particular aspects of the application of one or more interpretative elements accepted by international law. What is *sui generis* for the Judgment is the "unilateral acceptance of the jurisdiction of the Court"! It is effectively the entire optional clause system that is deemed *sui generis* by the Judgment. I have no difficulty in affirming that this Judgment is in truth hostile to this form of acceptance by States of the Court's jurisdiction.

156. All now becomes clear, including the fundamental question of what the Judgment considers to be the *subject-matter of the interpretation*. In essence, for the Judgment, this is no longer the declaration drawn up by Canada and deposited with the Secretary-General of the United

Nations, as one might have thought, but Canada's "unilateral acceptance of the jurisdiction of the Court", that is to say the considerations, motives or reasons — political or other — which led Canada to deposit its declaration of 10 May 1994. The declaration as such is ignored or plays only a minor supporting role in the Judgment as far as the interpretation of Canada's legally pertinent consent to jurisdiction is concerned.

157. For the Judgment, right from the very outset of the interpretative process, it is the political or internal psychological reasons which led Canada to deposit the 1994 declaration that comprise the true subject-matter of the interpretation. It is no longer a matter of interpreting the declaration *qua* unilateral international instrument, or Canada's consent as embodied in the deposited declaration and ascertained by interpretation, but in truth of interpreting the aims of the Canadian Government at the time when it made its declaration. This is the point we have reached in the interpretation of declarations under the optional clause some eighty years after the adoption of the first Statute. It would be hard to strike a more devastating blow at legal security, and at the operation of the optional clause system.

158. The Judgment thus accepts that what the Court must interpret is the "underlying intention" of which Canada spoke, but which the Court defines even more vaguely and subjectively than did Canada in its Counter-Memorial and oral argument. Once the Judgment takes this as the subject-matter of its interpretation, and given that the Court evidently has the requisite jurisdiction to interpret the Canadian declaration, then anything is possible, for the interpretative process is no longer subject to the constraints imposed by international law on the interpretation of international instruments. Thus what we are faced with here is a *free interpretation* of Canada's purported "underlying intention".

159. I cannot accept such an approach to the interpretation of declarations under the optional clause system. Even if the Court is the interpreter, the interpretation of declarations must be carried out on the basis of their text, the declarant State's intention being ascertained by the application of the normative rules of interpretation, which reflect the current state of international law and have, moreover, been formulated by States after taking due account of the Court's jurisprudence on the subject. If the approach to the interpretation of declarations adopted in this Judgment were to become confirmed in the future, then, in order to know what where they stood, declarant States would in every case have to enquire into the political or other *aims or reasons* which had led each of them to accept the Court's jurisdiction through the deposit of a declaration.

160. The technique used by the Judgment in support of the method of interpretation which it applies consists in bringing the principle of consent to jurisdiction into the interpretative process, as if it were a principle which was also an element in the interpretation of declarations. In other

words, by creating a vicious circle: that which has to be proved by interpretation (the meaning and scope of the declarant State's consent) becomes an integral part of the demonstration, that is to say of the interpretative process to be carried out by the interpreter. This is in effect to confuse two elements which are, however, quite distinct, namely, on the one hand, the principle of consent to jurisdiction and, on the other, the interpretation of the instrument in which that consent is manifested. This trend was already perceptible in some opinions of judges (especially from about 1994 onwards) on the interpretation of the compromissory clauses in certain treaties. The majority in the present case now extend this solution to the interpretation of Canada's declaration of 10 May 1994, even though the declarations here, both of the Respondent and of the Applicant, are declarations of acceptance of the compulsory jurisdiction of the Court, which may be characterized, notwithstanding the reservations they contain, as wide or general.

161. It is in the approach to interpretation applied by the Judgment to Canada's declaration and in its redefinition of the subject of the dispute submitted by Spain that the fundamental reasons for this dissenting opinion are to be found.

6. The respective functions of the parties and the Court in preliminary proceedings on jurisdiction

162. I agree with the general criteria adduced by the Judgment in this regard in its paragraphs 36 to 38, although their application in this case leaves something to be desired. On the other hand, even if the role of the parties is to "persuade" the Court to adopt their respective points of view and the Court's role is to decide whether it has jurisdiction (Art. 36, para. 6, of the Statute), the distinction between "persuasion"and "proof" remains, in truth, a highly theoretical one.

163. More importantly, it should be recalled that Canada's initial contention of manifest lack of jurisdiction and certain passages of its Counter-Memorial raised some doubts as to the Respondent's position with regard to the self-judging nature of the reservation contained in paragraph 2 *(d)* of its declaration. However, in my view, these doubts of the Respondent were dispelled in the oral phase. Moreover, Spain confirmed in its submissions the position it has consistently held on the reservation throughout these proceedings, namely:

> "Canada cannot claim to subordinate the application of its reservation to the sole criterion of its national legislation and its own appraisal without disregarding your competence, under Article 36, paragraph 6, of the Statute, to determine your own jurisdiction" (see paragraph 12 of the Judgment).

164. Thus, by the end of the hearings, both Parties recognized generally that it was for the Court to determine the issue of jurisdiction. But what role do the parties play in the determination by the Court of its

jurisdiction when that jurisdiction is disputed, as it is in the present case by Canada? The "persuasion" exercised by each party must be placed on an equal footing, that is to say, irrespective of whether a given party is the author of the declaration, or of its status as respondent or applicant in the case. The principle of the equality of the parties requires this. A party's own view of a reservation inserted by it in its declaration should not, as such, possess a persuasive force any stronger or weaker than that attributed to the reservation by the other party. In other words, the criterion of a high standard of proof, to which Canada referred, applies equally to both respondent and applicant.

165. I am sorry to say that, in my opinion, this is not exactly what appears to have occurred in these preliminary proceedings. From the outset, the Respondent's contentions were accorded — consciously or unconsciously — additional, superior, "persuasive" force by comparison with that attributed to those of the Applicant. However, the optional clause system does not and must not involve any presumption whatsoever for or against jurisdiction, any more than it involves a prior commitment to an extensive or restrictive interpretation of the declarant State's intention to enter into a binding obligation. The practical result is that, in reality, a self-judging approach to the interpretation of reservations is indirectly endorsed by the Judgment, even though the Respondent disowned it in the oral phase.

166. I am not convinced that the Judgment strictly respects the principles of the sound administration of international justice. Jurisdiction is assuredly a "point of law" which it is for the Court to decide. However, the Court's jurisdiction in this regard is clearly not a discretionary one. It must determine whether it has jurisdiction in an objective manner, "in the light of the relevant facts" (*I.C.J. Reports 1988,* p. 76, para. 16) or, as the Judgment puts it in paragraph 38, "from all the facts and taking into account all the arguments advanced by the Parties". In the light of the facts which were the source of the dispute and of other relevant facts, such as the subject of the dispute submitted in the Application, I am a long way — a very long way — from being able to find that all the relevant facts and arguments were truly weighed against one another and given equal consideration before the conclusion of lack of jurisdiction was reached. Quite the contrary. That is why my finding as to jurisdiction is diametrically opposed to that arrived at by the majority of the Court.

167. One final comment on the fact that, in these proceedings, the Court was called upon to exercise its *"compétence de la compétence"* (Art. 36, para. 6, of the Statute) in the context of preliminary proceedings (Art. 79 of the Rules of Court) and even before the Applicant had filed its Memorial on the merits. According to well-established jurisprudence, it is of the essence of preliminary proceedings to determine jurisdiction or admissibility that a judgment by the Court on the objection raised, adopted in a context like that of the present case, *cannot decide or prejudge any issue between the parties going to the merits.* Here again, I am

by no means convinced that the reasoning in this Judgment does not on occasion encroach further upon issues of the merits than is accepted as reasonable at the preliminary stage, or might not be interpreted as doing so. Be this as it may, such readings or interpretations of the reasoning in the Judgment would undoubtedly be *ultra vires*. The Judgment cannot, by definition, have such an effect. It was necessary to point this out in this opinion in order to avoid doubt, inasmuch as the entire merits of the dispute between the Parties remain undecided by the present Judgment.

B. The Question of Admissibility or Opposability to Spain, in the Circumstances of the Case, of the Reservation in Paragraph 2 (d) *of the Canadian Declaration*

168. Reading the text of the Canadian declaration, including the reservation in paragraph 2 *(d)*, one might find its wording surprising. It is clear that the text, irrespective of issues of "effectiveness", does not reflect the underlying intention relied upon by the Respondent in order to escape the Court's jurisdiction in the dispute submitted by Spain. The very fact that Canada invokes an underlying intention is the best possible evidence that its text is inadequate. In fact, as it stands, this text leaves the door wide open to the Court's jurisdiction, given the subject of the Application. The first question which then quite naturally springs to mind is to ask oneself why Canada was not more careful in the drafting of the 1994 text, bearing in mind the underlying intention invoked by it in these preliminary proceedings.

On the basis of the case-file and of information in the public domain, I have drawn certain general conclusions which I would like to expound in this opinion, for they have a direct bearing on the question we are considering at present.

169. According to the transcripts of the parliamentary debate on Bill C-29 amending the Canadian Coastal Fisheries Protection Act, which became law on 12 May 1994, certain members of the Canadian Government who took part in the debate acknowledged that no one had asked any lawyer for a brief or opinion on issues of international law. This is not the first time that politicians have acted in this way. They pay scant heed to legal niceties when they are determined to take rapid political action. The consequence, alas, is that their country may one day find itself brought before an international court.

170. It is also possible that many members of parliament, swept along by the majority tide of political opinion which emerged in favour of this policy during the debate in question, believed that, having embodied in a domestic statute a new policy of expansion aimed at a geographical area of the high seas adjacent to its exclusive economic zone, Canada was protecting itself sufficiently in terms of international relations and of inter-

national law by a reservation to the compulsory jurisdiction of the Court of the kind contained in paragraph 2 *(d)* of the 1994 declaration.

171. It is true that, at that time, the primary concern was with stateless and flag-of-convenience vessels and that Canadian diplomats would be explaining the situation to the members of NAFO (an international organization where, as a result of the European Union's common fisheries policy, the numerous votes previously held by the member States of the Union had been replaced by a single vote, that of the Union). In addition, there were friendly or allied nations which might be able to lend assistance or demonstrate their understanding in the event of a crisis.

172. But this assurance wore somewhat thin when Canada decided in 1995 to go a step further and attack Portuguese and Spanish fishing vessels on the high seas, without having amended, replaced or withdrawn the 1994 Declaration, while knowing full well that Portugal and Spain were declarant States under the optional clause system. Canada could have taken certain steps in respect of the wording of that declaration, even after it had used force against the *Estai* on 9 March 1995, for the Spanish Application instituting proceedings was not filed with the Registry of the Court until 28 March 1995. The Court is not therefore faced with a "lightning" Application like that brought by Portugal against India in the case concerning the *Right of Passage over Indian Territory*.

173. In this connection, it should be recalled that, notwithstanding that under the Canadian legal system the scope of an Act can be varied by regulation where this is provided for in the Act, the point at issue here is Canada's consent to the compulsory jurisdiction of the Court, that is to say the Canadian declaration of 10 May 1994. Changes in Canadian municipal law can have no automatic effect on the consent to jurisdiction manifested in the declaration of 10 May 1994. In order to adapt or change that consent, the declaration itself must be amended. Canada has not done so.

174. The opposite view would be tantamount to recognizing, as Spanish counsel put it, that the consent expressed by the deposit of the declaration is presumed to be one based on "variable geometry". The optional clause system makes no provision for this whatsoever. The system rests on good faith and the principles of mutuality and reciprocity. The legitimate expectations raised with other declarant States by the deposit of a declaration must be respected; hence the need for a declarant State to amend its declaration if, in the context of its international relations, it wishes to vary the consent thereby manifested.

175. But Canada did nothing at all about the consent it had given in 1994 to the compulsory jurisdiction of the Court, either before or after the events of March 1995. Possibly it believed that it was in a position of strength, or it might have been relying on action by its diplomats to resolve the crisis created in its relations with the European Union within NAFO, and subsequently with Spain. Did the Canadian Government believe that, as a coastal State, it was entitled to act as it did with regard

to Spain, and to Spanish and Portuguese vessels, when it decided, in the first months of 1995, to replace what the letter of 15 February 1995 from Mr. Ron MacDonald, Chair of the House of Commons Standing Committee on Fisheries and Oceans, calls "legal niceties" (Memorial of Spain, Annexes, Vol. I, Ann. 20) by "gunboat diplomacy", to quote the words used by the Canadian press (*ibid.*, Ann. 23)? Or did the Government think that Canada was adequately protected by the reservation in paragraph 2 *(d)* of the 1994 declaration, even in the new situation created by it in 1995?

176. All the indications are that this was not the case. What happened at the beginning of 1995, as in May 1994 when the declaration was deposited, was that the Canadian authorities were faced with a dilemma. Confronted with this dilemma, Canada's "underlying intention" made a choice. This choice entailed risks, but it also offered a chance of winning on all counts, for jurisdiction over fisheries and the management and conservation of fish stocks in the NAFO Regulatory Area had been transferred by member States to the European Union. In these circumstances, since Canada was a long-standing friend and ally, it might have been expected that, if there was a showdown with Spain or Portugal, the diplomacy of the other member States of the European Union would dissuade Spain or Portugal from submitting a dispute with Canada to the Court. At all events, the European Union itself was not entitled to bring the matter before the Court.

177. For the other horn of the dilemma involved far more serious risks for Canada's true policy aims within the NAFO Regulatory Area, which were to change the rules of the game on a permanent basis. Why? Because a fireproof reservation in the declaration would have been an implicit admission of the lack of any *title* under international law as a basis for the measures taken with regard to foreign vessels fishing in the free waters of the said area. This image could have had a very negative impact on the Government's overriding political aim at that time in a country which, having exhausted the biological resources in its exclusive economic zone, sought to proclaim itself "world leader in oceans and maritime resource management" (Memorial of Spain, Annexes, Vol. I, Ann. 26, p. 442).

178. In 1995, the Canadian Government's true target, its underlying political intention, was not the conservation of Greenland halibut, or the *Estai*, or the other Spanish or Portuguese vessels, but *the creation of a situation of uncertainty as to the existing law*, whereby straddling stocks were intended to serve as a spearhead in an attempt to negotiate a change in that law in favour of coastal States, and in particular Canada, to the detriment of the balances established in the 1982 Convention (which Canada has not yet ratified). In other words, Canada was and is seeking *international title to extend its State jurisdiction into the NAFO Area of*

the "high seas" adjacent to Canadian waters, an expression which is beginning to be replaced in Canadian legislation by another, without precise legal meaning in international law, namely the word *"oceans"*. If one is attempting to negotiate rights with other States, it is never wise to begin by acknowledging to all and sundry, even implicitly, that the title one is seeking to secure is nowhere to be found in current international law. Canada did not wish to speak of *international title*, not even in its Counter-Memorial in this case. Hence the position it adopted of feigning ignorance with regard to the subject of the dispute submitted to the Court by Spain.

179. When a title or, at the very least, general tolerance from other States is being sought, what diplomacy does is to fudge the issue. This explains why the reservation in paragraph 2 *(d)* of the 1994 declaration (and Canadian legislation) remains silent on the matter of the international title underpinning the measures adopted, or to be adopted, by Canada with regard to foreign flag vessels fishing in the NAFO Regulatory Area (other than stateless or flag-of-convenience vessels), despite the example set by the reservation in subparagraph *(d)* of the 1970 Canadian declaration (see paragraph 290 below).

180. The statement made by Mr. Tobin, Canadian Minister of Fisheries and Oceans, on 4 August 1996 to the Final Session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Memorial of Spain, Annexes, Vol. I, Ann. 25) clearly reflects what I have just said. We find, *inter alia*, the following:

> "To the people of Canada, especially in the Atlantic provinces and most especially in my own Newfoundland, let me express my confidence that this new convention can *end foreign overfishing permanently*. And, until the new convention is fully and properly implemented, the Government of Canada will retain Bill C-29[, and if necessary invoke it again in support of measures]*."[3] (Emphasis added.)

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181. The fact that the search for an international title enabling the Canadian Government to take action in the fisheries of the NAFO Regulatory Area was — and is — central to its concerns in the area is also

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* *Note by the Registry:* these words do not appear in the English text reproduced in Annex 25.]

[3] In the English text of Mr Tobin's statement, reproduced in the Annexes to the Memorial, the word *"foreign"* before *"overfishing"* appears to have been crossed out, but it is perfectly legible. These are the sort of problems an interpreter faces when the subconscious — the purported "underlying intentions" — is invoked.

demonstrated by Canada's right, subject to its acceptance of the relevant conditions as laid down in the 1982 Convention on the Law of the Sea, to extend its continental shelf beyond the 200-mile limit, given the location of the outer edge of the shelf's continental margin (Articles 76 *et seq.* of the Convention). In an article published on 22 December 1995 in the Toronto *Globe and Mail* (p. A1), entitled "Canada Could Gain Area the Size of the Prairies. Scientists Preparing Conclusive Claim to Vast Tract", we find, for example, after a reference to Article 76 of the 1982 Convention, the following:

> "This provision could significantly increase the international recognition of claims to potential assets in offshore oil and gas, seabed minerals *and some fisheries*, says the 34 pages report, obtained by The Canadian Press." (Emphasis added.)

The article refers to the dispute with Spain and is also accompanied by the sketch map reproduced on the following page.

182. Once again we find that Canada's interests in the NAFO Regulatory Area do not merely concern the conservation of straddling stocks. Canada has other important objectives in the area. What will happen if the Canadian continental shelf is extended to the superjacent water column containing the fishing banks of the Nose and Tail of the Grand Banks and those of the Flemish Cap, where at present, as far as I know, there are not even any straddling stocks? In the circumstances, the temptation to create *effectivités* in that water column cannot be ignored.

183. The present Judgment displays no interest at all in the international title which Canada seeks to forge for itself in the NAFO Regulatory Area. This is probably the reason why the Judgment preferred to redefine the subject of the dispute submitted in Spain's Application. But Canada's conduct also poses a problem of good faith *(abuse of rights)* which the Judgment should have considered, given its assertion that the establishment of jurisdiction is a question of law which the Court must determine in the light of all the facts. Are there any facts more pertinent than those which possibly mask some *abuse of a right* by a declarant State?

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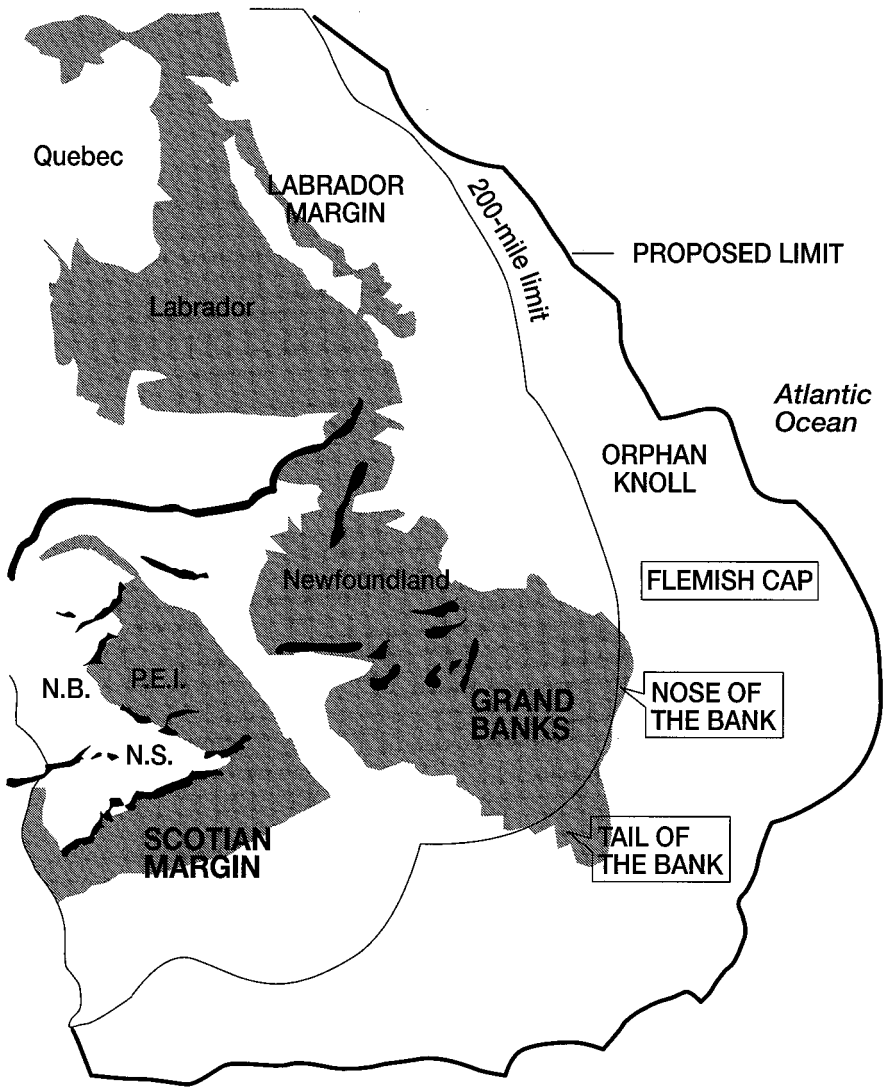
184. In this respect, we must first look at all the ambiguities in the amending Act of 1994 and the relationship between it and the reservation in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994. What is the scope of that amending Act, bearing in mind Canada's assertion that it wished to protect the integrity of this legislation by means of the res-



Sketch-map drawn from the map published by Geological Survey of Canada and appearing in *The Globe and Mail* on 22 December 1995

ervation in question? The Canadian argument about "the integrity of the legislation" has been invoked *ad nauseam* during the present incidental proceedings, yet neither Canada nor the Judgment took the trouble to examine the issue. Let us try and do that now, for convenience's sake with the help of Professor Douglas Day of Dalhousie University, Halifax. Speaking of the amendments of May 1994 to the Coastal Fisheries Protection Act, he first points out:

> "To justify its actions internationally, these amendments declare that one of the world's major renewable food resources is threatened with extinction by continued exploitation, and that Canada was assuming the power to prohibit certain classes of foreign vessels from exploiting prescribed straddling stocks in NAFO's Regulatory Area in order to ensure that the *agreed conservation and management measures of Canada and NAFO are not undermined. In defining NAFO as the institutional framework for its action, the Act focused on illegal fishing by non-members of NAFO and showed that Canada is prepared to extend its support to that organisation in terms not just of surveillance and monitoring, but also effective enforcement.* Canadian patrols by Aurora aircraft, fisheries and naval vessels, form the backbone of NAFO's surveillance and monitoring efforts, but the organisation still lacked an effective international enforcement effort to support its stock management efforts. Canada could now advocate that it was showing NAFO how it could cure its Achilles' heel by enlisting the support of the coastal state's full enforcement capabilities. Canada's most vocal opponent was, not unexpectedly, the EU and at NAFO's September 1994 meeting it pleaded that Canada should have waited for a consensus of NAFO members before taking action.
>
> Canada also sought to minimise the amount of opposition to its move through both its timing and the initial definition of targeted vessels . . ." ("Tending the Achilles' Heel of NAFO. Canada Acts to Protect the Nose and Tail of the Grand Banks", *Marine Policy*, 1995, Vol. 19, No. 4, p. 264; emphasis added.)

Professor Day continues:

> "The regulations can be amended by Governor in Council at any time, so that the Act provides flexibility in the face of new threats to different stocks in the same areas and threats by vessels with other registrations than those specified in May 1994. *Although ostensibly*

designed to target non-member fishing in the Regulatory Area, the latent potential of the Canada's amended Act could be invoked to eliminate more of Canada's concerns about NAFO. The Act embodied the power to make other members conform with majority thinking within NAFO. NAFO's history has been marked by conflict between Canada and the EEC/EU on management measures for straddling stocks. The EEC/EU (and before 1986, Spain and Portugal also) has often occupied a minority position on TAC and quota decisions and invoked the objection procedure to set its own quotas, thus 'legally' allowing it to overfish the straddling (and high seas) stocks. *Although the Act's initial target was control of illegal fishing by non-members* (especially expatriate Spanish and Portuguese vessels), *Canada could quickly amend the Regulations to allow the arrest of any EU-registered vessel contravening approved conservation and management measures* on the Nose and Tail and, in the case of turbot, in Division 3M. The latent potential of the amended Coastal Fisheries Protection Act included the ability to nullify use of the objection procedure in regard to NAFO decisions on straddling stocks . . ." (D. Day, p. 265; emphasis added.)

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185. We therefore see clearly what the "manifest initial target" was of Bill C-29, which became law in May 1994, that is to say, at the time when Canada invokes it as "circumstances surrounding the deposit of the declaration" of 10 May 1994. The text of the reservation in subparagraph *(d)*, as formulated in the declaration, can indeed protect the integrity of the 1994 Canadian legislation, since in principle there is no glaring contradiction between that legislation and the powers which Canada is entitled, by international law, to exercise in an area of the high seas in regard to the classes of vessels which the legislation then contemplated. The matter appears in a different light, however, when the reservation is invoked in order to protect, not the integrity of the legislation as amended on 12 May 1994, but the extension, by the Regulations of 3 March 1995, of its application to vessels having a proper nationality and flag — in this case, Spanish and Portuguese. As far as these fresh targets are concerned, the very text of the reservation, given the terms in which it is formulated, becomes self-contradictory in international law.

186. If that were all, the only problem would be one of interpretation.

What has to be borne in mind, however, is that in the present preliminary incidental proceedings Canada invokes the self-contradiction embodied in the wording of its declaration of 10 May 1994 in an attempt to convince the Court that the integrity of the legislation which the declaration was intended to protect applies also to the extension of that legislation's scope effected by the Regulations of 3 March 1995. If that was Canada's intention in May 1994, it should have been expressed far more clearly in the declaration itself — which is an instrument of international law — or at the very least expressed in plain terms in the statement which the Minister of Foreign Affairs, Mr. Ouellet, made in the Senate on 12 May 1994 when Bill C-29 was being discussed. But Canada did nothing of the sort. So what then becomes of its duty of good faith under the optional clause system vis-à-vis other declarant States, including Spain?

187. This question indeed arises because neither in the text of the declaration, nor in the statement by Minister Ouellet, nor indeed through diplomatic channels, did Canada give Spain due notice of the intention which it now ascribes to its declaration of 10 May 1994 in regard to Spanish vessels fishing in March/April 1995 in the NAFO Regulatory Area. Equivocation or false pretences have no part to play in the optional clause system, which is based on the good faith of the declarant in the performance of the obligations which it undertakes. Hence an issue of *abuse of rights* arises, and the Judgment ignores it. The new targets which Professor Day spoke of, if they existed, remained carefully concealed or kept well in the background in May 1994.

188. In the debate on Bill C-29, Canada's Ministers failed to make clear, to the extent required by the "principles" of good faith inherent in international law and the optional clause system, that the Canadian declaration accepting the compulsory jurisdiction of the Court also covered the possibility of the amended Act being applied to vessels of NAFO member States in general, and to Spanish or Portuguese vessels in particular. They even went so far as to reassure the members of the Canadian Parliament by telling them that Spain and Portugal were co-operating fully with NAFO. Ambiguities about the possibility of the amended Act being applied to vessels other than stateless or flag-of-convenience vessels in no way detract from what I have just said. In depositing its declaration Canada did not specify that the amended Act might apply to Spanish vessels, nor that the integrity of the amended legislation covered by its declaration of 10 May 1994 also embraced measures which might be taken and enforced against Spanish vessels. All else is simply *a posteriori* comment, of no legal relevance under international law in regard to the question I am now examining.

189. Nevertheless, in March 1995 Canada took action by attacking Spanish fishing vessels in the NAFO Regulatory Area. It is of course a well-established principle of international law, and one acknowledged in the Court's case-law, that *bad faith* is not to be presumed. Accordingly, until this time a declarant State such as Spain was bound by that prin-

ciple in its relations as declarant State with Canada. In this context, it was not for Spain to presume violations by Canada of rights over the high seas, still less an *abuse of rights*, under cover of a reservation in the Canadian declaration whose wording was far from clear in this regard. The presumption against *bad faith* or *abuse of rights* is fully recognized in international jurisprudence, for example by the Permanent Court in its Judgment in 1932 in the *Free Zones* case in the following terms:

> "A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. *But an abuse cannot be presumed by the Court.*" (*Free Zones of Upper Savoy and the District of Gex, 1932, P.C.I.J., Series A/B, No. 46,* p. 167; emphasis added.)

190. Before March 1995 it did not lie with Spain, as a declarant State, to presume that there had been violations of international law or an *abuse of rights* by Canada in regard to its declaration of 10 May 1994. This must have legal consequences for the admissibility or the opposability to Spain of the Canadian reservation in question in the present incidental proceedings, irrespective of its scope.

Moreover, Spain was all the less in a position to attribute such intentions to Canada, in that: (1) the Canadian declaration of 1994 contained an objective reservation of national jurisdiction (the reservation in paragraph 2 *(c)* which, as such, refers to international law for purposes of defining questions which fall exclusively within the jurisdiction of Canada); and (2) the rule of the exclusive jurisdiction of the flag State afforded protection to its vessels on the high seas — a customary rule and binding accordingly on both Canada and Spain.

191. It is true that, in the oral phase of the present incidental proceedings, counsel for Canada sought rather to persuade the Court that the measures taken by Canada against Spanish vessels did not constitute delictual conduct in international law (hence the efforts to lay emphasis on State practice in the matter). In its Counter-Memorial, however, when faced with the Applicant's arguments that the measures in question and their enforcement were internationally wrongful acts of Canada and not conservation and management measures, or the enforcement of such measures, Canada replied that the scope of its reservation covered everything, that is to say measures both legal and illegal under international law. That assertion does not, in my opinion, sit well with the principles of good faith and mutual trust on which the optional clause system is based, because the text of the reservation does not indicate that the measures in question might be illegal. While the text remains silent on that point, it is not for Spain to presume either *bad faith* or an *abuse of rights* on the part of Canada.

192. In the light of the foregoing, I believe that the reservation in para-

graph 2 *(d) of the Canadian declaration, regardless of any issue of validity, is neither admissible nor opposable to Spain in the present preliminary incidental proceedings.* If need be, the Court should reconsider it at the merits stage in the light of all the factual and legal elements which the case involves. The Judgment omits to pose a question which, by its very nature and importance, the Court should have examined *proprio motu.*

The Judgment declines to consider whether there has been an *abuse of rights* within the framework of the optional clause system. Here also, I cannot agree with its approach. The issue here is not one of derogation from the principle of consent to jurisdiction, or of a restriction on the freedom to insert reservations in declarations; it is about the conduct of declarant States in the exercise of those freedoms. In short, about good faith and mutual trust in relations between declarant States within the framework of the optional clause system.

193. It may be recalled in this connection that in 1945, in a letter reproduced in an article by Shabtai Rosenne entitled "Judge John E. Read and the International Court of Justice", Judge Read, the future Canadian Member of the Court, who took part in the drafting of the present Statute, made the following observation in regard to the power of States to include reservations in their declarations: "The experience of the past has shown that there is no likelihood of a general power of reservation being abused" (*The Canadian Yearbook of International Law*, Vol. XVII, 1979, p. 19). Regrettably, the present preliminary incidental proceedings show this to be possible; and what is far more alarming, looking to the future, is that, at least in the present Judgment, the Court considers this conduct acceptable on the part of a declarant State and its effects opposable to other declarant States.

C. The Interpretation of the Canadian Declaration of 10 May 1994, Including the Reservation in Paragraph 2 (d) *of the Declaration*

1. The Canadian declaration as the subject-matter of the interpretation which the Court must undertake

194. Canada invokes the reservation in paragraph 2 *(d)* of its declaration of 10 May 1994 in order to challenge the Court's jurisdiction in the present case. The Canadian declaration is, moreover, the only one which gives rise to a difference of interpretation between the Parties as to the Court's jurisdiction in this case, and it is this disagreement which has to be resolved in the present preliminary incidental proceedings.

195. Accordingly, the first question which arises in this respect is, what is the subject-matter of the interpretative process which the Court must undertake? My initial and principal answer to this question was given earlier, when I expressed my conviction that the subject of the interpretation is the Canadian declaration itself and not, as the Judgment main-

tains, the political or other reasons which led Canada to accept the compulsory jurisdiction of the Court unilaterally on 10 May 1994 (that is to say, Canada's subjective intention to become a declarant State). This conclusion must now be supplemented by a further conclusion, namely that the subject-matter of the interpretation to be undertaken by the Court is *the Canadian declaration as a whole*, for, as the Judgment points out in paragraph 44:

> "*All elements in a declaration* under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted *as a unity*, applying the same legal principles of interpretation throughout." (Emphasis added.)

196. The two Parties had, moreover, themselves acknowledged the unity of the Canadian declaration, that is to say the fact that reservations also constitute the declaration or form an integral part of it, but they did not infer the same practical consequences from this for purposes of the interpretation of the reservation in subparagraph *(d)*. The Judgment, for its part, having noted the unity of the Canadian declaration, immediately distances itself from that conclusion. In effect, in so far as the Judgment states that the Canadian declaration constitutes a whole (a unity), this is only in order the better to emphasize that there is no reason to interpret restrictively reservations contained in a declaration of acceptance of the compulsory jurisdiction of the Court.

197. The Judgment thenceforth confines its attention to the reservation in subparagraph *(d)*, isolating it from the rest of the declaration. All we are left with, ultimately, is the reservation, or rather the subjective intention or political motives which Canada now claims to have had when it included the reservation in its declaration of 10 May 1994. In the interpretative reasoning of the Judgment, the whole (the declaration) is replaced by one of its parts (the reservation in subparagraph *(d)*) or, going even further, the intention which the Judgment attributes to Canada when it made the declaration of 10 May 1994. I cannot accept either this reductionist approach of the Judgment or the contradictions which it involves. For example, when the Judgment talks of the *"context"* of the reservation, far from invoking the context as an element of interpretation recognized in international law, it refers instead to circumstances, that is to say, to supplementary means of interpretation.

A declaration made under the optional clause system effectively forms a whole. It constitutes a unity. The subject-matter of the interpretation is precisely that unity. It is from that unity that we have to ascertain the consent to jurisdiction given by a declarant State vis-à-vis other declarant States. Reservations to a declaration under the optional clause system are part and parcel of the declaration. It is the declaration as a whole which expresses the consent of the declarant State to the compulsory jurisdiction of the Court and it is the declaration as a whole which is at issue

when jurisdiction is challenged, even if part of a declaration or a single condition or reservation, as in the present case, is invoked to justify that State's objection to the Court's jurisdiction.

The jurisdictional title is the declaration as a whole. Reservations or conditions cannot stand on their own as titles excluding jurisdiction. That is why the principle of integrality plays an important role in the interpretation of declarations made under the optional clause system, which are unilateral instruments, but formal and solemn ones. Spain's Application refers to the Canadian declaration as a whole. Quite correctly.

198. I have already pointed out that the consent expressed in declarations is a consent given in writing prior to the dispute. Accordingly, under the optional clause system, it makes little sense to bring negative or positive presumptions of consent into the debate. The consent of the declarant State, within the limits it has set, is manifest. It is expressed in the declaration. All, therefore, that needs to be done is to ascertain its precise meaning and scope by interpreting the declaration in accordance with the rules of international law applicable to the interpretation of international instruments, rules to which the Court's jurisprudence has made a notable contribution over the years.

199. Canada's declaration was deposited in accordance with Article 36, paragraph 2, of the Statute. What does this mean? That Canada took this step for a very precise purpose, namely to accept the compulsory jurisdiction of the Court as expressed in the declaration. That being so, the point of departure of the legal reasoning cannot be that Canada has given its consent to nothing at all, unless there is evidence to the contrary! It must have given its consent to something. It is therefore perfectly legitimate for any interpreter acting in good faith to take as the point of departure of the interpretative process the fact that, by depositing its declaration, Canada gave a consent to the compulsory jurisdiction of the Court of the kind I have mentioned. This means that, under the optional clause system, the requirement of "strict proof of consent", so frequently emphasized by Canada, is less than absolute. Consequently, assertions such as "[y]ou cannot start from a *presumption* of jurisdiction based on the fact that a declaration has been made" carry no weight with me. Certainly, for the purposes of interpretation, "you can start from the fact that a declaration has been made".

200. What is more, in the present case the Canadian declaration itself states that Canada "accepts as compulsory *ipso facto* and without special convention . . . the jurisdiction of the International Court of Justice . . . over all disputes . . . *other than*" those enumerated in paragraphs 2 *(a)* to *(d)*. Is an interpreter, in his interpretative reasoning, not to take into consideration that part of the text of the declaration which immediately precedes the subparagraphs containing the reservations? Of course he may. He is indeed obliged to begin his interpretation there. To say that this is tantamount to making a "general rule" of a presumption in favour of the jurisdiction of the Court is absurd.

201. On the other hand, I agree with the statement in the Judgment that reservations contained in declarations do not derogate from an earlier provision or text, as is the case with reservations to treaties. All the same, as far as interpretation is concerned, we should not exaggerate the effects of the distinction between these two kinds of reservations at the risk of leading ourselves into contradictions. Yet Canada has based some of its arguments precisely on the Court's Judgment concerning the interpretation of the reservation by Greece to the General Act of 1928 (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978,* p. 3).

202. However, irrespective of any distinction between kinds of reservations, one thing is certain: in neither case does the subject-matter of the interpretation involve a subjective or political intention underlying the reservation. We interpret the instrument as a whole with its reservations, in accordance with the rules of interpretation of international law. The latter has no special rules for the interpretation of reservations. There can be no question of an objective interpretation of the declaration and a subjective interpretation of its reservations. Thus reservations must be interpreted according to the same rules and by the same methods as the rest of the declaration, bearing in mind the principle of integrality which I have already mentioned. The Judgment, however, seems to proceed on the basis of a purported "reservations régime" when interpreting the Canadian reservation, a régime, moreover, which it would appear to distinguish from the "declarations régime", despite assertions of principle to the contrary.

2. The question of the restrictive or extensive interpretation of the reservation in paragraph 2 (d) *of the declaration*

203. According to Canada, the Spanish interpretations of paragraph 2 *(d)* of the declaration deprive the reservation of any practical effect, in short of its effectiveness *(effet utile)*. It contends that Spain seeks to interpret the reservation in the most limited or restrictive manner possible, disregarding the fact that all the component elements of a declaration have precisely the same value; that there is a close and necessary link between a jurisdictional clause and its reservations; that the acceptance of jurisdiction relates to the entire declaration by the State, including the reservations; and that there is no rule of general acceptance of jurisdiction to which reservations are the exception, making acceptance of jurisdiction the rule and the reservation the exception. Yet in its Counter-Memorial (p. 32, paras. 70-71) and its oral pleadings, Canada itself acknowledged that "[t]he effectiveness doctrine does not provide a licence to read anything into the text".

204. Spain argues that the Respondent wishes to have the declaration interpreted restrictively but the reservation permissively, despite rhetorical statements as to their unity, thereby ignoring the fact that the point of departure is the *effet utile* of the declaration and confusing the *effet utile* of the reservation with its acceptance, by virtue purely of its having been

invoked by the Respondent. Spain denies having argued that reservations must *a priori* be interpreted restrictively. Spain's approach is that a restrictive or extensive interpretation can only result from the application to the declaration, including its reservations, of those rules of interpretation applicable under international law to international instruments; in the present case, the application of those rules to the Canadian declaration. However, the declaration, including its reservation in subparagraph *(d)*, was drafted by Canada and not by Spain. Thus Spain gave examples of the possible *effets utiles* of that declaration and emphasized in this connection the role of good faith and the *contra proferentem* rule.

205. On this point too the Judgment espouses the arguments put forward by Canada. In effect, for the Judgment the aim attributed by Canada to the reservation takes precedence over all else for purposes of the interpretation of its declaration. The *effet utile* of the declaration thus becomes the purpose of the reservation in subparagraph *(d)*, including, moreover, the political reasons which Canada purportedly had at the time when it deposited its declaration of 10 May 1994. At this point it should be recalled that Canada referred in this context to the political theory of "vital interests". The Judgment makes no mention of this. However, on a close reading, the Judgment does indeed appear to have taken it into account. We would point out, in passing, that *"effet utile"* and "vital interests" are not the same thing in the context of the interpretation of an international instrument. Be that as it may, it is clear that the Judgment applies an extensive interpretation to the reservation in subparagraph *(d)* to the detriment of the *effet utile* of Canada's declaration (including the reservation), in that it starts from a certain *a priori* assumption which, while not totally apparent in the reasoning, is nonetheless there. For the Judgment, the scope to be given to the reservation is that which Canada claims in these incidental proceedings to have intended to give to it at the time when it made the declaration. Thus, in effect, the Judgment endorses the application, through the intermediary of the Court, of the doctrine known as the *self-judging interpretation of reservations in declarations*.

206. I cannot accept the Judgment on this point either. As I have already pointed out in this opinion, the interpretation of declarations under the optional clause system must not be undertaken with mental reservations or subject to *a priori* restrictive or extensive assumptions. And this applies, of course, to the entirety of the declaration concerned. There can be no question of excluding restrictive interpretations only for reservations while accepting, implicitly or explicitly, a restrictive interpretation of other elements of the declaration, for example, in the present case, the initial clause of paragraph 2 of Canada's declaration and the reservation contained in subparagraph *(c)* of that paragraph. This would be contrary to the principle, recognized moreover by the Judgment, that one must always apply the same principles of interpretation to all of the component elements of a declaration. Moreover, the exclusion of *a priori*

assumptions of a restrictive or extensive nature at the outset of the interpretative process in no sense means that the *result* of a given interpretation cannot be afterwards characterized as restrictive or extensive in terms of specific parameters. There can be no question of the interpreter seeking at any price to give an extensive scope (or vice versa) to the result of his interpretation of a part of a declaration, if the result of the application to the particular case in question of the principles of interpretation of international law do not justify this. It is not the duty of an interpreter to alter the intention embodied in the declaration under interpretation.

207. Thus the question of the interpretation of the reservation contained in paragraph 2 *(d)* of the Canadian declaration must not be approached in abstract or theoretical terms as the Judgment does, but, on the contrary, in a quite concrete way, that is to say by examining closely the result of the application of the relevant interpretative elements in this case. In this connection I note that it is the *actual wording of paragraph 2* of the declaration which makes the reservation in subparagraph *(d) an exception* to the compulsory jurisdiction otherwise accepted by Canada by the deposit of its declaration. Thus, in paragraph 2 Canada accepts the compulsory jurisdiction of the Court "over all disputes *other than*" those set out thereinafter, including those mentioned in reservation *(d)*.

208. It is, then, the wording of paragraph 2 of Canada's declaration which makes the disputes in reservation *(d)* an exception to the compulsory jurisdiction otherwise accepted by Canada. Since the text of the declaration itself creates an exception, it follows that the result of the interpretation of the reservation is bound to be restrictive when that reservation is read in the context of the declaration. In any event, the result of the interpretation of the reservation in subparagraph *(d)* cannot encroach upon the scope of the compulsory jurisdiction accepted by Canada pursuant to paragraph 2 of its declaration as a whole without betraying the declarant's intention. Moreover, it is also necessary to give an *effet utile* to the compulsory jurisdiction accepted by Canada by virtue of its declaration, that is the declaration in its entirety. The restriction embodied in the reservation in subparagraph *(d)* cannot and must not allow us to forget or disregard the consent given by Canada to compulsory jurisdiction under paragraph 2 of the declaration which results from the natural and ordinary way of reading the text of the paragraph in the context of the declaration as a whole. However, this finding is not the consequence of any *a priori* assumption; it follows quite simply from the language of the Canadian declaration.

209. It is appropriate at this stage to point out, in the context of the reservation in subparagraph *(d)* and of its *effet utile*, that a finding that the Court has jurisdiction in the dispute submitted by Spain's Application would in no way deprive the reservation either of its purpose or of its true effect. The contrary argument is a false one, contradicted moreover by Canada's own conduct in 1994. The so-called conservation and management measures adopted by Canada in the NAFO Regulatory Area in

respect of Spanish (and Portuguese) fishing vessels were in force only from 3 March 1995 until the beginning of May. Well then! Does that mean that, before 3 March 1995 and after the beginning of May 1995, the reservation had no purpose or was incapable of producing any effect? It suffices to pose the question in simple terms in order to see that the argument developed by the Judgment on the basis of the effectiveness of the reservation does not stand up.

210. In order to justify its treatment of the question of the interpretation of the reservation in subparagraph *(d)*, the Judgment once again invokes the different question of the principle of consent to jurisdiction, and also ventures into the doctrinal arena, adopting a stance in favour of a certain school of thought on the *nature* of reservations in declarations of acceptance of compulsory jurisdiction of the Court. Here too I cannot share, *as a whole*, the conclusions reached by the Judgment in this respect. It all depends, in my view, on the wording chosen, in the exercise of its sovereignty, by the declarant State when it drafted and deposited the instrument containing its declaration.

211. In the present case, I simply note that Canada's declaration is not an instrument whereby the declarant accepts the compulsory jurisdiction of the Court *solely* for a specific category of disputes. On the contrary, it accepts that jurisdiction *for all disputes* subsequent to the declaration other than those excluded by the reservations. The presumption of non-consent as such cannot therefore have any role to play in the interpretative process, *since the text of the declaration begins by announcing such a consent*.

212. Finally, I note also that paragraph 3 of the declaration refers to subparagraphs *(a)* to *(d)* of its paragraph 2 as "reservations" and that the Respondent relied in these preliminary proceedings on the decision of the Court in the case concerning the *Aegean Sea Continental Shelf*, that is to say the interpretation of a reservation in an instrument of accession to an international agreement (the General Act of 1928). This attitude on the part of the Respondent shows clearly that the distinction between "reservations" to treaties and "reservations" in declarations appears not to be as clear as the Judgment would have us believe.

3. The general scheme of Canada's declaration

213. The text of Canada's declaration poses no problem of authenticity. It was published in the United Nations *Treaty Series* and in the Court *Yearbook*. Canada does not dispute that the text so published is indeed the text of the declaration forwarded to the Secretary-General of the United Nations in the name of the Canadian Government, done at New York on 10 May 1994 and signed by the Permanent Representative of Canada to the United Nations. Nor does Canada dispute that its declaration of 10 May 1994 was in force at the time when Spain filed its Application with the Registry of the Court on 28 March 1995, or that the circumstances or facts referred to in the Application are subsequent to

the deposit of its declaration. There is thus no problem *ratione temporis* as regards the application of the declaration to the dispute submitted to the Court by Spain.

214. Canada's declaration of 10 May 1994 begins with a paragraph 1 abrogating its declaration of 1985, which had itself abrogated the declaration of 1970. It ends with a paragraph 3 which reserves Canada's right to add to, amend or withdraw any of the reservations which it contains, by means of a notification addressed to the Secretary-General of the United Nations (see paragraph 14 of the Judgment).

Between these two paragraphs is paragraph 2, which deals specifically with the legal *obligation* assumed by Canada vis-à-vis other declarant States regarding the acceptance of the compulsory jurisdiction of the Court, together with the limitations on that obligation, for the provision in question contains four reservations. Paragraph 2 reads as follows:

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

It is clear from this text that the Canadian Government gave its consent to the compulsory jurisdiction of the Court in a very broad and general manner (as did Spain in its declaration), namely *for all disputes* arising after the declaration with regard to situations or facts subsequent to that declaration, *other than the disputes excluded* by subparagraphs *(a)*, *(b)*, *(c)* and *(d)* of paragraph 2.

215. The Applicant quite naturally emphasizes the broad terms of the acceptance of the Court's compulsory jurisdiction with which paragraph 2 begins, whilst the Respondent virtually speaks only of its reservation in subparagraph *(d)*. It should also be noted that paragraph 2 does not define any of the words or expressions used therein. Nor does it expressly refer the interpreter to any text of domestic law for that or any other purpose.

216. This is in reality a declaration which has nothing in common with that of Iran in the *Anglo-Iranian Oil Co.* case (*Preliminary Objection, Judgment, I.C.J. Reports 1952,* p. 93). Iran's declaration was not a declaration accepting the compulsory jurisdiction of the Court for "all disputes", with the exception of those covered by four reservations like those in Canada's declaration of 1994. On the contrary, it was a declaration which accepted compulsory jurisdiction for a single category of disputes, namely disputes "with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration". And that category of disputes was further accompanied in the declaration by three reservations!

217. In terms of the rules and methods of interpretation of declarations under the optional clause system, it is abundantly clear that it would not be in the interest either of Canada or of the Judgment to attempt to analyse in detail the 1952 Judgment in the *Anglo-Iranian Oil Co.* case. It is not merely that that Judgment rejects purely grammatical or exegetical interpretations of the text — which nobody seeks to defend in this case — as is shown by its statement that the Court "must seek the interpretation which is in harmony with a natural and reasonable way *of reading the text*, having due regard to the *intention* of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court" (*I.C.J. Reports 1952,* p. 104). This is absolutely true and correct. However, what must give pause for thought is the fact that the Applicant, Spain, also cites this Judgment, including the passage just quoted, in support of its submission that the Court has jurisdiction in the present proceedings, for here the issue is not in effect that of the natural and reasonable way of reading *"the intention of the Government of Canada"* at the time when it deposited its declaration, but in reality that of the natural and reasonable way of reading *"the text of the declaration"*, having due regard to the intention of the Government of Canada at the time when it accepted the compulsory jurisdiction of the Court.

218. Thus, in that Judgment of 1952, the Court first gives the interpretation that it considers to be in harmony with the natural and reasonable way of reading the text. The Judgment then goes on to examine the intention of the Government of Iran at the time in order to rebut the different, literal/grammatical interpretation relied on by the Applicant (United Kingdom). The Court concluded that the declarant's intention had found *"an adequate expression in the text of the Declaration as interpreted*

above by the Court"; the Court found decisive confirmation of the intention of the declarant Government at the time when it made its declaration in a clause of the Iranian law approving that declaration (during the League of Nations period there was no provision for the deposit of declarations), holding that it had subsequently given notice of its declaration without changing its text, namely in Iranian instruments relating directly to the declaration under interpretation. The interpretation of the text made by the Court in 1952 was also supported by particular considerations drawn from the general treaty practice followed by Iran at the time with regard to treaties concerning the former régime of capitulations.

219. Nor, in light of the general scheme of the instrument containing the reservations in question, do the conclusions to be drawn from the 1978 Judgment in the *Aegean Sea Continental Shelf* case (which was cited both by the Respondent and by the Applicant in connection with the interpretation of reservations) confirm the findings of the Judgment — indeed far from it — on the role of international law in the interpretation of certain words and expressions in the reservation in subparagraph *(d)* of the Canadian declaration; nor do they explain the silence of the Judgment on the possible effect on the interpretation of that reservation of the fact that the Canadian declaration contains an objective reservation (subparagraph *(c)*) of national jurisdiction, just as did the Greek instrument of accession to the General Act of 1928. At that time the Court had, however, drawn certain well known conclusions from this latter fact for purposes of its interpretation of the expression "territorial status" in the Greek reservation.

220. The fact remains that the Canadian declaration of 10 May 1994, in terms of its general scheme, is not in any sense a declaration formulated in "restrictive terms", as certain passages of the Judgment might, indirectly, lead one to believe. The Respondent itself recognized this at the hearings when one of its counsel stated that the scope of the reservation in subparagraph *(d)* was very limited, namely to fisheries in a defined geographic area, and that *the Canadian declaration potentially covered:*

> "*disputes concerning territory*, maritime boundaries, investment, humanitarian law, etc. The list is practically endless, *and none of this is affected in the least by an interpretation giving full effect to the reservation.*" (CR 98/12, p. 23, para. 102; emphasis added.)

It may well be that the Canadian counsel in question is not particularly familiar with the terminology of the Permanent Court in the *Lotus* Judgment, where "vessels" of States are assimilated to "territory". Whether we are talking of "territory" according to the old terminology or of "exclusive jurisdiction of the flag State" according to that accepted today, the present proceedings concern a conflict of jurisdiction between the Parties over vessels on the high seas. In these circumstances its territorial or spatial aspect is clear.

4. The legally material intention for the interpretation of Canada's declaration

221. As I have pointed out all through this opinion, the issue of the legally material intention for purposes of the interpretation of Canada's declaration of 10 May 1994 is at the heart of the interpretative dispute which divides the Parties. This has already manifested itself in a particularly striking manner with regard to the interpretation of subparagraph 2 *(d)* of the declaration.

For the Applicant, the legally material intention for the interpretation of the declaration is the intention of the declarant State at the date of deposit as embodied in the declaration itself. The Respondent, for its part, emphasizes an intention purportedly underlying the declaration or, in any event, an intention which is not necessarily identical in all respects with that ascertainable from the terms of the reservation in subparagraph *(d)* read in the context of the declaration. In certain respects it might well be thought that, for the Respondent, the legally material intention enjoys an autonomy in relation to the declaration such that it could undergo change after the deposit without any amendment of the declaration.

222. The general position of Canada on the legally material intention for purposes of interpretation of the reservation in paragraph 2 *(d)* of the declaration has been criticized over and over again by the Applicant. Spain's counsel saw this as an attempt by the Respondent to diminish the preponderant role which must be played in the interpretation of the reservation by the general rule of interpretation in good faith in accordance with the ordinary meaning of the terms in their context — subject to any *special meaning* attaching to them — in light of the object and purpose of the declaration. On Spain's view, in appealing to its subjective intention, Canada seeks to impose as real or true an intention which does not accord with the ordinary, current, natural or reasonable meaning of the words and expressions used in the reservation in subparagraph *(d)* in its context and in the context of the declaration as a whole.

223. I have already explained in detail that the Judgment goes even further in its subjective approach than the interpretative thesis advanced by the Respondent. The persuasive force of the Canadian argument was so strong for the majority with regard to this issue central to the decision that, for the Judgment, the object and purpose of the interpretative process in which the Court must engage is not even to ascertain the purported intention underlying the text of the reservation in subparagraph *(d)* invoked by Canada, but in truth the reasons or motives which on 10 May 1994 led Canada to accept the compulsory jurisdiction of the Court. There is thus a radical divergence between the position taken by the Judgment and that adopted in this dissenting opinion.

224. In my view, the legally material intention is that embodied in Canada's declaration, including the reservation in subparagraph 2 *(d)*, and that intention must be ascertained by applying the rules for the inter-

pretation of international instruments laid down by international law and, in particular, all of the interpretative elements accepted by those rules which are applicable to the circumstances of the case, namely: the principle of good faith; the rule that words must be given their ordinary meaning, in their context, in the light of the object and purpose of the declaration; the relevant rules of international law applicable in the relations between the parties; together with all relevant circumstances as supplementary means of interpretation.

225. As the Judgment says, "it is the declaration in existence that alone constitutes the unity to be interpreted" (paragraph 45 of the Judgment). However, the Judgment does not apply this rule. I too recognize that the reservation in subparagraph 2 *(d)* must not be interpreted as restricting the scope of a prior more general acceptance, for example that of Canada's declaration of 10 October 1985. That declaration was abrogated and replaced by a new one, that of 1994. However, what I do say is that the declaration of 10 May 1994, which was in force at the time when Spain filed its Application, must be interpreted by reference to its text in accordance with international law and not by reference to such political or other reasons that Canada may have had when it made the declaration and deposited it with the Secretary-General of the United Nations.

226. What counts for purposes of the interpretation which we have to make is not these reasons, or any other motives that the declarant may have had, nor the unilateral and sovereign nature of the acts of drafting and deposit, nor even the fact that a particular reservation has or has not been included, but the intention manifested in solemn written form in the instrument made, deposited, registered and published, including all of its reservations and conditions, which is the sole legally material intention notified to other States, including Spain.

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227. For example, in the *Phosphates in Morocco* case, cited by the Respondent, in which the titles interpreted were declarations, the Permanent Court begins by affirming that "this jurisdiction only exists within the *limits* within which it has been accepted" (*Judgment, 1938, P.C.I.J., Series A/B, No. 74,* pp. 23-24; emphasis added). I have already spoken of the Judgments of the Court in the *Anglo-Iranian Oil Co.* and *Aegean Sea Continental Shelf* cases. It is clear that, in interpreting declarations under paragraph 2 of Article 36 of the Statute, the Court has not hesitated to attach a certain importance to the intention of the declarant State. But what "intention" is at issue? While citing the aforementioned jurisprudence, the present Judgment comes to what I regard as an unprecedented conclusion: "the Court has not hesitated to place a certain emphasis on *the intention of the depositing State*" (paragraph 48 of the Judgment; emphasis added). This effectively represents a change of direction in the Court's jurisprudence in favour of

extreme subjective interpretation, a doctrine with which I cannot associate myself, either generally or in the context of the optional clause system.

228. Furthermore, the Judgment leaves no possible room for doubt that the "intention of Canada" that it interprets is not the one expressed or embodied in the declaration itself, but an intention extrinsic to the declaration, namely the political reasons alleged to have led Canada to make and deposit the declaration. A general response to that question is to be found in a passage of the Judgment in the *Temple of Preah Vihear (Preliminary Objections)* case, which reads:

> "[the Court] must interpret Thailand's 1950 Declaration on its own merits, and without any preconceptions of an *a priori* kind, in order to determine what is its real meaning and effect if that Declaration is read as a whole and in the light of its known purpose, which has never been in doubt" (*I.C.J. Reports 1961*, p. 32).

This passage expresses perfectly the legally material intention for purposes of interpretation of a declaration. It is not the position that the Judgment adopts. It should also be pointed out that the question of reservations did not arise in the *Temple of Preah Vihear* case. The issue was quite simply the interpretation of Thailand's declaration as a whole. Thus the purpose of which the Judgment speaks is that of the declaration, not that of any reservation. On the other hand, the present Judgment, after emphasizing the unity of the Canadian declaration, still seeks to make the interpretation of the reservation in paragraph 2 *(d)* of the declaration stand on its own. The result is a contradiction seldom seen in a Judgment of the Court between the initial general considerations and the practical consequences subsequently drawn therefrom in the interpretation of the reservation.

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229. With regard to the evidence of the *legally material intention* as I understand it, that is, the intention manifested or embodied in the declaration, it is clear that consideration must be given to all the other interpretative elements present, including international law in so far as it is relevant and the supplementary means of interpretation concerning the drafting and deposit of the declaration. But I cannot lend any weight, in the interpretation of the declaration, to an "intention of Canada" such as the one adopted by the Judgment in order to interpret the reservation in question.

To determine the extent of Canada's consent to compulsory jurisdiction in the present case, it is not the task of the Court to interpret imaginary items, but simply Canada's declaration of 10 May 1994, including the reservations. To accept the thesis of the intention as understood by the Judgment would be tantamount to jeopardizing the entire optional clause system.

230. Elementary reasons of legal security and logic require that, in

order to interpret the intention of the declarant State, we take as our starting point the actual text of the instrument in which the obligation is set forth, rather than seeking out *ab initio*, as it were, some extrinsic, indefinable psychological intention supposedly governing the one embodied in the instrument to be interpreted, and prevailing over that intention. Yet this is what the Judgment does. The following passage from the Judgment clearly confirms the subjective interpretation which is at the basis of its conclusions concerning the interpretation of the Canadian reservation:

> "*What is required in the first place* for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible *with the effect sought by the reserving State*" (paragraph 52 of the Judgment; emphasis added).

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231. The Court, States in two codification conferences concerning the law of treaties, the International Law Commission and the Institut de droit international have rejected the so-called subjective interpretation of international instruments, endorsing an objective system of interpretation, a system that must not be confused with purely grammatical or literal interpretations, but which clearly takes as the starting point for interpretation the text of the instrument, which is presumed to be the authentic expression of the intention of its author or authors.

232. Contemporary international law also seeks, in the interests of legal security, to ensure that this objective system of interpretation involves not only methods, canons and maxims to be freely applied by the Court, or criteria of purely formal logic, but also a set of rules of international law that the interpreter is required to apply. The interpretative process has now become a genuinely legal one by virtue of the fact that it is governed by international law. The Judgment is a far cry from that conception of interpretation. In my opinion, it is also inconsistent with the jurisprudence on which it relies. It is truly a *"first"*, with unforeseeable consequences.

233. It is clear that in the case of declarations under the optional clause system, the task is simply to ascertain the intention embodied in the instrument by the declarant State, while in the case of treaties it is to ascertain the "common intention" of the parties. But that does not alter what I have just said. On the contrary, because we are dealing here with a single author, the method of objective interpretation has to be particularly strict — regardless of the *contra proferentem* rule — where legal interpretation of unilateral declarations is concerned.

5. Interpretation in good faith of the Canadian declaration, including the reservation in subparagraph (d)

234. I have already had occasion to stress the importance of the principles of good faith and mutual trust in the circumstances of the present case. But hitherto I have considered these principles only in relation to the question of the admissibility or opposability to Spain of the reservation contained in paragraph 2 *(d)* of the Canadian declaration. It now remains for me to consider the role of good faith as an element in the interpretation of that declaration.

235. At the level of principles, the Parties agree that Canada's declaration must be interpreted and applied in good faith. But on the question of the role of good faith in the process of interpretation of the Canadian declaration, there is no clear agreement at all between the Parties. Here too, it is their differences with regard to the subject-matter, rules and methods of interpretation which predominate.

236. In Canada's view, good faith in the interpretation of its declaration would require seeking out what it calls its "true intention" (for which read "subjective reasons") as alleged by it in these incidental proceedings. In Spain's view, good faith would require seeking the intention of Canada as manifested or embodied in the declaration at the time of its deposit. This difference as to the role of good faith in the interpretation of the Canadian declaration is also to be seen, in consequence, in the Parties' presentation of the role of the rules or particular interpretative criteria governed by good faith, such as *effectiveness* and the *contra proferentem* rule. It must thus be borne in mind that when Canada or Spain speaks of the role of good faith, of effectiveness or of the *contra proferentem* rule, they are not referring to the same legal realities. For example, in the case of *effectiveness*, application of which is governed both by good faith and by the object and purpose of the declaration, it is clearly not the same thing to seek that object and purpose in Canada's purported subjective or political reasons as it is to seek it in the declaration deposited by the latter on 10 May 1994.

237. My position on the role of good faith in the interpretation and application of the Canadian declaration concurs with that assigned to that role by the rules of interpretation of international law: that is, a role analogous to the one it plays in the interpretation of treaties. Thus, good faith has the function of helping to ascertain Canada's intention as expressed in the declaration that Canada itself freely drafted, made and deposited; for the legal obligation assumed by Canada in relation to other declarant States accepting the same obligation is that to be found in the declaration, and nowhere else.

238. Canada is solely responsible for the wording of the declaration deposited by it in 1994 in exercise of its sovereignty. In these circumstances, good faith must play a fundamental role in the interpretation

and application of the declaration. Otherwise, faced with an application by a declarant State, the respondent declarant State could always reply that its intention consisted in truth not in that expressed in its declaration, but in subjective considerations — political or other — which might, moreover, change over the course of time.

239. The role of the principle of good faith in the interpretation of unilateral declarations is not open to question by anyone. It is even more fundamental than in the case of the interpretation of treaties, precisely because every declaration is an act solely attributable to the declarant State. That is what the jurisprudence of the Court states, even in cases where the declaration in question is governed not by paragraph 2 of Article 36 of the Statute, but by general international law:

> "[Just as the very rule of *pacta sunt servanda* in the law of treaties] is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, *and are entitled to require that the obligation thus created be respected.*" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49; emphasis added.)

The Judgment of the Court of 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, which involves declarations under the optional clause system, also contains a number of statements regarding the principle of good faith in relation to the question whether there is an obligation to give advance notification of acceptance of the compulsory jurisdiction of the Court and of the intention to file an application. In this context, the Court observed:

> "that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries* case (United Nations, *Reports of International Arbitral Awards*, Vol. XI, p. 188). It was moreover upheld in several judgments of the [Permanent] Court . . ." (*I.C.J. Reports 1998*, p. 296, para. 38.)

The Court goes on to note that "although the principle of good faith is 'one of the basic principles *governing the creation and performance of legal obligations* . . ., it is not in itself a source of obligation where none would otherwise exist' . . ." (*ibid.*, p. 297, para. 39; emphasis added).

240. In the present case, we are dealing with a specific obligation on a declarant State under the optional clause system of the Statute of the Court: not, indeed, to subscribe to that clause, which is an entirely free

and voluntary sovereign act; but not to do so while concealing its true intentions or equivocating with regard to the scope of the legal obligation it appears to be undertaking in the light of the terms of the declaration. In my view, chicanery, to use the traditional term, has no place in the optional clause system, which is a means of *creating* legal obligations assumed by the declarant State vis-à-vis the other declarant States. This point would seem to be regarded by the Judgment as irrelevant to the interpretation of a reservation in a declaration under the optional clause system.

241. Indeed, reading the reasoning of the Judgment, one is forced to conclude that good faith plays no role as an element in the interpretation of Canada's declaration. *The paragraphs of the Judgment devoted to the interpretation of the reservation in subparagraph 2* (d) *do not once mention good faith.* Conversely, the Judgment rejects the *contra proferentem* rule for purposes of interpreting that reservation (see paragraph 51 of the Judgment), even though the reservation was drafted by the Canadian Government and it is necessary to apply the principle of good faith to the interpretation of unilateral international declarations, a principle that cannot be reduced to a mere secondary rule of a technical nature. The Judgment then rejects the general principle of the presumption of the legality of legal instruments, invoked by the Applicant (paragraphs 53 to 55 of the Judgment) and expressed in the Court's jurisprudence in the *Right of Passage over Indian Territory* case, where it is stated:

> "*It is a rule of interpretation* that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it." (*I.C.J. Reports 1957*, p. 142; emphasis added.)

The considerations on the basis of which the Judgment rejects this rule of interpretation are a particularly good illustration of the spirit that inspires all those paragraphs of the Judgment concerning the interpretation of the Canadian reservation. These considerations also give an inaccurate representation of the Applicant's arguments founded on that rule.

242. Spain has not, as the Judgment claims, confused "the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law" (para. 55). The Applicant did not invoke the rule in question in order to obtain a decision from the Court on the substantive issue as to whether or not certain forms of conduct engaged in by Canada in its regard were compatible with international law. Far from it. Spain invoked the presumption of the legality of legal instruments emanating from a government *exclusively as a rule of interpretation, taking account of the wording by Canada of the text of the reservation in paragraph 2* (d) of its declaration. It is for the purposes of such an interpretation that the Applicant relies on the rule laid down by the Court in the *Right of Passage* case.

243. And why is that rule perfectly applicable in the present case? Because it is contrary to the principle of interpretation in good faith of declarations that the *ambiguities, obscurities or silences in the text* of a reservation or of any other part of a declaration should enable a meaning or scope at variance with existing law to be attributed to that text *by interpretation*. It is in such circumstances that the rule of presumption of the legality of legal instruments emanating from a government becomes applicable for purposes of interpretation. And those circumstances are clearly present in this case. Hence the applicability of the rule relied on by the Applicant in the present preliminary proceedings.

244. According to the Judgment, there might be situations — as, apparently, was the case with Canada in 1994, although the Respondent has never acknowledged it — in which a State wishing to make a declaration under the optional clause system believes that a reservation that it intends to include in its declaration raises or might raise a problem of legality under international law (paragraph 54 of the Judgment). What, in my view, the declarant State ought to do in such situations is to exercise particular caution and care in drafting the text of the reservation in question, that is, to express itself in the declaration in a manner consistent with such an intention, so that, if one day it requires interpretation, the rule of the presumption of the lawfulness of legal instruments will not be brought into play. To assert the contrary is to derogate from the principle of interpretation in good faith. However, bad faith on the part of a State is not to be presumed, even in the case of interpretation of a reservation in a declaration under Article 36, paragraph 2, of the Statute of the Court. It is not for the interpreter — in this case the Court — to take it as established fact that the reservation in paragraph 2 *(d)*, or the declaration in which it is incorporated, can be interpreted today as though Canada, when making its declaration, had wished to cause it to produce effects contrary to existing international law.

245. Furthermore, during consideration of Bill C-29, the Canadian Minister for Foreign Affairs declared in the Senate that the Bill, "which contains provisions that enable us to take action, *has a solid legal basis*" (Memorial of Spain, Annexes, Vol. I, Ann. 16, p. 271; emphasis added). Nor did Canada admit (notwithstanding the considerations evoked in the Judgment), either before or after the institution of the present proceedings, having committed in March-April 1995 acts in relation to Spain which violated international law. Moreover, on the facts, even an interpretation of the reservation in paragraph 2 *(d)* based exclusively on the practice of Canada subsequent to May 1994 would not enable one to conclude, in the present preliminary proceedings, that its author intended the reservation to produce from the outset effects contrary to existing law.

246. The point at issue is neither consent to jurisdiction, nor freedom to include reservations in declarations, but simply and solely the interpretation in good faith of the reservations in declarations deposited by declarant States. I therefore dissociate myself wholly from the general

argument of the Judgment that lawfulness does not constitute a potential yardstick for interpretation of the *ambiguities, obscurities* or *silences* of a declaration, including those in any reservations it might contain. That said, I cannot give greater weight to a general acceptance of the Court's jurisdiction than to a reservation, or vice versa. The author of this opinion is a firm believer in the integrity and unity of declarations. I do not seek to oppose the declaration to the reservation, or the reservation to the declaration. That is the course adopted by the Judgment, not by myself.

6. The ordinary meaning of the terms of the reservation in subparagraph (d) *in their context and in the light of the object and purpose of Canada's declaration*

247. The entire text of paragraph 2 of Canada's declaration of 10 May 1994 is reproduced in paragraph 214 above. We may now examine it and construe the terms of the reservation in subparagraph *(d)* in the context of the legal obligation accepted by the declarant State in paragraph 2.

248. The declaration deposited by Canada is an instrument of international law. Furthermore, it does not incorporate the Canadian legislation and regulations in its text. Thus, the reservation in paragraph 2 *(d)* speaks of "conservation and management measures" taken by Canada with respect to vessels fishing in an area of the high seas defined in the declaration by reference to an international treaty, and of the enforcement of such measures, without further clarification, but it makes no specific reference for any purpose to any Canadian law or regulation. It mentions only conservation and management measures taken and enforced by Canada in an area of the high seas defined by an international treaty.

249. It is clear that Canada, like any other State, may take measures both under its own domestic legal order and under the international legal order. And it is also clear that the domestic legal order of a given country is not to be confused with the international legal order, whether in terms of its sources or of its subjects. It follows, moreover, from the general scheme of the declaration that it concerns only possible disputes between Canada and other declarant States under the optional clause system, namely, *international disputes*, that is disputes involving international law, not Canada's domestic legal order.

250. For an international Court, as the Court's settled case-law confirms, Canada's legislation and other internal measures are only *facts*. Those facts may indeed generate an international dispute, but they are not *ex definitione* the law applicable to the settlement of the international dispute in question. The applicable law is international law, including for purposes of the interpretation of jurisdictional titles and of the expressions and terms to be found therein, unless otherwise stated in the jurisdictional title itself.

251. Thus, when viewed — as it must be — from the international perspective, the language of the reservation in paragraph 2 *(d)* of the declaration has a meaning only if interpreted by reference to the categories and terms of international law. If, on the contrary, as was the case with certain Canadian interpretations, expressions such as "conservation and management measures taken by Canada" are interpreted without reference to international law, the text of the reservation becomes contradictory — indeed, a complete oxymoron — as was rightly stressed by counsel for Spain in the oral proceedings.

Why? Because the measures in the reservation refer to a maritime area that is part of the high seas and to vessels in that area that may be flying the flag of other States. However, if a State, including Canada, refers in an international instrument to measures taken by it concerning the high seas as "conservation and management measures", the measures in question must be genuine "conservation and management measures" under the international law of the sea. Otherwise, while still undoubtedly being "measures taken by Canada", they would not be "*conservation and management* measures taken by Canada", as stated in the reservation. In the interpretation of international instruments, the *abuse of language*, like the abuse of law, is never presumed. Good faith does indeed have a role to play here, for declarations give rise to legitimate expectations on the part of other declarant States.

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252. In the present case, the fact is that "the Canadian declaration" and "Canadian legislation" do not refer — far from it in fact — to the same legal or material realities. They coincide as regards the "geographical" delimitation of the reservation (the NAFO Regulatory Area), but not with regard to other elements defining the scope of the reservation from the "functional" standpoint, to use the terminology employed in the Counter-Memorial of Canada. For example, the declaration, unlike the Canadian legislation, makes no mention of "straddling stocks".

Moreover, the Canadian legislation and regulations give definitions (indeed, more than one) of the expression "conservation and management measures", while the text of the reservation gives none, either expressly or by reference. The reservation uses the words "and the enforcement of such measures", without further specification. It does not refer to "enforcement measures". Conversely, the Canadian legislation and regulations distinguish between the terms "Act", "regulations", "measures" and "means". Furthermore, the use of force, so-called less violent means and the other means provided for in the Canadian legislation and regulations do not form part of their definitions of "conservation and management measures". They are dealt with in provisions distinct from those that define the measures in question.

253. The Canadian legislation also refers to a continuing pursuit commencing while a foreign fishing vessel is in the NAFO Regulatory Area, but the reservation in the declaration contains not the slightest reference to pursuits in that Area, or in any other area of the high seas. In this regard it should be noted that international law clearly distinguishes between a right of hot pursuit of foreign vessels — which it does not recognize if the vessel is on the high seas when the pursuit commences — and the régime of conservation and management of the living resources of the sea.

254. The Canadian legislation also deals with the application of Canadian criminal law to acts committed in the NAFO Regulatory Area by persons on board or by means of a foreign fishing vessel, whereas the reservation makes no mention whatever of any application of Canadian criminal law. In this connection, it should also be noted that under general international law breaches of fisheries regulations will normally render the perpetrator liable to administrative sanctions. They are certainly not treated as acts or omissions punishable under criminal law.

255. It is clear that a declarant State may exclude, by means of reservations in its declaration accepting the compulsory jurisdiction of the Court, any category of matters, irrespective of whether or not they are covered by national laws or regulations, or of the content or scope of any such laws or regulations, where these exist. But the question for the Court is not what Canada might have excluded by means of a reservation in its declaration at the time when it was drafting it, but what it actually excluded when it deposited the declaration with the Secretary-General of the United Nations.

There is, however, a *coincidence of great significance to the present case between the language of paragraph 2* (d) *of Canada's 1994 declaration and that of the Canadian legislation and regulations: neither the former nor the latter deals with Canada's international title to exercise jurisdiction on the high seas over vessels flying the flag of another State.*

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256. Indeed, the Canadian legislation and regulations are silent on the question of Canada's title under international law to exercise its State jurisdiction over vessels flying the flag of another State in the NAFO Regulatory Area or in any other place on the high seas; not even in terms of rights invoked, claimed or exercised *de facto* by Canada on the high seas, as in its 1970 declaration (see paragraphs 288 to 293 of this opinion). On the question of Canada's international title, there is thus total silence both in the reservation and in Canadian law.

257. In 1994 Minister Tobin spoke in the Senate of "the authority that Canada has given to itself *domestically* to act beyond 200 miles" (Memo-

rial of Spain, Annexes, Vol. I, Ann. 16, p. 271; emphasis added). However, the subject of Spain's Application is Canada's capacity to act *internationally* on the high seas against Spanish vessels. Regarding this aspect of the matter, Minister Tobin explained that the broad-ranging authority, extending beyond 200 miles, that Canada had given itself domestically was expressly for the purpose of conservation and that Canada would attempt to resolve the problem of foreign overfishing by agreement, wherever agreement was possible. He mentioned co-operation within NAFO, but added that Canada would "act by unilateral action", though only where that was the only remaining alternative, and that he "[did] not propose to ask anybody for permission" to adopt the new legislation (*ibid.*, pp. 271-272). In that connection, the Minister spoke as follows:

> "Neither the Parliament nor the Government of Canada have asked permission of other nations to enact such a piece of legislation. It would not be our intention to ask permission of every nation. If the litmus test to determine our fate with respect to the future of these resources, not only for ourselves but for the world, was to have all nations of the world concur in this action, I am afraid this action would never happen." (*Ibid.*, p. 272.)

It is thus evident that Canada gave itself domestic powers to take action on the high seas without any concern as to whether it had any international title to do so. It put forward possible "justifications" for its unilateral intervention on the high seas founded on doctrines such as "necessity", "emergency" and even the "vital interests" of Canada, but no "international titles" serving as a basis for the conduct on the high seas envisaged by its national legislation. However, these alleged justifications relate to the substance of the case and not to the present incidental proceedings. These questions have no bearing on the interpretation of Canada's declaration of 10 May 1994.

258. In truth, Canada acted in its sovereign capacity even though the matter concerned the high seas and, consequently, took risks that it believed it would be able to deal with through diplomatic channels or thanks to inaction on the part of other States. Its national self-assurance was such that it did not even consider it necessary to draft its new declaration of 10 May 1994 so as to take due account of the international régime governing the high seas. That régime does not concern only fish and the management or conservation of living resources. It is a great deal wider than that! And not only the Government of Canada, but all the States of the world, have a legal interest in it, and their own word to say on the matter. Canada could have excluded the régime governing the high seas by means of a reservation in its declaration, but did not do so. That is the crux of the matter.

As I stated in Chapter III of this opinion, the subject of the dispute before the Court is precisely Canada's international title or lack thereof to act as it did, and as it might again do in the future (as the amended Act

of 12 May 1994 is still in force), against vessels flying the Spanish flag on the high seas.

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259. The Judgment mentions the *context* as a criterion for interpretation and stresses the unity of the Canadian declaration, but on the practical level it draws no conclusion from this as regards the interpretation of the reservation, except to make the reservation prevail over the declaration as a whole. As I have already pointed out, the Judgment's analysis of the reservation contained in paragraph 2 *(d)* for the purposes of its interpretation actually runs contrary to the unity which it proclaims, for the Judgment seeks to remove the reservation from its context. For the Judgment, the context of the reservation is not the declaration (see paragraph 197 of this opinion). In truth, as far as the Judgment is concerned, the only legal reality to be taken into consideration in the present preliminary proceedings is the reservation and its circumstances. However, the reservation is not the jurisdictional instrument at issue. There is no such thing as a "declaration" of lack of jurisdiction. There are declarations containing reservations, which is quite a different matter for purposes of interpretation. In fact, without acknowledging it explicitly, the Judgment replaces the context of the reservation contained in paragraph 2 *(d)* by the circumstances surrounding the deposit of the Canadian declaration, that is, by supplementary means of interpretation! But, *pace* the Judgment, it goes without saying that the *text* of paragraph 2 of the Canadian declaration, like the declaration as a whole, also serves as a *context* for the interpretation of particular provisions, reservations, conditions, phrases, expressions or terms to be found in that paragraph, including those in the reservation contained in its subparagraph *(d)*.

260. But, furthermore, international law also tells us that in interpreting an international instrument the text of the instrument in question is not necessarily the only possible context of which account must be taken. It may be — and this is often the case — that there are instruments or other elements extrinsic to the text of the instrument to be interpreted which, for the purposes of the legal process of interpretation, must be taken into consideration as a context by the interpreter.

The question thus arises whether, for the purposes of interpretation of the Canadian declaration of 10 May 1994, there are any instruments or elements extrinsic to the declaration that may serve as a context for its interpretation. It should be said at the outset that the declaration was not the subject of any prior debate in either Chamber of Parliament. At any rate, the Court has not been informed to the contrary. The Court has not been apprised of any law or act of ratification of the Canadian declaration, or of any official record concerning the deposit or delivery of the declaration to the Secretary-General of the United Nations.

It goes without saying that the Government of Canada prepared, drafted, finalized, adopted and deposited the declaration of 10 May 1994 by virtue of its powers under the Canadian constitutional system. But, in the context of an interpretation under international law, the method adopted by that Government means that there is no instrument or element extrinsic to the declaration that can now serve as a context for purposes of interpretation of the Canadian declaration by the Court. The situation is thus quite different from those that obtained when the Court interpreted Iran's declaration in the *Anglo-Iranian Oil Co.* case, or Greece's reservation in the *Aegean Sea Continental Shelf* case.

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261. As for the reservation in subparagraph 2 *(c)* of the declaration, it is a typical example of an objective reservation of national jurisdiction. It was capable of having an effect on the interpretation of the reservation in subparagraph 2 *(d)*, as in the *Aegean Sea Continental Shelf* case, especially in so far as it is sought to define the expression "conservation and management measures" without reference to international law. On the other hand, inasmuch as the Canadian declaration is governed by international law — as is the case — then the reservation in subparagraph 2 *(d)* must also be interpreted in conformity with international law. The Respondent's position on these questions was far from clear. Indeed, the Respondent said nothing with regard to the reservation in subparagraph 2 *(c)*, or to any relationship between it and the reservation in subparagraph 2 *(d)* as a context for the latter. The Judgment, too, is silent on this point, even though the Applicant has invoked in these proceedings a rule of exclusive jurisdiction in respect of its vessels on the high seas. Thus, no reply is to be found in the Judgment to any of these questions.

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262. It only remains to consider the other elements extrinsic to the declaration of which *account might need to be taken together with the context*. These are elements extrinsic to the instrument interpreted which, while comprising neither "text" nor "context", must nevertheless be taken into account by the interpreter in the interpretative process along with the context. I am referring to those interpretative elements that some English-language writers qualify, at the risk of introducing legal ambiguities, as *"wide context"*, a concept that must not be mistaken or confused with that of "supplementary means of interpretation" (e.g. *travaux préparatoires*; circumstances of conclusion or preparation).

These extrinsic elements of which account may have to be taken concurrently with the context consist of instruments and practices subse-

quent to the adoption of the instrument under interpretation and relevant to its interpretation or application, and of any relevant rule of *international law* that is applicable as between the parties.

263. In the present case, Canada did not exercise, prior to the filing of Spain's Application, the right it reserved to itself in paragraph 3 of its declaration to add to, amend or withdraw the reservations formulated in its declaration of 10 May 1994. It did not formulate other reservations, *nor did it make any notification* with regard to the interpretation or application of the reservations contained in the declaration. There is thus no such notification by Canada of which account is required to be taken for purposes of interpretation of the declaration of 10 May 1994. The same is true as regards subsequent practice concerning the interpretation or application of the declaration of 10 May 1994. The present dispute is the first case to come before the Court in which the Canadian declaration of 10 May 1994 is relied upon as the basis for the Court's jurisdiction.

264. Consequently, there only remain the relevant rules of international law applicable in relations between the parties. On this question I believe, first and foremost, that the Canadian declaration, which is an international instrument intended, by its object and purpose, to produce certain effects in international relations, must in general be interpreted and applied in conformity with the positive international law that the Court applies. But it is also possible, given certain expressions used in the text of the declaration, that international law may be invoked in the interpretative process for much more specific and concrete purposes.

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265. I have mentioned the important function of the *object and purpose* in the interpretation of declarations under the optional clause system. It is of course the object and purpose *of the declaration* as such that are relevant here. In interpreting the Canadian declaration, it is important not to confuse, as does the Judgment, that interpretative element (or indeed the rule of *effectiveness*) with the purpose or intention of the declarant State regarding a specific provision, condition or reservation included in the declaration.

Thus the Judgment speaks only of the effectiveness of the reservation contained in paragraph 2 *(d)* and entirely neglects the role of the object and purpose of the declaration in interpretation of that reservation. Moreover, in the Judgment the "*effectiveness*" of the reservation swiftly becomes the "*effect sought*" or the "*intended effect*" of the reservation (paragraphs 52 and 71 of the Judgment). Here again, the purpose of the interpretation appears to be not to deprive the reservation of the effect "sought" or "intended" by the alleged "underlying intention" or motives of the declarant State. The references to effectiveness are thus simply yet another mirage.

7. The role of international law in interpretation of the reservation contained in subparagraph (d) *of the Canadian declaration*

266. International law has much to say regarding the interpretation of any given international legal instrument, even when the instrument in question is a jurisdictional title, as is the case with the 1994 Canadian declaration. International law has a role to play in the interpretation of declarations both as regards *the words and expressions used* in the text and as regards its *silences.*

Declarant States themselves normally use terms and expressions of international law in wording their declarations. The *Aegean Sea* Judgment is a good example of this, and it has in fact been cited by both Parties in the present proceedings.

267. That said, we should bear in mind that "any relevant rules of international law applicable in the relations between the parties" are among the elements which make up the general rule of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties (Art. 31, para. 3 *(c)*, of the Convention) and that the reservation in paragraph 2 *(c)* of the Canadian declaration of 1994 excludes from the Court's compulsory jurisdiction — jurisdiction which Canada accepted — "disputes with regard to questions which *by international law* fall exclusively within the jurisdiction of Canada" (emphasis added).

268. It follows — inasmuch as the Respondent, directly or indirectly, maintains that disputes relating to measures taken by Canada in respect of vessels fishing in the NAFO Regulatory Area are disputes which, for one reason or another, are subject exclusively to Canadian jurisdiction — that the reservation in subparagraph 2 *(c)* of the declaration should be fully applicable in the present preliminary proceedings. At this point, we need to see what international law has to say on this subject in order to determine the resultant consequences for the interpretation of the reservation in subparagraph 2 *(d)*. As the Permanent Court stated:

> "it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law . . ." (*Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4,* p. 24.)

269. In point of fact, however, in the oral phase of the present proceedings Canada did not go that far. In rejecting the Spanish arguments regarding "automatic" or "self-judging" interpretations of the reservation in subparagraph *(d)*, counsel for Canada more than once made statements like the following:

"We have never suggested that anything Canada or Canadian legislation unilaterally defines as a conservation and management measure is *ipso facto* a conservation and management measure for the purposes of the reservation. We did not include in the text of the reservation the words 'in the opinion of Canada', or 'as defined by Canadian legislation'. And, we have never suggested that the reservation should be interpreted as if those words were there." (CR 98/14, p. 39.)

"Canada does not say 'These are conservation and management measures — because we say so.' We do not define 'conservation and management measures' simply by reference to Canadian law. We readily concede to the Court the power to decide whether the Canadian measures are conservation and management measures — by reference to general practice. And we can also concede the Court's power to decide whether the Canadian enforcement actions are 'enforcement' actions — also by reference to general practice." (CR 98/14, p. 11.)

These statements by Canada represent implicit admissions by the Respondent that international law and international practice have an important role to play in the interpretation of the reservation in subparagraph 2 *(d)* of the declaration. They also serve to acknowledge the fact that the reservation is one which requires to be interpreted before it can be applied. In other words, we are far from Vattel's "clear meaning" maxim. And if the reservation has to be interpreted, then it has to be interpreted within the framework of international law and in accordance with it. In the present case, the international law in question is the general international law concerning the interpretation of international instruments and that establishing the legal régime for the high seas, including the conservation and management of living resources within that maritime space.

There are definitely words, expressions and silences in the reservation in subparagraph *(d)* of the Canadian declaration which, as we shall see, require the interpreter to have recourse to international law in order to be able to establish, by interpretation, the meaning and scope they actually bear in the reservation.

270. The Court has had to interpret words in international instruments in the light of international law on more than one occasion. Examples of this are the interpretation of the word "dispute" in the case concerning *Rights of Nationals of the United States of America in Morocco* (1952), the expression "sacred trust of civilization" in the *South West Africa* cases (1962, 1966) and the term "territorial status" in reservation *(b)* to Greece's instrument of accession to the General Act of 1928 in the *Aegean Sea Continental Shelf* case (1978). Recourse to international law by arbitral tribunals in interpreting international instruments is also very frequent and long-standing. In 1919, for example, in the *North Atlantic Coast Fisheries* case, the arbitral tribunal interpreted

the word "bays" in a treaty of 1818 in the light of the international law of the sea as it stood at the time the treaty was concluded.

271. In the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen* (1993), the Court interpreted the 1965 Agreement between Denmark and Norway "in its context, in the light of its object and purpose", beginning in this respect with a reference to the definition of "continental shelf" in the 1958 Geneva Convention on the Continental Shelf (*I.C.J. Reports 1993,* p. 50, para. 27). International law is fully evident in the Court's treatment of other issues of interpretation which are dealt with in that Judgment, for example, the question of the relationship between the delimitation of the continental shelf and the fishery zones of the Parties. On this point, the Judgment mentions the concept of the exclusive economic zone "as proclaimed by many States and defined in Article 55 of the 1982 United Nations Convention on the Law of the Sea" (*ibid.*, p. 59, para. 47).

272. What is the meaning of the expression *"conservation and management measures"* in general international law as it was in 1994 and as it is today? To reply briefly, but adequately for the present purpose, we must turn to the new legal order of the sea which States established at the Third United Nations Conference on the Law of the Sea, by concluding the United Nations Convention on the Law of the Sea of 10 December 1982.

This Convention gives formal expression to the general rules concerning the conservation and management of the living resources of the *high seas*. The Court's case-law has confirmed on a number of occasions and in varying contexts that the 1982 Convention reflects the general practice of States in present-day international relations concerning the law of the sea, as well as their *opinio juris* in this respect.

273. The provisions which deal with such measures are Articles 116 to 120 of the Convention, and also, as regards straddling stocks, Article 63 of the Convention. The broad duty laid down in the Convention is that each State shall take such measures for its respective nationals as may be necessary for the conservation of the living resources of the high seas, and co-operate with other States in taking those measures (Art. 117). This duty is expanded on in Articles 118, 119 and 120. As regards straddling stocks, Article 63, paragraph 2, provides that:

> "the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area".

There is no provision in the 1982 Convention which authorizes a State, whether coastal or not, to exercise its jurisdiction over a vessel flying the flag of another State on the high seas, or board such a vessel by force

without the authorization of the flag State, for purposes of the conservation and management of the living resources of the high seas. In general international law such purposes do not derogate from the jurisdiction of the flag State. As Article 92, paragraph 1, of the 1982 Convention puts it:

> "Ships shall sail under the flag of one State only and, *save in exceptional cases expressly provided for in international treaties or in this Convention*, shall be subject to its exclusive jurisdiction on the high seas." (Emphasis added.)

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274. The reservation in subparagraph *(d)* of the Canadian declaration does not concern every possible and imaginable measure, but one single category of measures, namely *"conservation and management measures"* taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, and the enforcement of such measures. This is a limitation of the reservation — expressly intended by the declarant State — which is of great importance in evaluating the scope of the consent which Canada expressed in 1994 in its declaration accepting the compulsory jurisdiction of the Court.

275. Canada might have worded its reservation so as to refer simply to "measures taken by Canada . . .", but it did not do so. Why it did not do so lies outside the task of interpretation which falls to the Court in the present proceedings. That is a question which concerns the political or other motives which Canada had in formulating and depositing the declaration of 10 May 1994. The Court is not required to determine or pass judgment on the motives of a sovereign State where it makes a declaration under Article 36, paragraph 2, of the Statute. Its task is to assess the extent of the consent which the State has manifested in the declaration in question, so as to be able to give it effect.

276. In any case, it would be incompatible with the rules of interpretation generally accepted in international law to hold that the words "conservation and management" qualifying the word "measures" in the reservation are totally without purpose or effect. The declarant State must certainly have had some meaning in view when it used the words "conservation and management", and therefore what it intended to say in this regard also forms part of the elements which define the scope of the reservation in subparagraph *(d)* and, consequently, of Canada's consent to the compulsory jurisdiction of the Court.

277. Thus in order, to be in a position to determine the scope of the reservation in subparagraph *(d)*, the Court has to interpret the meaning of the expression *"conservation and management measures"* contained in the reservation, particularly since the Parties cannot agree on it. This situation very often arises in preliminary proceedings on jurisdiction concerning declarations. How should the Court go about this? In my opinion, there is only one answer: in *the absence in the Canadian declaration of*

any definition — direct or indirect — of the "conservation and management measures" referred to in subparagraph *(d)* of its reservation which gives that expression a *special meaning*, the interpreter can only construe it in the light of its *ordinary meaning* in general international law.

278. Whether or not the interpreter turns to international law always depends, in the last analysis, on the intention manifested —either expressly or by necessary implication — by the author or authors of the instrument to be interpreted or applied, because, as masters of the text, he or they could have given the legal term in question a meaning different from the one it possesses in general international law, in other words, a *special meaning*. But they must actually have done so. Canada has not done so in respect of the "conservation and management measures" referred to in the reservation in paragraph 2 *(d)* of its 1994 declaration.

Recourse is frequently had to international law in the interpretation of unilateral or conventional international legal instruments. It happens very often, even where it is a case of interpreting terms used to describe certain basic concepts or notions forming part of a body of rules, a régime or a particular international legal status. Maritime spaces such as the high seas are a good example of this.

8. The circumstances surrounding the deposit of the Canadian declaration as a supplementary means of interpretation

279. The Court has not been provided with any *travaux préparatoires* concerning the declaration which Canada deposited with the United Nations Secretary-General on 10 May 1994, but there have been available to it the reports of the debates in the Canadian House of Commons, and in the Senate immediately afterwards, on Bill C-29 amending the Canadian Coastal Fisheries Protection Act, and on Bill C-8 amending the Canadian Criminal Code, both of which became law on 12 May 1994.

280. I have no difficulty in accepting the existence of a relationship between Canada's new declaration and the passing of Bills C-29 and C-8. This arises from the following well-established facts: *(a)* the Canadian declaration of 10 May 1994 was deposited only two days before the Act amending the Canadian Coastal Fisheries Protection Act was assented to; *(b)* the 1994 declaration contains a reservation in paragraph 2 *(d)* which was not part of the Canadian declaration of 10 September 1985; *(c)* the 1985 declaration was revoked by the new declaration of 10 May 1994; and *(d)* on 12 May 1994, in the Senate, the Canadian Minister of Foreign Affairs and International Trade, Mr. Ouellet, expressly established a relationship between the new 1994 declaration and Bill C-29, which was then about to be passed. A link also exists between Bill C-8 and the passing of Bill C-29.

The reports of the debate are not of course *travaux préparatoires* of the declaration itself, nor are they circumstances "surrounding" the declaration. As the Respondent has most aptly put it, they are merely circumstances "surrounding the *deposit* of the declaration".

(a) *The statements made in the Senate on 12 May 1994 by the Canadian Minister of Foreign Affairs and International Trade*

281. I have already referred in various contexts to statements made by Mr. Tobin during these parliamentary debates. There are also the statements of Members of Parliament, some of which have been commented on by the Parties, in particular in the Memorial and the Counter-Memorial. From the point of view, however, of interpreting the Canadian declaration of 10 May 1994, by far the most important, as evidence of Canada's intentions regarding this declaration, or as an indication of them, are the statements made in the Senate on 12 May 1994 by the Canadian Minister of Foreign Affairs and International Trade, Mr. Ouellet. Let us examine these for a moment.

282. The best way of successfully grasping the meaning and scope of Mr. Ouellet's statements (only two sentences of which are reproduced in the Judgment, in paragraphs 60 and 77) is to read them in the context of the debate, since the Minister did not make his statements on his own initiative but in reply to questions put by Senator Beaudoin. These exchanges are reproduced in the records (Memorial of Spain, Annexes, Vol. I, Ann. 16, p. 271) as follows:

Senator Beaudoin

"Mr. Minister, I have no problem with the principle of the bill. I have already voted on second reading. *As a jurist* I am a little concerned about the reputation of our country in the international field.

I have read that some jurists have stated that, strictly speaking, Canada may be making something that is beyond law; but, of course, some other jurists will say that, yes, we are in a crisis, and I agree that we are in a crisis. So they are applying to a certain extent the doctrine of emergency outside the territory of Canada, and even over the 200-mile limit.

Do you have any assurance from your legal experts that this is not unprecedented, that we may have good reasons to do it?"

Minister Ouellet

"I may remind honourable senators that Canada took a similar approach in the 70s with respect to the Arctic, so there is a precedent.

I may also recall that on a number of occasions, other countries

have passed similar laws to protect what they considered to be the national interest.

Our bill, which contains provisions that enable us to take action, has a solid legal basis. As you know, to protect the integrity of this legislation, we registered a reservation to the International Court of Justice, explaining that this reservation would of course be temporary and would apply only during such time as we felt was necessary to take retaliatory action against those engaged in overfishing.

We have every reason to believe that the legislation gives Canada the right to take action *against these pirate vessels and that other countries will not challenge Canada's right to act.*" (Emphasis added.)

Senator Beaudoin

"You see this is as a necessarily temporary, extraordinary measure, to deal with an emergency?"

Minister Ouellet

"Yes. We think that overfishing is a very serious threat to certain fish species and that unless we intervene quickly, across the board, we will not be able to save these species.

We have said from the outset, *and Canada's representatives abroad in our various embassies have explained to our European partners and other parties, that this measure is directed first of all toward vessels that are unflagged or that operate under so-called flags of convenience, and these are the people who act like irresponsible pirates and must be removed from the Nose and Tail of the Grand Banks.*" (Emphasis added.)

283. Two main conclusions can be drawn from these statements by Mr. Ouellet as to Canada's intentions when its Government deposited the declaration of 10 May 1994. They can be summed up as follows:

(1) There was a connection between the deposit of Canada's new declaration and the protection of what the Minister called *"the integrity of the legislation"*. Yet Bill C-29 (and Bill C-8 too) deal not with the international title of Canada to exercise its national jurisdiction on the high seas over foreign vessels, but with what are called conservation and management measures taken and enforced by Canada on the high seas against vessels described by the Minister as "pirate" vessels. The question of *international title* is not touched upon. This is confirmed in the statements made by Mr. Tobin. As regards international title, namely Canada's right or capacity to act on the high seas under international law, Mr. Ouellet was counting on the absence of any challenge from other States, including European States, but that presumed absence does not

form part of the provisions of the Act either. The purpose of the Act is to establish a title under Canadian law enabling the Government to act within that legal order. Moreover, the Minister confined himself to asserting that the bill has "a solid legal basis". What is more, he said, it was a necessarily temporary and extraordinary measure.

(2) Bill C-29 concerns fishing activities in a specified area of the high seas (the NAFO Regulatory Area) for the stated purpose of conservation and management of the straddling stocks in that area, the vessels contemplated being primarily "stateless" vessels and vessels flying "flags of convenience". The Minister's description of these vessels as *pirate* vessels was very probably designed to seek out some basis for jurisdiction in international law, *even in respect of those vessels,* and thus to dispel the misgivings of certain Members of Parliament. The Minister also spoke of taking *"retaliatory action against those engaged in overfishing"*. I shall come back to the Minister's use of the term "retaliatory action" ["représailles"] in connection with the interpretation of the text of the reservation in paragraph 2 *(d)* of the declaration, since it is a notion which also has a precise meaning in international law. Its use by the Minister is significant.

(b) *The statements by the Canadian Minister of Fisheries and Oceans*

284. The Minister of Fisheries and Oceans, Mr. Tobin, spoke on more than one occasion in the parliamentary debates on Bill C-29, and to various effects. I have already cited some of his statements and the Judgment cites others too. For example, he expressly excluded Spanish and Portuguese fishing vessels from the sphere of application of the new legislation because Spain and Portugal participated fully as NAFO member States, and this was confirmed subsequently by the implementing regulations of 28 May 1994. What is more, he also said, on another occasion, that "[t]he legislation gives *Parliament of Canada* the authority to designate any class of vessel *for enforcement of conservation measures.* The legislation does not categorize whom we would enforce against" (see Judgment, para. 77; emphasis added). As regards these new classes of vessels, therefore, the Minister was referring to Parliament (and not just the implementing regulations made by the executive); nor did he talk about conservation and management measures taken and enforced by Canada independently of NAFO or in violation of the NAFO Convention; above all — this was not of course his responsibility as Minister of Fisheries and Oceans — he expressed no view about the possible relationship between the new Canadian legislation on protection of coastal fisheries and the scope of the Canadian declaration of 10 May 1994.

285. Mr. Ouellet was the only person to do that, in the terms I have indicated, as Minister of Foreign Affairs. And internationally, any statements to be taken into account in the interpretation of the Canadian dec-

laration would undoubtedly be those of the Minister of Foreign Affairs. Here, as in other contexts, the Judgment overturns the natural order of things without offering the slightest justification. It quotes just a few lines from Mr. Ouellet's statements and links them to certain passages from one of Mr. Tobin's!

(c) *The news release of 10 May 1994*

286. As regards Canada's intentions, the Judgment seems to ascribe a certain evidential value to a Canadian news release of 10 May 1994, which read as follows:

> "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*." (Paragraph 60 of the Judgment; emphasis added.)

287. I am far less certain than the Judgment that "any challenge" is the same thing as "any application to the Court". After all, the news release speaks of the protection of Canadian stocks, whereas the declaration concerns the NAFO Regulatory Area (the high seas) and makes no mention of "stocks", whether Canadian, straddling or any other. At all events, the news release does nothing to detract from the conclusions expressed above with regard to the statements made two days later by Mr. Ouellet in the Senate. By its very nature, the news release cannot be accorded greater evidential value than the statements in the Senate by the Minister of Foreign Affairs, just as a Registry press release cannot take precedence over the contents of a judgment or an order of the Court. I interpret this news release in the light of those statements by Mr. Ouellet.

9. Other supplementary means of interpretation

(a) *The Canadian declaration of 7 April 1970*

288. Decisive proof exists that Canada's intention when it drafted the reservation in paragraph 2 *(d)* of the declaration of 10 May 1994 was directed not to the question of Canada's title, jurisdiction or rights on the high seas, but in fact to the disputes which might arise from the conservation and management measures which it took and enforced. That proof lies in the Canadian declaration of 7 April 1970.

Mr. Ouellet cites the 1970 *approach* as a precedent. In doing so he acknowledges that when the Canadian Government drew up the declaration of 10 May 1994 it had to hand its declaration of 7 April 1970, which did in fact contain a reservation *(d)* relating to questions then of concern to the Canadian authorities with regard to the creation of exclusive fishery zones and the pollution of the waters of the Arctic. Here was a

ready-made model for the Canadian Government if its intention was, by way of a reservation, to exclude disputes concerning Canada's title, jurisdiction or rights on the high seas. But that ready-made model was not utilized. In its place came the new *text* of paragraph 2 *(d)* of the present declaration, which relates solely to measures taken and enforced by Canada. The differences between the two texts are absolutely conclusive.

289. In 1994, the 1970 procedure was adopted but not the text of the 1970 reservation in subparagraph *(d)*. That was deliberately discarded in 1994. The conclusion to be drawn by the interpreter could not be clearer: the text of the 1970 reservation in subparagraph *(d)* was not adopted because the Canadian Government's intention in 1994 was not the same as in 1970. Since Canada has not given the Court any satisfactory explanation of the significant difference between the texts of these two reservations, I consider it demonstrated for the purpose of the present proceedings that Canada's intention in drawing up the 1994 reservation was far more limited in scope than its intention with the 1970 reservation, and that it did not concern disputes relating to Canada's title, jurisdiction or rights on the high seas (in connection with the 1970 declaration, see the separate opinion of Sir Robert Jennings appended to the Judgment which the Court delivered in 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 551).

290. How then did Canada formulate the reservation in subparagraph *(d)* of the 1970 declaration in order to achieve the political aim expressed at the time by its Prime Minister? It worded it as follows:

> "*(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 of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada" (*I.C.J. Yearbook 1970-1971*, p. 49).

In the 1970 reservation, therefore, the first issue is "jurisdiction" and "rights claimed or exercised by Canada", followed by measures "in respect of the prevention or control of pollution", whereas in the declaration of 10 May 1994 the reservation in subparagraph *(d)* is confined to "measures", specifically to "conservation and management measures taken by Canada with respect to vessels . . . and the enforcement of such measures". There is not a word in the present declaration about "jurisdiction" or "rights claimed or exercised by Canada". In this respect no honest interpretation can attribute the same scope to the reservation in subparagraph *(d)* of the 1970 declaration as to that in subparagraph *(d)* of the 1994 declaration.

291. The declaration of 10 May 1994 does not exclude from the Court's jurisdiction disputes concerning jurisdiction or rights claimed or exercised by Canada — ultimately, disputes concerning its international title — in any area of the high seas in regard to matters or activities of whatever nature, including the conservation and management of living resources in the NAFO Regulatory Area.

292. The facts thus speak for themselves: the same approach in 1970 and 1994, *but not the same intention* and consequently different texts for the reservation in subparagraph *(d)* of each of the declarations. Canada made a choice when it drew up its new declaration in 1994. That choice was surely not the best way of defending itself against an application of the kind filed by Spain on 28 March 1995. But that is the choice which Canada made, and in my opinion that choice, as expressed in the declaration of 10 May 1994, represents the consent of Canada to the compulsory jurisdiction of the Court in regard to the present case.

293. Given the importance of this circumstance as evidence of Canada's intentions in May 1994, I cannot understand why the present Judgment is *totally silent* with regard to the 1970 declaration, which was mentioned in the Senate as a *precedent* by the Minister of Foreign Affairs, Mr. Ouellet. The Judgment prefers to talk of a news release! My surprise turns to astonishment at the fact that the Judgment itself acknowledges that the intentions of the Government concerned can be ascertained "by comparing the terms of the two instruments" (paragraph 50 of the Judgment), and the fact that it employs that method in regard to the 1985 and 1994 declarations (see, for example, paragraph 59 of the Judgment). In my opinion, the comparison between the 1970 and 1994 declarations is of far more decisive importance for ascertaining Canada's intention from elements extrinsic to the declaration.

(b) *The NAFO Convention of 1978*

294. Geographically, the scope of the reservation in paragraph 2 *(d)* of the Canadian declaration of 1994 is confined to the NAFO Regulatory Area, as defined in Article I of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on 24 October 1978 (and in force since 1 January 1979). Canada and the European Community are parties to this Convention (Spain was also a party before it joined the Community). It should be noted that the geographical scope of the reservation is defined in terms of an international treaty to which Canada is a party and not, in any respect, by reference to Canadian national legislation, as could have been the case.

295. The conservation and management measures taken by Canada, and their enforcement as contemplated in the reservation in subparagraph *(d)* of the Canadian declaration, are therefore deemed to co-exist

in the NAFO Regulatory Area with those taken by an international organization, the Northwest Atlantic Fisheries Organization (NAFO) set up by Article II of the Convention, and including a Fisheries Commission. It is of course this Commission which is responsible for the management and conservation of the fishery resources of the NAFO Regulatory Area (Article XI of the Convention).

296. The dispute referred to the Court by Spain does not concern fisheries or the management and conservation of the fishery resources of the high seas, either in the NAFO Regulatory Area or elsewhere. Nevertheless, a question does arise in the present preliminary proceedings as to the interpretation of a reservation in the Canadian declaration of 1994, a reservation which refers to the 1978 NAFO Convention and its Regulatory Area. This purpose fully justifies our examining whether the NAFO Convention is of some value as a supplementary means of interpreting the reservation in paragraph 2 *(d)* of that declaration.

297. The question arises because of the Respondent's contention that, for the purpose of interpreting its reservation, the measures which it took against the *Estai* and other vessels flying the Spanish flag and fishing in March/April 1995 in the NAFO Regulatory Area (on the high seas) are "conservation and management measures taken by Canada . . . and the enforcement of such measures". It is clear to me that international law does not take the same view. And a reading of the 1978 NAFO Convention also shows that the measures taken by Canada against Spanish and Portuguese vessels in 1995 represented neither management and conservation measures nor their enforcement as contemplated in the NAFO treaty régime.

298. This raises a problem which the present Judgment ignores. It concerns good faith. Can we accept an interpretation of certain terms and expressions in the Canadian reservation which inevitably implies a breach by Canada of the provisions of an international treaty? Can we accept by means of interpretation that Canada intended, when it deposited its 1994 declaration, to violate the provisions of the NAFO Convention in the Regulatory Area in regard to vessels of States which are members of that Organization? In international law the interpreter cannot presume such a degree of bad faith on the part of a declarant State which is a party to the convention in question. Nor is there any evidence of it in the documents. On the contrary, in May 1994 Canada championed the cause of NAFO and the management and conservation measures approved by the organization.

299. The NAFO Convention does not affect the exercise by the flag State of jurisdiction over its vessels in the Regulatory Area, nor does it provide any means of control involving the use of force or violence or

coercion by other States, without the consent of the flag State, against the latter's fishing vessels and their crews, etc. In a word, the NAFO Convention deals with the management and conservation of resources in an area of the high seas in a manner compatible with general international law and the 1982 Convention on the Law of the Sea, namely through co-operation and agreement among the States concerned and in respect for their sovereignty. Where for one reason or another States wish to go further than general international law in controlling fishing on the high seas, they conclude agreements like the one of April 1995 between Canada and the European Community, which NAFO subsequently adopted.

300. I therefore put the following question: are we entitled, in the circumstances of this case, to interpret the expressions "conservation and management measures" and "enforcement of such measures" in the reservation in paragraph 2 *(d)* of the 1994 Canadian declaration in a manner running counter to the meaning and scope possessed by those notions in the NAFO Convention, which in March 1995 applied for the same purposes and to the same area of the high seas, and to which Canada is a party and whose cause it championed in May 1994? Can such an underlying intention be attributed to Canada at that time? It is a serious matter to ascribe to a State, by means of subjective methods of interpretation, an intention to violate an international treaty in order to be able to attribute a particular meaning to the present reservation. I shall refrain from doing so. The Judgment is silent on this point, but its silence is no answer to a question which inevitably arises in the context of the interpretation it places on the reservation in paragraph 2 *(d)* of the Canadian declaration.

10. The interpretation of the reservation in subparagraph (d) *of the Canadian declaration in the light of the rules, elements and methods of interpretation of international law*

301. Paragraphs 61 to 87 of the Judgment set out the considerations and conclusions of the majority of the Court with regard to the actual interpretation of the reservation in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994, which the Spanish Application of 28 March 1995 invokes as a basis for the jurisdiction of the Court. I am in total disagreement with the whole of these considerations and conclusions as well.

(a) *The "measures" referred to in the reservation*

302. The word "measures" appears twice in the reservation in paragraph 2 *(d)* of the Canadian declaration and with the same meaning. It is not defined either in the reservation itself or in any other part of the declaration. In this reservation the word must therefore be given its ordi-

nary meaning. In its ordinary meaning, or its usual or natural meaning if one prefers, a "measure" is something which is taken or implemented with a view to a given result. The reservation specifies the kind of measures (conservation and management), who is to take the measures (Canada), the object of the measures taken or enforced by Canada (vessels fishing in the NAFO Regulatory Area) and the maritime space within which those measures are to apply and be enforced (the area of the high seas defined by the NAFO Convention as "the Regulatory Area").

303. I have no problem with the interpretation as such of the word *"measures"* in the context of the reservation and the declaration. The Spanish Memorial dwelt at length on the meaning of "measures" in the context of Canadian law. Here, however, I am dealing with its meaning in the reservation in subparagraph *(d)* of the Canadian declaration, which is an international instrument, and not with the meaning which the term has or might have in the internal legal order of Canada.

I agree that, in the reservation, "measures" refers to all the measures taken by Canada, including legislative measures, such as the amended Coastal Fisheries Protection Act. This being so, we should be consistent and acknowledge at the same time that the reservation is not concerned in any way with *title or the question of title*, not even as regards the internal legal order of Canada.

There is no justification for confounding the meaning of "measures" with that of Canada's "title" or "right" to take and enforce the measures contemplated in the reservation in subparagraph *(d)*. This is precisely why I cannot accept the Canadian argument that *"an exclusion of jurisdiction with respect to a measure not only includes but is above all an exclusion of disputes about the legal right to take those measures"* (CR 98/14, p. 38). In my opinion, it is perfectly possible that where there is no title *"the measures cannot be measures, the rights claimed could not be rights, the jurisdiction exercised could not be jurisdiction"* (*ibid.*, p. 37).

304. In other words, I consider the "measures" of the reservation in subparagraph *(d)* to embrace everything connoted by "measures" in the ordinary or natural meaning of the word in international law, but nothing else. This is an important conclusion because it carries the implication that the question of *title* does not fall within the "measures" referred to in the reservation in paragraph 2 *(d)* of the Canadian declaration. Whatever may be said, one thing is certain: the title, jurisdiction and rights of Canada are not contemplated in the reservation and the ordinary meaning of the word "measures" in international law does not embrace the notion of *title*. That is probably why the majority of the Court re-defined the subject-matter of the dispute referred to it in the Spanish Application in the way it did, namely by excluding from its definition of it the question of Canada's title or absence of title in international law to take the measures referred to in its reservation and/or enforce them. This is all very fine and well if the aim is to exclude the Court's jurisdiction at all

costs, but does the Court have the power to act in this way? I have already answered this question in Chapter III of the present opinion.

305. *Title* is the status, authority or power conferring upon a person a right, or the ability to exercise that right, or to enforce the performance of an obligation, or doing of an act, by another person. In other words, title is the source or basis of the right, or of its exercise, or of the enforcement or other claim, but it is not a *measure*. Where the "title" exists, it precedes the "measure". "Measures" are taken and enforced by virtue of, in opposition to, or without title. This is the whole point! In every case, though, whether a "measure" is taken or enforced under, in opposition to, or without title, it is not a "title" in the ordinary meaning of either of these words in international law. And the Canadian declaration of 1994 is an international legal instrument.

306. The context of the word "measures" in the reservation lends support to the ordinary meaning of the term which I have just indicated. The measures are those of conservation and management taken by Canada "*with respect to vessels fishing* . . ." and of the enforcement of such measures in an area of the high seas, namely the NAFO Regulatory Area. Clearly, measures intended to apply to *vessels fishing* in an area of the high seas have nothing to do with any title or titles that Canada might possess in regard to other sovereign States to take action against their vessels in a maritime space which is subject to a régime of *res communis*.

307. The international régime of the high seas — of the high seas as a whole — and the kinds of jurisdiction which that régime entitles States to exercise on the high seas over vessels within that maritime space are questions of international law, and in the first instance concern relations of sovereignty between States, their rights and their duties on the high seas.

Where an international text such as that of the reservation in paragraph 2 *(d)* of the Canadian declaration speaks simply of "measures" taken by a single State, concerning not other States but "vessels" within an area of the high seas, it obviously does not cover the question of the title or titles of States as sovereigns to act on the high seas or to exercise any kind of State or national jurisdiction on the high seas with regard to other sovereign States.

308. It follows that, in the context of the reservation in subparagraph *(d)* of the Canadian declaration, the word "measures" does not concern Canada's title under international law to take or enforce the measures in question. This conclusion is confirmed by the supplementary means of interpretation, that is to say, by the circumstances surrounding the deposit of the Canadian declaration (including the statements by Mr. Ouellet and Mr. Tobin in Parliament), and by the wording which Canada employed in its declaration accepting the compulsory jurisdiction of the Court in 1970, when it wished to exclude the jurisdiction of the Court with regard to *titles and measures* relating to the conservation, management or exploitation of

the living resources of the sea and the prevention or control of pollution of the marine environment in marine areas adjacent to the Canadian coast.

309. Canada has given the Court no satisfactory explanation of why the reservation in subparagraph *(d)* of the 1994 declaration did not follow the model provided by the reservation in subparagraph *(d)* of the 1970 declaration, despite the reference to the latter as a "precedent" in Mr. Ouellet's statements in the Senate. To say, for example, that States should not be permitted to make broadly worded reservations does not solve the point. Nor does the assertion that the reservation in the 1994 subparagraph *(d)* is perfect. That may well be the case, but the conclusion then is that the reservation does not express the same intention or address the same object as the 1970 reservation does in regard to the conservation, management or exploitation of the living resources of the sea.

310. It may also be the case that the reservation in the 1994 subparagraph *(d)* is functional, concrete, specific or precise *in relation to its subject-matter*. But that is not the point; the real question is to determine the subject-matter of the 1994 reservation. If the subject of the reservation adopted in 1994 was intended to be the title, jurisdiction or rights of Canada to take and enforce the measures, why does it not use wording similar to, or closely following, that of the 1970 reservation — which was ready to hand — even though Mr. Ouellet referred to it as a precedent? The Respondent has failed to answer this question. Its silence speaks volumes about Canada's real intentions when it deposited its declaration of 10 May 1994. The Judgment for its part prefers not to consider the point, whether closely or from a distance. It is clearly more convenient to change the subject of the dispute.

311. The question is nevertheless important, since the 1994 reservation does not simply talk of "measures", but of "conservation and management measures". Thus, it refers the reader not to a "factual" or "neutral" concept, but to a category of measures which are clearly recognized in the international law of the sea, that is to say to an objective legal category. It is not sufficient to say that the measures are what they are; they have to be, and remain to be, something more than this, namely "conservation and management measures" — an international legal category — since the declaration fails to provide for its own purposes any specific definition of such conservation and management measures.

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312. In Chapter III of the present opinion, I summed up the Court's case-law regarding title as a legal category in the law of the sea. The question of title can arise in all kinds of matters and contexts, including that of preliminary proceedings concerning the jurisdiction of the Court. This is often the case where the Court has to deal with issues raised by way of defence or objection. Defences of *national or exclusive jurisdiction* of States are such a case, but there are other instances too.

313. In this connection, we must remember that paragraph 2 *(c)* of the Canadian declaration of 1994 establishes an objective reservation of exclusive jurisdiction, and that the principle of *reciprocity* of reservations contained in declarations applies to the optional clause system. Furthermore, Spain has invoked reservation *(c)* in its Application and arguments. At all events, the reservation in subparagraph *(c)* represents a *context* for the purpose of interpreting the reservation in subparagraph *(d)* of the Canadian declaration, although here again the Judgment remains utterly silent about the relationship between the two reservations.

What conclusions can be drawn from this for purposes of the present proceedings? Inasmuch as the Respondent claims exclusive jurisdiction in regard to its title to take or enforce the measures referred to in the reservation in subparagraph *(d)* on the high seas, irrespective of the vessels concerned, or to interpret those measures exclusively in the light of its own internal legal order, it follows that the reservation in subparagraph *(c)* of the Canadian declaration is applicable. In deciding this point the Court should, according to the terms of the reservation itself, do so *in accordance with international law*. That is what the declarant State intended in its declaration, even though it now takes refuge in its purported underlying intention.

314. As far back as 1923, the Permanent Court, in its Advisory Opinion No. 4 concerning an aspect of the dispute between France and Great Britain with regard to the nationality decrees issued in Tunis and Morocco (French Zone) on 8 November 1921 and their application to British nationals, had this to say about the objective reservation of exclusive jurisdiction laid down in Article 15, paragraph 8, of the League of Nations Covenant:

> "It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds *(titres)* relied on are such as to justify the *provisional conclusion* that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State *to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds* (titres), the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law.
>
> If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds *(titres)* invoked by the Parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.

> For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is only called upon to consider *the arguments and legal grounds* (titres) *advanced* by the interested Governments *in so far as is necessary in order to form an opinion upon the nature of the dispute.* While it is obvious that *these legal grounds* (titres) *and arguments cannot extend either the terms of the request submitted to the Court by the Council or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution — with regard to which the Court's opinion has been requested.*" (*Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., Series B, No. 4,* p. 26; emphasis added.)

In interpreting the reservation in paragraph 2 *(d)* of the Canadian declaration, the majority of the Court has found it more convenient to refrain from examining the question of Canada's titles to take the measures in question.

315. The fact is that the Judgment leaves the reader totally in the dark about the question of Canada's title or absence of title to take and/or enforce the measures contemplated in the reservation. Why this deliberate silence? Why specifically avoid giving this question consideration — central though it is to Spain's Application — in determining the Court's jurisdiction in the present case? Indeed, the word *dispute* is the first word in the reservation in paragraph 2 *(d)* of the Canadian declaration which the Court must interpret, and the subject-matter of the dispute is particularly decisive to a determination of the issue of the Court's jurisdiction in this case.

316. In the present case, it is quite clear that Canada's title or absence of title in international law to take and/or enforce the measures in question is also a matter of decisive relevance for the present preliminary proceedings concerning the Court's jurisdiction, whatever the Judgment may say. It therefore permeates my entire interpretation of the reservation in subparagraph *(d)* of the Canadian declaration.

(b) *The "vessels fishing" referred to in the reservation*

317. The reservation in subparagraph *(d)* of the declaration concerns measures taken and enforced by Canada "with respect to vessels fishing" in the NAFO Regulatory Area. It is therefore confined geographically to that area. The text says so and the Parties agree. It is an area clearly delimited by the NAFO Convention of 1978 and it lies outside the Canadian 200-mile limit, that is to say on the high seas.

318. The Spanish Application relates to the entire high seas as a maritime space subject to its own legal régime, and not just to the NAFO Regulatory Area. That point should not be overlooked in the decision on the Court's jurisdiction, since the subject-matter of the dispute referred to

it in the Spanish Application concerns not only the Regulations of 3 March 1995 implementing the amended Coastal Fisheries Protection Act, or the boarding of the *Estai* three days later (matters which do in fact involve the NAFO Regulatory Area), but the *existence* of Canadian legislation which seeks to ignore Spain's international title to the exclusive exercise of its jurisdiction over its vessels on the high seas and is also capable of being extended, on the initiative of Canada alone, so as to encompass areas of the high seas other than the Regulatory Area.

319. Quite apart from the matter of whether, as a result of a decision by Canada, its legislation becomes applicable in the future to other areas of the high seas adjacent to Canada's exclusive maritime zones, there is also the fact that the *Estai*, for example, was pursued by Canadian coastguard vessels or patrol boats while it was fishing in the NAFO Regulatory Area, and that this pursuit could have been extended towards other areas of the high seas lying outside the Regulatory Area. In point of fact, as it stands at present the Canadian legislation could already, in a particular instance of pursuit, apply in practice to areas of the high seas situated well beyond the NAFO Regulatory Area. The Judgment provides no answer to this question which the Spanish Application raises.

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320. In May 1994, when the Canadian Parliament debated Bill C-29, the Canadian Government stated that the measure was aimed at stateless vessels and those flying flags of convenience. In his statement to the Senate on 12 May 1994, Minister Ouellet described such vessels as pirate vessels. Addressing Parliament, Minister Tobin moreover expressly excluded Spanish and Portuguese vessels. And the fact remains that the initial implementing regulations to Canada's amended Coastal Fisheries Protection Act, those of 25 May 1994, concerned only stateless and flag-of-convenience vessels. Yet these were the precisely the circumstances surrounding the deposit of the declaration of 10 May 1994. It is not acceptable, for purposes of interpretation under international law of the reservations contained in subparagraph *(d)*, to take account of the circumstances obtaining in March 1995! So, how do those who hold that the subject-matter of the interpretation is Canada's purported underlying intention, and not the actual wording of the reservation contained in subparagraph *(d)*, answer this question? They do so by claiming that, by means of internal legislative devices inserted in the Canadian Act, the latter can be made applicable to other vessels fishing in the NAFO Regulatory Area through the adoption of regulations (see paragraphs 74-77 of the Judgment). This is true in Canadian law. But how does this contribute to establishing in international law Canada's legally material intention for the purposes of interpreting the reservation contained in subparagraph *(d)*?

321. Moreover, the least that can be said in this regard, notwithstanding the contrary position taken by the Judgment, is that in May 1994 the Canadian Ministers' statements to Parliament were equivocal and misleading, since they appeared to restrict the application of the Canadian legislation in question to "pirate vessels" alone. The underlying intention evidenced by the Canadian Ministers was neither plain nor clear. Mr. Tobin himself referred to Parliament's authority to designate new prescribed classes of vessels which might subsequently be brought within the terms of the amended Act (paragraph 77 of the Judgment).

322. The principle of good faith must come fully into play here in relation to the interpretation of any "underlying" intention on Canada's part. Yet, as we know, the Judgment quite simply ignores good faith in its interpretation of the reservation contained in subparagraph *(d)*. For the Judgment, there is accordingly no inconsistency with the requirements of conduct in good faith. In this opinion, however, I base my interpretation of the Canadian reservation on the objective rules and methods of interpretation, which require that the terms of the instrument be interpreted in good faith. In any event, whether the interpretation be objective or subjective, it is unreasonable to conclude, in light of the supplementary means of interpretation put forward by the Parties, that the intention expressed in the regulations adopted on 3 March 1995 — almost one year after the declaration under interpretation — may be considered as a circumstance surrounding the deposit of the Canadian declaration of 10 May 1994. For the purposes of interpretation, this intention clearly came into being far too long after the deposit of the declaration.

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323. Since it is clear that a subjective interpretation of the underlying intention of May 1994 does not enable it to achieve its ends regarding the interpretation of the words "vessels fishing", the Respondent doggedly insists on a literal interpretation here, going so far as to declare, in reply to Spain's arguments, that the rules of grammar must be respected! Canada's interpretation of the passage on the intention of the declarant State in the Judgment in the *Anglo-Iranian Oil Co.* case, quoted by it *ad nauseam*, was somewhat played down in this context. And what does the Judgment do? Once again it adopts the Respondent's position, changing its method of interpretation according to the point to be interpreted.

324. For Canada, as for the Judgment, the words "vessels fishing", in the reservation contained in subparagraph *(d)* of the declaration, refer to vessels fishing in the NAFO Regulatory Area, since this is what the text of the reservation says. Hence, the statement to the House of Commons on 11 May 1994 by the Minister of Fisheries and Oceans, Mr. Tobin, in which he says, *inter alia*, that there are no exceptions, serves only to confirm the meaning of the text. Yet there is also the statement to the Senate on 12 May 1994 by the Minister of Foreign Affairs and International

Trade, Mr. Ouellet, which raises serious doubts as to that interpretation of the text of the reservation in subparagraph *(d)*. How then do Canada and the Judgment resolve this aspect of the matter? Quite simply by relying on a few selected sentences from Mr. Ouellet's statement and forgetting the rest.

325. While the text of the amended Act of 12 May 1994 refers in general to "foreign fishing vessels" which continue to fish for stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of "sound" conservation and management measures, and in particular the measures taken under the 1978 NAFO Convention (Memorial of Spain, Annexes, Vol. I, Ann. 14, p. 70), the implementing Regulations of 25 May 1994 specifically state that the classes of vessel to which the Regulations apply are vessels without nationality and foreign fishing vessels flying under the flag of a State set out in Table III to Section 21 of the Regulations, namely Belize, Cayman Islands, Honduras, Panama, Saint Vincent and the Grenadines, and Sierra Leone (*ibid.*, Ann. 17, pp. 297-298). It was only in the Regulations of 3 March 1995 that the Canadian Government (and not Parliament) added to the above-mentioned classes of foreign fishing vessels "foreign fishing vessels that fly the flag of any state set out in Table IV to this Section", namely Portugal and Spain (*ibid.*, Ann. 19, pp. 309 and 311).

326. These facts are conclusive on one point, namely that between May 1994 and March 1995 the amended Act did not apply to Spanish and Portuguese vessels, nor did it apply to vessels from any other NAFO State. It must also be said that the *legally material intention* in this case is that relating to Canada's declaration of acceptance of the compulsory jurisdiction of the Court, not the intention of Canadian Ministers and Parliamentarians concerning the scope of the future amended Act and its possible future evolution; an evolution which might, moreover, broaden or restrict the scope of the Act since, following the agreement of April 1995 between Canada and the European Community, the situation obtaining between May 1994 and March 1995 has been restored. At present the amended Act once again applies solely to the "pirate" vessels of May 1994. And yet the Canadian declaration of 10 May 1994 remains the same!

327. Does this mean that the reservation in subparagraph *(d)* of the 1994 declaration now lacks *effectiveness*, as Canada would have us believe when it rejects this or that aspect of Spain's interpretation of the reservation? This is a question we are entitled to ask, in view of the Respondent's readiness to rely on *effet utile* in its interpretation of the reservation. For Canada has argued that if vessels flying the Spanish or Portuguese flag, or that of some other State fishing in the NAFO Regulatory Area, were to be excluded from the scope of the reservation, then the reservation would cease to have any *effet utile*. Once again, I have to say, Canada puts forward two diametrically opposed arguments.

328. The overall intention behind the debates on Bill C-29 in May

1994 and on the implementing Regulations of 25 May 1994, although somewhat obscure, was not, however, that these provisions of Canadian law should apply to vessels of member States of the European Union fishing in the NAFO Regulatory Area. For those countries, Canadian diplomacy would be called into play if need be. The statement to the Senate on 12 May 1994 by the Minister for Foreign Affairs, Mr. Ouellet, was conclusive in this respect. Yet it was on 10 May 1994 that Canada deposited its declaration with the Secretary-General of the United Nations, not in March 1995.

329. Canada's intention in May 1994 was thus far from what was done in March 1995. Yet, as far as the underlying intention is concerned, the only intention which may be taken into consideration is that underlying the deposit of the declaration, not some intention which came into existence after that deposit. It is doubtless in order to avoid this flagrant contradiction that, at this point, Canada and the Judgment abandon their general line of argument with regard to the interpretation of the intention and this time turn to the text of the reservation contained in subparagraph *(d)* of Canada's declaration.

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330. For my part, I interpret Canada's declaration objectively, applying the rules and methods of interpretation based on the text of the instrument being interpreted, yet without excluding factors relating to the determination of the intention in the light of international law and for purposes which are accepted in international law. In this connection, I note that the text as such is applicable to all vessels. Canada's underlying intention is less clear. A reasonable doubt is permitted. It is within the confines of such doubt that good faith should come into play in the interpretation.

In any event, in 1995 Canada did not change the language in which it consented to the Court's compulsory jurisdiction in 1994. It did not avail itself of the right of amendment which it had reserved in paragraph 3 of the declaration. Amending its declaration by interpretation after the filing of Spain's application is compatible neither with the optional clause system, nor with an interpretation in good faith.

Moreover, in international law an interpretation in good faith cannot restrict itself to the text of the declaration on some points, and on others refer either to Canada's underlying intention — an intention which, moreover, apparently changes over the months — or to the reasons which Canada might have had when it made and deposited the declaration of 10 May 1994. A choice has to be made.

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331. The conclusion that the words "with respect to vessels fishing" in the reservation contained in subparagraph *(d)* of the Canadian declara-

tion apply to all vessels nevertheless has a negative implication for Canada's argument based on the *effectiveness* of the reservation, since "Canadian vessels" therefore also fall within the possible scope of the reservation.

What does this mean? Quite simply that if one day Canada were unilaterally to take measures "described" as conservation and management measures in the NAFO Regulatory Area, but which are in fact measures favouring Canadian vessels to the detriment of vessels belonging to other States or certain other States (for example in the allocation of TAC quotas), any resultant disputes between States would be excluded from Canada's consent to the jurisdiction to the Court expressed in the 1994 declaration.

332. Canada, on the other hand, remains silent on this possible, by no means insignificant, *effet utile* of the words in the reservation "with respect to vessels fishing". Clearly, interpreting these words literally, Canadian vessels fishing in the NAFO Regulatory Area would be covered by the reservation. This conclusion is by no means absurd. For what the reservation would exclude from the Court's jurisdiction would not be relations between Canada and Canadian vessels, but relations between Canada and another State with regard to measures taken or enforced by Canada in respect of Canadian vessels, which might well discriminate against vessels flying the flag of another State or run counter to the interest of that State in the fisheries concerned. If, to this, we then add stateless and flag-of-convenience vessels, it can easily be seen that the exclusion of other vessels from the reservation contained in subparagraph *(d)* would in no way deprive the reservation of effectiveness. In fact, this is the situation which existed before 3 March 1995 and which has existed since early May 1995, i.e., the current situation.

(c) *The "conservation and management measures" of the reservation and the failure to define such measures in the declaration*

333. As I have already mentioned, Canada could have formulated the reservation contained in subparagraph *(d)* of its 1994 declaration by referring quite simply to "measures taken by Canada . . .". This wording would then have covered all possible and conceivable measures taken by Canada. Yet Canada, in the exercise of its sovereignty, did not do so. For my part, in the context of the interpretation of the reservation, I refuse to enter into the debate as to why Canada did not do so. This is a matter for Canada's domestic political choices, as is the fact of making a declaration accepting the Court's compulsory jurisdiction or not making such a declaration. I cannot accept this kind of subjective approach to interpretation in the context of the optional clause system. It is the intention expressed in the declaration which I interpret in this opinion.

334. Moreover, we are dealing here with an objective limitation of the

reservation, one which was specifically sought by the declarant State and which forms part of the text of the reservation itself. The measures in the reservation *must be "conservation and management measures"*. We are not dealing with the reasons for the reservation or even with some underlying intention, but clearly and simply with an intention expressed in the actual wording of the text. Moreover, there is no definition — direct or indirect — of the expression "conservation and management measures", either in the reservation in subparagraph *(d)* or in any other part of the Canadian declaration; nor is any particular meaning there given to the expression, or to any of the words used.

335. In the absence of any specific definition — direct or indirect — provided by Canada, the expression "conservation and management measures" used in the reservation in subparagraph *(d)* can only be interpreted in the light of general international law. The qualification in the text of the reservation of the term "measures" by the words "conservation and management", together with the failure to define this expression in the declaration itself, reflects the objective intention of the declarant State to give this term the meaning it has in international law, the legal frame of reference for declarations under the optional clause system. Moreover, the application of the rules of interpretation leads to the same conclusion, since the relevant rules of international law applicable in relations between the Parties are one of the accepted elements of interpretation which must be taken into account "together with the context".

336. Furthermore, at the hearings Canada itself emphasized the *generic character* of the expression "conservation and management measures" in the reservation in subparagraph *(d)* of its declaration, invoking the jurisprudence of the *Aegean Sea Continental Shelf* case. It thus recognized, in the context of these preliminary proceedings, the role of international law in the interpretation of the expression "conservation and management measures" in the reservation, since the point at issue in the *Aegean Sea* case was the meaning in international law of certain terms embodied in an international legal instrument. That Judgment interpreted the expression "territorial status" in accordance with international law and the evolution it has undergone.

337. Hence, we must look to international law in order to determine whether the measures taken by Canada in March 1995 against vessels flying the Spanish flag were "conservation and management measures" within the meaning of the reservation contained in subparagraph *(d)* of the Canadian declaration of 10 May 1994. And we are obliged to do this by virtue of the terms of the declaration itself and of the rules of interpretation of international law.

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338. The Judgment itself accepts that the Court must interpret the reservation in subparagraph *(d)* of paragraph 2 of the Canadian declaration by ascertaining the meaning attaching "in the light of international

law" to the expression "conservation and management measures" as used in that reservation (paragraph 69 of the Judgment). It might have been thought that the Judgment was now finally to fall into line with international law, yet this was not at all the case. For the following paragraph of the Judgment states: "According to international law, in order for a measure to be characterized as a 'conservation and management measure', *it is sufficient* that its purpose is to conserve and manage living resources and that, . . ., it satisfies various *technical requirements*." (Emphasis added.) For the Judgment, the authority taking such measures, the maritime areas affected by them, and/or the way in which they are to be enforced are not elements belonging to the definition of "conservation and management measures" in international law. These latter elements are taken into consideration only for the purpose of determining the legality of such measures under international law (paragraph 70 of the Judgment).

339. The author of this opinion disagrees totally with this conclusion of the Judgment. "Conservation and management" measures are defined in international law by reference to legal criteria and not solely or exclusively technical ones. The Judgment, on the other hand, belatedly asserts: "International law thus characterizes 'conservation and management measures' by reference to factual and scientific criteria" (paragraph 70 of the Judgment), without however providing evidence of *international practice* nor of the *opinio juris* of States. Here, the Judgment in effect confounds general international law with the implementing regulations and annexes to Canada's Coastal Fisheries Protection Act, or even with the domestic legislation of other countries, which it refers to but without any form of analysis! It will be seen below that both general international law, as embodied in the 1982 Convention on the Law of the Sea, and recently concluded international agreements relating to this Convention take a different stand: for example, the FAO "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" of November 1993, and the United Nations "Agreement for the Implementation of the Provisions of the United Nations Conference 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" of 4 December 1995. I therefore agree entirely with the criticism in other dissenting opinions of the majority conclusion as to the meaning in international law of the expression "conservation and management measures" of the living resources of the high seas. The references in the Judgment to Article 62 of the 1982 Convention on the Law of the Sea to certain other agreements and conventions and to certain European Union and NAFO texts cannot be accepted as evidence of international practice, nor as a record of the *opinio juris* of States in this matter.

340. In reaching its conclusion on the meaning of this concept in international law — and also in the reservation contained in subparagraph *(d)* of the Canadian declaration, bearing in mind that the latter is silent on this point — the Judgment once again refers to the question of the *legality of the measures* (see paragraph 70). It accepts, however, that the question of the existence and the content of the concept in international law is a question of *definition,* while at the same time maintaining that whether a particular action covered by the concept violates the normative requirements of that legal order remains a question of legality. While it is indeed the definition of the notion in question that must form the basis for an interpretation of the expression under consideration in these preliminary proceedings on jurisdiction, it nonetheless often happens — as with the definition of "conservation and management measures" in the international law of the sea — that such definition includes legal criteria, not merely technical, factual or scientific ones. And it is also the case that the notion of legality may form an integral part of the definition of a particular legal concept. In such circumstances, the Court in preliminary proceedings might well conclude that a given objection does not possess an exclusively preliminary character. And it is in fact to eliminate this possibility that the Judgment seeks to exclude any legal criterion from the elements relating to the existence or content of the notion of "conservation and management measures", that is to say, from its definition.

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341. Let me recapitulate my own views on this issue. Recourse to international law to interpret the expression "conservation and management measures" is encouraged in this case by the context of that expression in the reservation contained in subparagraph *(d)* of the Canadian declaration, which tells us that we are dealing here with conservation and management measures taken by Canada against vessels fishing in the NAFO Regulatory Area, together with the enforcement of such measures. The context thus places the interpreter within a specific field of international law, namely the law of the sea, and, within that field, in the legal régime applicable to a single, precisely defined maritime space, namely the NAFO Regulatory Area of *the high seas.*

342. We are not dealing with a reservation which refers to two or more maritime areas. For example, the reservation contained in subparagraph *(d)* does not exclude from the Court's compulsory jurisdiction disputes concerning conservation and management measures taken by Canada within its exclusive economic zone. This, too, greatly facilitates the interpreter's task, since, contrary to what is claimed by Canada and by the Judgment, conservation and management measures affecting the living resources of the sea are not defined in the same way in all the maritime areas recognized by international law. And why is this so?

Because in this regard international law takes into account the general legal régime governing the maritime area concerned, the author of the measures in question and the nature of the measures adopted.

343. Admittedly, there are conservation and management measures on the high seas, but they are not defined in the same way as, for example, those applicable within a State's exclusive economic zone. The conservation and management of living resources is one of the aims of the law of the sea, a social value, protected by the international legal order and applicable to the various recognized maritime areas, but "conservation and management measures" have neither the same nature nor the same content in all of these areas, precisely because of the differences in the latter's respective legal régimes. A measure which international law considers to be a conservation and management measure within an exclusive economic zone may well not be one on the high seas. The Judgment disregards what to me is clear and self-evident, without producing any real evidence of the international practice of States and of their *opinio juris*.

344. International law — like municipal legal systems — is a coherent system. For example, were a Canadian agency to take a measure not recognized under Canadian law as a conservation and management measure, could that measure be described as a conservation and management measure within that legal system? In these proceedings, Canada says not, for example in its response to the arguments on the extraterritorial application of its criminal code or on the use of force. *Mutatis mutandis*, the same applies in international law. In defining "conservation and management measures" affecting the living resources of the sea, international law takes into account the authority responsible for the measure, the maritime area concerned, the purpose and nature of the measure and the manner in which it is enforced.

345. Let us take a few more examples to illustrate the matter. When an individual is deprived of his liberty by a police officer of a given State or by a terrorist, does not the capacity or status of the author of that measure have some role to play, and can this always be described as a "police measure"? And when the said police officer pursues and arrests an offender in the territory of a neighbouring State, do such acts still fall within definition of a "police measure"? In defining a particular type of accepted measure, legal systems take into account not merely its factual or material object, or even its purpose. They also rely for their definition on other criteria, which are thus equally relevant for purposes of the legal definition of the measures concerned. International law does the same.

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346. Let us now examine the Parties' respective interpretations of the expression "conservation and management measures" in the Canadian

reservation in subparagraph *(d)*, beginning with that of the Applicant. In the first place Spain contends that the conservation and management of resources is not a matter relevant to the subject of the dispute which it has brought before the Court, namely Canada's *international title* to exercise its jurisdiction on the high seas against Spanish vessels and their crews. In Spain's view a claim by a coastal State unilaterally to exercise jurisdiction over the high seas, an international maritime space, or against foreign vessels on the high seas, cannot shelter behind the pretext of the conservation and management of resources. The reservation in subparagraph *(d)* of the Canadian declaration refers to "conservation and management measures with respect to vessels fishing" and not to Canada's jurisdiction or rights on the high seas against other States or against vessels flying other flags on the high seas.

347. For Spain, the Canadian coastal fisheries protection legislation is a cover for a claim to extend its sovereignty over the international space of the high seas, to the detriment of the rights of other sovereign States, even to the extent of enforcing its criminal law outside its territory and authorizing the use of force.

348. For Spain, the legal régime of the *high seas* precludes the possession by Canada of an international title allowing it to exercise jurisdiction against Spanish vessels on the high seas. No such title can derive from the general law of the sea or from the 1978 NAFO Convention, and there is no bilateral agreement between Spain and Canada allowing such Canadian activities against Spanish vessels in international waters. True, Canada relies on its national legislation, but this is not opposable to other States, including Spain, since it is not based on a title valid in international law.

349. Spain also points out that the text of the reservation in subparagraph *(d)* excludes the compulsory jurisdiction of the Court in respect of *a single category of measures*: "conservation and management measures". However, Spain does not accept that this expression may be taken to include other acts lawful or unlawful, or other possible categories of measures, for example "enforcement measures".

350. Spain also considers that, being formulated in terms of an *objective category not otherwise defined in the declaration* (for example by reference to Canadian legislation), the measures concerned must be genuine "conservation and management measures" *in international law* in order to fall within the scope of the reservation in subparagraph *(d)*. From the standpoint of international law and international practice, in Spain's view the various measures taken and enforced by Canada in this case were not true "conservation and management measures". Consequently they are not covered by the reservation in subparagraph *(d)*. They *merely constitute acts*, indeed *internationally unlawful acts*.

351. Canada's amended Coastal Fisheries Protection Act, with its claim that Canadian jurisdiction may be exercised against foreign vessels on the high seas, the extension of Canadian criminal law to the crews of foreign vessels on the high seas, and the authorization of the use of force against such crews and vessels cannot be described as a "conservation and management measure" in the international law of the high seas. Even Article 73 of the 1982 Convention on the Law of the Sea, concerning the enforcement of the laws and regulations of the coastal State in its exclusive economic zone, does not envisage the enforcement of criminal law against foreign vessels and their crews in that zone.

352. Spain draws two main conclusions from the use of the expression "conservation and management measures" in the text of the reservation in subparagraph 2 *(d)* of the Canadian declaration: *(a) the* effet utile *of the reservation is more limited* than Canada claims; *(b) the reservation is not capable of being applied* to the dispute which Spain has brought before the Court as a result of the events of March 1995. Had Canada's intention in 1994 been as it claimed in these preliminary proceedings, then, in Spain's view, Canada would have been inconsistent or mistaken in the wording of its reservation, since, on an objective view, the reservation cannot apply to events such as those of March/April 1995. The reservation was not capable of being applied to those events. Its own text would prevent this. Counsel for Spain described the reservation as *lame.* Canada must now take responsibility for the consequences of its actions in 1994, when it drafted and deposited its declaration. It is not for other declarant States, such as Spain, to bear the brunt of consequences resulting from action by Canada alone.

353. As to Canada's insistence on the content or factual object of the measures as the decisive criterion for interpreting the expression "conservation and management measures", Spain has pointed out that the Canadian position ignored the principle of integrality in the interpretation of the declaration, since the instrument which was the subject of the interpretation was the declaration and not merely the reservation in subparagraph *(d)*. In other words, the reservation cannot be interpreted without regard for the declaration as a whole, for the statements in 1994 by the relevant Ministers during the parliamentary debates on Bill C-29 (references to so-called "pirate" vessels), and to the subject of the dispute brought before the Court by Spain (Canada's "title").

354. Lastly, for Spain, legal categories cannot be arbitrary, and any capacity for evolution which they may possess must not be confused with volatility in regard to the meaning and scope of the terms employed. Terms, including generic terms, adapt themselves to circumstances, but they cannot change the nature of the legal categories concerned. Thus any generic character claimed by Canada for the expression in the reservation cannot turn that reservation into a black hole, all the more so in

that the measures taken by Canada in March 1995 were not even "conservation and management measures" under the NAFO Convention.

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355. On the basis that the word "measures" is a broad term encompassing all kinds of acts, including legislative acts done with a specific aim or purpose in view, Canada has claimed a broad, all-encompassing meaning for the words "conservation and management" in the reservation contained in subparagraph *(d)*. It is said that these words are not subject to any particular restriction, except that the measures must clearly concern fisheries resources and their rational exploitation. The qualifying terms "conservation and management" are said to cover all measures taken by the Canadian State (whether legislative, regulatory or administrative) in respect of the living resources of the sea (protection of resources, conservation properly so-called, management of fisheries).

356. This broad conception of the expression "conservation and management measures" in the reservation in subparagraph *(d)* leads Canada in practice to equate such measures to some extent with measures *for or concerning* conservation and management. For Canada, a measure is a conservation and management measure if it has been devised for the purpose of conserving and managing fisheries, or if it might be concluded that, by reason of its content or object, the measure concerns the conservation and management of fisheries. The measures taken by Canada are said to be not at all unusual in the conservation and management of fisheries and to be found both in international agreements and in national legislation on fisheries, making them "conservation and management measures" for the purposes of the reservation in subparagraph *(d)*. It is claimed that, in effect, it is the factual content and subject, and the aim pursued, that are the elements to be taken into consideration in defining the "conservation and management measures" of the reservation.

Canada has, however, accepted that the expression "conservation and management measures" in the reservation refers to a *generic category* of measures, one moreover which might be subject to future change, after criticizing Spain for restricting the scope of the expression to what was done in the past. Canada also spoke of the "nature" of the measures concerned.

357. Canada also contends that the expression "conservation and management measures" in the reservation in subparagraph *(d)* encompasses both measures which are in conformity with *international law* and those which are contrary to it, since — so it claims — a measure is a measure whether it be lawful or not (see, for example, CR 98/12, pp. 11-14, 16). A measure, even if it is unlawful, is a conservation and management measure if it concerns conservation and management, for the reservation does not speak of authorized measures or internationally lawful measures or even of measures taken pursuant to a valid title (there is an

attempt here to overturn the rule of interpretation that legal instruments are presumed to be lawful if nothing is said in the instrument under interpretation, a rule I have already mentioned in this opinion). Thus, according to Canada, Spain's contention that the measures cannot be considered to be "conservation and management measures" in the absence of a title is contradicted by the wording of the Canadian reservation.

358. In Canada's view, the existence or lack of title, and the legality or illegality of the measures taken, provide no answer to the question whether the reservation is applicable in this case, since this is a question for the Court to deal with at the merits stage. According to Canada, it would be absurd to deal with the merits before jurisdiction. This argument by Canada is only a partial response to the Spanish thesis, since this is based not only on the *illegality* of the measures taken by Canada but also on the contention that, in terms of the international law of the high seas, they *cannot exist* as "conservation and management measures".

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359. It is quite clear that, in its arguments on the definition of the expression, Canada sought to overcome the considerable obstacle represented — in view of the wording of the reservation — by the *legal régime applicable to the high seas*. It was for this reason that counsel for Canada found themselves obliged to repeat again and again that it was the content or the factual object of the measures which was important rather than legal régimes or categories. In the verbatim records of the hearings, for example, we read that the measures taken and enforced in 1995 against Spanish vessels were quite ordinary conservation and management measures *except* for the fact that they were applied on the high seas or, further, that *the only thing that made them different* is where Canada applied them. Hence there is an element which distinguishes the said measures of 1995 from ordinary conservation and management measures, and Canada does accept this, albeit discreetly.

360. Having accepted the inevitable, Canada did its best to minimize the effects of this admission as regards the interpretation of the expression "conservation and management measures" in the reservation in subparagraph *(d)*. It was at this point that it accused Spain of confusing what was essential and what was merely incidental. The geographical area or the place of enforcement, even the authority responsible for the measure, were said not to appertain to the *essence* of conservation and management measures. They were thus mere incidental elements. The Judgment follows this Canadian argument almost word for word (see paragraph 338 of this opinion). The distinction made by the majority between the "concept" and the "essence of the concept" (or the "[essential] characteristics of the concept") has been lifted from Canada's oral arguments and not from international law.

361. For Canada, the legal régime governing the maritime area in which the measures apply, the authority taking the measures, those affected by the measures, or the way in which the measures are enforced are all said to be unimportant in defining the "conservation and management measures" referred to in the reservation. Yet one has only to read the 1982 Convention on the Law of the Sea (or the other agreements referred to above) to be convinced otherwise. But for Canada and for the Judgment, legal criteria are not to be taken into account for purposes of the interpretation and application of the reservation in subparagraph *(d)*. Accordingly to counsel for Canada, they are not "sufficiently objective elements"! For Canada and for the Judgment, whether the measures are applied inside or outside the 200-mile limit is accordingly of no importance, for the purposes of interpreting the expression "conservation and management measures" in the reservation.

362. However, it has to be said that the reservation in subparagraph *(d)* of the Canadian declaration in no way defines the expression "conservation and management measures" by reference to the content or factual object of the measures taken or enforced by Canada. These notions are found only in the arguments put forward by Canada in these preliminary proceedings. Thus Canada characterizes the amended Act and its implementing regulations as conservation and management measures, on the basis of arguments concerning their content or factual object and their purpose. However, these words are not in the text of the reservation contained in the declaration, nor can they be found in the supplementary means of interpretation of the declaration submitted by the Parties to the Court. Nowhere in the records of the parliamentary debates on Bill C-29 could I find any definition by those responsible of the expression "conservation and management measures" as used in the reservation in subparagraph *(d)*. Canada has admitted that the amended Coastal Fisheries Protection Act provides penalties for violations of the Act and that it contains provisions for the enforcement of Canadian criminal law within the NAFO Regulatory Area, although it is claimed that such provisions are strictly limited to cases where offences are committed in the course of enforcing this legislation. Hence, being directly linked to the enforcement of conservation and management measures taken by Canada, the provisions concerned would accordingly be covered by the reservation.

363. The initial Canadian arguments about the definition of the measures specified in the reservation in subparagraph *(d)* were to shift their ground during the oral phase. At the hearings, counsel for Canada sought more objective terms of reference in order to show that the measures taken and enforced by Canada in March 1995 against Spanish vessels in the NAFO Regulatory Area really were "conservation and management measures" for purposes of the interpretation of the reservation. Thus various subparagraphs of Article 62, paragraph 4, of the 1982 Convention on the Law of the Sea were mentioned (as also in the Judgment) in support of the contention that the measures taken against the Spanish vessels — measures set out in Table V of the Regulations of 3 March

1995 — were conservation and management measures. This provision relates of course to the exclusive economic zone and not to the high seas, as do Articles 61 and 73 of the Convention, which counsel for Canada also mentioned. They further pointed out that the 1995 Agreement on Straddling Stocks uses the expression "conservation and management measures", that the entire Agreement concerns the high seas and that the NAFO conservation and management measures apply in an area of the high seas. But they overlooked the essential point, namely that these are measures applied in areas of the high seas *pursuant to international agreements concluded between the States concerned*! This is a far cry from the measures taken and enforced by Canada in 1995 against vessels on the high seas flying the Spanish flag. The majority set themselves to putting the finishing touches to Canada's endeavours by means of additional research which produced nothing new, but which the Judgment presents as though it were genuine evidence of the international practice of States and their *opinio juris* in regard to the definition of "conservation and management measures".

364. Finally, I should mention one further Canadian ambiguity of this kind, which relates to Canada's position in the present proceedings as regards the 1978 NAFO Convention and its régime. Here we have treaty commitments by Canada applicable to the area of the high seas in which the March/April 1995 events took place. Yet counsel for Canada nevertheless objected to the "conservation and management measures" of the reservation in subparagraph *(d)* being defined by reference to the NAFO Convention, despite the references in the amended Coastal Fisheries Protection Act to NAFO and to the measures adopted by that body. Is it that these provisions do not form part of the integrity of the legislation which, according to Mr. Ouellet, the reservation was designed to protect?

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365. What are the meaning and the scope of the expression "conservation and management measures" in today's international law of the high seas? To answer this question, we must turn to certain principles of the new legal order of the sea which States themselves created at the Third United Nations Conference on the Law of the Sea, by signing the United Nations Convention on the Law of the Sea of 10 December 1982. It is this Convention which gave formal expression to the most recent general principles of conservation and management of the living resources of the high seas.

366. The Court's case-law has confirmed on a number of occasions and in varying contexts that the 1982 Convention reflects in general the practice of States in present-day international relations concerning the law of the sea, as well as their *opinio juris* in this respect. Moreover, Canada's declaration was deposited on 10 May 1994, that is, approxi-

mately 12 years after the signature of the Convention on the Law of the Sea, and Canada was among the most active States at the Third Conference. What is more, by virtue of the new legal order of the sea accepted by Spain and other States, Canada has a 200-mile exclusive economic zone and possesses other rights as a coastal State. During the present incidental proceedings, both Spain and Canada cited provisions of the 1982 Convention on the Law of the Sea in support of their respective arguments on the interpretation of the reservation in subparagraph *(d)* of the Canadian declaration.

367. Today, as in the past, international law proclaims the freedom of the high seas and enjoins that no State may validly purport to subject any part of the high seas to its sovereignty. This freedom of the high seas gives States a whole series of rights, including freedom of navigation and freedom of fishing. Freedom of the high seas is exercised under the conditions laid down by the provisions of the 1982 Convention and other rules of international law; that is to say, it is not exercised under conditions stipulated in the national legislation of any State whatsoever. Furthermore, every State must exercise the freedoms conferred on it by the freedom of the high seas with due regard for the interests which that freedom implies for other States (Articles 87 and 89 of the 1982 Convention).

368. Conscious of the need to protect all the rights and interests which the various recognized maritime spaces involve, international law even requires that the *"laws and regulations of the coastal State"* in regard to conservation applicable in its own exclusive economic zone shall be *consistent* with the 1982 Convention on the Law of the Sea (Art. 62, para. 4). Thus the nature of "conservation and management measures" is far from indifferent either to their *author* or to the general régime governing the *maritime space* in which they are intended to operate. To assert otherwise, as the Judgment does, seems to me to conflict with the law of the sea. What is more, the so-called "technical" or "factual" meaning which the Judgment ascribes to the measures specified in the reservation in subparagraph *(d)* cannot be ascertained by interpreting the text of the reservation. To reach such a conclusion, the interpreter would have to qualify the text by the addition of words which are not there and also, in my view, disregard international law in interpreting the reservation.

369. Every State has the right to sail ships flying its flag on the high seas. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship, and every State must fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. *Ships must sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the 1982 Convention, are subject to its exclusive jurisdiction on the high seas.* A ship which sails under the flags of two or more States, using them according to convenience, may not, however, claim any of the nationali-

ties in question with respect to any other State, and may be assimilated to a ship without nationality (Articles 90, 91 and 92 of the 1982 Convention).

370. Every State must effectively exercise its jurisdiction and control over ships flying its flag and, in taking the necessary measures in relation to such ships, must conform to generally accepted international regulations, procedures and practices and take any steps which may be necessary to secure their observance. *A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship on the high seas have not been exercised may report the facts to the flag State.* Upon receiving such a report the flag State must investigate the matter and, if appropriate, take any action necessary to remedy the situation. Each State must cause an enquiry to be held into every instance of conduct at sea involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State *or to the marine environment*. The flag State and the other State shall co-operate in the conduct of the enquiry (Article 94 of the 1982 Convention). Even in the event of a collision or any other incident of navigation concerning a ship on the high seas, the penal or disciplinary jurisdiction is that of the State of which the person concerned is a national (Article 97 of the 1982 Convention).

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371. The body of general provisions constituting the international legal régime applicable to the high seas is based on two fundamental principles: that of *the exclusive jurisdiction of the flag State over its vessels* on the high seas and that of *co-operation among States* on a series of matters of common interest concerning the high seas (assistance at sea; transport of slaves; repression of piracy; illicit traffic in narcotic drugs; unauthorized broadcasting; protection of submarine cables and pipelines). The seizure, right of visit and right of hot pursuit of a vessel on the high seas by a State other than the flag State are thus exceptions which are strictly regulated by the general international law of the high seas (Articles 105, 110 and 111 of the 1982 Convention).

372. *The same principles and general considerations govern the conservation and management of the living resources of the high seas*. In the new legal order of the sea, freedom of fishing is of course subject to the conditions laid down in Part VII, section 2, of the 1982 Convention (Arts. 116-120), including States' treaty obligations and the rights and duties, as well as the interests, of coastal States laid down in Articles 63-67 of the Convention with regard to the exclusive economic zone, and especially in Article 63, paragraph 2, on straddling stocks. But what is the duty of States in these matters in general? *To take, or to co-operate with other*

States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas (Article 117 of the 1982 Convention).

373. By their nature, measures for the conservation and management of the living resources of the high seas are representative of that general duty. Thus Article 118 of the Convention provides that:

> "States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end."

NAFO is precisely such an organization.

374. Article 119 of the 1982 Convention lays down detailed rules on the organization of co-operation among States concerned in the conservation and management of the resources of the high seas, including rules concerning the allowable catch and other conservation measures, as well as objective criteria, including scientific criteria, on which such measures are to be based. In addition, the Article ends with a paragraph 3 which is of the utmost interest in connection with the principle of non-discrimination. The paragraph is worded as follows:

> "States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State."

The requirement of non-discrimination in "conservation and management measures" taken in respect of an area or region of the high seas is not of course new. It already exists in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (see Articles 5 and 7 of the Convention). It is a requirement which necessarily flows from the régime of *res communis* governing the high seas.

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375. Two recently concluded agreements specifically concerning the conservation and management of the living resources of the high seas define conservation and management measures with due regard for legal criteria, and in particular the pertinent rules of the 1982 United Nations Convention on the Law of the Sea. For example under Article 1 (Definitions), paragraph *(b)*, of the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, for the purposes of the Agreement:

> "'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.)

Canada accepted this agreement on 20 May 1994 (ten days after the deposit of its declaration), and the European Community on 6 August 1996.

376. 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 of 4 December 1995 is also perfectly in line, as regards the definition of "conservation and management measures", with the pertinent provisions of the international law of the sea as codified in the 1982 Convention on the Law of the Sea. Although the Agreement is not yet in force, the Parties referred to it in the present incidental proceedings in certain contexts and the Judgment does so as well.

377. The Judgment contends that Article I (1) *(b)* of the 1995 Agreement cited above does nothing to invalidate its conclusion regarding the meaning of "conservation and management measures" because, it says, that provision does not itself define conservation and management measures (any more than the FAO Agreement of 1993). I take precisely the opposite view, since I read in this provision that, for the purposes of the 1995 Agreement:

> "'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 [on the Law of the Sea of 1982] and this Agreement*" (A/CONF.164/37; emphasis added).

That is wholly compatible with the definition of those measures which results from the general international law of the sea and which this opinion upholds. The definition in the 1995 Agreement demonstrates just as much as the 1982 Convention on the Law of the Sea (and the 1993 FAO Agreement) that, in current international law, the criterion of compatibility of the measures in question with the pertinent rules of international law applicable to the maritime space concerned is an element which is a *sine qua non* of the definition of "conservation and management measures" for the living resources of the sea which the international legal order contemplates. Moreover, Article 4 of the 1995 Agreement provides that:

"Nothing in [the 1995] Agreement shall prejudice the rights, jurisdiction and duties of States under the [1982] Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the [1982] Convention."

378. Furthermore, Article 5 of the 1995 Agreement, entitled "General principles", states that in order to conserve and manage the stocks covered by the Agreement "coastal States and States fishing on the high seas shall, in giving effect to their *duty to co-operate* in accordance with the [1982] Convention: *(a)* adopt measures . . ." (emphasis added); and Article 3 makes the distinction which the international law of the sea requires between, on the one hand, "areas under national jurisdiction" and, on the other, "areas beyond national jurisdiction". Furthermore, in both the 1995 Agreement and the 1982 Convention, no "conservation and management measures" can be taken by a coastal State on the high seas against vessels in that maritime space flying the flag of another State except *by agreement between the States concerned.*

379. The majority does its best in paragraph 70 of the Judgment to evade the conclusions stated above regarding the meaning of "conservation and management measures" on the high seas as understood in general international law and international agreements; however, legal definitions are hard to kill. No considerations of the kind evoked justify the Judgment in altering or overturning the existing positive international law on this subject. The author of the measures, the maritime space they concern, their nature and so on — and not just their content or factual object — are all elements inherent in the very definition of "conservation and management measures" in respect of the living resources of the sea under international law, and hence of the measures referred to in the reservation contained in subparagraph *(d)* of the Canadian declaration. Canada itself has admitted, in the present preliminary proceedings, that the conservation and management measures contemplated in the reservation are not necessarily the same as those stated by it to be measures of that kind. For Canada, this was a way out of its difficulty, leaving it to the Court to speak on its behalf. And, once again, the majority followed.

However, the Judgment's demonstration of what it considers to be the meaning and scope of the expression "conservation and management measures" in international law is totally inadequate. This is another serious weakness of the Judgment, one which could have consequences extending well beyond the present preliminary proceedings. In effect, in order to reach the conclusion that the Court has no jurisdiction, the majority have, one might say, adjusted the international law on the subject to suit Canada's purported underlying intention or purported reasons for the reservation in subparagraph *(d)* of its declaration; for, as paragraph 71 of the Judgment expressly states, "any other interpretation of that expression would deprive the reservation of its intended effect"!

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380. In the present incidental phase, it is not a question of the Court adjudicating upon a particular aspect of illegality or responsibility in connection with the merits of the case, or on the defences which Canada might in due course plead on the merits, but quite simply of it interpreting the declaration by virtue of its power to determine its own jurisdiction (Article 36, paragraph 6, of the Statute), since Canada challenges the Court's jurisdiction in reliance on the reservation in subparagraph *(d)* of its declaration. It is thus in connection with the subject of the present incidental proceedings that I conclude, in the light of the above considerations, that:

(a) the meaning to be given to the expression "conservation and management measures" in the reservation in paragraph 2 *(d)* of the Canadian declaration, because it is the meaning which it bears under the general international law of the high seas, cannot be determined solely by reference to the content or the factual or material object of those measures, which itself has to be ascertained in light of the particular circumstances of the case[4];

(b) the measures concerned in the present case, which Canada took on the basis of its internal legislation, are not "conservation and management measures" under the general international law of the high seas: *they do not exist as such in the international law governing that maritime space.*

381. The latter conclusion is based on considerations which are perfectly compatible with the exercise by the Court of its power to determine its own jurisdiction. The measures taken in the present case by Canada are not "conservation and management measures" under the general law of the high seas — nor therefore under the terms of the reservation in subparagraph *(d)* — for very simple reasons:

(a) they were taken in regard to vessels on the high seas having a genuine nationality and flag, not of Canada but of other sovereign States such as Spain;

(b) they were taken unilaterally, regardless of the principle of co-operation between the States concerned, and were not the outcome of any negotiations or any understanding or agreement between those States (including Spain);

(c) they were taken despite the pertinent treaty functions exercised by NAFO in regard to vessels of States fishing in its Regulatory Area (including Canada and Spain); and, in addition,

[4] I mentioned earlier that the measures taken and enforced by Canada in the circumstances of the present case in March 1995 against Spanish and Portuguese vessels fishing in the NAFO Regulatory Area were not directed towards "conservation", their factual object and purpose being to procure a change in the position of the European Union and the attribution by it to Canada of certain preferential rights in that area.

(d) in this particular case they constituted an act of discrimination against Spain and Portugal and Spanish and Portuguese fishermen.

The discriminatory nature of the measures taken by Canada in March/April 1995 against Spanish vessels is a proven fact in the present incidental proceedings, since it is embodied in the Canadian Coastal Fisheries Protection Regulations of 3 March 1995, which are before the Court (Memorial of Spain, Annexes, Vol. I, Ann. 19, p. 311). This fact alone makes it quite impossible legally for the measures taken in the present case by Canada to enjoy consideration in international law as "conservation and management measures" for the living resources of the high seas, and thus, for the reasons indicated, precludes them from being accorded that meaning in the interpretation of the reservation in paragraph 2 *(d)* of the Canadian declaration.

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382. These conclusions can be no more or no less restrictive than the actual text of the reservation in subparagraph *(d)* of the Canadian declaration of 10 May 1994. Nor do they prevent the expression "conservation and management measures" from being interpreted in a given declaration as having a different meaning or a different scope; for example, that contained in a national law or regulations. That might perfectly well happen, since consent to the Court's jurisdiction is not to be confused with the principles and rules of the pertinent international law. And it could also happen that the Court is required to give effect to a jurisdictional instrument without reference to international law because of the terms themselves in which the State concerned gave its consent to jurisdiction (see, for example, paragraphs 66-68 of the Judgment). But neither of these eventualities is at issue here, since the declarant State did not, either directly or indirectly, give any particular definition of the measures in question, either in the reservation or in the declaration as a whole or elsewhere, before the proceedings were instituted.

383. The principal ground invoked in the Judgment for its finding on the present point would seem to be no more than a single — and supplementary — element of interpretation, namely the reference which Mr. Ouellet made in his statement in the Senate to the protection of the integrity of Canadian legislation; the fact that the Canadian Minister of Foreign Affairs and International Trade emphasized other factors as well, such as the sound legal basis of that legislation, is overlooked. If this kind of supplementary means of interpretation is adduced as proof of an underlying intention, it should at least be taken in its entirety. Nor should we forget Mr. Ouellet's reference to what he called "pirate" vessels, or the precedent represented by the Canadian declaration of 1970.

384. I agree that the question of the "conformity" of an act with inter-

national law is one of "legality" (paragraph 68 of the Judgment), and therefore a matter for the merits. Of course the word is being used in a double sense — the reference being to the "legality" or "illegality" of the act concerned — and the present proceedings are indeed only preliminary incidental proceedings. However, the separate question of the "existence" or "non-existence" of the measure concerned — its reality as a "conservation and management measure" under international law (since it is not defined in the text of the declaration) — is not a question going to the merits. I do not consider that the measures with which the Applicant charges the Respondent in the present case, and which the Respondent admits, have any existence, any legal reality in the general international law of the sea as "conservation and management measures", and therefore they cannot, in my view, be characterized in the particular circumstances of this case as measures of "conservation and management", which is how the Judgment describes them for the purpose of interpreting the reservation in paragraph 2 *(d)* of the Canadian declaration.

385. My purpose in taking account, in the present context, of the international law of the sea has nothing to do with the merits of the case, namely the conformity or non-conformity of the Canadian measures with that law. The interpretation of the reservation and its silence on the subject are my sole reason for having turned to general international law, where I find that that law does not recognize measures such as those taken by Canada in this case in 1995 against Spanish vessels in the NAFO Regulatory Area as "conservation and management measures".

386. General international law also tells us that the content or factual object of the measures is not the only criterion to be taken into account in determining the existence of a "conservation and management measure" under international law. Other criteria come into play here, namely the maritime space concerned, whether or not the measures are unilateral, whether or not they are discriminatory, whether or not the specific measures taken aim at conservation, and so on. The FAO and United Nations Agreements referred to above simply serve to confirm the general international law of the sea on this subject.

387. I cannot therefore accept the conclusions of the Judgment on this issue as representing a natural and reasonable manner of construing the text of the reservation in the context of the declaration, having regard also to the intention of the declarant State as reflected in the supplementary means of interpretation submitted to the Court by the Parties.

(d) *The words "the enforcement of such measures" in the reservation and the silence on the use of force in respect of the matters reserved by the declaration*

388. Having concluded that the "measures" taken by Canada in the present instance were not "conservation and management measures" within the meaning of paragraph 2 *(d)* of the Canadian declaration of

10 May 1994, it is clear to the author of this opinion that the enforcement of such measures by Canada is, too, an aspect of the dispute which does not fall within the scope of the reservation. However, since the Judgment gives a different interpretation of the expression "conservation and management measures", I must also state my view on the interpretation of the words "the enforcement of such measures" as used in the Canadian reservation, that is to say, independently of the interpretation of the measures taken by Canada in the present case and of their characterization as conservation and management measures under international law.

389. In interpreting the words "the enforcement of such measures", the first thing to bear in mind is the distinction between "measures" and their "enforcement". The reservation in paragraph 2 *(d)* of the Canadian declaration deals with only a single category of measures, namely the "conservation and management measures" taken by Canada in regard to vessels fishing in the NAFO Regulatory Area. In the reservation, "enforcement" is not a measure or a separate category of measures; it simply relates to the implementation of the "conservation and management measures" in question. The Judgment on the other hand, aligning itself yet again with the Canadian position, arrives at the opposite conclusion, talking of "measures in enforcement of conservation" (see, for example, paragraph 82 of the Judgment).

390. The author of this opinion, however, believes that the word "enforcement" cannot be interpreted in the reservation in subparagraph *(d)* independently of the "conservation and management measures" which govern it. Without the existence of this latter category of measures, there can be no "enforcement" within the meaning of the reservation to the Canadian declaration. Accordingly, once it is established that the measures taken by Canada in the case are of a different kind, then the enforcement of that different kind of measure does not fall within the scope of the reservation, whether as the "taking" or as the "enforcement" of measures.

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391. Spain stressed on a number of occasions the distinction which I have drawn above. This distinction is what underlies its second main argument in favour of the Court's jurisdiction in this case, namely that the use of force by Canada against vessels on the high seas flying the Spanish flag cannot reasonably be regarded as the enforcement of measures relating to the conservation and management of fish stocks. In Spain's view, since international law has prohibited the use of force, its use cannot be covered by the reservation in subparagraph *(d)*, bearing in mind that the text of Canada's reservation and declaration as a whole is silent on the use of force in relation to the matters excluded by the reservations contained in the declaration.

392. In Spain's view, the use of force is clearly not covered by the reservation in subparagraph *(d)*, because the reservation does not mention

it, and because the use of force for which the Canadian legislation provides in respect of foreign vessels on the high seas constitutes conduct contrary to international law, that being the law which governs the interpretation of declarations made under the optional clause system establishing the Court's jurisdiction. Thus the boarding of the *Estai* by force on the high seas on 9 March 1995 was not in itself an act of enforcement of a conservation and management measure under international law, but something altogether different.

393. According to Spain, the force whose use is prohibited by international law is not confined to actual armed aggression. What is prohibited is the use of armed force by a State against another State, whether in relation to territory, persons or objects, including those on the high seas, falling under the sovereignty or exclusive jurisdiction of that latter State. The use of force on the high seas against a vessel flying the flag of another State is, Spain maintains, contrary to the United Nations Charter, to general international law and to the law of the high seas and, as such, cannot be covered by an interpretation of the reservation in paragraph 2 *(d)* of the Canadian declaration unless the text of the declaration as a whole, or of the reservation relied on by Canada, makes explicit reference to it.

394. As far as the facts are concerned, Spain placed particular emphasis on the provision in Canada's current relevant legislation for the use of force against vessels flying the flag of another State on the high seas; on the magnitude of the 1995 conflict; on the gravity of the incidents; on the degree of force employed by the Canadian patrol boats in their pursuit and boarding of the *Estai* some 245 miles from the Canadian coast; in the harassment, over the following days, of other Spanish fishing vessels in the NAFO Regulatory Area; and on the despatch to the area of units of the Spanish Navy.

395. As regards the Canadian legislation, Spain laid particular stress on the extension of Canadian criminal law to the NAFO Regulatory Area, permitting Canadian peace officers to use force on the high seas against foreign vessels at the risk of causing death or serious bodily harm. Spain thus rejected the Canadian arguments in this regard that the use of force was intended to be confined to serious cases and to situations of self-defence. Spain also emphasized the fact that the Canadian legislation complained of, and the theatre of the Canadian actions, concerned the *high seas* (the NAFO Regulatory Area) and that relations between States on the high seas are governed by the international law of the high seas, and not by the rules of the law of the sea relating to coastal States' exclusive economic zones, or by their national legislation. It thus rejected the notion that the legal régime governing national maritime areas could be applied to the high seas so as to justify the exercise of certain powers of coercion of the coastal State against foreign vessels on the high seas.

396. In Spain's view, Canada has no international title to use force

against vessels flying the Spanish flag in the NAFO Regulatory Area, or in any other area of the high seas. In this connection, Spain asked where was the practice, whether customary, traditional or well known, that permitted the use of force on the high seas against foreign vessels, in defiance of the restrictive provisions imposed by Articles 110 and 111 of the 1982 United Nations Convention on the Law of the Sea. Finally, it reminded the Court that the 1995 United Nations Agreement on Straddling Stocks is not in force and not binding on any State and that Canada is not yet a party to the 1982 Convention on the Law of the Sea, the former being intended to implement certain provisions of the latter.

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397. Canada had difficulty in answering these Spanish arguments. It endeavoured to do so indirectly, trying first to get round the link created in the reservation in subparagraph *(d)* between "conservation and management measures . . . and the enforcement of such measures" by constructing a new category of measures, namely, "enforcement measures", not found in the text of the reservation. This approach is that of the Canadian Counter-Memorial in general, and the same can be said of some of the Canadian statements at the hearings. For example, Canada's counsel argued that the expression "enforcement measures" used in the reservation *(sic!)* cannot mean anything less than the powers and procedures that are expressly set out in the amended Coastal Fisheries Protection Act of 1994. But the reservation says nothing about enforcement *"measures"*.

398. Occasionally, Canada avoided using the word "enforcement" or referred to its ordinary meaning in a manner isolating it from its context in the reservation. Sometimes its counsel talked of "disputed measures", meaning both the "conservation and management measures" mentioned in the reservation and "the enforcement of such measures", or else they resorted to descriptive formulae, such as "measures such as those necessary to effect . . .". These various presentations of the issue by Canada sought to eliminate or reduce, in the interpretation of the reservation, the effectiveness of the word "such" or to isolate it from the context of "conservation and management measures" which precedes it in the reservation. Canada went so far as to say that, if the use of force is not specifically *excluded,* it must be *included* in any reasonable and logical definition of the word "enforcement". In other words, it tried to overturn the general principle of law and of the Court's jurisprudence to which I have already referred to the effect that juridical instruments are to be presumed to conform to the law (*Right of Passage* Judgment).

399. Canada maintained that the use of force against the *Estai* on 9 March 1995 on the high seas (no mention was made of the harassment at that time of other Spanish fishing vessels in the NAFO Regulatory

Area) is "enforcement" of the "conservation and management measures" taken by it in regard to vessels fishing in the NAFO Regulatory Area under the 1995 regulations implementing its amended Coastal Fisheries Protection Act. Consequently, all of these actions by Canada, it was contended, came within the scope of the reservation. However, this did not prevent Canada's counsel from referring also to certain defences on the merits, such as the need for urgent action in 1995 because of overfishing by Spanish fishermen and the normal and customary nature of the action taken, although they acknowledged that, in the present preliminary proceedings concerning jurisdiction, the Court could not rule on the question of the degree of force employed in this particular case.

400. Canadian counsel emphasized that the measures taken by Canada in 1995 against Spanish and Portuguese vessels were "traditional" conservation and management measures; in this respect they compared the Canadian measures with those provided for in Article 61, paragraph 4, of the 1982 Convention on the Law of the Sea concerning the "exclusive economic zone", in keeping with Canada's general thesis in the present incidental proceedings that the nature of maritime space in question is quite irrelevant. According to their statements at the hearings, the *only* difference was *where* these measures were applied by Canada: the NAFO Regulatory Area which is so precisely designated in the reservation! Canada's counsel also mentioned other countries' legislation but gave no specific examples of it.

401. Canada accused Spain of dramatizing the degree of force used by Canadian coastguard vessels against the *Estai* when it was boarded on 9 March 1995. No shots had been fired at the vessel, and the boarding had taken place without loss of life or serious bodily harm. The force was *reasonable force,* employed for the sole purpose of arresting a fishing vessel which offered resistance and was suspected of having violated conservation and management measures prescribed by Canadian law. In other words, it was force used solely to enforce Canadian law, and plain common sense required that force needs to be used in enforcing the law. The fact that the vessel was Spanish, the law Canadian and the maritime space an area of the high seas were mere details, neither relevant nor of any value for the purpose of interpreting the reservation in paragraph 2 *(d)* of the Canadian declaration.

402. Canada asserted that the measures taken against the *Estai* had nothing to do with the use of force in relations between States as contemplated in the United Nations Charter, adding, however, that it recognized that the prohibition of the use of force laid down in Article 2, paragraph 4, of the United Nations Charter was a peremptory norm *(jus cogens)*. At the same time Canada's counsel pointed out that, as far as the interpretation of the reservation was concerned, the legality or illegality of the "enforcement" of the measures was immaterial, but they

refrained from characterizing Canada's own acts in this regard (adoption of the Regulations of 3 March 1995; boarding of the *Estai*; harassment of other Spanish fishing vessels).

403. The Canadian legislation permitted the use of force to board the *Estai,* but only as a last resort and in the most limited way possible, since Canadian criminal legislation was general law having "an entirely humanitarian and commendable purpose . . . force likely to cause death or serious injury is *not* justified *unless* it is necessary for self-preservation or the preservation of any other person — in brief, self-defence" (CR 98/14, pp. 46-47; emphasis added). Who then attacked the Canadian coastguard vessels or patrol boats that boarded the *Estai*? Who was it that placed these coastguard vessels and patrol boats in a situation of "self-defence"? Canada failed to answer these questions and therefore its argument based on self-defence does not hold water. Despite invoking Canadian legislation (which for the Court is simply a fact in the present proceedings and not the applicable law), Canada's counsel nevertheless sought recourse, as far as they were able, in international law in order to attempt to justify the use of force provided for in the Canadian legislation and its application on the high seas to the Spanish vessel *Estai* on 9 March 1995.

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404. Canada's arguments concerning the use of force provided for in its legislation and/or the force used against the *Estai* have no basis either in the text of the reservation in subparagraph *(d)* of its declaration or in its purported underlying intention. As far as the text of the reservation is concerned, the word "enforcement", taken in its ordinary or natural sense, does not cover "coercive measures". What is more, *enforcement* is not to be confused with *"enforcement action"*. It is highly significant in this respect that the statements by Canada's counsel talked of *enforcement* and *enforcement action* as though they were the same thing. These Canadian arguments thus add words to the text of the reservation which are not in it. This is the time to ask ourselves whether the application of grammar is to be confined to the interpretation of the words "vessels fishing" in the reservation. Even more significant is the fact that Canada, while certainly speaking of its national legislation, makes no mention of those matters really relevant to the interpretation of the reservation from the point of view of the "underlying intention", so frequently referred to in other contexts. Not a word, for example, of the statements of Mr. Ouellet or Mr. Tobin. This is somewhat surprising, since Mr. Ouellet spoke of reprisals ("retaliatory action") in his statement to the Senate on 12 May 1995, and *reprisals* is a term which in international law has a very precise and generally accepted meaning.

405. As to the facts, Canada, as we have just said, presents them as so-called conservation and management measures as provided for in its

national legislation, or as the enforcement of such measures. But the issue calls for a far more detailed study of the "facts which are the source" of the present dispute submitted to the Court by Spain on 28 March 1995 (see Chapter II of this opinion). On an examination of these facts, it emerges clearly that neither the adoption of the Regulations of 3 March 1995 nor the boarding by force of the *Estai* are acts which genuinely concern the conservation of the living resources of the sea, but acts of retaliation directed against measures adopted in respect of the NAFO Regulatory Area by a third party, the European Union.

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406. And what line does the Judgment take as regards the interpretation of the words "and the enforcement of such measures" in the reservation in subparagraph *(d)* of Canada's declaration? In paragraphs 78 to 84, it identifies and rejects one by one the Spanish arguments, namely: enforcement contrary to international law; the extra-territorial application of Canadian criminal law; the silence of the declaration and the reservation in subparagraph *(d)* on the use of force; and the illegality, under international law, of the relevant provisions of the Canadian legislation.

407. Notwithstanding the provisions of the 1982 Convention on the Law of the Sea, the Judgment apparently sees nothing abnormal in the Canadian domestic legislation, at least for purposes of the interpretation of the reservation in the Canadian declaration with which we are concerned. Indeed, it asserts that the use of a certain degree of force against foreign vessels on the high seas is permissible in relations between sovereign States where the conservation and management of the living resources of the high seas are concerned. This again represents a shift of direction by the Judgment in the Court's jurisprudence, both general in scope and unforeseeable in its consequences, to which I cannot subscribe, except in regard to cases of agreement between the States concerned.

408. What evidence does the Judgment put forward about the practice of States and their *opinio juris* in this respect? The same as Canada, namely Canada's own legislation, unidentified and unanalysed legislation of other countries, and Article 22, paragraph 1 *(c)*, of the Convention of December 1995 on Straddling Stocks (paragraph 81 of the Judgment). The author of this opinion cannot agree, in the absence of specific evidence about the practice of States and their *opinio juris*, that the provision of the Convention on Straddling Stocks cited by the Judgment is "a general practice accepted as law" (Article 38, paragraph 1 *(b)*, of the Court's Statute), either in March 1995 or today. Neither can I share the astonishing conclusion in paragraph 84 of the Judgment that the use of force on the high seas as contemplated by the Canadian legislation against vessels flying the flag of a foreign State is *today* "commonly understood as enforcement of conservation and management measures",

thus enabling certain conduct by Canada with regard to Spain to be brought willy-nilly within the sphere of application of the reservation in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994.

409. I find it neither "natural" nor "reasonable" to assert, as the Judgment does, that in general international law the notion of "enforcement" of conservation and management measures relating to the living resources of the high seas *now* includes the use of force (whether minimal or not) against foreign vessels on the high seas. In my opinion, for such force to be used, general international law still requires the agreement of the States concerned. In this connection, it is of interest to reproduce here point 6 of the *interpretative declarations* concerning the signing by the European Community and its member States of the 1995 United Nations Agreement on Straddling Stocks:

> "The European Community and its member States reiterate that all States shall refrain in their relations from the threat or use of force in accordance with general principles of international law, the United Nations Charter and the United Nations Convention on the Law of the Sea.
>
> Moreover, the European Community and its member States emphasize that the use of force contemplated in Article 22 [of the Agreement on Straddling Stocks] is an exceptional measure, to be based on the most rigorous respect for the principle of proportionality, and that any abuse will engage the international responsibility of the inspecting State. Any case of non-compliance shall be settled by peaceful means, in accordance with the relevant procedures for dispute settlement.
>
> Furthermore, the European Community and its member States consider that the relevant terms and conditions for boarding and inspection should be elaborated in accordance with the relevant principles of international law in the framework of the appropriate regional and sub-regional fisheries management organizations and arrangements." (European Union, extract from the draft Minutes of the 1935th session of the Fisheries Council, held at Luxembourg on 10 June 1996, Annex I, point *(ii)*, to the extract from the record; the United Kingdom made an interpretative declaration in this respect.)

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410. It is also clear, at least to me, that, in the legal and factual circumstances of the present case, the Judgment broaches an important issue which divides the Parties on the merits of the matter. In its presentation of the issue, the Judgment effectively prejudges the merits to an extent unacceptable in preliminary proceedings concerning the Court's jurisdiction. Article 79, paragraph 7, of the Rules of Court, might thus be

one more victim of the present Judgment. As we have seen, the Judgment brings the use of force under the Canadian legislation within the definition of what are "commonly" understood as "enforcement of conservation and management measures", but the Parties are divided on the merits as to the degree of force used by Canada in this case, and this also raises the question of how Canada's specific acts should be characterized. The Judgment does not deal with this latter issue. And of course it also remains utterly silent on the question whether the use of force which it accepts can be reconciled with the rule of the exclusive jurisdiction of the flag State over its vessels on the high seas.

411. The Judgment also fails to deal with the question of the *adoption* of the Canadian Regulations of 3 March 1995; throughout, its sights are set, either exclusively or in the main, on the acts of enforcement involved in the forcible boarding of the *Estai*. Yet the first request in the Spanish Application concerns precisely the non-opposability of the Canadian legislation, and thus above all the adoption of the Regulations of 3 March 1995. The acts concerning the *Estai* are simply a consequence of the adoption of the Regulations. It is this measure first and foremost which should be the focus of the present incidental proceedings for purposes of interpretation of the Canadian reservation.

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412. As regards the use of force, as with the other aspects of the dispute, the task of the present incidental proceedings should be to determine whether such a form of enforcement of conservation and management measures is or is not excluded by the reservation in the Canadian declaration, the declaration being totally silent about force and its use. The declaration as a whole also tells us that in 1994 Canada gave its consent to the jurisdiction in regard to all disputes *other than* those enumerated in the reservations contained in the declaration itself (paras. 2 *(a)* to *(d)*).

413. In these circumstances, the use of force to enforce the measures contemplated in the reservation in subparagraph *(d)* cannot simply be taken for granted, since the international legal order contains a general prohibition on the use of force by States in international relations. One formulation of this general prohibition of the use of force, recognized by Canada itself as a peremptory norm, is to be found in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*I.C.J. Reports 1996*, p. 247, para. 48). The Respondent has given no adequate explanation of why its declaration of 10 May 1994, including the reservation in subparagraph *(d)*, is silent about the use of force.

414. To this initial contribution to the interpretation of the Canadian reservation, international law adds another which follows directly from the general law of the sea. The high seas are a maritime area reserved for

peaceful purposes (Article 88 of the Montego Bay Convention), where no State is entitled to use force in order to enforce measures of conservation and management of living resources against vessels in that area flying the flag of another State. There is not a single provision in the Convention which permits any conclusion to the contrary. And these are rules of international law which, as customary or general law, are applicable between Canada and Spain.

415. A declarant State may, by way of reservation, exclude principles and rules of international law in any sphere of international relations in connection with its consent to the jurisdiction of the Court, but, clearly, it must say so in its declaration, either expressly or by necessary implication, since the silence of the declaration deposited operates not against, but in favour of, the international law in force, notwithstanding the conclusions to the contrary in this respect in the present Judgment.

In the present case, there also exists in relation to the area of the high seas in question a multilateral treaty régime concerning the management and conservation of the living resources of the area, that of the *NAFO Convention* of 1978, to which the fishing vessels of the two Parties are subject — a convention which the Canadian reservation expressly mentions for the purpose of delimiting its geographical scope. Under this particular treaty régime too, force may not be used in order to enforce measures of conservation and management of resources against foreign vessels, in the absence of agreement between the parties concerned (this is the position set out in document NAFO/FC Doc. 96.1 mentioned in paragraph 70 of the Judgment).

416. Moreover, declarations under Article 36, paragraph 2, of the Statute must be made, interpreted and applied in *good faith*. Within the framework of the optional clause system — which is a system in the public domain — declarant States are entitled to know the extent of the consent to the compulsory jurisdiction of the Court which each of them has given, as well as any changes which take place in that consent after the deposit of the original declaration. Silences, equivocations, false pretences, etc., represent neither the letter nor the spirit of the optional clause system and the Court should not encourage them when it interprets declarations. This is particularly so inasmuch as in the present case there are a number of declarations in force expressly excluding by way of reservation disputes or situations involving the use of force.

The Court has stated time and again, and in different contexts, that the entire optional clause system is based on good faith and *mutual trust* among declarant States. I have said and repeated this in the present opinion. Moreover, reciprocity in the application of reservations contained in declarations is also part of the system. All of this militates against any automatic conclusions being drawn, in the interpretation of declarations, from the silence or mental reservations of the declarant State with regard to the use of force.

417. Where a declarant State makes and deposits a declaration relating to all disputes other than those specifically excluded from the Court's jurisdiction, as is the case with the Canadian declaration, and where none of the reservations in the declaration specifically excludes the use of force in its text, it is neither acceptable nor in conformity with international law to contend subsequently that, by virtue of internal domestic legislation, the silence of the text with regard to the use of force is to be interpreted as excluding from the jurisdiction which the State has accepted a dispute (or an aspect of a dispute) with another declarant State concerning the use of force.

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418. Let us now take a closer look at what Minister Ouellet said in the Senate on 12 May 1994. He undoubtedly stated that Canada, in order to protect its amended Coastal Fisheries Protection Act, had made a reservation in its new declaration of 10 May 1994, but he did not discuss the text of the reservation as such. Nor was the text read out or commented on in the Senate. Furthermore, he stated that the reservation would apply "only during such time as we felt was necessary *to take retaliatory action ['représailles']* against those engaged in overfishing" and that the vessels concerned were irresponsible "pirate" vessels (Stateless vessels and vessels flying a flag of convenience). This latter aspect of the matter has already been discussed in the present opinion, but not as yet the mention by the Minister of taking "retaliatory action".

419. The context readily lends itself to this, because from the conceptual point of view Mr. Ouellet's words refer the reader to the notion of "enforcement" of measures. Yet it is highly pertinent to note that the Minister himself refers us in this regard to international law, since *"reprisals"* are an institution of customary international law, called countermeasures in Article 30 of the International Law Commission's draft articles on State responsibility (*ILC Yearbook,* 1979, Vol. II, Part Two, pp. 128-135).

420. Whether reprisals are armed or not, and regardless of the question of the relationship between "armed" reprisals and the rule in Article 2, paragraph 4, of the United Nations Charter, there is clearly unanimity about the *definition of reprisals or countermeasures.* This definition was formulated in the following terms in the Arbitral Award of 31 July 1928 in the responsibility case between Germany and Portugal with regard to the *Naulilaa Incident*:

> "*Reprisals* are an act of self-redress (Selbsthilfehandlung) of the injured State, an act done in reply — *after giving notice and not receiving satisfaction* — to an act contrary to the law of nations by the offending State. Their effect is temporarily to suspend, in the relations between the two States, the observance of one or another rule of the law of nations. They are *limited* by humanitarian experience and by the rules of good faith applicable in relations between

States. *They would be unlawful if a prior act contrary to the law of nations had not furnished the cause for them.*" (United Nations, *Reports of International Arbitral Awards*, Vol. II, p. 1026 *[translation by the Registry]*; the emphasis is that of the original text of the arbitral award.)

Thus Mr. Ouellet himself refers us, quite rightly, to international law, and not to Canadian legislation or its implementing regulations, in regard to the definition of "enforcement" of the measures contemplated by the reservation in subparagraph *(d)* of the Canadian declaration. But if we accept, in interpreting the Minister's remarks, that in fact even armed retaliation is covered by the reservation, inasmuch as it constitutes enforcement of the measures adopted, we must immediately ask ourselves, what prior act contrary to the law of nations on the high seas was being charged against Spain by Canada when it adopted the Regulations of 3 March 1995 and boarded the *Estai* on 9 March 1995? In the present incidental proceedings the Respondent has not argued, far less proved, the existence of a prior internationally wrongful act imputable to Spain. It has merely spoken in general teams of overfishing in an area of the high seas. That is insufficient in international law for the taking of reprisals.

421. The conclusion could not therefore be clearer. *In the circumstances of the present case* the supplementary means of interpretation invoked by the Respondent serve only to confirm my interpretation of the words "enforcement of such measures" in the Canadian reservation, an interpretation reached on the basis of good faith, the text, the context and the international law applicable between the Parties. Accordingly, the Court also has jurisdiction — in the view of the author of this opinion — to deal with this aspect of the Spanish Application, whether or not the specific measures taken by Canada are "conservation and management measures" under international law.

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422. Finally, it should be noted that the Judgment remains totally silent with regard to the harassment, by Canadian coastguard vessels in particular, of Spanish fishing vessels other than the *Estai*. Nor does it breathe a single word about the question whether the "threat" of military force by the Canadian Government, after the boarding of the *Estai*, so as to induce all Spanish fishing vessels to cease their activities in the NAFO Regulatory Area is, as such, to be considered as having its origin in the enforcement of conservation and management measures within the meaning of the reservation in paragraph 2 *(d)* of the Canadian declaration of 10 May 1994. Is such threat of force also commonly included in the notion of enforcement of measures of conservation and management of the living resources of the high seas in international law? The Judgment fails to answer this question.

(e) *The expression "disputes arising out of or concerning . . . measures" in the reservation and the subject of the dispute submitted by Spain*

423. As I have made clear throughout this opinion, in particular in Chapter III, the subject of the dispute submitted by Spain to the Court concerns Canada's title or lack of title to exercise certain jurisdiction, rights or claims on the high seas in regard to vessels in that maritime space flying the Spanish flag; accordingly, this dispute does not fall outside the consent to the jurisdiction of the Court expressed by Canada in its 1994 declaration, despite the reservation in paragraph 2 *(d)* included in that declaration. The reservation refers only to "conservation and management measures" taken by Canada and "the enforcement of such measures", and not to Canada's entitlement under international law to take and enforce the measures in question against Spain and its vessels on the high seas. The reservation in the existing Canadian declaration does not deprive the Court of jurisdiction with regard to the title and measures, as was the case with the reservation in paragraph 2 *(d)* of the 1970 declaration.

424. It follows, in my view, that the taking and enforcement by Canada of conservation and management measures — even if it were compatible with the facts and the law — could not give rise to a dispute whose subject is precisely Canada's title or lack of title to take and/or enforce the measures in question. Law and logic require that the issue of Canada's title or lack thereof be treated as a pre-condition for the measures taken and/or enforced by Canada.

425. This initial conclusion alone would dispose of the objection to the Court's jurisdiction which Canada founds on the reservation in subparagraph *(d)* of its 1994 declaration. In other words, a dispute of the kind submitted to the Court by the Spanish Application of 28 March 1995 could not be a dispute *arising out of or concerning the measures* to which the reservation refers. Thus it is clear from the outset that the words used in the reservation cannot operate so as to exclude jurisdiction in the circumstances of the present case. It should be noted that, in Canada's 1970 declaration, the reservation in subparagraph *(d)* contained the same words, but those which followed them referred also to the jurisdiction, rights and claims of Canada as well as to the measures taken by Canada. This is not the case with the present reservation, in which the phrase following the words in question relates solely to measures taken and enforced by Canada.

426. The foregoing conclusion represents what Spain has argued throughout the present preliminary incidental proceedings. At first, as I said, Canada's position on this point was that the subject of the dispute was identical with the subject-matter of the reservation in subparagraph *(d)* of its declaration. At the oral stage of the proceedings, that argument was replaced by the contention that the subject of the dispute was *also* the conservation and management of fisheries. From then on,

all Canada's efforts were directed towards showing that the disputes to which the reservation referred related to a notion wider than that of disputes whose subject was "conservation and management measures". In Canada's view, therefore, certain aspects or elements common to the dispute and the reservation were sufficient to bring the dispute within the sphere of application of the reservation. This was the context in which Canada invoked the expression "disputes arising out of or concerning . . . measures". Thus any issue raised by the measures adopted by Canada, directly or indirectly, in relation to any matter, such as title, necessity, appropriateness, method of enforcement etc. *(arising out of or concerning)* would be covered by the reservation. *Arising out of* looked to the origin and *concerning* to the subject of the dispute.

427. At first sight, that interpretation by Canada would appear to find support in the text of the reservation in subparagraph *(d)*. However, this is pure illusion. Apart from the fact that the words "directly or indirectly" do not appear in the text of the reservation, the Canadian arguments quickly abandoned the French and English versions of the text of the reservation in favour of others. This amounts to an admission that the text of the reservation does not support Canada's *"also"* argument. Canada's counsel then considered the expression *"relating to"* in the Greek reservation in the case concerning the *Aegean Sea Continental Shelf* (*I.C.J. Reports 1978*, p. 3).

428. The Respondent thus immediately took liberties with the text of its own reservation. Canada's arguments at the hearings featured a whole spate of substitutes for the expression *"arising out of or concerning"* used in the reservation. And they didn't just stop at *"relating to"*. Sometimes that expression was joined by another,*"refer to"*. And there were many others, despite the soothing assertions that the text was clear and the intention behind it no less so. For example, I noted the following: *"also concerns"; "for it to have been caused by"; "for it to relate to"; "involve"; "regard"; "give rise to";* and so on.

429. From all this, it is obvious, yet again, that in Canada's eyes the reservation has no text or, at the very least, that Canada considers itself entitled to amend the text to suit the moment or the needs of the argument. The issue is no longer the interpretation of a declaration under the optional clause system. That has to be said. The initial reliance on the expression "arising out of or concerning" was clearly no more than a procedural ploy. The whole discourse remains centred on and governed by Canada's underlying intention.

430. The Judgment takes the view that the terms used in the reservation in subparagraph *(d)* confer a broader and more comprehensive character on the exclusion established by the reservation. The Judgment accordingly espouses the Canadian argument and, like Canada, proceeds to utilize other forms of words to explain what would otherwise be per-

fectly clear (see paragraphs 62 and 63 of the Judgment). At this point in its reasoning the Judgment had already been careful to eliminate the question of Canada's title or lack of title as a subject of the present dispute. The Judgment thus did not deem it necessary to express an opinion on the pre-condition, that is to say, the legal and logical contradiction mentioned above. Moreover, it did not even bother at this point to compare the expressions in the two declarations, a procedure which it accepts and employs for other purposes in paragraph 50 and elsewhere. As I have already pointed out, nowhere in the Judgment is there any mention of the reservation in paragraph 2 *(d)* of the Canadian declaration of 1970, but only of the 1985 reservation.

431. Let it be said in conclusion that the matter of the words used in subparagraph *(d)* of the reservation in the 1994 Canadian declaration seems to play a quite secondary role in the reasoning of the Judgment, and for the same reasons as in the present dissenting opinion, although different conclusions are reached as to the existence of jurisdiction. Once one has concluded, as I have done, that the measures adopted and enforced by Canada in March/April 1995 against Spanish vessels were not conservation and management measures, or the enforcement of such measures, within the meaning which these expressions bear in the reservation, the words of the reservation no longer have a major part to play in its interpretation. This conclusion accordingly reinforces that which I reached in the opening paragraphs of the present section. Thus neither the word "disputes", which precedes the phrase in question, nor the expression "conservation and management measures", which follows it, do anything to alter the interpretation which this opinion attributes to the Canadian reservation in the light of my observations and conclusions with regard to that word and that expression.

CHAPTER V. OTHER ISSUES

1. The Court's Power to Determine Its Own Jurisdiction

432. In replying to Spain's arguments, counsel for Canada stated repeatedly that this or that issue was a matter for the "merits" and not the "jurisdiction", thereby overlooking the "preliminary" character of the present incidental proceedings. For to assert that "jurisdiction/merits" is synonymous with "preliminary/non-preliminary" is erroneous. The question of jurisdiction must always be decided first, but that can occur both in the preliminary incidental phase and at the merits phase. The fact that a defence or objection is put forward in a preliminary form, as was done by Canada, does not mean that it is genuinely preliminary or that it can be settled in a preliminary incidental phase.

As the case-law confirms, by categorizing certain objections as preliminary, Article 79 of the Rules of Court makes it quite clear that:

> "when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986,* p. 31, para. 41.)

Thus in declaring, for example, that Canada's objection founded on the reservation in subparagraph *(d)* did not, in the circumstances of the case, possess an exclusively preliminary character, the Court would in no way be ruling upon the legality of the conservation and management measures referred to in the reservation, or of their enforcement. Such a declaration would simply mean that the Court would decide those issues only at the merits stage. The Judgment seems to proceed from considerations of a different kind, namely the famous "underlying intention" of Canada that the reservation should exclude any consideration of merits, whether at the jurisdiction phase or subsequently.

2. *Objections Which Do Not Possess an Exclusively Preliminary Character*

433. Article 79, paragraph 7, of the Rules of Court provides that, after hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. In its Memorial and in the hearings, Spain invoked this provision of the Rules with regard to certain interpretations of the Canadian reservation put forward by the Respondent. The Judgment avoids making any declaration to the effect that the objection does not have an exclusively preliminary character. It does this by drawing a distinction between the interpretation of the reservation and the question of the legality of the acts referred to in paragraph 2 *(d)* of the Canadian declaration (paragraph 85 of the Judgment).

434. For the Judgment, that is possible even when interpreting ambiguities, uncertainties and silences in reservations contained in declarations. Paragraphs 54 and 79 of the Judgment — which I reject — are absolutely clear on this point. Good faith, it seems, has no part to play in the interpretation of reservations! The Judgment appears to take pleasure in stressing this point, for example when it states:

> "Nowhere in the Court's case-law has it been suggested that interpretation in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations." (Paragraph 54 of the Judgment.)

435. However, even this extraordinary conclusion of the Judgment seems to me insufficient to justify the exclusion, from the interpretation of a reservation, of a declaration that a particular objection is not of an exclusively preliminary character. Despite the Judgment's having redefined the subject of the dispute (for example, by excluding Canada's title or lack of title or the opposability or non-opposability of the Canadian legislation to Spain), I find it quite impossible to agree with its conclusion that, in the present case, not one of the issues which it addresses is *other than of an exclusively preliminary character*, in particular the meaning of the expressions "conservation and management measures" and "the enforcement of such measures" in the reservation, as well as the matter of Canada's use of force in the circumstances against Spanish vessels and its subsequent threatening acts on the high seas. At all events, the Judgment ignores the third alternative which Article 79, paragraph 7, of the Rules of Court offers in regard to incidental proceedings on preliminary objections.

3. *The Extent to Which the Present Judgment Constitutes* Res Judicata

436. All the Court's judgments, including therefore the present one, are binding on the parties, final and without appeal (Articles 59 and 60 of the Statute), without prejudice of course to requests for interpretation or applications for revision as provided in Articles 60 and 61 of the Statute respectively. Self-evidently, the present Judgment is *res judicata* only as far as the preliminary question of the Court's jurisdiction to decide the dispute is concerned, the subject of the dispute as submitted in the Application having moreover been reformulated by the Judgment itself. What is more, having been delivered in preliminary incidental proceedings, the Judgment cannot by its very nature decide or prejudge any question whatsoever relating to the merits of the dispute between the Parties, whatever its reasoning may say on that subject. Consequently, *all the questions concerning the merits of the dispute between Spain and Canada submitted to the Court in the Spanish Application of 28 March 1995 fall entirely outside the scope of the* res judicata *of the present Judgment on jurisdiction.*

General Conclusions

437. In the light of all of the foregoing considerations, I conclude that the Court has full jurisdiction to adjudicate upon the dispute brought before it by the Application filed by Spain on 28 March 1995.

There are three principal grounds on which this dissenting opinion is based. First of all, the fundamental role of the rule of good faith both in the *modus operandi* of the optional clause system and in the interpreta-

tion and application by the Court of declarations made by States under Article 36, paragraph 2, of its Statute. Secondly, the equally fundamental distinction which must always be made between, on the one hand, the principle of the consent to the Court's jurisdiction of the States involved and, on the other, the interpretation, in accordance with the rules of interpretation laid down by international law, of the consent objectively manifested in declarations at the time of their deposit with the United Nations Secretary-General. Lastly, the no less fundamental requirement of international proceedings that, in the interest of the principle of the equality of the parties, the sovereign right of the applicant State to define the subject of the dispute which it submits to the Court should be respected just as much as that of the sovereign right of the respondent State to challenge the Court's jurisdiction by presenting preliminary objections or filing a counter-claim.

Each of these fundamental grounds is sufficient in itself to prevent me from subscribing to a Judgment which I fear may have particularly negative consequences, extending well beyond the present case, for the development of the optional clause system as a means whereby States accept the compulsory jurisdiction of the Court pursuant to Article 36 of its Statute.

(Signed) Santiago TORRES BERNÁRDEZ.