CASE CONCERNING FISHERIES JURISDICTION (SPAIN *v.* CANADA) (JURISDICTION OF THE COURT)

Judgment of 4 December 1998

In its Judgment on jurisdiction in the case concerning Fisheries Jurisdiction (Spain *v.* Canada) the Court, by twelve votes against five, declared that it had no jurisdiction to adjudicate upon the dispute brought in 1995 by Spain.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Lalonde, Torres Bernárdez; Registrar Valencia-Ospina.

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The text of the operative paragraph of the Judgment reads as follows:

"89. For these reasons,

THE COURT

By twelve votes to five,

Finds that it has no jurisdiction to adjudicate upon the dispute brought before it by the Application filed by the Kingdom of Spain on 28 March 1995.

IN FAVOUR: President Schwebel; Judges Oda, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Lalonde;

AGAINST: Vice-President Weeramantry; Judges Bedjaoui, Ranjeva, Vereshchetin; Judge ad hoc Torres Bernárdez."

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President Schwebel and Judges Oda, Koroma and Kooijmans appended separate opinions to the Judgment of the Court. Vice-President Weeramantry, Judges Bedjaoui, Ranjeva and Vereshchetin, and Judge ad hoc Torres Bernárdez appended dissenting opinions to the Judgment of the Court.

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Review of the proceedings and submissions of the Parties
(paras. 1-12)

The Court begins by recalling that on 28 March 1995, Spain instituted proceedings against Canada in respect of a dispute relating to the amendment, on 12 May 1994, of the Canadian Coastal Fisheries Protection Act, and the subsequent amendments to the regulations implementing that Act, as well as to specific actions taken on the basis of the amended Act and its regulations, including the pursuit, boarding and seizure on the high seas, on 9 March 1995, of a fishing vessel — the *Estai* — flying the Spanish flag. The Application invoked as the basis of the jurisdiction of the Court the declarations whereby both States have accepted its compulsory jurisdiction in accordance with Article 36, paragraph 2, of its Statute.

By letter of 21 April 1995, the Ambassador of Canada to the Netherlands informed the Court that, in his Government's opinion, the Court "manifestly lacks jurisdiction to deal with the Application filed by Spain ..., by reason of paragraph 2 (*d*) of the Declaration, dated 10 May 1994, whereby Canada accepted the compulsory jurisdiction of the Court".

At a meeting between the President of the Court and the representatives of the Parties it was agreed that the question of the jurisdiction of the Court should be separately determined before any proceedings on the merits; agreement was also reached on time limits for the filing of written pleadings on that question. A Memorial by Spain and a Counter-Memorial by Canada on the question of the jurisdiction of the Court were duly filed within the time limits prescribed by an Order of the President of 2 May 1995.

After Spain had expressed the wish to be authorized to submit a Reply and Canada had opposed that request, the Court, by an Order of 8 May 1996, decided that it was sufficiently informed, and that the presentation by the Parties of further written pleadings on the question of the Court's jurisdiction therefore did not appear necessary. Public hearings were held between 9 and 17 June 1998.

In the Application, the following requests were made by Spain:

"As for the precise nature of the complaint, the Kingdom of Spain requests:

(A) that the Court declare that the legislation of Canada, insofar 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 the Kingdom of 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 the Kingdom of 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

aforementioned principles and norms of international law."

In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Spanish Government, at the sitting of 15 June 1998:

"At the end of our oral arguments, we again note that Canada has abandoned its allegation that the dispute between itself and Spain has become moot. At least, it appears to have understood that it cannot be asserted that the Spanish Application, having no further purpose for the future, merely amounted to a request for a declaratory judgment. Nor does it say — a fact of which we take note — that the agreement between the European Union and Canada has extinguished the present dispute.

Spain's final submissions are therefore as follows:

We noted at the outset 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. These matters are not included in Canada's reservation to the jurisdiction of the Court.

We also noted that 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.

Lastly, we noted that the use of force in arresting the *Estai* and in harassing other Spanish vessels on the high seas, as well as the use of force contemplated in Canadian Bills C-29 and C-8, can also not be included in the Canadian reservation, because it contravenes the provisions of the Charter.

For all the above reasons, we ask the Court to adjudge and declare that it has jurisdiction in this case."

On behalf of the Canadian Government, at the sitting of 17 June 1998:

"*May it please the Court* to adjudge and declare that the Court has no jurisdiction to adjudicate upon the Application filed by Spain on 28 March 1995."

Background to the case
(paras. 13-22)

The Court begins with an account of the background to the case.

On 10 May 1994 Canada deposited with the Secretary-General of the United Nations a new declaration of acceptance of the compulsory jurisdiction of the Court. Canada's prior declaration of 10 September 1985 had already contained the three reservations set forth in subparagraphs (*a*), (*b*) and (*c*) of paragraph 2 of the new declaration. Subparagraph (*d*) of the 1994 declaration, however, set out a new, fourth reservation, further excluding from the jurisdiction of the Court "(*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 Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."

On the same day that the Canadian Government deposited its new declaration, it submitted to Parliament Bill C-29 amending the Coastal Fisheries Protection Act by extending its area of application to include the Regulatory Area of the Northwest Atlantic Fisheries Organization (NAFO). Bill C-29 was adopted by Parliament, and received the Royal Assent on 12 May 1994. The Coastal Fisheries Protection Regulations were also amended, on 25 May 1994, and again on 3 March 1995, when Spanish and Portuguese fishing vessels were taken up in Table IV of Section 21 (the category of fishing vessels which were prohibited from fishing for Greenland halibut in the area concerned).

On 12 May 1994, following the adoption of Bill C-8, Canada also amended Section 25 of its Criminal Code relating to the use of force by police officers and other peace officers enforcing the law. This Section applied as well to fisheries protection officers.

On 9 March 1995, the *Estai*, a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles from the Canadian coast, in Division 3L of the NAFO Regulatory Area (Grand Banks area), by Canadian Government vessels. The vessel was seized and its master arrested on charges of violations of the Coastal Fisheries Protection Act and its implementing regulations. They were brought to the Canadian port of St. John's, Newfoundland, where they were charged with offences under the above legislation, and in particular illegal fishing of Greenland halibut; part of the ship's catch was confiscated. The members of the crew were released immediately. The master was released on 12 March 1995, following the payment of bail, and the vessel on 15 March 1995, following the posting of a bond.

The same day that the *Estai* was boarded, the Spanish Embassy in Canada sent two Notes Verbales to the Canadian Department of Foreign Affairs and International Trade. The second of these stated inter alia that: "the Spanish Government categorically condemn[ed] the pursuit and harassment of a 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".

In its turn, on 10 March 1995 the Canadian Department of Foreign Affairs and International Trade sent a Note Verbale to the Spanish Embassy in Canada, in which it was stated that "[t]he *Estai* resisted the efforts to board her made by Canadian inspectors in accordance with international practice" and that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".

Also on 10 March 1995, the European Community and its member States sent a Note Verbale to the Canadian

Department of Foreign Affairs and International Trade which protested against the Canadian action.

On 16 April 1995, an "Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the context of the NAFO Convention" was initialled; this Agreement was signed in Brussels on 20 April 1995. It concerned the establishment of a Protocol to strengthen the NAFO Conservation and Enforcement Measures"; the immediate implementation on a provisional basis, of certain control and enforcement measures; the total allowable catch for 1995 for Greenland halibut within the area concerned; and certain management arrangements for stocks of this fish.

The Agreed Minutes further provided as follows: "The European Community and Canada 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. Nothing in this Agreed Minute shall prejudice any multilateral convention to which the European Community and Canada, or any Member State of the European Community and Canada, are parties, or their ability to preserve and defend their rights in conformity with international law, and the views of either Party with respect to any question relating to the Law of the Sea." The European Community emphasized that the stay of prosecution against the vessel *Estai* and its master was essential for the application of the Agreed Minute.

On 18 April 1995 the proceedings against the *Estai* and its master were discontinued by order of the Attorney-General of Canada; on 19 April 1995 the bond was discharged and the bail was repaid with interest; and subsequently the confiscated portion of the catch was returned. On 1 May 1995 the Coastal Fisheries Protection Regulations were amended so as to remove Spain and Portugal from Table IV to Section 21. Finally, the Proposal for Improving Fisheries Control and Enforcement, contained in the Agreement of 20 April 1995, was adopted by NAFO at its annual meeting held in September 1995 and became measures binding on all Contracting Parties with effect from 29 November 1995.

The subject of the dispute
(paras. 23-35)

Neither of the Parties denies that there exists a dispute between them. Each Party, however, characterizes the dispute differently. Spain has characterized the dispute as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas, and the non-opposability of its amended Coastal Fisheries Protection legislation and regulations to third States, including Spain. Spain further maintains that Canada, by its conduct, has violated Spain's rights under international law and that such violation entitles it to reparation. Canada states that the dispute concerns the adoption of measures for the conservation and management of fisheries stocks with respect to vessels fishing in the NAFO Regulatory Area and their enforcement.

Spain insists that it is free, as the Applicant in this case, to characterize the dispute that it wishes the Court to resolve.

The Court begins by observing that there is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seize the Court and to set out the claims which it is submitting to it. Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as "essential from the point of view of legal security and the good administration of justice".

In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application. However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seized, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.

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. It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence.

In order to decide on the preliminary issue of jurisdiction which arises in the present case, the Court will ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties.

The filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law. These acts were carried out on the basis of certain enactments and regulations adopted by Canada, which Spain regards as contrary to international law and not opposable to it. It is in that context that the legislative enactments and regulations of Canada should be considered. 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.

The jurisdiction of the Court
(paras. 36-84)

As Spain sees it, Canada has in principle accepted the jurisdiction of the Court through its declaration under Article 36, paragraph 2, of the Statute, and it is for Canada to show that the reservation contained in paragraph 2 (*d*) thereto does exempt the dispute between the Parties from this jurisdiction. Canada, for its part, asserts that Spain must bear the burden of showing why the clear words of paragraph 2 (*d*) do not withhold this matter from the jurisdiction of the Court.

The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts". That being so, there is no burden of proof to be discharged in the matter of jurisdiction.

Declarations of acceptance of the Court's compulsory jurisdiction and their interpretation
(paras. 39-56)

As the basis of jurisdiction, Spain founded its claim solely on the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute. On 21 April 1995 Canada informed the Court, by letter, that in its view the Court lacked jurisdiction to entertain the Application because the dispute was within the plain terms of the reservation in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. This position was elaborated in its Counter-Memorial of February 1996, and confirmed at the hearings. From the arguments brought forward by Spain the Court concludes that Spain contends that the interpretation of paragraph 2 (*d*) of its declaration sought for by Canada would not only be an anti-statutory interpretation, but also an anti-Charter interpretation and an anti-general international law interpretation, and thus should not be accepted. The issue for the Court is consequently to determine whether the meaning to be accorded to the Canadian reservation allows the Court to declare that it has jurisdiction to adjudicate upon the dispute brought before it by Spain's Application.

Different views were proffered by the Parties as to the rules of international law applicable to the interpretation of reservations to optional declarations made under Article 36, paragraph 2, of the Statute. In Spain's view, such reservations were not to be interpreted so as to allow reserving States to undermine the system of compulsory jurisdiction. Moreover, the principle of effectiveness meant that a reservation must be interpreted by reference to the object and purpose of the declaration, which was the acceptance of the compulsory jurisdiction of the Court. Spain did not accept that it was making the argument that reservations to the compulsory jurisdiction of the Court should be interpreted restrictively; it explained its position in this respect in the following terms:

> "It is said that Spain argues for the *most restrictive scope permitted* of reservations, namely a restrictive interpretation of them ... This is not true. Spain supports the most limited scope permitted in the context of observing of the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties."

Spain further contended that the *contra proferentem* rule, under which, when a text is ambiguous, it must be construed against the party who drafted it, applied in particular to unilateral instruments such as declarations of acceptance of the compulsory jurisdiction of the Court and the reservations which they contained. Finally, Spain emphasized that a reservation to the acceptance of the Court's jurisdiction must be interpreted so as to be in conformity with, rather than contrary to, the Statute of the Court, the Charter of the United Nations and general international law. For its part, Canada emphasized the unilateral nature of such declarations and reservations and contended that the latter were to be interpreted in a natural way, in context and with particular regard for the intention of the reserving State.

The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court. It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "This jurisdiction only exists within the limits within which it has been accepted". Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. This is true even when, as in the present case, the relevant expression of a State's consent to the Court's jurisdiction, and the limits to that consent, represent a modification of an earlier expression of consent, given within wider limits; it is the declaration in existence that alone constitutes the unity to be interpreted, with the same rules of interpretation applicable to all its provisions, including those containing reservations.

The regime relating to the interpretation of declarations made under Article 36 of the Statute which are unilateral acts of State sovereignty, is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties. In the event, the Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations.

In accordance with those rules the Court will interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an

examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. In the present case the Court has such explanations in the form of Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués.

It follows from the foregoing analysis that the *contra proferentem* rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.

The Court was also addressed by both Parties on the principle of effectiveness. Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court; however, 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.

Spain has contended that, in case of doubt, reservations contained in declarations are to be interpreted consistently with legality and that any interpretation which is inconsistent with the Statute of the Court, the Charter of the United Nations or with general international law is inadmissible. Spain argues that, to comply with these precepts, it is necessary to interpret the phrase "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area ... and the enforcement of such measures" to refer only to measures which, since they relate to areas of the high seas, must come within the framework of an existing international agreement or be directed at stateless vessels. It further argues that an enforcement of such measures which involves a recourse to force on the high seas against vessels flying flags of other States could not be consistent with international law and that this factor too requires an interpretation of the reservation different from that given to it by Canada.

The Court observes that Spain's position is not in conformity with the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation. In point of fact, reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy. 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. There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties. Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States. Any resultant disputes are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties.

Subparagraph (d) of paragraph 2 of Canada's declaration of 10 May 1994
(paras. 57-84)

In order to determine whether the Parties have accorded to the Court jurisdiction over the dispute brought before it, the Court must now interpret subparagraph (*d*) of paragraph 2 of Canada's declaration, having regard to the rules of interpretation which it has just set out.

Before commencing its examination of the text of the reservation itself, the Court observes that the new declaration differs from its predecessor in one respect only: the addition, to paragraph 2, of a subparagraph (*d*) containing the reservation in question. It follows that this reservation is not only an integral part of the current declaration but also an essential component of it, and hence of the acceptance by Canada of the Court's compulsory jurisdiction.

The Court further notes, in view of the facts as summarized above, the close links between Canada's new declaration and its new coastal fisheries protection legislation, as well as the fact that it is evident from the parliamentary debates and the various statements of the Canadian authorities that the purpose of the new declaration was to prevent the Court from exercising its jurisdiction over matters which might arise with regard to the international legality of the amended legislation and its implementation.

The Court recalls that subparagraph 2 (*d*) of the Canadian declaration excludes the Court's jurisdiction in the following terms:

> "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 Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures".

Canada contends that the dispute submitted to the Court is precisely of the kind envisaged by the cited text; it falls entirely within the terms of the subparagraph and the Court accordingly has no jurisdiction to entertain it. For Spain, on the other hand, whatever Canada's intentions, they were not achieved by the words of the reservation, which does not cover the dispute; thus the Court has jurisdiction. In support of this view Spain relies on four main arguments: first, the dispute which it has brought before the Court falls outside the terms of the Canadian reservation by reason of its subject matter; secondly, the amended Coastal Fisheries Protection Act and its implementing regulations cannot, in international law, constitute "conservation and management measures"; thirdly, the reservation covers only "vessels" which are stateless or flying a flag of convenience; and fourthly, the pursuit, boarding and seizure of the *Estai*

cannot be regarded in international law as "the enforcement of ..." conservation and management "measures". The Court examines each of these arguments in turn.

Meaning of the term "disputes arising out of or concerning"
(paras. 62-63)

The Court begins by pointing out that, in excluding from its jurisdiction "*disputes arising out of or concerning*" the conservation and management measures in question and their enforcement, the reservation does not reduce the criterion for exclusion to the "subject matter" of the dispute. The words of the reservation — "*disputes arising out of or concerning*" — exclude not only disputes whose immediate "subject matter" is the measures in question and their enforcement, but also those "*concerning*" such measures and, more generally, those having their "origin" in those measures ("*arising out of*") — that is to say, those disputes which, in the absence of such measures, would not have come into being.

The Court has already found, in the present case, that a dispute does exist between the Parties, and it has identified that dispute. It must now determine whether that dispute has as its subject matter the measures mentioned in the reservation or their enforcement, or both, or concerns those measures, or arises out of them. In order to do this, the fundamental question which the Court must now decide is the meaning to be given to the expression "*conservation and management measures ...*" and "*enforcement of such measures*" in the context of the reservation.

Meaning of "conservation and management measures"
(paras. 64-73)

Spain recognizes that the term "*measure*" is "an abstract word signifying an act or provision, a démarche or the course of an action, conceived with a precise aim in view" and that in consequence, in its most general sense, the expression "*conservation and management measure*" must be understood as referring to an act, step or proceeding designed for the purpose of the "conservation and management of fish". However, in Spain's view this expression, in the particular context of the Canadian reservation, must be interpreted more restrictively. Spain's main argument, on which it relied throughout the proceedings, is that the term "conservation and management measures" must be interpreted here in accordance with international law and that in consequence it must, in particular, exclude any unilateral "measure" by a State which adversely affected the rights of other States outside that State's own area of jurisdiction. Hence, in international law only two types of measures taken by a coastal State could, in practice, be regarded as "conservation and management measures": those relating to the State's exclusive economic zone; and those relating to areas outside that zone, insofar as these came within the framework of an international agreement or were directed at stateless vessels. Measures not satisfying these conditions were not conservation and management measures but unlawful acts pure and simple.

Canada, by contrast, stresses the very wide meaning of the word "measure". It takes the view that this is a "generic term", which is used in international conventions to encompass statutes, regulations and administrative action. Canada further argues that the expression "conservation and management measures" is "descriptive" and not "normative"; it covers "the whole range of measures taken by States with respect to the living resources of the sea".

The Court points out that it need not linger over the question whether a "measure" may be of a "legislative" nature. As the Parties have themselves agreed, in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby. Numerous international conventions include "laws" among the "measures" to which they refer. The Court further points out that, in the Canadian legislative system as in that of many other countries, a statute and its implementing regulations cannot be dissociated. The statute establishes the general legal framework and the regulations permit the application of the statute to meet the variable and changing circumstances through a period of time. The regulations implementing the statute can have no legal existence independently of that statute, while conversely the statute may require implementing regulations to give it effect.

The Court shares with Spain the view that an international instrument must be interpreted by reference to international law. However, in arguing that the expression "conservation and management measures" as used in the Canadian reservation can apply only to measures "in conformity with international law", Spain would appear to mix two issues. It is one thing to seek to determine whether a concept is known to a system of law, in this case international law, whether it falls within the categories proper to that system and whether, within that system, a particular meaning attaches to it: the question of the existence and content of the concept within the system is a matter of definition. It is quite another matter to seek to determine whether a specific act falling within the scope of a concept known to a system of law violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality.

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, to this end, it satisfies various technical requirements. It is in this sense that the terms "conservation and management measures" have long been understood by States in the treaties which they conclude. The same usage is to be found in the practice of States. Typically, in their enactments and administrative acts, States describe such measures by reference to factual and scientific criteria.

Reading the words of the reservation in a "natural and reasonable" manner, there is nothing which permits the Court to conclude that Canada intended to use the

expression "conservation and management measures" in a sense different from that generally accepted in international law and practice. Moreover, any other interpretation of that expression would deprive the reservation of its intended effect.

After an examination of the amendments made by Canada on 12 May 1994 to the Coastal Fisheries Protection Act and on 25 May 1994 and 3 March 1995 to the Coastal Fisheries Protection Regulations the Court concludes that the "measures" taken by Canada in amending its coastal fisheries protection legislation and regulations constitute "conservation and management measures" in the sense in which that expression is commonly understood in international law and practice and has been used in the Canadian reservation.

Meaning to be attributed to the word "vessels"
(paras. 74-77)

The Court goes on to observe that the conservation and management measures to which this reservation refers are measures "*taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978*". As the NAFO "Regulatory Area" as defined in the Convention is indisputably part of the high seas, the only remaining issue posed by this part of the reservation is the meaning to be attributed to the word "vessels". Spain argues that it is clear from the parliamentary debates which preceded the adoption of Bill C-29 that the latter was intended to apply only to stateless vessels or to vessels flying a flag of convenience. It followed, according to Spain — in view of the close links between the Act and the reservation — that the latter also covered only measures taken against such vessels. Canada accepts that, when Bill C-29 was being debated, there were a number of references to stateless vessels and to vessels flying flags of convenience, for at the time such vessels posed the most immediate threat to the conservation of the stocks that it sought to protect. However, Canada denies that its intention was to restrict the scope of the Act and the reservation to these categories of vessels.

The Court observes that the Canadian reservation refers to "vessels fishing ...", that is to say all vessels fishing in the area in question, without exception. It would clearly have been simple enough for Canada, if this had been its real intention, to qualify the word "vessels" so as to restrict its meaning in the context of the reservation. In the opinion of the Court the interpretation proposed by Spain cannot be accepted, for it runs contrary to a clear text, which, moreover, appears to express the intention of its author. Neither can the Court share the conclusions drawn by Spain from the parliamentary debates cited by it.

Meaning and scope of the phrase "and the enforcement of such measures"
(paras. 78-84)

The Court then examines the phrase "*and the enforcement of such measures*", on the meaning and scope of which the Parties disagree. Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction.

The Court notes that, following the adoption of Bill C-29, the provisions of the Coastal Fisheries Protection Act are of a character and type to be found in legislation of various nations dealing with fisheries conservation and management, as well as in Article 22 (1) (*f*) of the United Nations Agreement on Straddling Stocks of 1995. The limitations on the use of force specified in the Coastal Fisheries Protection Regulations Amendment of May 1994 also bring the authorized use of force within the category familiar in connection with enforcement of conservation measures. The Court further notes that the purpose of other Canadian enactments referred to by Spain appears to have been to control and limit any authorized use of force, thus bringing it within the general category of measures in enforcement of fisheries conservation.

For all of these reasons the Court finds that the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (*d*) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of this concept.

The Court concludes by stating that in its view, the dispute between the Parties, as it has been identified in this Judgment, had its origin in the amendments made by Canada to its coastal fisheries protection legislation and regulations and in the pursuit, boarding and seizure of the *Estai* which resulted therefrom. Equally, the Court has no doubt that the said dispute is very largely concerned with these facts. Having regard to the legal characterization placed by the Court upon those facts, it concludes that the dispute submitted to it by Spain constitutes a dispute "arising out of" and "concerning" "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" and "the enforcement of such measures". It follows that this dispute comes within the terms of the reservation contained in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. The Court consequently has no jurisdiction to adjudicate upon the present dispute.

Separate opinion of President Schwebel

President Schwebel, in a separate opinion, held that, contrary to Spain's argument, a reservation to a declaration under the optional clause is not ineffective insofar as it excludes actions by the declarant State that are illegal under international law. A very purpose of a reservation may be to debar the Court from passing upon legally questionable actions.

Nor does Canada's reservation embody a self-judging proviso in violation of the authority of the Court to determine its jurisdiction.

Spanish counsel argued that Canada's reservation as interpreted by Canada is "a nullity" and that it "excludes nothing, since it can apply to nothing". While not accepting this argument, President Schwebel concluded that if, *arguendo*, these contentions of Spain are correct, it follows that the nullity or ineffectiveness of the reservation entails the nullity of the declaration as a whole. The Canadian reservation is an essential element of the declaration, but for which the declaration would not have been made. When, as in this case, the reservation has been treated by the declarant as such an essential one, the Court is not free to hold the reservation invalid or ineffective while treating the remainder of the declaration to be in force. If the Spanish argument on the results to be attached to Canada's interpretation of the reservation is accepted, there is no basis whatever in this case for the jurisdiction of the Court.

Separate opinion of Judge Oda

Judge Oda fully concurs with the operative part of the Judgment.

Judge Oda nonetheless considers it appropriate, lest the real issues in the case should be buried in obscurity, to spell out what issues existed in the dispute between Canada and Spain.

He considers that the subject of the "dispute" in the present case relates to the *Estai* incident. In his view, Canada's legislative enactments in 1994/1995 are to be examined, *but only* in the context of that incident. The *Estai* incident occurred in the "Regulatory Area" of the 1979 NAFO Convention, which area lies beyond the exclusive economic zone where the coastal States exercise fisheries jurisdiction. Judge Oda makes it plain that, within the framework of the NAFO Convention, the adoption of measures of conservation and management of fishery resources in the Regulatory Area is the responsibility of the NAFO Fisheries Commission, but not of any particular coastal State. He has stressed that the whole chain of events regarding the *Estai* incident unfolded irrespective of the NAFO Convention.

Judge Oda thus suggests that the only issue in dispute was whether Canada violated the rule of international law by claiming and exercising fisheries jurisdiction on the high seas, or whether Canada was justified, irrespective of the NAFO Convention, in exercising fisheries jurisdiction in an area of the high seas on the ground of its honestly held belief that the conservation of certain fish stocks was urgently required as a result of the fishery conservation crisis in the Northwest Atlantic.

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Judge Oda is of the opinion, however, that the sole question to be decided by the Court at the present stage of the case is whether the dispute falls within the purview of the clause whereby Canada declared its acceptance of the Court's jurisdiction on 10 May 1994.

He considers it to be clear, given the basic principle that the Court's jurisdiction is based on the consent of sovereign States, that a declaration to accept the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and any reservations attached thereto, must, because of the declaration's unilateral character, be interpreted not only in a natural way and in context, *but also* with particular regard for the intention of the declarant State. Any interpretation of a *respondent* State's declaration against the intention of that State will contradict the very nature of the Court's jurisdiction, because the declaration is an instrument drafted unilaterally.

He further states that the fact that Canada made its declaration containing the reservation set out in paragraph 2 (*d*) only a few days prior to enacting the amendments to its fisheries legislation clearly indicates the true intention of Canada in respect of those amendments and of any dispute which might arise as a result of their implementation.

Judge Oda is at a loss to understand why the Court should have felt it necessary to devote so much time to its interpretation of the wording of that reservation. After making an analysis of the development of the law of the sea, particularly as it concerns marine living resources, Judge Oda notes that there exists no fixed or concrete concept of "conservation and management *measures*".

It is clear to Judge Oda that Canada, having reserved from the Court's jurisdiction any "disputes arising out of or concerning conservation and management measures", had in mind — in a very broad sense and without restriction and showing great common sense — any dispute which might arise following the enactment and enforcement of legislation concerning fishing, whether for the purpose of conservation of stocks or for management of fisheries (allocation of catches), in its offshore areas, whether within its exclusive economic zone or outside it.

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Judge Oda points out that no diplomatic negotiations took place between Spain and Canada with regard to the enactment in 1994 and 1995 of Canada's national legislation or its amendment, and that there was no further diplomatic negotiation between the two countries over the *Estai* incident. He notes that after the conclusion on 20 April 1995 of the Agreement between the EC and Canada, the dispute arising out of the *Estai* incident was practically solved. Judge Oda suggests that the dispute could have been solved if negotiations between Spain and Canada had been held.

Judge Oda refrains from entering into the debatable issue of whether a legal dispute may be submitted unilaterally to the Court only after diplomatic negotiations between the disputing parties have been exhausted or at least initiated. He submits, however, that it could have been questioned, even at this jurisdictional stage — separately from the issue of whether the Court has jurisdiction to entertain Spain's Application — whether Spain's Application of 28 March 1995 in the present case was really *admissible* to the Court at all.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma emphasized the absolute and unfettered freedom of a State to participate or not to participate in the optional clause system. As a corollary, he confirmed that a State is entitled to attach to its declaration made under the optional clause a reservation excluding or limiting the Court's jurisdiction to apply the principles and rules of international law which the Court would have applied, had the subject matter not been excluded from the jurisdiction of the Court.

In Judge Koroma's view, flowing from first principles, once it is established that a dispute falls within the category of the subject matter defined or excluded in a reservation, then that dispute is precluded from the jurisdiction of the Court, whatever the scope of the rules which have purportedly been violated. He agreed with the Court's finding that, once it had determined that the measures of conservation and management referred to in the reservation contained in the Canadian declaration were measures of a kind which could be categorized as conservation and management of the resources of the sea, and were consistent with customary norms and well-established practice, then the Court was bound to decline to found jurisdiction on the basis of the principles which have been invoked.

Judge Koroma pointed out that it is in this sense that he understands the statement in the Judgment that "the lawfulness of the acts which a reservation to a declaration seeks to exclude from the jurisdiction of the Court has no relevance for the interpretation of the terms of that reservation".

In other words, the Court's jurisdiction to adjudicate in a dispute derives from the Statute and the consent of a State as expressed in its declaration and not from the *applicable law*.

In the judge's view, what was determinative in this matter was whether Canada had made a declaration under the optional clause, whether that declaration excluded disputes arising out of or concerning conservation and management measures and whether the acts complained of fall within the category of the excluded acts. The Court in responding affirmatively to those questions, not only reached the right decision but affirmed that its compulsory jurisdiction is based on the previous consent of the State concerned and subject to the limits of that consent.

Accordingly, and flowing from the above principles, since Canada had excluded from the jurisdiction of the Court "disputes arising out of or concerning conservation and management measures", the question whether the Court was entitled to exercise its jurisdiction must depend on the subject matter which had been excluded and not on the applicable laws or on the rules which were said to have been violated.

Finally, Judge Koroma emphasized that this Judgment should not be viewed as an abdication of the Court's judicial function to pronounce on the validity of a declaration and its reservation, but rather should be seen as a reaffirmation of the principle that the character of a declaration makes it necessary for the Court to determine the scope and content of the consent of a declarant State. The Court reserves its inherent right to decide that a reservation has been invoked in bad faith, and to reject the view of the State in question.

Separate opinion of Judge Kooijmans

Judge Kooijmans concurs with the Court's finding that it has no jurisdiction to entertain the dispute submitted by Spain. He cast his vote, however, with a heavy heart since the Court's Judgment bears testimony to the inherent weakness of the optional clause system. The making of reservations by a State to its declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2 of the Statute has never been controversial (with the exception of reservations which are contrary to the Statute itself). The Court, therefore, has to apply the law as it stands.

In the present case Canada has submitted a new declaration in which it added a reservation in order to prevent the Court from scrutinizing the legality of an action it intended to undertake. According to present international law Canada was fully entitled to do so. Nevertheless, it seems to be a legitimate question how far a State can go in accepting the compulsory jurisdiction of the Court, thereby expressing its conviction that adjudication is the most appropriate method to settle a wide range of conceivable but not imminent legal disputes, at the same time exempting from the Court's jurisdiction an anticipated and therefore imminent dispute. According to Judge Kooijmans it would not have been beyond the Court's mandate to draw attention to the risks to which the optional clause system is exposed since this system is an integral and essential element of the Statute of which the Court is the guardian. In this context Judge Kooijmans draws attention to the fact that compulsory adjudication is more than a matter of procedure but that it also touches upon the substance of the law. States who know that they can be brought to court will inevitably be more inclined to see the law in terms of how they think a court would apply it.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his dissenting opinion, observes that there is no question of the invalidity of the Canadian reservation. The reservation is a valid one which Canada was well entitled to make. The Court's task is to interpret this valid reservation. Would this reservation cover certain actions that commenced as conservation measures,

but were also alleged to involve fundamental breaches of international law, including violation of the freedom of the high seas, the unilateral use of force by Canada, and infringements of Spain's sovereignty over its vessels at sea?

Vice-President Weeramantry's view is that it is a matter for the Court's discretion as to whether such matters fall within the general part of the declaration (which gives the Court jurisdiction over *all* disputes arising after the declaration), or under the reservation relating to conservation measures. Where violations of basic principles of international law, extending even to violation of Charter principles are alleged, Vice-President Weeramantry is of the view that the dispute falls within the general referral rather than the particular exception. It seems unreasonable that the mere fact that such acts originated in conservation measures should preserve them from Court scrutiny even when they have extended so far beyond the reach of the reservations clause as to enter the area of violations of basic principles of international law.

Optional clause jurisdiction represents a haven of legality within the international system and, while States have unfettered autonomy to decide whether to enter the system, once they do so they are bound by its rules and by the basic principles of international law which prevail therein. It is not possible to contract out of the applicability of the latter, once a State has opted to enter the system.

The Spanish allegations are as yet unproved, and a preliminary objection to jurisdiction can succeed only if the Court would still lack jurisdiction, even assuming that all the alleged circumstances will eventually be proved. In Vice-President Weeramantry's view, the Court cannot so hold, as some of the circumstances alleged would, if proved, give jurisdiction to the Court under the general part of the declaration. The objection raised by Canada is therefore not of an exclusively preliminary character.

Vice-President Weeramantry also examines the historical origins of the optional clause with a view to stressing the difficulty with which the limited jurisdiction of the Court was achieved. The expectation at the time of the creation of this jurisdiction was that it would develop with use. An unduly narrow interpretation of the clause, when other interpretations are reasonably available within the framework of the declaration considered as a whole, would contract rather than develop this jurisdiction.

Dissenting opinion of Judge Bedjaoui

I. *General Introduction*

Canada's twice formulated reservations would appear to reflect its hesitation, or reluctance, to submit to the sanction of the International Court issues which it regards as vital, and in relation to which it considers the applicable law to be, in the words of the Canadian Foreign Minister, "inadequate, non-existent or irrelevant". The point was that Canada was not entirely satisfied with the Montego Bay Convention of 10 December 1982 on the Law of the Sea, which for this reason it has not ratified and which, in its view, failed to settle fully the problem of overfishing, thus jeopardizing fisheries resources for future generations. Canada has frequently expressed its dissatisfaction and invoked the "emergency", or "state of necessity", which it is currently undergoing in this regard.

The Court had to rule on its jurisdiction by examining the meaning and scope of Canada's reservation, but it was not entitled to ignore the fact that, if it accepted such a reservation, it was leaving the author of that reservation free to combat foreign overfishing by unilaterally giving itself powers *over the high seas* for as long as no settlement had been reached between itself and the States concerned. This account of the background to the case was necessary, inasmuch as, where a reservation has been formulated *ratione materiae*, it cannot prime facie be understood without some minimal reference to the substantive issues involved.

The case would have been perfectly simple if the duty of the Court had merely been to ascertain the meaning of the expression "conservation and management measures" contained in the reservation, and to declare that "the enforcement of those measures" against the Spanish fishing vessel *Estai* was precisely covered by the terms of that reservation, thus preventing the Court from entertaining any claim in this regard. The emphasis has to be placed on another far more important term of the reservation, that which places Canada's action, in geographical terms, "in the NAFO Regulatory Area", that is to say *outside the 200-mile limit*. And indeed the *Estai* was boarded some 245 miles off the Canadian coast.

The purpose of the reservation is to signal *urbi et orbi* that Canada claims special jurisdiction over the high seas. The Court cannot interpret or accept this reservation in the same way as it would interpret or accept an ordinary reservation, since, without any need for a consideration of the merits, its terms prima facie disclose a violation of a basic principle of international law. This is an issue which the Court cannot simply ignore by restricting itself to an external and superficial interpretation of the reservation. It cannot be right for the Court to content itself in this case with a purely *formal* view of the reservation, disregarding its *material* content — a content which does not require investigation involving an examination of the merits, since it is abundantly clear that the reservation affects a traditionally established right. This is the real flavour of this fascinating case.

The Court cannot content itself with declaring that the boarding on the high seas of a foreign fishing vessel simply constitutes enforcement of conservation and management measures taken by Canada, and thus hold that that incident is covered by a reservation entirely depriving it of jurisdiction, for this would be to utilize the screen of "conservation and management measures", interpreted in an artificial manner, without any regard for what such measures involve in terms of their violation of a well-established principle of international law.

It follows that the only proper attitude is to interpret and assess the said "conservation and management measures" by

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

Judge Bedjaoui has not dealt with all the points which appear to him disputable in the Judgment — in particular the theoretical and practical implications of the methods of interpretation employed therein, or at least the manner in which the Judgment formulates a number of these points (see in particular paragraphs 46 to 54 of the Judgment) — but has restricted himself to raising three important questions on which, to his great regret, he finds himself obliged to express his disagreement with the majority of the Court:

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

II. *The subject matter of the dispute*

What is *unique* about the present case and at the same time gives it its great interest from the legal point of view, is the persistent disagreement between the applicant State and the Respondent with regard to the actual subject matter of the dispute — a disagreement now extended by another, just as far-reaching, between the majority of the Court and the minority on the same point. This is a situation rarely encountered in the Court's jurisprudence.

It is of course the Applicant who has the initiative and who defines — at its own procedural risk — the subject of the dispute which it wishes to bring before the Court. In this regard it enjoys a clear procedural right, deriving from its *status as Applicant*, to seek and to obtain from the Court a ruling on the subject of the dispute which it has submitted to it and *on that alone*, to the exclusion of all others (subject, of course, to any incidental proceeding). Spain, as a *sovereign* State and as *applicant* State, enjoyed the undisputed right to bring before the Court — at its own clear procedural risk — any aspect of the dispute which it considered it might legitimately submit, and it had an inalienable *legal interest* in seeking and obtaining a ruling on the specific dispute whose subject matter it had clearly defined.

Spain clearly indicated the precise matter on which it was bringing Canada before the Court. In both its written and its oral pleadings, it consistently complained of "a very serious infringement of a right deriving from its sovereign status, namely exclusive jurisdiction over vessels flying its flag on the high seas".

It was an *altogether different* subject matter that Canada — notwithstanding its status as *respondent State* — raised against Spain. It invoked issues of fishing and of the conservation and management of fisheries resources within the NAFO Regulatory Area, and consequently contended that this was the true subject of the dispute, which was excluded from the jurisdiction of the Court by virtue of reservation (*d*) inserted by Canada in its new declaration notified on 10 May 1994 (two days before the adoption of Bill C-29 amending the Coastal Fisheries Protection Act).

There is of course a connection between the subject matter of the dispute, as defined by the Applicant for the purposes of the proceedings which it instituted, but regrettably cannot pursue, and the subject matter alleged by the Respondent to be the true one, now settled and emptied of substance. However, that connection in no way justified the substitution by the Court of the second subject for the first one as defined by the Applicant.

The Court cannot in any sense modify "the decor" or change the subject of the dispute. For, if it did so, it would be rendering judgment in a case altogether different from that submitted to it by the Applicant. *The Court's role is to give an appropriate legal characterization to those claims of the applicant State which properly come within the framework of the subject matter of the dispute as that State has defined it in its Application.* This does not mean that the Court has the power to alter the subject matter put before it. Still less can the respondent State propose a different subject matter to the Court. That would be *to hear a different case.*

Thus, while Spain proclaims its sovereignty on the high seas over its vessels, Canada speaks of conservation and management measures. While Spain invokes a "conflict of jurisdiction" on the high seas, Canada opposes to it a "conflict over fisheries conservation and management". In brief, *Spain talks of State sovereignty, Canada of fisheries conservation and management.*

In the present case, the Court has based itself on a jurisprudence which is either not entirely relevant or appears to have been interpreted incorrectly.

III. *The validity of the Canadian reservation*

It would of course be absurd to cast doubt, in any degree, on the sovereign power of a State to maintain or amend, whether by restricting or by extending it, a declaration of acceptance of the Court's jurisdiction, or to withdraw it whenever it wishes — always subject, of course, to compliance with the procedure (and in particular any prior notice) established by that State itself in its

declaration. Doctrine and jurisprudence are unanimous on this point.

However, a State's freedom to attach reservations or conditions to its declaration must be exercised in conformity with the Statute and Rules of Court, with the Charter of the United Nations, and more generally with international law and with what this judge would venture to call "*l'ordre public international*".

Within this optional clause "system", as currently structured within the framework of the "*international legal corpus*" — that is to stay, neither total chaos nor an absurd "bric-a-brac" (Jean Combacau) — and which we call "*international law*", a State's freedom is immense, but cannot be regarded as limitless. Any person is free to join a club or not to do so, but if they consent to join, then they must abide by the rules governing the club's activities.

A declarant State *has obligations vis-à-vis the clause "system" and its participants, current or potential, and also to the party to whom that clause is ultimately addressed, namely the International Court.* It is not entitled to cause that "system" to implode, since it also now owes it duties — the counterpart of the rights which it derives from it. The possibility of withdrawing from the system remains fully open to it, but what is not acceptable is that it should distort or pervert it, or compromise its existence or operation while remaining within it.

In the present case, I cannot but feel a certain sense of disquiet. These were events which occurred over a specific period of two days, 10 and 12 May 1994, during which almost simultaneously Canada formulated its reservation, thus precluding any review by the Court, lodged a Bill with Parliament and had it adopted. There is every reason to think that, in so acting, Canada wished to protect itself in advance against any judicial action, so as to be completely free to follow a particular line of conduct, over whose legality it had certain doubts.

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

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

If, for reasons of domestic or international policy, which may moreover be perfectly legitimate, a declarant State finds itself embarrassed by the terms of its declaration, *it should provisionally withdraw that declaration for the period required by the political action which it is contemplating, rather than attaching to it — I am tempted to say, encumbering and undermining it — a reservation intended to cover a purpose which might very well be regarded as unlawful.*

According to a maxim of French civil law, "*you cannot validly both give and take away*". A declarant State cannot take away with one hand what it has given with the other. It cannot do homage to international justice by submitting itself to the latter's verdict in respect of those acts where it considers that it has behaved correctly, while shunning that same justice in the case of those acts whose legality it fears may be questionable. It is not possible for a declarant State to remodel the philosophy of the clause "system" in this way, still less to bend that "system" to suit its own contradictory requirements, or to mix two incompatible aims.

IV. *The definition of "conservation and management measures"*

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

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

Canada's reservation (*d*) refers to "*conservation and management measures*", taken or enforced by it against fishing vessels within the "NAFO Regulatory Area". The Court was therefore bound to interpret that expression in order to identify the scope of the reservation.

Nor does the Judgment take sufficient account of the new approach embodied in the *international* concept of "conservation and management measures", an approach already evident at the First United Nations Conference on the Law of the Sea, which resulted in the "Convention on Fishing and Conservation of the Living Resources of the High Seas", then formalized in the Montego Bay Convention and, indeed, already described in 1974 in the Court's Judgment in the *Fisheries* case.

It is perfectly clear that this new approach could only be — and has indeed been — an international one; otherwise the chaos created by overfishing would have been replaced by a different form of chaos — that produced by each State taking, as and wherever it thought fit, whatever conservation and management measures it wished. To limit this progression to a simple harmonization of the technical aspects of fishing, as the Judgment has done, is to ignore the entire development in the law which, both now and over the

last two or three decades, has been taking place in the field of conservation and management measures, *and which gives judicial expression to a profound need on the part of States for clarification, harmonization and cooperation.* Such measures cannot therefore simply be reduced to any act taken by a State with regard to its choice of conservation techniques, whilst ignoring the fact that such measures now have to be inserted into an international network of rights and obligations which the States have created for themselves. *Here, economic logic and legal logic have to combine — and indeed do so in all international instruments — in order to avoid the chaos both of uncontrolled overfishing and of illegal regulation.* Compatibility with international law is an integral part of the international definition of conservation and management measures; it is "*built in*". It is not a matter of adjudicating on the merits or ruling in any way on responsibility. It is simply a question of stating that, on a true interpretation of the expression "conservation and management measures", the reservation cannot act as a bar to jurisdiction.

The notion of "conservation and management measures" cannot be confined, contrary to what the Judgment states, to simple "factual" or "technical" matters, but has to be taken to refer to those types of measure which the "*new legal order of the sea*" has been gradually regulating, with the result that such measures now constitute *an objective legal category* which cannot be other than part of international law.

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

It accordingly follows that the Canadian measures relating to the high seas cannot be interpreted on the basis of Canada's own internal legal order — for this in effect is what the Judgment has done — since the definition of conservation and management measures which the Judgment claims to draw from international law has ultimately been reduced to a standard technical definition — the very same that underlies the Canadian legislation and its implementing rules — without any regard for respect of the principle of freedom of the high seas. On the basis of its reservation as thus interpreted by the Judgment, Canada is protected against the sanction of review by the Court. But in reality conservation and management measures can be assessed only by reference to international law. If this is so — and it cannot be otherwise — then the Court was bound to declare itself competent at this stage and to undertake an examination of the merits in order to determine whether the measures taken against the Spanish vessels were in fact conservation and management measures (see Article 79, paragraph 7, of the Rules of Court).

Dissenting opinion of Judge Ranjeva

In a dissenting opinion appended to the Judgment, Judge Ranjeva expressed the wish that this Judgment should not be interpreted as sounding the death-knell of the optional clause system under Article 36, paragraph 2, of the Statute of the International Court of Justice. He fears a desertion from the Court as a forum for the settlement of disputes, in the absence of guarantees to ensure the integrity of the subject matter of the dispute as presented in the Application submitted by the applicant State. In Judge Ranjeva's view it was not appropriate for the Court to seek to define the subject matter of the dispute at the preliminary stage. Whether the subject matter was interpreted broadly as the Applicant wished, or narrowly, the question, at this incidental stage of the proceedings, was whether the preliminary dispute on questions of jurisdiction and admissibility came within the terms of the reservation formulated by Canada.

The case-law cited in the Judgment is not relevant to justify a restatement of the subject matter of the dispute as it was presented in the Application. In those decisions the Court restated the terms of the dispute after carrying out a detailed examination, in light of the evidence available to it, of those matters constantly and consistently claimed by the Applicant. Moreover, in the absence of claims by the Respondent on the merits, or of any counter-claim, the Court is necessarily bound by the terms of the claim as formulated in the Application.

With regard to the interpretation of the Canadian reservation contained in subparagraph 2 (*d*) of Canada's declaration of 10 May 1994, Judge Ranjeva agrees with the majority of the Members of the Court on the importance of ascertaining the intention of the author of the reservation. But, in his view, a reservation to jurisdiction, while unilateral in origin, is international in its effects, since it becomes part of the network made up of all the declarations under Article 36, paragraph 2, of the Statute. It follows that, in filing its unilateral application, the Applicant accepts all the conditions laid down by the author of the reservation, and a contractual link arises between the two parties to the litigation. It is therefore difficult to see how the reservation can be interpreted without recourse to the rules, principles and methods of interpretation of international agreements, and outside the framework of the Law of the Sea

Convention of 1982, which constitutes the lowest denominator common to the parties. Moreover, retracing the historical background to Article 1 of the 1995 Agreement on Straddling Stocks, one of the two instruments relevant to a definition of conservation and management measures, Judge Ranjeva recalls that it was on the initiative of Canada that that Agreement included a reference to the definitions contained in the Montego Bay Convention, with a view to defining more clearly what was meant by conservation and management measures. In the opinion of this Member of the Court, there is no contrary international practice of States or of international organizations which would contradict his analysis and confirm the definition given by the Court.

In Judge Ranjeva's view, Canada's objections were not of an exclusively preliminary character.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin found himself unable to concur with the arguments and findings in the Judgment relating to two principal points:

(*a*) the subject matter of the dispute between the Parties, and

(*b*) the effects of the Canadian reservation on the Court's jurisdiction in this case.

As to the first point of his disagreement, Judge Vereshchetin takes the view that the scope of the dispute between the Parties is much broader than the pursuit and arrest of the *Estai* and the consequences thereof. Quite apart from this proximate cause of the dispute, it would appear that what underlies it are different perceptions by the Parties of the rights and obligations which a coastal State may or may not have in a certain area of the high seas; or, more generally, different perceptions of the relationship between the exigencies of the law of the sea, on the one hand, and environmental law on the other. The Court had no good reason for redefining and narrowing the subject matter of the dispute presented by the Applicant.

With regard to the effects of the Canadian reservation, Judge Vereshchetin considers that, while a State is absolutely free to join or not to join the optional clause system, its freedom to make reservations and conditions to the declaration deposited under Article 36, paragraph 2, of the Statute is not absolute. For example, it is uncontested that the Court cannot give effect to a condition imposing certain terms on the Court's procedure which run counter to the latter's Statute or Rules. Generally, reservations and conditions must not undermine the very raison d'être of the optional clause system. The Court as "an organ and guardian" of international law may not accord to a document the legal effect sought by the State from which it emanates, without having regard to the compatibility of the said document with the basic requirements of international law.

On the other hand, the Court cannot impute bad faith to a State. Therefore, it should seek to interpret declarations and reservations thereto as consistent with international law. A term of a declaration or of a reservation may have a wider or narrower meaning in common parlance or in some other discipline, but for the Court "the natural and ordinary" meaning of the term is that attributed to it in international law. The Canadian reservation would be consistent with the international law of the sea if the expression "conservation and management measures", obtaining in the text of the reservation, were to be understood in the sense accepted in recent multilateral agreements directly related to the subject covered by the reservation. In those agreements, the concept "conservation and management measures" is characterized by reference not merely to factual and scientific criteria, but also to legal ones.

In the view of Judge Vereshchetin, "due regard" given to the declarant's intention, in the circumstances of the case, has not revealed with certainty "the evident intention of the declarant" at the time material for the interpretation of the reservation. In any event, this intention cannot be controlling and conclusive for the outcome of the interpretation by the Court.

Judge Vereshchetin considers that the scope (*ratione materiae* and *ratione personae*) of the Canadian reservation, as well as its implications for the Court's jurisdiction in this case, could not be established with certainty by the Court. Therefore, the correct course of action for the Court would have been to find that in the circumstances of the case the objections of Canada did not have an exclusively preliminary character.

Dissenting opinion of Judge Torres Bernárdez

In his dissenting opinion Judge Torres Bernárdez concludes that the Court has full jurisdiction to adjudicate on the dispute brought before it by the Application filed by Spain on 28 March 1995.

He has reached this conclusion after a thorough study of:

- the subject matter of the dispute (where he was in total disagreement with the definition adopted by a majority of the Court, a definition which in his view accords with neither the applicable law nor with the relevant jurisprudence of the Court, or with that of the Permanent Court);
- the optional clause system in general, including the role within that system of the principles of good faith and mutual confidence;
- the question of the admissibility or opposability as against Spain, in the circumstances of the case, of the reservation contained in subparagraph 2 (*d*) of Canada's declaration (in relation to which, in the judge's view, the Court has declined to exercise its right of review over *abuse* of the optional clause system);
- and the interpretation of Canada's declaration of 10 May 1994, including the reservation contained in subparagraph 2 (*d*). In this regard Judge Torres Bernárdez expresses his conviction that the subject of the interpretation which the Court is called upon to undertake is Canada's declaration itself, including the reservation in subparagraph (*d*), and not, as the Judgment claims, the political or other reasons which led

Canada to make its unilateral acceptance, on 10 May 1994, of the compulsory jurisdiction of the Court together with the said reservation; Judge Torres Bernárdez rejects the extreme subjectivity displayed by the majority in the Judgment in their approach to interpretation, an approach which he considers to be contrary to current international law and to the principle of legal certainty in relations between declarant States.

The basic reasons on which his dissenting opinion are founded are three. First, the fundamental role of the principle of good faith, both in the *modus operandi* of the optional clause system and in the interpretation 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 drawn between, on the one hand, the principle of consent by the States concerned to the jurisdiction of the Court and, on the other, an interpretation, in accordance with the rules of interpretation laid down by international law, of the consent objectively demonstrated in declarations at the time of their deposit with the Secretary-General of the United Nations. Finally, the no less fundamental requirement of international procedure that, in the interest of the principle of the equality of the parties, the sovereign right of the applicant State to define the subject matter of the dispute which it is submitting to the Court must be just as fully respected as the sovereign right of the respondent State to seek to oppose the Court's jurisdiction by presenting preliminary or other objections, or by filing a counter-claim of its own.

Each of these fundamental reasons is sufficient in itself to make it impossible for Judge Torres Bernárdez to subscribe to a judgment, the effect of which will, he fears, be particularly negative, even beyond the present case, for the development of the optional clause system as a means of acceptance by States of the compulsory jurisdiction of the Court in accordance with Article 36 of the Court's Statute.