CR 98/11

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNEE 1998

Audience publique

tenue le jeudi 11 juin 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Schwebel, président

en l'affaire de la Compétence en matière de pêcheries (Espagne c. Canada)

COMPTE RENDU

YEAR 1998

Public sitting

held on Thursday 11 June 1998, at 10.00 a.m., at the Peace Palace,

President Schwebel presiding

in the case concerning Fisheries Jurisdiction (Spain v. Canada)

VERBATIM RECORD

Présents : M. Schwebel, président
M. Weeramantry, vice-président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek, juges
MM. Lalonde
Torres Bernárdez, juges *ad hoc*

M. Valencia-Ospina, greffier

Present:	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

Le Gouvernement de l'Espagne est représenté par :

M. José Antonio Pastor Ridruejo, chef du service juridique international du ministère des affaires étrangères d'Espagne, professeur de droit international à l'Université Complutense de Madrid,

comme agent et conseil;

M. Pierre-Marie Dupuy, professeur de droit international à l'Université Panthéon-Assas (Paris II),

M. Keith Highet, conseil en droit international, vice-président du comité juridique interaméricain de l'Organisation des Etats américains,

M. Antonio Remiro Brotóns, professeur de droit international à l'Université autonome de Madrid,

M. Luis Ignacio Sánchez Rodríguez, professeur de droit international à l'Université Complutense de Madrid,

comme conseils et avocats;

M. Félix Valdés Valentín-Gamazo, ministre-conseiller de l'ambassade d'Espagne aux Pays-Bas,

comme coagent;

M. Carlos Domínguez Díaz, secrétaire d'ambassade, sous-directeur général aux organisations internationales de gestion de pêcheries au ministère de l'agriculture et des pêcheries d'Espagne,

M. Juan José Sanz Aparicio, secrétaire d'ambassade, membre du service juridique international du ministère des affaires étrangères d'Espagne,

comme conseillers.

Le Gouvernement du Canada est représenté par :

S. Exc. M. Philippe Kirsch, c.r., ambassadeur et jurisconsulte, ministère des affaires étrangères et du commerce international,

comme agent et avocat;

M. Blair Hankey, avocat général délégué, ministère des affaires étrangères et du commerce international,

comme agent adjoint et avocat;

M. L. Alan Willis, c.r., ministère de la justice,

comme conseil principal et avocat;

The Government of Spain is represented by:

Mr. José Antonio Pastor Ridruejo, Head, Department of International Legal Affairs, Ministry of Foreign Affairs of Spain, Professor of International Law at the Complutense University of Madrid,

as Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of International Law, University of Paris II (Panthéon-Assas),

Mr. Keith Highet, Counsellor in International Law, Vice-Chairman, Inter-American Juridical Committee, Organization of American States,

Mr. Antonio Remiro Brotóns, Professor of International Law, Autonomous University of Madrid,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Complutense University of Madrid,

as Counsel and Advocates;

Mr. Félix Valdés Valentín-Gamazo, Minister-Counsellor, Embassy of Spain to the Netherlands,

as Co-Agent;

Mr. Carlos Domínguez Díaz, Embassy Secretary, Assistant Director-General for International Fisheries Management Organizations, Ministry of Agriculture and Fisheries of Spain,

Mr. Juan José Sanz Aparicio, Embassy Secretary, Department of International Legal Affairs, Ministry of Foreign Affairs of Spain,

as Advisers.

The Government of Canada is represented by:

His Excellency Philippe Kirsch, Q.C., Ambassador and Legal Adviser to the Department of Foreign Affairs and International Trade,

as Agent and Advocate;

Mr. Blair Hankey, Associate General Counsel, Department of Foreign Affairs and International Trade,

as Deputy Agent and Advocate;

Mr. L. Alan Willis, Q.C., Department of Justice,

as Senior Counsel and Advocate;

M. Prosper Weil, professeur émérite de l'Université de Paris,

comme conseil et avocat;

M. Paul Fauteux, ministère des affaires étrangères et du commerce international,

M. John F. G. Hannaford, ministère des affaires étrangères et du commerce international,

Mme Louise de La Fayette, Université de Southampton,

Mme Ruth Ozols Barr, ministère de la justice,

Mme Isabelle Poupart, ministère des affaires étrangères et du commerce international,

Mme Laurie Wright, ministère de la justice,

comme conseils;

M. Malcolm Rowe, Gouvernement de Terre-Neuve et du Labrador,

M. Earl Wiseman, ministère des pêches et des océans,

comme conseillers;

Mme Manon Lamirande, ministère de la justice,

Mme Marilyn Langstaff, ministère des affaires étrangères et du commerce international,

Mme Annemarie Manuge, ministère des affaires étrangères et du commerce international,

M. Robert McVicar, ministère des affaires étrangères et du commerce international,

Mme Lynn Pettit, ministère des affaires étrangères et du commerce international,

comme agents administratifs.

Mr. Prosper Weil, Professor Emeritus, University of Paris,

as Counsel and Advocate;

Mr. Paul Fauteux, Department of Foreign Affairs and International Trade,

Mr. John F. G. Hannaford, Department of Foreign Affairs and International Trade,

Ms Louise de La Fayette, University of Southampton,

Ms Ruth Ozols Barr, Department of Justice,

Ms Isabelle Poupart, Department of Foreign Affairs and International Trade,

Ms Laurie Wright, Department of Justice,

as Counsel;

Mr. Malcolm Rowe, Government of Newfoundland and Labrador,

Mr. Earl Wiseman, Department of Fisheries and Oceans,

as Advisers;

Ms Manon Lamirande, Department of Justice,

Ms Marilyn Langstaff, Department of Foreign Affairs and International Trade,

Ms Annemarie Manuge, Department of Foreign Affairs and International Trade,

Mr. Robert McVicar, Department of Foreign Affairs and International Trade,

Ms Lynn Pettit, Department of Foreign Affairs and International Trade,

as Administrative Officers.

The PRESIDENT: Please be seated. I call upon the distinguished Agent of Canada, Ambassador Kirsch.

M. KIRSCH :

1. Monsieur le président, Madame, Messieurs de la Cour, c'est un grand honneur pour moi de représenter le Canada devant la Cour internationale de Justice.

Introduction

2. En se présentant devant la Cour, le Canada tient à réitérer ses engagements passés en faveur du règlement pacifique des différends et sa déférence à l'égard de la Cour internationale de Justice. Si le Canada conteste aujourd'hui la compétence de la Cour, il ne remet en cause ni son autorité, ni la confiance qu'il lui a toujours témoignée. Conformément au droit international, le Canada a simplement choisi la négociation comme mode privilégié de règlement pour certains différends.

3. Ces différends, le Canada les a exclus de la compétence au moyen d'une réserve. Il s'agit des «différends auxquels pourraient donner lieu les mesures de gestion et de conservation adoptées par le Canada pour les navires pêchant dans la zone de réglementation de l'OPANO, ... et l'exécution de ces mesures» (contre-mémoire du Canada, annexe 2). En anglais, *«disputes arising out of or concerning conservation and management measures ... and the enforcement of such measures»*.

4. A ce stade, la Cour est donc appelée à examiner la question de sa propre compétence. Et, à cet égard, je voudrais faire deux observations préliminaires.

5. En premier lieu, je note avec regret que les plaidoiries espagnoles des deux derniers jours, ont porté essentiellement sur le fond de l'affaire. M. Highet évoquait hier avec délicatesse la nécessité de faire quelques incursions limitées sur le fond pour déterminer la portée d'une réserve. Soit, mais l'Espagne ne s'est pas limitée à quelques incursions. Dans ses plaidoiries, sous couvert de traiter la compétence, les dissertations sur le fond ont été la règle. Je n'insiste pas. Nous y sommes habitués, mais cette démarche n'en est pas moins contraire aux ordonnances de la Cour.

J'invite celle-ci à en tenir compte lorsqu'il s'agira pour elle de départager les éléments pertinents à sa décision sur la compétence et ceux qui ne le sont pas.

6. En second lieu, je ne peux que déplorer les excès qui ont marqué les plaidoiries espagnoles. Nous aurons l'occasion de revenir sur certains d'entre eux, notamment à propos des événements qui se sont réellement passés à l'occasion de l'arraisonnement de l'*Estai*. Nous regrettons d'autant plus ces intempérances qu'il est vrai que l'Espagne est un pays ami. Le Canada attache une grande importance à cette amitié, comme il attache une grande importance à la réelle harmonie qui règne à nouveau dans nos relations.

Rappel des Faits

7. Cela dit, je passerai très rapidement sur les quelques faits pertinents à la question de la compétence de la Cour, qui sont bien connus. Le 10 mai 1994, le Canada a déposé une nouvelle déclaration d'acceptation de la compétence de la Cour qui comporte la réserve que j'ai citée. Le même jour, le Gouvernement du Canada présentait au Parlement le projet de loi C-29. Ce texte, qui modifiait la loi sur la protection des pêches côtières, a été adopté sans changement par le Parlement le 12 mai 1994. Les modalités d'application de cette loi ont été définies peu après dans un règlement, qui, lui-même, a été modifié le 3 mars 1995 de manière à soumettre à la législation les navires espagnols et portugais. Le 9 mars, le navire de pêche espagnol *Estai* était inspecté et saisi, et son capitaine arrêté, pour avoir contrevenu à la loi et aux règlements. Voilà les faits qui ont amené l'Espagne à déposer une requête introductive d'instance au Greffe de la Cour le 28 mars 1995.

8. Normalement, je m'en tiendrais là sur le plan des faits. La réserve se suffit à elle-même. Mais le silence de l'Espagne sur certaines questions pourtant évidentes m'amène à ajouter quelques éléments qui, je l'espère, seront utiles à la Cour.

9. Au début de son discours introductif d'avant-hier, l'agent de l'Espagne s'est interrogé longuement sur les raisons des mesures prises par le Canada et exécutées notamment à l'encontre de l'*Estai*. Il n'avait pourtant pas à chercher bien loin. La réponse se trouve dans la crise de la conservation des ressources halieutiques qui sévissait alors dans l'Atlantique du Nord-Ouest. Il est

d'ailleurs remarquable que l'Espagne n'en ait dit mot, ni dans ses écrits, ni oralement. Cette question est traitée en détail aux paragraphes 23 à 27 du contre-mémoire du Canada et je ne la rappelle que pour une raison unique : remettre la Cour dans le contexte qui a entouré l'adoption de la loi C-29 et le dépôt de la réserve, alors que l'Espagne se permet, contre toute évidence, de mettre en question les objectifs que poursuivait mon pays. L'Espagne affirme que la crise de la conservation des ressources n'était qu'un «prétexte» aux mesures prises par le Canada. Elle est pourtant bien placée pour savoir que pour beaucoup, en Amérique du Nord comme en Europe, cette crise a été une réalité cruelle. La surpêche chronique et les autres pratiques de pêche espagnoles ont laissé une profonde amertume des deux côtés de l'Atlantique.

10. La crise de la conservation des années quatre-vingt et quatre-vingt-dix a été catastrophique. Les pêcheries de l'Atlantique du Nord-Ouest, dont l'abondance et la richesse semblaient constituer une manne inépuisable, étaient menacées de disparition. Des communautés entières perdaient ainsi leurs moyens de subsistance traditionnels et faisaient face à un avenir extrêmement sombre.

11. Nous reconnaissons d'emblée que les responsabilités de cette crise sont partagées. Les pratiques de pêche de bien des pays y ont contribué. Le Canada a fait sa part d'erreurs. Nous les avons reconnues et essayons de les corriger.

12. Quoi qu'il en soit, il fallait agir et l'urgence du problème a donné lieu à un certain nombre d'initiatives nationales, régionales et internationales. Pour sa part, le Canada a commencé par adopter, dans sa zone de pêche de 200 milles, une série de mesures de gestion et de conservation, notamment plusieurs moratoires draconiens, pour assurer la survie des stocks de poissons qui y étaient menacés.

13. Dans ce contexte, il me faut dire un mot de la question des stocks chevauchants (ce qu'on appelle en anglais les *straddling stocks*) que l'Espagne n'a fait qu'effleurer alors qu'elle est au cœur du problème. Par définition, les stocks chevauchants se déplacent entre la zone de pêche de 200 milles de l'Etat côtier et la zone qui lui est adjacente. L'Etat côtier peut bien prendre à l'intérieur des 200 milles toutes les mesures possibles, elles ne pourront suffire à elles seules à assurer la conservation des stocks chevauchants. Pour être efficaces, les mesures de l'Etat côtier doivent

nécessairement s'accompagner de mesures qui s'appliquent au-delà de cette zone. Si les pêcheurs attendent simplement que le poisson se trouve en haute mer pour le capturer, les mesures de l'Etat côtier ne servent à rien et la survie de l'espèce dans son ensemble est menacée.

14. C'est ce qui explique que le Canada se soit mis à la recherche de solutions à long terme. Comme on le sait, il s'est fait l'instigateur d'un accord multilatéral sur la pêche en haute mer qui mettrait en place un régime international efficace de gestion et de conservation des stocks de poissons chevauchants et grands migrateurs, accord d'ailleurs adopté par les Nations Unies en août 1995 (accord des Nations Unies relatif à l'application de la partie XI de la convention des Nations Unies sur le droit de la mer du 10 décembre 1982, concernant la conservation et la gestion des stocks chevauchants et grands migrateurs, doc. NU A/CONF. 164/37, 8 septembre 1995).

15. De la même façon, le Canada a intensifié ses efforts au sein de l'OPANO (organisation des pêches de l'Atlantique du Nord-Ouest) en vue de l'élaboration de règles spécifiques pour les stocks chevauchants dans la zone de réglementation de cette organisation, donc au-delà des 200 milles. Conformément à la convention de l'OPANO, le Canada a fait adopter des mesures compatibles avec les siennes propres, en tant qu'Etat côtier, pour mettre fin à la surpêche.

16. A l'époque, beaucoup de stocks chevauchants, la morue et la plie, par exemple, étaient déjà décimés. Restait le flétan du Groenland, mais il connaissait un déclin rapide que le Canada observait avec grande inquiétude. Pour lui épargner un sort similaire à celui des autres stocks chevauchants de la côte est, le Canada s'est donc tourné vers l'OPANO. Ses efforts, on le sait, se sont heurtés à un certain nombre d'obstacles. Il est inutile d'y revenir ici; notre contre-mémoire relate tous les détails nécessaires aux paragraphes 32 à 44.

17. En bref, le Canada n'a pas réussi à faire observer les décisions de l'OPANO qui auraient pu assurer la conservation de l'espèce. Devant la surpêche qui se poursuivait, il a, en 1994 et 1995, pris les mesures que j'ai décrites au début de mon exposé.

18. L'objectif du Canada n'avait rien à voir avec un désir d'étendre les zones maritimes sous sa juridiction, comme se plaît à le répéter l'Espagne. Dans toute cette affaire, la position du Canada a été entièrement dominée par les impératifs de gestion et de conservation, les termes mêmes que

l'on retrouve dans la réserve. Voilà ce que je souhaitais rappeler à la Cour en évoquant ces événements.

L'importance du consentement

19. Monsieur le président, Madame, Messieurs de la Cour, l'argumentation que le Canada vous présentera repose sur un principe essentiel, la condition *sine qua non* de la compétence, à savoir le consentement des Etats. La Cour l'a encore rappelé en 1995 : «l'un des principes fondamentaux de son Statut est qu'elle ne peut trancher un différend entre des Etats sans que ceux-ci aient consenti à sa juridiction» (*Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26). Ce passage est l'écho d'une jurisprudence constante datant des premiers prononcés de la Cour permanente de Justice internationale qui affirmait, dès 1924, que sa compétence «ne saurait subsister en dehors des limites dans lesquelles [le] consentement a été donné» (*Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 16).

20. La nécessité du consentement procède naturellement du principe du libre choix des moyens en matière de règlement pacifique des différends, comme des attributs mêmes de la souveraineté étatique. Je ne m'attarderai pas. Je me contenterai de rappeler ici ce que disait la Cour dans son arrêt dans l'affaire des *Activités militaires et paramilitaires* :

> «Les déclarations d'acceptation de la juridiction obligatoire de la Cour sont des engagements facultatifs, de caractère unilatéral, que les Etats ont toute liberté de souscrire ou de ne pas souscrire. L'Etat est libre en outre soit de faire une déclaration sans condition et sans limite de durée, soit de l'assortir de conditions ou de réserves.» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 418, par. 59.)

21. Monsieur le président, si un Etat est libre de ne pas accepter du tout la compétence de la Cour, à plus forte raison est-il libre de n'accepter cette compétence qu'à l'intérieur de limites dont la définition lui incombe.

22. Le Canada accepte la compétence de la Cour depuis ses origines. Il a assorti son acceptation de certaines réserves, comme beaucoup d'autres Etats déclarants, y compris l'Espagne. La possibilité d'émettre des réserves est la pierre angulaire de la clause facultative. C'est elle qui a encouragé une acceptation large de la compétence de la Cour de la part d'un certain nombre

d'Etats, parce qu'elle leur permettait de choisir un autre mode de règlement pour certains types de différends. Et donc, un respect scrupuleux des principes qui régissent l'émission et l'interprétation des réserves n'est pas seulement bénéfique à l'ensemble du système de la clause facultative, il est essentiel à son acceptation par les Etats. Autrement dit, il faut que les Etats puissent compter sur les règles du jeu. Pour s'épanouir, pour prospérer et même pour maintenir sa place, le système de la clause facultative doit continuer à inspirer aux Etats la plus grande confiance. Pour notre part, cette confiance, nous la plaçons en la Cour.

23. Dans l'affaire qui est devant vous, le consentement du Canada à la compétence de la Cour n'existe pas. Le texte de la réserve exprime sans aucune ambiguïté sa volonté de soustraire à la compétence de la Cour les différends auxquels pourraient donner lieu les mesures de gestion et de conservation.

24. Je conclus sur ce point en rappelant le principe général qui sous-tend la nécessité du consentement. Il est bien simple : la Cour tire son autorité de la volonté des Etats. Face à l'Espagne qui l'invite à ne pas respecter celle du Canada, il revient à la Cour de réaffirmer les principes qui fondent sa compétence et de mettre un terme aux tentatives espagnoles d'y passer outre.

Résumé du corps de l'argumentation

25. Monsieur le président, Madame, Messieurs de la Cour, une fois établie l'importance du consentement, le reste est une question d'interprétation de la réserve canadienne telle qu'elle s'inscrit dans la déclaration d'acceptation.

26. A première vue, il n'y a pas grande différence entre l'Espagne et le Canada sur les principes à appliquer. Nous sommes tous d'accord : les réserves font partie intégrante des déclarations d'acceptation de compétence; les déclarations constituent des actes unilatéraux *sui generis*; elles doivent être interprétées d'une manière naturelle et raisonnable de façon à donner plein effet à l'intention de l'Etat déclarant; et leur interprétation doit être conforme au principe de la bonne foi.

27. Cette belle harmonie connaît quand même ses limites. Parce qu'elle n'a pas le choix, l'Espagne accepte du bout des lèvres que les critères d'interprétation ne sont en soi «ni restrictifs ni expansifs» (mémoire de l'Espagne, p. 67, par. 37). Mais dans la même foulée, elle nous dit et redit qu'il faut donner aux réserves «la portée la plus limitée permise par leur interprétation». Ce qui ressort de ce clair-obscur juridique, dont on chercherait en vain le fondement, c'est qu'en pratique, l'Espagne fait tout ce qu'elle peut pour appliquer à la réserve canadienne une interprétation aussi restrictive que possible. Le problème, c'est qu'elle part d'une fausse prémisse. Elle suppose, on l'a bien entendu dans les deux derniers jours, que la reconnaissance de la compétence de la Cour est la règle générale et que toute limitation est une exception. Or, Monsieur le président, le système auquel ont souscrit les Etats membres de la Communauté internationale ne fonctionne pas du tout de cette façon. Ce n'est pas tout de dire que déclaration et réserves forment un instrument juridique unique. Il faut en tirer la conclusion logique : il n'y a aucune raison d'appliquer aux réserves une interprétation restrictive. Pour établir la portée de l'instrument d'acceptation de la compétence de la Cour, on le sait, il suffit de lire le texte de manière raisonnable et naturelle, eu égard à l'intention de l'Etat déclarant (*Anglo-Iranian Oil Co., arrêt, C.I.J. Recueil 1952*, p. 104). La Cour sera appelée à déceler cette intention en se fondant tant sur le texte de la réserve que sur les circonstances entourant son dépôt.

28. Il est vrai que dans certains cas, l'intention apparente de l'Etat déclarant et le sens ordinaire des mots qui forment le texte de la réserve ne pointent pas dans la même direction. Le processus d'interprétation est alors délicat. Mais il ne présente aucune difficulté lorsque *la lettre de la réserve et l'intention de l'Etat déclarant* ne font qu'un, comme c'est le cas ici.

29. Je rappelle d'abord *la lettre* de la réserve. La déclaration d'acceptation du Canada exclut de la compétence de la Cour les «différends auxquels pourraient donner lieu les mesures de gestion et de conservation adoptées par le Canada pour les navires pêchant dans la zone de réglementation de l'OPANO ... et l'exécution (l'*enforcement*) de telles mesures». Ces termes couvrent de toute évidence les mesures de gestion et de conservation adoptées par le Canada en raison de la crise de conservation des ressources halieutiques que j'ai évoquées plus haut, à savoir la loi C-29 et les règlements qui en découlent. Ces termes couvrent également l'exécution de ces mesures dont la

saisie du navire espagnol *Estai* a été l'une des manifestations. Mes collègues, MM. Hankey et Willis, donneront davantage d'explications sur chacune de ces questions.

30. Je passe à *l'intention de l'Etat déclarant*. On nous a dit que l'intention devait exister au moment du dépôt de la réserve. Nous sommes bien d'accord, et je citerai d'abord le communiqué de presse émis par le Canada le 10 mai 1994, jour de l'introduction du projet de loi C-29 au Parlement et du dépôt de la nouvelle déclaration renfermant la réserve :

> «Aujourd'hui, le Canada a modifié son acceptation de la compétence obligatoire de la Cour internationale de Justice à La Haye afin d'empêcher toute situation qui pourrait anéantir les efforts du Canada pour protéger ses stocks.» (Contre-mémoire du Canada, par. 107.)

Ecoutons aussi le ministre des affaires étrangères, le 12 mai, lors du débat sur le projet de loi au Sénat : «Afin de protéger l'intégrité de cette loi [donc la loi C-29] nous avons présenté une réserve ... auprès de la Cour internationale de Justice» (contre-mémoire du Canada, par 109). Il est vraiment difficile d'imaginer que l'intention du Canada ait pu s'exprimer d'une façon plus limpide.

31. Troisième et dernière citation, que j'invite la Cour à écouter attentivement :

> «Attendu que le but de la réserve était clairement lié à l'application de cette législation, la seule conclusion appropriée est que l'intention du Gouvernement canadien à l'époque où il a adopté la réserve était de se prémunir contre une récusation judiciaire contre le type de «mesures de gestion et de conservation» ou «exécution» de telles mesures...» (Mémoire de l'Espagne, p. 95, par. 107.)

Cette citation, Monsieur le président, est tirée du mémoire espagnol. La Cour appréciera le contraste entre la clarté de cette admission et les remises en question de l'intention du Canada auxquelles l'Espagne a cru bon de se livrer au cours des deux derniers jours.

32. L'Espagne a raison de dire que le Canada aurait pu formuler sa réserve de façon différente. Le Canada avait toute liberté de soustraire à la compétence de la Cour toutes espèces de différends, jusqu'à retirer sa déclaration d'acceptation dans son ensemble. Mais là n'était pas son intention. Le Canada entendait bien rédiger sa réserve de la façon dont il l'a fait et la voir s'appliquer exactement au type de différend auquel a donné lieu la saisie de l'*Estai*. C'est la seule conclusion raisonnable à laquelle peut mener l'examen du texte de la réserve et des circonstances ayant entouré son dépôt.

33. Tout cela, l'Espagne le sait très bien. Aussi a-t-elle cherché à noyer l'évidence dans une série d'arguments de toutes sortes, dans l'espoir de créer une situation aussi confuse et aussi compliquée que possible. Cette volonté délibérée de semer la confusion, nous l'avons découverte dans les écrits espagnols, nous l'avons retrouvée dans les plaidoiries des deux derniers jours : invocation de règles d'interprétation qui n'existent que dans l'imagination espagnole; restrictions qui ne correspondent ni au texte de la réserve, ni à l'intention du Canada, au-delà de toute vraisemblance et de toute logique; arguments qui dénaturent la réserve au point de la transformer en une réserve toute différente, qu'imagine ou souhaite l'Espagne.

34. Je passerai sous silence Humpty Dumpty, le cheval de Caligula et, naturellement, la charrue et les boeufs dont on ne sait toujours pas, après deux jours de plaidoiries espagnoles, qui finalement passe avant.

35. Ainsi, à force de contorsions et de distractions, l'Espagne espère-t-elle amener la Cour à se pencher sur une série de questions sans rapport avec la présente affaire et à perdre de vue, petit à petit, la question fondamentale : la réserve canadienne exclut-elle la compétence de la Cour en l'espèce ?

36. Mes collègues se chargeront de démonter les multiples rouages — souvent contradictoires — de la mécanique intellectuelle mise en place par l'Espagne. Je me contenterai à ce stade de dégager quelques exemples tirés des arguments présentés par nos collègues espagnols.

37. Premier exemple : nul ne conteste que la zone au-delà des 200 milles appelle des mesures de gestion et de conservation tout aussi bien que la zone des 200 milles. Comme elle ne peut le nier, l'Espagne livre un procès d'intention au Canada en espérant évacuer le problème : la loi C-29 ne serait pas une mesure de gestion et de conservation, mais le reflet de la volonté du Canada d'étendre sa juridiction au-delà des 200 milles. Elle ne viserait donc pas vraiment la protection des ressources. Monsieur le président, cet argument ne tient pas la route. D'abord, au moment des débats parlementaires, le ministre responsable a été très clair quant au but de la nouvelle loi : «Je le répète, il ne s'agit pas aujourd'hui d'étendre notre compétence, mais bien de mettre en place un régime de conservation.» (Débat de la Chambre des communes, 11 mai 1994, mémoire de l'Espagne, annexes, vol. I, annexe 15, p. 4216.)

38. Jetons maintenant un coup d'oeil à la loi elle-même. Son but est défini en son article 5 de façon tout à fait explicite : elle vise à «permettre au Canada de prendre les mesures d'urgence nécessaires pour mettre un terme à la destruction [des stocks chevauchants] et les reconstituer tout en poursuivant ses efforts sur le plan international en vue de trouver une solution au problème de l'exploitation indue par les bateaux de pêche étrangers» (*Lois du Canada*, 1994, ch. 14, mémoire de l'Espagne, annexes, vol. 1, annexe 14, art. 5.1). Et que fait la loi ? Elle permet au gouvernement de désigner des stocks de poissons chevauchants, des classes de bateaux étrangers et les mesures de gestion et de conservation pour ces stocks chevauchants qui doivent être observées par les personnes se trouvant à bord des bateaux désignés. Comment l'Espagne peut-elle affirmer qu'il ne s'agit pas là de gestion et de conservation ? Oui, la loi canadienne s'applique au-delà des 200 milles. C'est ce que commandent les impératifs de la conservation. Elle n'en reste pas moins une mesure de gestion et de conservation au sens de la réserve. Comment pourrait-il en être autrement quand le but de la loi est de protéger un stock de poissons qui par nature ignore les frontières ?

39. L'expression «mesures de gestion et de conservation» a été retenue par le législateur et par les rédacteurs de la réserve parce qu'elle englobe toutes les mesures visant à la protection et à la réglementation des pêcheries, qu'elles s'appliquent à l'intérieur ou au-delà des 200 milles. Si on leur enlève leur portée géographique, les mesures prises par le Canada n'ont plus aucun sens et la réserve est dépourvue de toute utilité pratique.

40. Deuxième exemple : l'Espagne répète à l'envi que la réserve ne vise pas l'objet principal du différend, à savoir la question de ce qu'elle appelle le «titre international» du Canada pour l'exercice de sa juridiction à l'encontre des navires étrangers en haute mer.

41. Monsieur le président, il saute aux yeux que cet «objet principal» est une question de fond, pas de compétence. C'est précisément à ce genre de question que la réserve fait barrage. La réserve porte sur les mesures de gestion et de conservation qui seraient prises par le Canada dans la zone de réglementation de l'OPANO, donc dans une partie de la haute mer. Comment peut-on être plus clair ? Cet argument se désintègre aussitôt que l'on y touche. C'est vraiment beaucoup de bruit pour rien.

42. Troisième exemple : les mesures canadiennes de gestion et de conservation que mentionne la réserve ne comprennent, dit l'Espagne, que celles qui sont permises par le droit international. Cette interprétation dénature complètement la réserve. L'application de la réserve dépend de la réunion des éléments objectifs qu'elle précise, et non de principes juridiques dont elle ne fait aucune mention. Qu'elle soit fondée ou non en droit international, une mesure de gestion et de conservation demeure une mesure. Encore une fois, la question de savoir si elle est licite ou illicite est une question de fond. Si la Cour suivait l'Espagne sur ce terrain, elle ne pourrait trancher la question de sa compétence qu'après s'être prononcée au préalable sur le fond de l'affaire, à l'encontre de l'objectif même de la réserve.

43. L'interprétation espagnole mène à une impasse : si les mesures étaient jugées illégales, la réserve ne s'appliquerait pas et la Cour serait compétente pour connaître de l'affaire, mais elle se serait déjà prononcée sur le fond; si les mesures étaient jugées légales, la réserve s'appliquerait, mais la Cour, encore là, se serait déjà prononcée sur le fond, cette fois sur une affaire pour laquelle elle n'avait pas compétence. Peut-on imaginer un résultat plus absurde et plus manifestement contraire à l'intention de l'Etat auteur de la réserve ?

44. Quatrième et dernier exemple : selon l'Espagne, la réserve canadienne ne pourrait faire échec à la compétence de la Cour car la présente affaire ne porte pas uniquement sur des questions relatives à la gestion et à la conservation. Elle mettrait également en cause, dit-elle, des principes fondamentaux du droit international, par exemple celui de la liberté de la haute mer et celui du non-recours à la force dans les relations entre Etats. Les questions touchant au respect de ces principes ne seraient pas couvertes par la réserve, dit l'Espagne.

45. Avant d'apporter une réponse générale à cet argument, je voudrais ouvrir une parenthèse sur la question de l'usage de la force, dont l'Espagne fait tant de cas. J'observerai d'abord que les mesures d'exécution qui ont été appliquées à l'*Estai* n'ont strictement rien à voir avec le recours à la force dans les relations entre Etats dont il est question dans la Charte des Nations Unies. Ce dont nous parlons ici, ce sont des moyens d'exécution de mesures de gestion et de conservation qui sont tout à fait classiques dans la pratique des Etats. Mes collègues y reviendront. Je ne m'étends pas.

46. Mais il me faut aussi — et je regrette de devoir le faire — dénoncer la façon éhontée dont l'Espagne exagère les faits se rapportant à l'incident de l'*Estai*. Pourquoi le fait-elle ? De toute évidence, afin de dépeindre une situation si dramatique que la Cour en oubliera que nous sommes bel et bien en présence de simples mesures de gestion et de conservation. Nous avons écouté nos collègues espagnols et leurs conseils parler de menaces à la vie humaine qui ne se sont jamais produites, brandir le spectre d'un bombardement ou d'un torpillage dans un univers hypothétique, voire même de l'exécution du capitaine et de l'équipage. Il faut vraiment que l'Espagne soit à court d'arguments sérieux pour se lancer dans de pareilles fictions.

47. Heureusement, les événements réels, tels qu'ils se sont passés, sont sans proportion avec cette dramatisation. Non seulement l'arraisonnement de l'*Estai* s'est déroulé sans pertes de vie ou lésions corporelles graves, mais personne n'a subi la moindre égratignure. Forcément, puisque le bateau n'a jamais été la cible de quoi que ce soit. Tout ce qui a été tiré, c'est un coup de semonce à l'avant du bateau. La raison en est bien simple : les règlements applicables ne permettent l'utilisation de la force qu'en dernier ressort, et de la façon la plus limitée possible.

48. Revenons à la question plus générale des principes fondamentaux du droit international. Ce que la réserve exclut de la compétence de la Cour, ce sont «les différends auxquels pourraient donner lieu les mesures de gestion et de conservation». La réserve exclut les différends définis par leur objet : ceux qui trouvent leur *origine* dans une mesure de gestion ou de conservation ou, de manière plus large encore, ceux qui ont une *relation* avec une telle mesure. Les différends exclus ne sont en aucune façon définis par la nature des normes dont la violation est alléguée par l'une des Parties. Peu importe le caractère ou la portée de ces normes.

49. Qu'elles appartiennent au droit conventionnel ou au droit coutumier, qu'elles soient générales ou spécifiques, mineures ou fondamentales, rien de cela n'a la moindre importance ici. Il est bien évident qu'un différend qui est exclu de la compétence de la Cour par son objet principal peut toucher par ailleurs un certain nombre d'objets ou de domaines de droit différents. Cela se produit très souvent et cela ne change rien au résultat : le différend demeure exclu.

50. Monsieur le président, Madame, Messieurs de la Cour, ce qui frappe dans l'ensemble des arguments de l'Espagne, c'est à quel point ils déforment la réalité. J'en relèverai trois manifestations.

51. Déformation du texte, d'abord : l'Espagne assortit la réserve de restrictions que l'on y cherche en vain. Ce que l'Espagne demande à la Cour, en réalité, ce n'est pas si le différend entre dans le champ de la réserve formulée par le Canada, mais s'il appartient à une autre catégorie, celle-là choisie par l'Espagne. La réserve à multiples restrictions imaginée par l'Espagne n'existe pas; celle qui laisserait de grands vides où elle ne s'appliquerait pas, n'existe pas non plus. Libre à l'Espagne de laisser aller son imagination. Mais la Cour, elle, doit simplement déterminer si les mesures prises par le Canada entrent dans le cadre de la réserve, telle qu'elle a été formulée par le Canada.

52. Déformation de l'intention du Canada, ensuite : l'Espagne a beau rappeler de temps en temps la nécessité d'interpréter toute réserve en lui donnant un «effet utile», elle le fait à vide. Les exemples d'«effets utiles» hypothétiques qu'elle nous a présentés hier ne sont vraiment pas sérieux. Il est impossible que le Canada ait jamais eu l'intention de présenter une réserve aussi dénuée d'effet pratique que celle que veut fabriquer l'Espagne. Le Canada voulait soustraire à la compétence de la Cour les différends qu'il a définis comme il le voulait dans sa réserve. Les ajouts artificiels de l'Espagne ont nécessairement pour effet de frustrer l'intention du Canada.

53. Déformation du processus judiciaire, enfin : l'argument espagnol, qui se déroule sur fond de condamnation incendiaire du Canada et de présomption à priori d'acte illicite, ne cesse de postuler ce qui doit être prouvé et qui, par définition, ne saurait être prouvé, ni même débattu au stade de la procédure consacré exclusivement à la question de la compétence de la Cour. Ce que l'Espagne demande à la Cour, c'est de sauter l'étape préliminaire de la détermination de sa compétence et de se prononcer sur le fond, c'est-à-dire de faire ce que la réserve vise précisément à éviter.

54. En réalité, Monsieur le président, tout cela peut probablement se ramener à une seule observation. Les arguments à multiples facettes présentés par l'Espagne rappellent ces jeux de miroirs où l'on voit, multiplié à l'infini, le même objet. Sous toutes sortes d'angles, l'Espagne

répète sans cesse le même argument : la réserve ne s'appliquerait que si la licéité internationale des mesures prises par le Canada était d'avance démontrée. Et donc, à tout coup, la Cour devrait contourner la réserve pour se pencher sur le fond.

55. Monsieur le président, la réserve du Canada est là précisément pour soustraire à la compétence de la Cour le fond du différend. Les termes de la réserve sont parfaitement clairs, l'intention du Canada l'est tout autant. Le litige qui est devant vous est exclu de la compétence de la Cour.

La question de la disparition ou de la persistance du différend

56. Monsieur le président, Madame, Messieurs de la Cour, il me faut à présent dire un mot de la question de la disparition ou de la persistance du différend. Ce que l'agent et les conseils de l'Espagne en ont dit, et l'importance démesurée qu'ils lui ont accordée dans leurs plaidoiries, me donne à penser qu'ils se sont vraiment mépris sur la position du Canada. Je dois à la Cour la mise au point suivante.

57. L'objection que le Canada a soulevée dans sa lettre du 21 avril 1995 se réfère uniquement à la compétence de la Cour à la lumière de la réserve dont il a accompagné sa déclaration d'acceptation. Elle ne se réfère à rien d'autre.

58. Au cours d'une réunion que le président de la Cour a tenue avec les représentants des Parties le 27 avril 1995, il a été convenu qu'il serait statué séparément, avant toute procédure sur le fond, sur la question de la compétence de la Cour en l'espèce. A la suite de cette réunion, une ordonnance du président de la Cour en date du 2 mai 1995 confirma cet accord.

59. Il ressort de la combinaison de la lettre du Canada du 21 avril, de l'accord réalisé entre les Parties le 27 avril et de l'ordonnance du président de la Cour du 2 mai 1995, qui se réfère à la lettre et à l'accord précités, que la question à laquelle est consacrée la présente procédure est celle de la compétence de la Cour pour connaître du différend compte tenu de la réserve canadienne. Que le différend ait été réglé, comme le croit le Canada, ou qu'il persiste, comme le soutient l'Espagne, est indifférent aux fins de la présente procédure.

60. Quant à l'évolution du différend depuis le dépôt de la requête espagnole, le Canada s'est borné à «attirer l'attention de la Cour» sur certains événements. «Attirer l'attention de la Cour», ce sont là très exactement les termes employés par le Canada dans le dernier chapitre de son contre-mémoire (contre-mémoire du Canada, par. 204). Ces événements sont tous les efforts que le Canada a fait non seulement pour régler les problèmes bilatéraux qui l'avaient opposé à l'Espagne et à l'Union européenne, mais aussi pour favoriser la recherche de solutions à long terme telles que l'accord des Nations Unies sur les stocks chevauchants et grands migrateurs que j'évoquais au début de mon exposé. Le succès rencontré par ces efforts de négociations, confirmé par une amélioration notable des relations canado-espagnoles en matière de pêches, permettait, à notre sens, de regarder le différend comme réglé et les conclusions de l'Espagne comme sans objet. Il est stupéfiant, dans ces conditions, que l'Espagne ait l'audace de reprocher au Canada de ne pas avoir tenté de régler pacifiquement le différend.

61. Le Canada est conscient des difficultés juridiques que soulève à divers égards le problème de l'incidence sur la compétence de la Cour de faits et d'événements affectant la persistance du différend entre le dépôt de la requête et le jugement de la Cour. Le Canada connaît les solutions jurisprudentielles nuancées apportées à ce problème par la Cour, ainsi que la diversité des points de vue des juges qui ont rattaché des opinions aux arrêts en cause. Le Canada a estimé qu'il n'était pas utile dans le contexte de la présente procédure d'entrer dans une discussion sur la question de savoir si la persistance du différend doit être regardée comme une question préliminaire à celle de la compétence, ou s'analyse comme une question de compétence, ou doit être conçue comme une question de recevabilité, ou relève du fond. C'est très délibérément et en toute connaissance de cause que le Canada a limité son objection à la question de la compétence de la Cour au regard de la réserve.

62. Le Canada a cru de son devoir d'informer la Cour des faits postérieurs au dépôt de la requête. Il n'a pas entendu, et il n'entend pas aujourd'hui, fonder son objection à la compétence de la Cour sur autre chose que la réserve. C'est sur ce problème, et sur nul autre, que la Cour est appelée à statuer.

Conclusion

63. Monsieur le président, Madame, Messieurs de la Cour, en 1994, conformément au principe du libre choix des moyens de règlement des différends, le Canada a estimé que la voie judiciaire n'était pas la plus appropriée pour régler les différends auxquels pourraient donner lieu les mesures de gestion et de conservation des ressources halieutiques dans l'Atlantique Nord-Ouest. Il a donc soustrait ces différends de la compétence de la Cour, en toute conformité avec le droit international.

64. Plutôt que de déposer une nouvelle déclaration le 10 mai 1994, le Canada aurait pu tout aussi bien retirer son acceptation de la compétence obligatoire de la Cour. Il ne l'a pas fait. Pourquoi ? Parce que depuis maintenant près de soixante-dix ans, le Canada a placé sa confiance en cette Cour et en sa devancière. Les termes de la nouvelle déclaration sont clairs et précis. La réserve soustrait à la compétence de la Cour une catégorie bien définie de différends, à laquelle appartient précisément le différend à l'origine de la présente affaire. Le Canada demande aujourd'hui à la Cour d'honorer les termes de cette réserve.

65. Monsieur le président, Madame, Messieurs de la Cour, je vous remercie beaucoup de votre bienveillante attention, et je vous prie, Monsieur le président, de donner la parole à l'agent adjoint du Canada, Monsieur Blair Hankey.

The PRESIDENT: I thank the Agent of Canada and call upon Mr. Hankey.

Mr. HANKEY:

Introduction

1. Mr. President, distinguished Members of the Court. It is a great honour for me to again represent the Government of Canada before this Court, the supreme judicial organ of the international community.

2. My task today is to speak to you about the meaning and effect of Canada's declaration of acceptance of the Court's jurisdiction. Spain has based this case on a calculated misreading of Canada's declaration. This misreading in turn is founded on a systematic distortion of the principles of interpretation.

3. To determine the correct meaning and effect of the Canadian declaration, we must first establish the proper rules governing consent to jurisdiction and the interpretation of optional clause declarations. I shall outline seven key points regarding these rules and the relevant jurisprudence of the Court. Next, we must consider the text of the declaration to determine the categories of disputes it covers. This will involve an examination of each phrase in the text of the reservation invoked by Canada. Finally, I shall apply the reservation to the facts of this case to determine or rather to demonstrate that the matters complained of by Spain fall squarely within the wording of the Canadian reservation.

A. The Principle of Consent and Interpretation of Optional Clause Declarations

Introduction

4. I shall begin, Sir, by discussing the general principles regarding consent to jurisdiction and the interpretation of optional clause reservations. The points I wish to make are the following:

First, consent to jurisdiction can never be presumed. It must be irrefutably established.

Second, reservations are an integral part of an optional clause declaration that serve to define the extent of the jurisdiction that has been accepted.

Third, while the general principles on treaty interpretation are a useful guide, there are special considerations derived from the nature of declarations as unilateral acts and from the rule that States are free to choose to what extent they accept the Court's compulsory jurisdiction.

Fourth, the basic rule of interpretation is that declarations must be read in a natural and reasonable way, giving full effect to the intention of the declarant State.

Fifth, because declarations are unilateral acts, the intention of the declaring State is of particular importance. That intention is to be discerned objectively from the text, in the light of the circumstances at the time of its adoption.

Sixth, a generic term covers not only the specific situation originally envisaged by the declaring State, but also anything falling within its fullest meaning.

Seventh and finally, the fundamental principles of good faith and effectiveness govern the interpretation of optional clause reservations.

1. Jurisdiction Can Never Be Presumed

5. Mr. President, the goal of interpretation of an optional clause declaration is to determine whether consent has been given. Spain contends that Canada has the burden of proving that this Court is without jurisdiction (Spanish Memorial, p. 57, paras. 26, 28; p. 67, para. 37). It claims that the mere existence of an optional clause reservation creates a presumption in favour of jurisdiction, where a reservation is obviously applicable (*ibid.*, p. 57, para. 27). In his presentation, my colleague, Professor Remiro Brotóns, also contends that the point of departure *(point de départ)* is the effectiveness of the declaration, which must not be "suffocated" *(étouffer)* by the reservation (CR 98/9, pp. 57-58, paras. 10-11). I submit, sir, that these propositions cannot be sustained from your jurisprudence.

6. States have an unfettered freedom to participate or not in the optional clause system. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court held that declarations of acceptance of compulsory jurisdiction were, "facultative, unilateral engagements that States are absolutely free to make or not to make" (*I.C.J. Reports 1984,* p. 418, para. 59). Because the submission to the jurisdiction of the Court is purely voluntary, it follows that jurisdiction can never be presumed; it must be clearly established to the satisfaction of the Court. (See *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), I.C.J. Reports 1959*, p. 142.)

7. Because consent can never be presumed, there simply is no "burden of proof" on the party contesting jurisdiction. In fact, there is no fixed burden of proof on either party. In the *Border and Transborder Armed Actions* case, the Court reaffirmed the principle dating back to the days of the Permanent Court that it had to consider whether "the force of arguments militating in favour of [jurisdiction] is preponderant", and to "ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it" (*Factory at Chorzów, P.C.I.J., Series A, No. 9,* p. 32, as quoted in *Border and Transborder Armed Actions, I.C.J. Reports 1988,* p. 76, para. 16). In his separate opinion in that case, Judge Oda stated that "When considering the jurisdiction of the . . . Court . . . I take as my point of departure the conviction that the Court's jurisprudence must rest on the free will of sovereign States, clearly and categorically expressed, to grant the Court the competence to settle the dispute in question" (*ibid.*, p. 109, para. 44).

8. On this issue, Fitzmaurice has stated that what is required is "*strict proof* of consent" — Fitzmaurice who is cited many times during the last two days with great approval by our worthy adversaries. He wrote again: "jurisdiction ought at the very least not to be assumed in cases in which there is room for any serious doubt as to whether consent was given, and whether it covers the dispute . . ." (Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* Vol. II, 1986, p. 514). In the case concerning *Certain Norwegian Loans*, Judge Lauterpacht said: "the Court will not uphold its jurisdiction unless the intention to confer it has been proved *beyond reasonable doubt*" — "beyond reasonable doubt": it's a very strong standard — (*I.C.J. Reports 1957,* p. 58, emphasis added). I note my learned colleague Professor Dupuy also refers with approval to Judge Fitzmaurice (CR 98/10, p. 45, para. 20) and to the *Norwegian Loans* case (*ibid.*, p. 39, para. 5). In the *Genocide* case, the Court followed a long line of precedents, including the *Rights of Minorities in Upper Silesia* and the *Corfu Channel* cases (*P.C.I.J., Series A, No. 15,* p. 24; *I.C.J. Reports 1947-1948,* p. 15), in emphasizing the need for an "unequivocal indication" of a "voluntary and indisputable" acceptance of jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993,* p. 342, para. 34).

9. In the case of optional clause declarations, therefore, the limits of acceptance by both parties, must **clearly, indisputably** and **unequivocally** admit the jurisdiction of the Court in the specific dispute brought before it. In other words, as I said at the beginning, consent to jurisdiction can never be presumed. It must be irrefutably established.

2. Reservations Are Integral Parts of Optional Clause Declarations and Serve to Define the Scope of Acceptance of the Jurisdiction of the Court

10. Now Sir, I come to my second point, that reservations are an integral part of optional clause declarations that serve to define the extent of the jurisdiction that has been accepted. Reservations to optional clause declarations are not separate legal acts; they are integral parts of the declarations that define the scope of acceptance of the Court's jurisdiction.

11. Optional clause reservations are manifestations of the absolute freedom of States to accept or to limit compulsory jurisdiction. In order to promote a greater number of acceptances of compulsory jurisdiction, the practice of making reservations was approved and indeed encouraged by the League of Nations. When the Statute of the present Court was drafted in 1946, it was decided that a provision on reservations was unnecessary, because the practice of making reservations had become thoroughly established (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996 of Justice,* Vol. II, 1997, at *Jurisdiction*, pp. 767-768).

12. This right to limit the scope of a State's acceptance of jurisdiction derives from the principle of free choice of means and the requirement of consent. As explained by President Jiménez de Aréchaga: "The so-called reservations to the optional clause are based on [the principle] *'in plus stat minus'*". If any party to the Statute is allowed to remain totally apart from the system of the optional clause, then a party must be permitted to accept only partially the Court's jurisdiction by subordinating its acceptance to certain conditions or limitations" (Jiménez de Aréchaga, "International Law in the Past Third of a Century", *Recueil des cours*, 1978, Vol. 159, p. 154). Similarly, in his opinion in the *Anglo-Iranian Oil Company* case, Sir Arnold McNair noted that, and I quote, "The machinery provided . . . is that of 'contracting-in' not of 'contracting out'. A State, being free either to make a declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity" (*I.C.J. Reports 1952,* p. 116).

13. Thus, reservations are essential, integral parts of optional clause declarations. Yesterday Professor Remiro Brotóns affected to agree with this dictum. However, he then proceeded to contradict it, by focusing exclusively on the positive aspect of the declaration and ignoring the limiting effect of the reservation. But the teaching of the Court is clear: a declaration, including its reservations, is an indivisible whole that defines the scope of jurisdiction. In the *Aegean Sea* case, the Court referred to: "the close and necessary link that always exists between a jurisdictional clause and the reservations to it" (*I.C.J. Reports 1978*, p. 33, para. 79). The function of reservations is to outline the limits, to determine the precise extent of the voluntary acceptance of jurisdiction.

Jurisdiction therefore depends on a determination that the subject-matter of the dispute is **not** within the scope of any limiting reservation appearing in the declarations of either party.

14. Because an optional clause declaration, including its reservations, is a single legal instrument, it must be construed in accordance with a consistent set of interpretative principles. Full effect must be given both to the acceptance of jurisdiction in a declaration and to the reservations limiting that acceptance.

3. Special Rules of Interpretation Derive from the Fact that Optional Clause Declarations are *Sui Generis* Unilateral Acts

15. Mr. President, my third point is that while the general rules on treaty interpretation are a useful guide, there are special considerations derived from the nature of declarations as unilateral acts and from the rule that States are free to choose to what extent they accept the compulsory jurisdiction of the Court.

16. As explained yesterday by Professor Dupuy with great eloquence and persuasiveness (CR 98/10, p. 39, para. 5; p. 41, para. 10), optional clause declarations are *sui generis,* unilateral acts. Unlike treaties, they are not the product of bilateral or multilateral negotiation. They do not embody the wills or intentions of several States, but are the product of one will and one intention only. That is why it is the intention of the declarant State that is crucial to interpretation. Of course, I do not suggest that a State can argue for a meaning or interpretation that is quite contrary to the plain meaning of the words it has used in its declaration, but I do suggest that where the words used are consistent with a State's intention — an intention made clear from the surrounding circumstances — then any good faith interpretation must allow that declaration and that intention to take effect.

17. In his intervention, Professor Dupuy painstakingly demonstrated that declarations have a conventional or a contractual aspect (CR 98/10, pp. 39-46). However, Spain also suggests an analogy between reservations in declarations and reservations to treaties (Spanish Memorial, p. 60, para. 32). I submit, Sir, that such an analogy is entirely unfounded. Although the word reservations is commonly applied both to limitations in an optional clause declaration and to

derogations from a treaty commitment, this common terminology in fact is misleading. Because declarations are *sui generis*, and reservations form an integral part of declarations, reservations to optional clause declarations are also *sui generis*; they are not analogous to treaty reservations. Treaty reservations are derogations from an **agreed** text, so there may be an argument for restrictive interpretation of such reservations. Moreover, they must conform to certain rules to be effective, they must be accepted by the other parties. Reservations to declarations, however, are an altogether different species: they form an integral part of the text; they may exclude any category of dispute at the will of the declarant; and they take effect against other parties without their consent.

18. For these reasons, the rules governing the interpretation of treaty reservations are not directly relevant to the interpretation of reservations to optional clause declarations (James Crawford, "The Legal Effect of Automatic Reservations to the Jurisdiction of International Court", (1979) 50 *BYBIL* 77-79). This flows necessarily from the differing nature of the two instruments — treaties versus optional clause declarations — in which the reservations appear.

4. Optional Clause Declarations Must Be interpreted in a "Natural and Reasonable Way", Giving Full Effect to the Intention of the Declaring State

19. My fourth point, Mr. President, concerns the basic rule of interpretation of optional clause declarations. It is that declarations must be read in a natural and reasonable way, giving full effect to the intention of the declarant State.

20. Although optional clause declarations are not treaties, they are, as my learned colleague Professor Dupuy pointed out yesterday (CR 98/10, p. 40, para. 7), analogous to treaties in that they create a "network of engagements" among all States making such declarations (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports* 1984, p. 418, para. 60). The Court, therefore, has applied the rules of interpretation to certain aspects of the interpretation of optional clause declarations. However, because of the special **unilateral** character of such declarations, the Court has applied other principles as well, as *lex specialis.*

21. In effect, through its jurisprudence the Court has established particular rules for the interpretation of optional clause declarations. The general rule governing the interpretation of international legal instruments is that the text must be interpreted in good faith in accordance with

the ordinary meaning of the words, in their context, and in the light of the object and purpose of the instrument. Recourse may be had to supplementary means of interpretation, including the *travaux préparatoires* and the surrounding circumstances, to confirm the meaning resulting from the application of the general rule, or to determine the meaning where the text is obscure or ambiguous.

22. The fundamental principles governing the interpretation of optional clause declarations were enunciated by the Court in two important cases: the *Anglo-Iranian Oil Company* case and the *Aegean Sea Continental Shelf* case. These cases will illustrate my fourth point, as well as my fifth point and sixth point. The fifth point is that, because declarations are unilateral acts, the intention of the declaring State is of particular importance. That intention is to be discerned objectively from the text, in the light of the circumstances at the time of its adoption. And my sixth point is that a generic term covers not only the specific situation originally envisaged by the declaring State, but also anything falling within its fullest meaning.

***(a)* Anglo-Iranian Oil Company *case* (United Kingdom *v.* Iran)**

23. In the *Anglo-Iranian* case, the Court held that — and I believe Spain has cited this same quotation yesterday, — "It 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). The Court noted further — and this is extremely important — that the "Declaration must be interpreted as it stands, having regard to the words actually used" (*ibid.*, p. 105).

24. In that case, Britain had disputed the Iranian interpretation of the text of Iran's declaration on the basis of a grammatical ambiguity. After examining all the surrounding circumstances, the Court adopted the interpretation that it considered to be consistent with the Government of Iran at the time of making the declaration. This **intention** was ascertained in the light of Iranian policy, the Iranian policy of ending the régime of "capitulations" and related treaties. It was clear to the Court that in 1930 Iran had intended to confer jurisdiction only with respect to treaties subsequent to the ratification of the declaration. This intention was corroborated by the terms of a law passed

by Iran in 1931 approving the declaration. The Court referred to this law as "a decisive confirmation of the intention of the Government of Iran" (*ibid.*, p. 107). It concluded that the Iranian declaration covered only treaties subsequent to its adoption and that it therefore excluded jurisdiction in that case.

25. The Judgment noted that the "Declaration is not a treaty text resulting from negotiations", but rather: "the result of unilateral drafting" (*ibid.*, p. 105). The Court considered that the broad principles of treaty interpretation should be applied with due regard for the special character of optional clause declarations, and in particular their unilateral formulation. Due to the unilateral origin of the text, the intention of the declarant State has a special role to play in the process of interpretation.

26. Commenting on the Anglo-Iranian decision, Sir Gerald Fitzmaurice wrote that

> "the Court, while in general applying ordinary principles of treaty interpretation, seems to have felt that the voluntary and unilateral character of these declarations put them in a special position in which it was necessary to have particular regard to the known, apparent or probable intentions of the State making the declaration, particularly with reference to any conditions or limitations which that State had placed on the extent of the obligation it was assuming" (Fitzmaurice, *op. cit.*, p. 503).

27. In the case of a negotiated instrument, it is often difficult to identify a single intention, as each State involved might have a different objective. However, in the case of a unilateral declaration, there is only a single intention, and that intention, as objectively determined, will elucidate or — as in the present case — confirm the plain and ordinary meaning of the words.

***(b)* Aegean Sea Continental Shelf *case* (Greece *v.* Turkey)**

28. Sir, I now come to the *Aegean Sea Continental Shelf* case. It is interesting to note that while Spain does make reference to the *Anglo-Iranian* case, it virtually ignores the *Aegean Sea* case (only one reference at CR 98/10, p. 45, para. 18). Mr. President, this is understandable, because this Court's Judgment in *Aegean Sea* effectively undermines the Spanish case on interpretation.

29. In *Aegean Sea*, Greece sought to have the continental shelf between itself and Turkey in the Aegean Sea delimited by the Court. The main title of jurisdiction asserted by Greece was the *1928 General Act for the Pacific Settlement of International Disputes*. In order to establish that the

Parties had consented to jurisdiction, Greece had to overcome the Turkish objection based on reciprocity, invoking the Greek reservation excluding "disputes relating to the territorial status of Greece" (*Aegean Sea Continental Shelf, I.C.J. Reports 1978,* p. 15, paras. 8, 35-36; p. 17, para. 39).

30. Claiming that the reservation was not applicable, Greece advanced several arguments. In the first argument, based on a grammatical ambiguity, Greece claimed that the reservation with respect to territorial status was part of a reservation concerning domestic jurisdiction. However, the Court concluded that Greece had intended to make a separate reservation on questions of territorial status. Thus, as in the *Anglo-Iranian* case, the initial grammatical interpretation was directly supported by the original intention of the State concerned.

31. Greece then claimed that when it had adhered to the *General Act* in 1931, it had intended the words "territorial status" to have a special meaning relating to the territorial settlements resulting from the conclusion of the First World War. Moreover, the reservation could not cover the delimitation of the continental shelf, as territorial status did not relate to delimitation. The Court however reached its own determination of the meanings of the word "territorial status" by examining the political and diplomatic context in order to ascertain the intention of Greece at the time it made the reservation. It decided that the words "territorial status" were to be construed as a generic term covering the broadest possible range of disputes that could be encompassed within the phrases such as "territorial disputes", "territorial integrity", "territorial questions" and "existing frontiers" (*ibid.,* pp. 31-32, paras. 76-77).

32. Finally, Greece argued that the reservation could not be construed as covering the continental shelf, because the concept of the continental shelf was unknown when it made its reservation. The Court however considered that, as a generic term, "**territorial** status" had a very wide scope indeed, provided only that the matter sought to be included within the reservation was somehow related to **territorial** status. And it took an equally broad view of the meaning of the phrase "relating to". The Court observed that:

> "The question for decision is whether the present case is one 'relating to the territorial status of Greece', not whether the rights in dispute are legally to be considered as 'territorial' rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status" (*Aegean Sea Continental Shelf, I.C.J. Reports 1978,* p. 36, para. 86).

33. Thus, the interpretation of the reservation by the Court included Greece's original motivation in making the reservation, but also encompassed a broader meaning than was warranted by the terms actually used. Far from making the rather restrictive view of the reservation advocated by Greece, the Court gave full effect to the generic meaning of the words, to allow the reservation to encompass any subject-matter that could reasonably be directly or indirectly "related to" the terms used in the reservation.

34. I submit, Mr. President, that there are three lessons to be learned from these cases, lessons corresponding to my fourth, fifth and sixth points. First, from *Anglo-Iranian*, we learn that optional clause declarations must be read in a natural and reasonable way, taking into account the intention of the declarant State.

35. Second, *Anglo-Iranian* and *Aegean Sea* both show that in interpreting reservations in unilateral declarations, the Court considers the intention of the declarant State to be of particular importance. The intention sought is not the subjective "psychological" intention of the drafters. It is the intention of the State at the time of making the reservation, as "objectified" or expressed in the wording of the text, and as determined by an examination of the historical circumstances and policies of the State concerned. The universal character of this principle in the world's major legal systems is evidenced in the fact that in his separate opinion, in the *Aegean Sea* case, Judge Tarazi relied both on Islamic law and on the French Civil Code to establish the importance of intention relative to the "literal meaning of the words and phrases actually used" (*I.C.J. Reports 1978*, pp. 57-58).

36. The third lesson is that a generic term used in an optional clause declaration covers more than the specific situation originally envisaged by the declarant State in making its reservation; a generic term will cover anything related to its fullest meaning and will exclude related matters from the jurisdiction of the Court.

Mr. President, do you wish me to break here, or shall I continue?

The PRESIDENT: Yes, thank you. We may break here.

The Court adjourned from 11.20 to 11.35 a.m.

The PRESIDENT: Please be seated. Mr. Hankey.

Mr. HANKEY: Thank you, Sir. Just as we reached the coffee break I had completed my sixth point summarizing the principles and interpretation of the jurisdiction and the relevant jurisprudence of the Court.

5. Interpretation Should Give a Real and Substantive Effect to the Object and Purpose of the Declaration and its Reservations

37. Now, Mr. President, I now come to my seventh and final point. The interpretation of optional clause declarations must respect the fundamental principles of good faith and effectiveness. These principles operate to give a real and substantive effect to the object and purpose of the declaration, including, of course, its reservations.

38. It is axiomatic that a declaration must be interpreted to achieve its intended end. The principle of effectiveness expressed in the maxim *ut res magis valeat quam pereat* has been associated by the International Law Commission with the principle of good faith and with the need to respect the object and purpose of an instrument (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 219). The effectiveness doctrine prohibits any attempt to produce an effect contrary to that intended by the declarant State. That doctrine in and of itself is sufficient to counter the Spanish attempt to eviscerate the Canadian declaration and empty it of any practical meaning.

39. Effectiveness means real and not token effectiveness. As the Court stated in the *Temple* case, the declaration is to be read "without any preconceptions of an *a priori* kind in order to determine what is its real meaning and effect if the Declaration is read as a whole and in the light of its known purpose, which has never been in doubt" (*Temple of Preah Vihear, I.C.J. Reports 1961*, p. 32). The application of this pronouncement to the present case must be fatal to Spain's position, because Spain has known from the very beginning and has acknowledged in its pleadings (Memorial of Spain, p. 76, para. 55; pp. 94-96, paras. 107-110) that Canada intended its declaration to exclude the 1994 legislation, and everything done under it from the jurisdiction of the Court. During the past two days we have listened with great patience to one after another of

Spain's counsel arguing that the alleged incompetence of Canada's legal drafters — who, I might add, are part of our delegation here today before this distinguished Court — that their incompetence defeated our known purpose which, in the words of the *Temple* Judgment, "has never been in doubt".

40. This concludes, Sir, the initial part of my presentation. I trust that it is now evident that the Spanish contentions regarding the interpretation of optional clause declarations do not correspond to well-established principles and practice. Canada, on the other hand, relies on established principles and on the precedents pronounced by this very Court and its distinguished predecessor.

B. The Meaning and Effect of the New Reservation to the Canadian Declaration

Introduction

Mr. President, distinguished Judges, I now come to the second part of my presentation: the meaning and effect of the new reservation to Canada's declaration. Spain has invoked as the title of jurisdiction in this case the optional clause declaration made by Canada on 10 May 1994. The issue in these proceedings is simply whether the Canadian declaration confers jurisdiction on the Court in view of the reservation set out in paragraph 2 *(d)*. The Canadian reservation is found at Tab 5 in your folders. It applies to, and I quote

> "**disputes** arising after the present declaration with regard to **situations or facts** subsequent to this declaration, **other than** . . .
>
> *(d)* 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" (emphasis added).

It is difficult to imagine an exclusion of jurisdiction more exactly or carefully aimed at the "facts or situations" of the kind that have given rise to this litigation.

42. The words that follow the introductory phrase define the subject-matter of the reservation as "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area . . . and the enforcement of such measures". The measures must be conservation and management measures. They must be taken by Canada. They must be taken with

respect to vessels fishing in the NAFO Regulatory Area. The enforcement of such measures is also covered by the reservation. Both the measures and their enforcement are excluded from the jurisdiction of the Court. There are absolutely no qualifiers or limitations. Within its generally defined sphere, the reservation encompasses everything and anything, everything and anything, related to conservation and management measures taken by Canada in the NAFO Regulatory Area.

43. Mr. President, I shall first explain the meaning of the reservation by proceeding through the text phrase by phrase in the order in which the words appear. I will then demonstrate the intention of Canada in making the reservation. This I will do by examining the historical circumstances and policy context in which Canada revised its declaration in May 1994. I invite you now to turn to Tab 6 in your folders to follow the text of the reservation.

1. The Plain and Ordinary Meaning of the Words

(a) "Disputes"

44. An important preliminary point is that both the declaration and the reservation apply only to "disputes". It is axiomatic that the Court will have jurisdiction only if there is an active, legal dispute between the parties. This is clear from Article 36, paragraph 2, of the Statute of the Court, it is clear from the context of the Canadian declaration and it is clear from the jurisprudence of the Court (see Counter-Memorial, paras. 205-208).

(b) "Arising Out of or Concerning"

45. The introductory phrase "arising out of or concerning" establishes the scope of the exclusions of jurisdiction. The most striking feature of the phrase is its breadth. The term "measures" can raise any number of ancillary issues including: first, the right to take such measures, or to use Spain's terminology *"titre"*; second, the factual need for them; third, their appropriateness in the light of that need; and fourth, the methods of their enforcement. A question about any one of these issues clearly arises out of or concerns the measure under consideration. By including in our reservation, the term "arising out of or concerning" Canada made absolutely clear that all questions concerning its conservation and management measures are beyond the jurisdiction of the Court. Efforts by our friends on the Spanish side to separate out questions of

title and enforcement, as though they were somehow quite distinct from the term "measure" and can thus form the basis of distinct disputes, are transparently strategies to evade the comprehensive language Canada has used. As we said in our Counter-Memorial, but it bears repetition, the words "arising out of or concerning" signal an intention to capture the subject-matter in all its aspects; and to include both the core and anything directly or indirectly associated with it (para. 88). "Arising out of" refers to the origins of the dispute, while "concerning" refers to the object of the dispute. Both terms are subsumed in the French phrase *"auxquels pourraient donner lieu"*. This French phrase and the English word "concerning" convey the same meaning as the phrase "relating to" in the Greek reservation construed by the Court in the *Aegean Sea* case. These terms plainly indicate that the reservation covers anything directly or indirectly relating to the subject-matter of the reservation. The phrase "arising out of" underscores Canada's intention to cast as wide a net as language will permit.

(c) "Conservation and Management Measures"

46. The next phrase, Sir, is "conservation and management measures". A conservation and management measure is a measure taken for the purpose of the conservation and management of fishery resources. According to the *Oxford Concise Dictionary*, the meanings of the word "measure" include, "legislative enactment" and "suitable action (as in to take measures to ensure that)". This is exactly what this case concerns: a legislative enactment and suitable measures taken to implement it.

47. In fact, the word "measures" is about as broad and elastic a term as one could imagine. It includes all kinds of actions taken to achieve an end or goal. The Spanish Memorial quotes *Webster's Dictionary* definition of measure as, "an act, step or proceeding designed for the accomplishment of an object" (pp. 80-81, para. 70). In other words, it refers to actions that are taken deliberately, with a definite person in mind. It certainly covers all acts of a State taken in pursuit of a national policy, whether they be physical, economic, administrative or legislative. The Spanish Memorial says quite rightly that it is "an abstract term" (in French, *"un mot abstrait"*),

which means that it is a **generic** term (p. 80, para. 70). In other words, the word "measures" may cover an unlimited range of actions that falls within the general definition.

48. Contrary to what our Spanish colleagues have alleged, the phrase "conservation and management" covers the whole range of measures taken by States with respect to the living resources of the sea. It covers both the protection of the resource, or "conservation" *per se*, and the "management" of the fishery. In many cases these two terms overlap. The use of the two terms in combination conveys a clear intention to cover the broadest possible range of measures, from the most traditional regulatory controls to measures that have yet to be tried or even conceived. There are no limitations implied by this phrase, other than the obvious requirement that the measure should be addressed to the fishery and to its rational exploitation.

49. It is precisely because of its comprehensiveness that the term "conservation and management measures" has been used in innumerable international instruments such as the *1958 Geneva Convention on the High Sea Fisheries*, the 1982 *United Nations Convention on the Law of the Sea*, the 1995 *United Nations Straddling Stocks Agreement (The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks)* and the 1993 *FAO Compliance Agreement (Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas)*. What is included is anything related to the conservation and management of fishery resources, such as legislative, regulatory and administrative measures, providing for, *inter alia*:

- The determination of the species that may be caught and those that may not be caught, including the absolute prohibition of the fishing of certain species;
- the fixing of catch quotas, whether in relation to particular stocks or catches by particular vessels over a specified period of time;
- fish size limits;
- the regulation of the seasons and areas of fishing;
- the regulation of the types of gear that may be used; and
- regulations concerning the vessels permitted to fish.

50. The conservation and management measures in the 1994 legislation and the regulations were not at all unusual; they are the same type of conservation and management measures used by Canada within its own waters, applied by NAFO member States in the NAFO Regulatory Area, and found in various international fisheries agreements. In its Memorial, Spain admits that the Canadian measures are the same type of "conservation and management measures" as those found in international conventions (p. 84, para. 75). However, it argues that the measures taken by Canada were not "conservation and management measures", because they were applied to an area beyond the 200-mile zone. All of Spain's counsel have made this the *leitmotif* of their submissions. And there are two answers to this, and they are related.

51. First, in order to establish a definition, one must distinguish what is **essential** to the term being defined from that which is merely **incidental**. The essential aspect of "conservation and management measures" is that they are designed to control a fishery and to preserve and protect the stocks from diminution or depletion. What matters is the subject-matter, the function and the purpose of the measures. The geographical area where these measures apply will, of course, vary. In other words, contrary to the Spanish contention, the **location** of the measures is irrelevant to their essential nature as conservation and management measures. A measure to control fishing is a conservation and management measure, no matter where it is applied or enforced.

52. Second, Spain implies that the expression is limited to what has been done in the past in response to past problems. But this is a distortion of the concept of a generic category. As we noted in our Counter-Memorial, a generic category is never limited to the known examples it contains (para. 91). A measure is a fisheries or conservation measure if it is an "act, step or proceeding" — to use the words from *Webster's* dictionary cited in the Spanish Memorial — an act, step or proceeding taken for purposes of the conservation and management of fisheries. Whether it fits in an existing pattern of State practice and law in a rapidly evolving field such as fishery management, is frankly, irrelevant. New measures will always be devised to solve new problems, and such measures will be encompassed within the scope of the term "conservation and management measures" if they fall within the general definitions of that term. It is the subject-matter of the measures that is decisive, not their novelty. To deny this truth would not only be to deny logic,

it would reject the clear holding of this Court with respect to generic categories in the *Aegean Sea* case. The decision in the *Aegean Sea* case settles the question: generic language is to be construed generally, it extends even to matters that could not have been contemplated when the reservation was made, which, of course, is not the case here (*I.C.J. Reports 1978*, pp. 32-33, paras. 77-78). *A fortiori*, the language applies where the whole purpose of the legislation was to protect straddling stocks just beyond the 200-mile limit.

53. Spain has implied that the word "measure" cannot cover a legislative enactment such as Bill C-29 (Spanish Memorial, Annexes, Vol. I, Ann. 14). As we have seen, the ordinary dictionary definition of the word "measure" includes "legislative enactment" as one of its principal meanings. Moreover, this usage is accepted internationally in a broad range of legal instruments. The word "measure" is used in innumerable international conventions to encompass statutes, regulations, and administrative actions. For example, Articles 61 and 62 of the 1982 Law of the Sea Convention use the expressions "conservation and management measures" and "conservation and management laws and regulations" almost interchangeably. The context leaves no doubt that "measures" includes legislative measures in either statutory or regulatory form.

(d) "Taken by Canada"

54. Moving to the next phrase, Mr. President, the reservation is limited to measures "taken by Canada", restricting its scope to measures taken by the declarant State. It is clear that the phrase "taken by Canada" refers to enforcement measures, as well as to conservation and management measures. In its Memorial, Spain suggests that the reservation could have been intended to cover enforcement actions taken by flag States against their own vessels (p. 93, para. 102). Frankly, the very idea is absurd. Who else but Canada would wish to enforce Canadian conservation measures? Who else but Canada would arrest vessels at sea under its legislation? The phrase "by Canada" was omitted the second time simply to avoid redundancy.

(e) "With Respect to Vessels Fishing"

55. Moving to the next phrase, Sir, the target of the measures in the reservation is "vessels fishing" in the NAFO Regulatory Area. There is no limitation on the categories of fishing vessels

to which the reservation applies. It applies to **any** vessel fishing in the NAFO Regulatory Area, whether it is stateless or duly registered, whether it is registered in a NAFO State or a non-NAFO State, whether it is registered in an "open registry" or in one of the principal maritime powers. Any suggestion to the contrary would contradict the plain meaning of the words. Spain suggests that in order for the reservation to cover all vessels registered in any State, the reservation would have to include the word "all". Again, this is a distortion of plain language and a perversion of the rules of grammar. It is clear that if the noun "vessels" is unqualified by any limiting word or phrase, it necessarily refers to all vessels and to any vessels. What else could it mean? To what in fact does an unqualified noun refer? The answer is elementary: to anything falling within the general definition of that noun, or in our case, to any fishing vessel. No other logical meaning is possible.

(f) "In the NAFO Regulatory Area . . ."

56. Thus far, we have established that the reservation covers anything related to conservation and management measures taken by Canada with respect to any and all vessels fishing. The next question is where? Not anywhere, as is sometimes implied by Spain, but in one specific, well-defined geographical area: the NAFO Regulatory Area. Because the conservation and management measures set out in the 1994 legislation apply to the NAFO Regulatory Area, the reservation was drafted in exactly the same terms. And thus it refers to "vessels fishing in the NAFO Regulatory Area, as defined in the *Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978*", usually referred to as the NAFO Convention (Spanish Memorial, Annexes, Ann. 21). The NAFO Convention applies to a defined "Convention Area" that covers much of the Northwest Atlantic, including the Grand Banks of Newfoundland, where the continental shelf extends well beyond the 200-mile limit. The Convention Area lying **outside** the 200-mile limit on the high seas is called the NAFO Regulatory Area (Art. I). This area is shown on the right-hand side of the map included in your folders at Tab 7. There is no disagreement between the Parties that the seizure of the *Estai* occurred in the NAFO Regulatory Area.

(g) "And the Enforcement of Such Measures"

57. Finally, Sir, I come to the phrase "and the enforcement of such measures". Spain has devoted a great deal of time, effort and imagination, I might say, to a deliberate attempt to distort the meaning of "enforcement". In Canada's view, the word "enforcement" should be given its ordinary meaning in relation to fisheries management and conservation measures. That is, it refers to measures such as those necessary to effect the boarding and inspection of vessels at sea, including coercive measures if the boarding is resisted; arrest if there is evidence of a major infringement; inspection in port; and prosecution, if the evidence so warrants, all under due process of law. My colleagues, Mr. Willis and Professor Weil will address this matter later, but I wish to make at this time just three points.

58. First, we are here clearly not dealing with the use of force in international relations as referred to in Article 2, paragraph 4, of the United Nations Charter. We are dealing with the use of reasonable force by fisheries protection officers for the sole purpose of arresting a fishing vessel suspected of violations of conservation and management measures. Second, the use of some kind of coercion is an inherent and necessary part of the enforcement of any law, whether on land or at sea. Obviously the word "enforcement" is derived from and related to the English word "force". It is normal and customary practice everywhere in the enforcement of all kinds of laws for peace officers or policemen to use coercive measures to effect an arrest. The types of measures used by Canada are not at all unusual.

59. Third, if the use of force is not specifically **excluded**, it must be **included** in any reasonable and logical definition of the word "enforcement". This is the clear teaching of the Court in its recent Judgment in the *Oil Platforms* case (Judgment of 12 December 1996, para. 21), where it recognized that in interpreting a provision in an instrument relied on for compulsory jurisdiction, the absence of a reference to the use of force in the text of the instrument did not mean that an incident involving the use of force was excluded from jurisdiction. Although in our case the type of force used was very, very different, the same principle applies. The fact that the word "force" was not included in the reservation does not mean that such measures are excluded from the scope

of the reservation. This is all the more so, in that "enforcement" in this case would have been impossible without the use of some coercive measures.

Conclusion

60. As we said in our Counter-Memorial — but it bears repetition — the Canadian reservation is both precise in its delineation of the subject-matter, and comprehensive in its exclusion of everything related to that subject-matter from the jurisdiction of the Court (paras. 86 and 115). The language is simple and the meaning is clear. Taking into account the interpretation of all the individual words and phrases of the Canadian reservation, the reservation as a whole clearly covers anything directly or indirectly related to laws, regulations and administrative actions concerning fisheries jurisdiction, management and conservation, taken by Canada, with respect to all vessels fishing in the NAFO Regulatory Area, and to the enforcement by Canada of those same conservation and management measures.

2. The Plain Meaning is Confirmed by the Intention Evident in the Surrounding Circumstances

61. Mr. President, distinguished Judges, this interpretation of the Canadian reservation derived from the plain meaning of the words is confirmed by the intention evident in the surrounding circumstances. As we have seen, in cases such as *Anglo-Iranian* and *Aegean Sea*, the Court carefully explored the historical circumstances in which the declaration was originally made in order to determine the intention of the declarant State. In both cases, a grammatical ambiguity allowed one party to argue that the reservation meant something different from the meaning discerned by the Court on an initial reading, but in both cases, the intention derived from historical circumstances confirmed the meaning apparent in the text.

62. There is no such ambiguity in the present case, but the circumstances do provide confirmation of the only "natural and reasonable way of reading the text", to use the words of the Anglo-Iranian Judgment (*Anglo-Iranian Oil Company., I.C.J. Reports 1952,* p. 104). As the Agent has already stated, Bill C-29 was introduced into the House of Commons on 10 May 1994. That very same day, Canada withdrew its existing declaration of acceptance of jurisdiction and

substituted the new declaration, which of course, included the reservation set out in paragraph 2 *(d)*. The sole purpose of withdrawing the old reservation and substituting a new one was to add the new reservation in paragraph 2 *(d)*. The addition of the reservation was thus timed to coincide precisely with the introduction of the legislation.

63. The exact coincidence in timing of Bill C-29 and the new declaration demonstrates that the reservation was deliberately designed to exclude Bill C-29 and everything done in or in connection with it from judicial settlement. Canada took great care to ensure that the new reservation was in place on the very day of its introduction into the legislation, before its passage through Parliament and before any regulations were passed or enforced.

64. On the day on which Bill C-29 was introduced, and on which the new declaration was deposited, the Government of Canada issued a single press release explaining both initiatives. After reviewing the legislation, the press release states: "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" (Counter-Memorial, Annexes, Ann. 35). The stated objective clearly covers the entire matter of Bill C-29, which was designed to protect the straddling stocks in the NAFO Regulatory Area.

65. Further confirmation of the intention of the Canadian Government and of the meaning of the reservation is found in the statement of the Minister of Foreign Affairs in the Canadian Parliament on 12 May. In response to a question posed during the Senate debate, the Minister explained that "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" (Spanish Memorial, Annexes, Vol. I, Ann. 16).

66. It is clear that the purpose of the reservation was, as the Minister put it, to protect "the integrity of this legislation", which can only mean the Statute itself, together with its regulations and the enforcement actions which it authorizes. The reservation covers the same range of measures as the legislation itself, which includes all vessels in all forms of fisheries conservation and

management in the NAFO Regulatory Area, with none of the imaginative restrictions conjured up by our worthy adversaries.

67. In the *Anglo-Iranian* case, the Court looked to the law passed by the Iranian Parliament to approve the declaration of assistance in order to ascertain the Iranian intentions as to its meaning. The Court referred to this evidence as being "decisive" (*I.C.J. Reports 1952*, p. 107). In the *Aegean Sea* case, the Court referred to an explanation of the reservation given by the Greek Government to its national legislature in an *exposé des motifs* accompanying the Bill authorizing ratification, as putting the intention of that government "beyond doubt" (*I.C.J. Reports 1978*, p. 27, para. 66). In the present case, the official press release and ministerial statements on the reservation have exactly the same relevance and probative value.

68. The press release and the oral statement to questions by the Foreign Minister are identical in substance. Both make perfectly clear that the purpose of the new reservation in the Canadian declaration was to protect the 1994 legislation and the actions taken pursuant to it from being contested before this Court. Neither statement leaves the slightest doubt about the intention of Canada, which in any event is equally clear from the text of the reservation itself.

69. In this case, the Court does not have to choose between different principles of interpretation. There is no contradiction between the stated intention and the plain language of the text. There is nothing in fact to interpret; the Court has only to apply the simple and unambiguous language of Canada's reservation.

C. Application of the Reservation to the Present Case

Introduction

70. Mr. President, distinguished Judges, I now come to the final part of my presentation. In the first part, I reviewed the requirement of consent and the principles of interpretation of optional clause declarations. In the second, I applied those principles to the interpretation of the Canadian declaration of 10 May 1994. In this third part, I shall apply the reservation to the facts of the present case.

71. To determine whether the dispute falls within the Canadian reservation, we have first to identify the relevant facts (*Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 34, para. 81). It is far from clear from the sometimes contradictory Spanish pleadings what exactly Spain considers this case to be about. But whatever Spain claims that it is — the arrest of the *Estai*, the 1994 legislation or the application of the legislation to Spain in the regulations of 3 March 1995, or all three — they are all unequivocally covered by the reservation.

1. The Facts Relevant to Jurisdiction

72. The first point to note about the Canadian reservation, Mr. President, 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. Conservation and management measures have as their subject-matter the regulation and protection of fisheries. A simple reading of the Canadian legislation confirms that it concerns the regulation and protection of fisheries, and that it is plainly a conservation and management measure in the sense of the reservation. This can lead to only one conclusion: any dispute involving this legislation or actions taken under it falls within the factual ambit of Canada's reservation and therefore outside the jurisdiction of the Court.

73. As explained by the Agent, the background to the legislation was the fisheries crisis of the early 1990s. Canada had faced the successive collapse of one after another of the commercial fish stocks off its Atlantic coast. By 1994, almost all the valuable groundfish stocks which straddle the outer limit of Canada's 200-mile zone, were under moratorium, that is to say, under absolute prohibition from fishing. Faced with a conservation crisis, and unfortunately unable to persuade all States involved to control their vessels, the Canadian Government felt compelled to take special measures to conserve the fisheries. On 10 May 1994, it introduced into Parliament Bill C-29, containing amendments to the *Coastal Fisheries Protection Act*, establishing fisheries conservation measures for foreign vessels fishing in the NAFO Regulatory Area. Further details of specific restrictions on fishing, as well as the specific fish stocks affected and the vessels covered, were

prescribed in regulations adopted two weeks later on 25 May (Spanish Memorial, Annexes, Vol. I, Ann. 17).

74. These regulations were further amended in 1995 to address the imminent threat posed by Spanish and Portuguese vessels to Greenland halibut (Spanish Memorial, Annexes, Vol. I, Ann. 19). Greenland halibut was the last commercially viable straddling stock of any significant size in the Northwest Atlantic. Despite NAFO's decision to allocate 3,400 tonnes of Greenland halibut to the European Union for 1995, the EU unilaterally adopted its own quota of 18,630 tonnes, more than five times higher than the quota allocated to the EU by NAFO. Since diplomatic approaches had failed to prevent this unilateral EU action, Canada felt compelled to take emergency actions to prevent the overfishing of Greenland halibut by Spain and Portugal. In an amendment to the regulations implementing the 1994 legislation, the names of Spain and Portugal were added to a new table of countries subject to a prohibition on fishing Greenland halibut, as well as to such NAFO measures as limitations on fish size and on the mesh size of nets.

75. Spain and Portugal were the only countries named in the new regulations, because they were the only EU countries fishing for Greenland halibut and because they had a history of overfishing and of breaching NAFO rules (Counter-Memorial, paras. 33-34).

76. Despite Canada's continued efforts to address the conservation crisis in co-operation with all States concerned, it had become clear that Spanish and Portuguese vessels were prepared to far exceed even the quotas allocated by NAFO. In fact, by early March, they had exceeded their NAFO quota for the whole of 1995 — that is to say, by the beginning of March, they had exceeded their NAFO quotas for the whole of 1995. Canada therefore felt compelled to enforce its conservation and management measures against Spanish vessels in the NAFO Regulatory Area. I must say I was surprised to hear my friend, Keith Highet, assert that Canada provided no warnings concerning the application of its measures to Spanish and Portuguese vessels (CR 98/10, p. 18). In fact, Mr. Highet, messages were broadcast to the NAFO Regulatory Area in various languages, including Spanish and Portuguese, providing direct notice of the 3 March 1995 amendments to the Coastal Fisheries Protection Regulations (Canadian Counter-Memorial, p. 21, fn. 72). I refer you to Annex 32 to Canada's Counter-Memorial where you will find the text of this announcement. On

9 March 1995, Canadian fisheries protection officers boarded and seized the Spanish fishing vessel *Estai*, in accordance with the *Coastal Fisheries Protection Act* and its regulations. The master and the vessel were subsequently charged with offences under the regulation, including, "fishing for, or catching and retaining Greenland halibut" (Regulations of 3 March 1995, Spanish Memorial, Annexes, Vol. I, Ann. 19, p. 307).

2. The Facts of this Case Fall Squarely within the Canadian Reservation

77. Mr. President, distinguished Judges, the facts are clear; the law is clear; and the application of the law to the facts is equally clear. Everything complained of by Spain falls squarely within the Canadian reservation. First, the entire purpose and only subject-matter of the legislation is a response to the conservation crisis of the Northwest Atlantic. There can be no doubt that the Canadian legislation itself is a "conservation and management measure", and, as such, it falls within the terms of the Canadian reservation. Similarly, there can be no doubt that any dispute **concerning** the legislation also falls within the terms of the legislation.

78. Second, it is equally clear that the regulations of 3 March 1995, which applied the legislation to Spain and Portugal, were a conservation and management measure. The subject-matter of those measures was the conservation of the rapidly dwindling stock of Greenland halibut, in the words of the legislation, "to prevent further destruction of this stock". Whether any of this was urgently needed or not, whether it was warranted in the circumstances or not, whether it was lawful under international law or not, none of these issues is now before the Court. Rather, what is before the Court is whether what Spain complains of is covered by the Canadian reservation. This, in turn, depends on whether the measures Canada took were for fisheries conservation and management. Incontestably, they were. A prohibition on fishing a defined stock in a defined area is inherently a conservation and management measure. Its character as a conservation and management measure does not logically depend on how urgently it may be needed, on whether or not it was warranted under international law and whether it was warranted in the circumstances. These are questions for the merits. This Court is not now considering the merits, but rather jurisdiction, based on Canada's declaration and reservation. The transparent

intention of Canada's reservation was to prevent the adjudication of such questions because they were more appropriate for negotiation. I submit, Mr. President and distinguished Judges, that the Court is bound to give effect to that intention and to refrain from an examination of the merits.

79. Finally, it is clear that the boarding and seizure of the *Estai* on 9 March 1995, including all the related prior and subsequent acts, were measures taken by Canada to enforce the conservation and management measures in the legislation and regulations. Accordingly, there can be no doubt that the enforcement measures taken against the *Estai* also fall squarely within the terms of the Canadian reservation. Any claim concerning these enforcement measures is therefore excluded from the Court's jurisdiction.

80. The seizure of the *Estai* for fishing a straddling stock pursuant to the provisions of the 1994 legislation is precisely what was envisaged in paragraph 2 *(d)* of the Canadian declaration. In contrast to *Aegean Sea*, this is not a case where the "situations or facts" are at some remove from those that initially motivated the filing of the reservation. What has happened here is exactly the type of situation that was anticipated when the reservation was filed. As stated in the Canadian Counter-Memorial, there is virtually an exact coincidence between what was foreseen and what happened — between the motive, the intention and language of the reservation and the actions complained of by Spain (para. 100).

Conclusion

81. Mr. President, distinguished Members of the Court, the outcome in this case must be that the Court is without jurisdiction. There can be no other result where the reservation is clear in its text, where the declarant's intention is amply demonstrated and accords with the clear meaning of the text, and where the litigation arises in relation to the specific issue that prompted the reservation: namely the legislation of May 1994 and its subsequent implementation in March 1995. That the issue is the very thing contemplated by the reservation has to be conclusive against jurisdiction. Any other result would be incompatible with the requirement that there be consent and that it must be real.

82. Mr. President, distinguished Judges, I thank you for your patience and attention, and request that you invite my colleague, Mr. Willis, to address the Court.

The PRESIDENT: Thank you, Mr. Hankey. I call upon Mr. Willis.

Mr. WILLIS: Mr. President, distinguished Judges. For me, as for any jurist, it is a great honour and a privilege to appear before the International Court of Justice. I am genuinely grateful for the opportunity, and I hope to do justice to the responsibility my government has given to me.

1. You have just heard Mr. Hankey on the Canadian interpretation of the reservation in the declaration. My topic is the Spanish interpretation. There should have been very little to say. The reservation is plain, short and simple: barely five lines of text on a clearly-defined topic. Our opponents have, however, taxed their imaginations and have proposed not one but a variety of interpretations, all of which contradict the natural meaning of the text and the intention disclosed by the circumstances.

2. This morning, Mr. President, I will deal with some of the specific interpretations that Spain has proposed. First, and most important, Spain's restrictive interpretation of the expression "conservation and management measures". Secondly, its restrictive interpretation of the expression "enforcement". And finally, the Spanish suggestion that the word "vessels" was intended to refer only to "pirate" or stateless vessels, contrary to the plain meaning of the language and to all the evidence.

3. In addition to these specific questions, however, I will also discuss two implicit but nevertheless fundamental themes that lie behind the various Spanish interpretations. One is that the Canadian reservation should be given the most restrictive conceivable interpretation. The second implicit theme, which I will deal with at the end of my presentation tomorrow, is that one way or another the Canadian reservation must be deprived of any practical effect. These two implicit themes, of course, go together because the whole point on the attempt to cut down on the meaning of the words is simply to ensure that the Canadian reservation fails to achieve its intended effect.

1. Restrictive Interpretation

(a) General

I begin with the first of these two implicit themes, restrictive interpretation.

4. Spain of course does not admit to a strategy of restrictive interpretation. This week Professor Remiro Brotóns expressly disavowed a restrictive approach. He said, correctly, that the criteria for interpretation are neither restrictive nor expansive (CR 98/9, p. 57, para. 8). The Spanish Memorial cited the excellent passage from the dissent of Judge Read in the *Anglo-Iranian* case — that declarations "should be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to thwart the intention of the State in exercising this sovereign power" (Spanish Memorial, para. 37; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), I.C.J. Reports 1952*, pp. 143-144).

5. So at times the parties appear superficially to be in agreement on the basic approach. But, Mr. President, theory is one thing and practice is another. And in practice, the facts speak for themselves: the specific interpretations Spain has proposed are about as restrictive as the human mind could conceive. And even at the level of theory, or doctrine, the Spanish arguments are shot through with contradictions. The Spanish Memorial said that reservations are subject to a presumption that in making reservations a State intends to restrict the Court's jurisdiction "in the most limited form permitted" by the rules of interpretation (Spanish Memorial, paras. 7, 42, 71). And Professor Remiro Brotóns said essentially the same thing this week (CR 98/9, p. 58, para. 11). So in reality the Spanish commitment to restrictive interpretation is about as clear as it could possibly be.

6. Mr. President, there are no presumptions that apply to the interpretation of reservations. There can be no presumptions, because the law requires strict proof of consent; and the requirement of strict proof means that presumptions have no role to play. The Court must be satisfied that there is in the well-known phrase, a "voluntary and indisputable acceptance" of its jurisdiction in every case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 342, para. 34). Mr. Hankey has reviewed the principles of jurisdiction and the principles of

interpretation. At every step of the way these principles contradict the Spanish argument that reservations are to be interpreted "in the most limited form permitted".

7. At the heart of the Spanish argument is the idea that optional clause reservations are to be interpreted restrictively as exceptions to a rule. But this would imply that consent to jurisdiction is the rule, to which reservations are exceptions (CR 98/10, p. 15, para. 34). Mr. President, there is no such rule. If anything the rule is the contrary — that jurisdiction does *not* exist, unless and until it is accepted. And acceptance depends upon the *whole* of a State's declaration, including the reservations.

8. As Mr. Hankey has just explained, the declaration in its entirety is a single legal instrument with a single intention, a single expression of legal will that defines and limits the jurisdiction. The *Aegean Sea* decision confirms this: it refers to the "close and necessary link that always exists between a jurisdictional clause and reservations to it" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 33, para. 79). Every part of the declaration has exactly the same status as every other part, as a free exercise of sovereignty whereby jurisdiction is both conferred and limited. It would therefore be wrong in principle to place the grant of jurisdiction on a higher footing than the limitations, or to interpret the one more broadly than the other.

9. Professor Remiro Brotóns appeared to concede the point — he said that the declaration and the reservation are all part of the same document and indeed accused Canada — without demonstration — of treating the reservation as a separate instrument (CR 98/9, p. 56, paras. 5, 6). But the concession he made turns out to be empty, because a moment later we were told that a grant of jurisdiction is the principle and the reservation is the exception (CR 98/9, p. 58, para. 11). So one is forced to ask: what exactly is Spain's position? If there is to be no restrictive interpretation, why do reservations have to be interpreted "in the most limited form permitted"? And if declarations and reservations are all part of a single act, why is one the principle and the other the exception?

10. The Spanish Memorial and Professor Remiro Brotóns this week, invoked the *contra proferentem* doctrine, from the law of contracts, but failed to point out that this was argued unsuccessfully, and therefore implicitly rejected, in the *Anglo-Iranian* case (Spanish Memorial,

para. 36; CR 98/9, pp. 14-15, paras. 32-33). The *contra proferentem* doctrine properly relates to contractual matters and was applied as such in *Brazilian Loans*. It also depends on the existence of an ambiguity, which Spain asserts but fails to demonstrate. And finally, it would produce unreasonable results where the reciprocity aspect of the optional clause comes into play.

11. Sir Gerald Fitzmaurice considered whether the principle might have some relevance in the context of jurisdictional clauses, but he concluded that "it overlooks the fact that States would not be subject to international jurisdiction at all but for their own consent" *(The Law and Practice of the International Court of Justice*, Vol. II (1986), p. 514). And that, I suggest, hits the nail on the head and demonstrates that any attempt to interpret the words narrowly would be wrong, even if it respected the bounds of grammatical meaning.

12. This is why Judge Jennings in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, pointed out that, because no State is required to grant its consent under the optional clause, and relatively few have done so, "any reservation qualifying such a consent especially demands caution and respect" (*I.C.J. Reports 1986*, p. 529).

13. There may be a temptation to think that reservations are an undesirable feature of the optional clause system, and should therefore be narrowly interpreted. Implicit or explicit, this would be the wrong approach. Reservations make a positive contribution. They allow States to participate when they might otherwise consider an unlimited acceptance of jurisdiction to be incompatible with their essential sovereign interests. The flexibility that reservations provide is essential to a widespread acceptance of compulsory jurisdiction under the optional clause. But they make this positive contribution only if given their full intended effect, not grudgingly restricted to something less than the natural meaning of the words, and the intention disclosed by the circumstances.

14. If the restrictive approach taken by Spain were ever adopted, the practical results would be unfortunate. States would be led to draft reservations in more sweeping terms than the circumstances actually require, simply as an insurance policy against interpretations that attempt to give as little meaning to the words as possible. Some States might withdraw their consents

altogether. This is why the established approach of the Court as demonstrated in *Anglo-Iranian* and *Aegean Sea* is sound both in law and in its practical effect, and why it should be maintained.

15. We heard very little this week about the theory of "anti-statutory interpretation" in the Spanish Memorial, and I will therefore not revisit the issue today. But Professor Dupuy did develop an argument that the Canadian interpretation is somehow incompatible with Article 36, paragraph 6, of the Statute, the fundamental provision that empowers the Court to adjudicate upon its own jurisdiction *(la compétence de la compétence)* (CR 98/10, pp. 51-53, paras. 33-36).

16. Professor Dupuy as we understood him, took issue with our position that an interpretation that respects the language of the text and the intention of the declaring State cannot be anti-statutory (CR 98/10, p. 52, para. 34). He said this was a "radical" position, that would turn the reservation into an "automatic reservation", a self-judging reservation, inconsistent with the power of the Court under Article 36, paragraph 6, of the Statute.

17. Mr. President, the Canadian approach can hardly be "radical". It happens to be the position of the Court as expressed in both *Anglo-Iranian Oil* and *Aegean Sea.* When the Court gave effect to the natural meaning of the text and the intention of its author at the time when it filed the reservation, it was hardly abdicating its function under Article 36, paragraph 6. On the contrary it was *exercising* that function. How the judicially accepted and orthodox principles that Canada has advocated could be called radical, or inconsistent with Article 36, paragraph 6, remains a mystery.

2. The Spanish Interpretations

The Common Theme: That the Measures were not Conservation and Management Measures

18. I said, Mr. President, that Spain has proposed a variety of interpretations. But there is one theme that dominates, and necessarily so. Spain has attempted to establish that the measures taken by Canada which gave rise to this case were not conservation and management measures within the meaning of the Canadian reservation.

19. It is obvious that Spain would have to succeed on this point in order to establish a basis for jurisdiction. In order to show that there is a consent to jurisdiction under the Canadian

declaration, Spain would have to demonstrate that the legislative, regulatory and enforcement measures Canada took in 1994 and 1995 were not conservation and management measures as that term is used in the reservation. If Spain cannot prevail on this point, the Court cannot have jurisdiction, because the measures were clearly taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as the reservation provides; and it was these measures that triggered the dispute. Mr. President, I suggest that this is a battle that Spain cannot win, because the record shows that the measures were exactly what was contemplated by the reservation, and because the language of the reservation is clear.

20. I invite the Court to join me in a close look at the terms of the Canadian legislation and regulations. It will be apparent that these are conservation and management measures in every conceivable respect.

21. I begin with the legislation introduced as Bill C-29 in 1994, which I will simply refer to as "the legislation". This is a set of amendments to the *Coastal Fisheries Protection Act*, dealing specifically with the issue of straddling stocks in the NAFO Regulatory Area, illustrated at Tab 7. Let me review the key terms, which Mr. Hankey has introduced. "NAFO", as the Court knows, stands for the Northwest Atlantic Fisheries Organization, which is the treaty organization set up for the express purpose of promoting "the conservation and optimum utilization of the fisheries resources of the Northwest Atlantic" (Spanish Memorial, Ann. 21, Preamble). The NAFO treaty applies to a defined "Convention Area" which covers much of the Northwest Atlantic, including the Grand Banks of Newfoundland where the dispute arose (Art. 1). The treaty also defines a "Regulatory Area", which is the portion of the Convention Area lying outside and beyond the 200-mile limit, on the high seas (Art. 2).

22. It is this NAFO Regulatory Area to which the legislation of 1994 and the regulations made under that legislation apply. It is also the area to which the Canadian reservation applies. The "straddling stocks" referred to in the legislation are of course the stocks that overlap the 200-mile limit. Greenland halibut is one of them, cod is another. They are all species whose range extends beyond 200 miles because of the very broad continental shelf off this part of the Canadian coast.

23. With that as background, I would ask the Court to consider the terms of the legislation. The purpose is set out in Section 5.1, which is reproduced at Tab 8. That purpose is to take urgent action "to prevent further destruction" of the straddling stocks of the Grand Banks of Newfoundland, and to permit the rebuilding of these resources while continuing to seek international solutions to the conservation problem. All this is found in the concluding words of Section 5.1. The preceding paragraphs of that section focus on the conservation crisis in greater detail, stating that the straddling stocks are threatened with extinction; that there is an urgent need for all fishing vessels to comply with sound conservation and management measures; and that some foreign fishing vessels are fishing straddling stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of such conservation and management measures.

24. So much for the object and purpose of the legislation. According to its terms it is conservation and management, and nothing else. It is precisely what is described in and intended by the reservation.

25. I turn next to the substance of the legislation, paraphrasing the technical terms. Three things have to be prescribed by regulations. First, the classes of fishing vessels to which the legislation will apply. Second, the straddling stocks concerned. Third, the detailed conservation and management measures to be applied, such as quotas or the size limits of fish. Section 5.2 then takes effect to prohibit persons on the designated foreign vessels from fishing for the designated straddling stocks in violation of the detailed conservation and management measures as set out in the regulations.

26. The regulations obviously derive all their legal force from the legislation. It is Section 6 of the legislation that authorizes the necessary regulations, and the wording is highly instructive. The regulations are to be made in order to ensure that foreign fishing vessels do not "engage in any activity that undermines the effectiveness of measures . . . that are taken under the NAFO Convention", or "any other measures for the conservation and management of a straddling stock".

27. This, Mr. President, is the heart of the legislative scheme. The terms are clear. The substance and subject-matter of the legislation — like the purpose — is conservation and management. And because a legislative measure is obviously a measure, it

follows — inescapably — that the legislation is a conservation and management measure, taken by Canada, with respect to vessels fishing in the NAFO Regulatory Area. To suggest that the legislation is not covered squarely by the reservation is simply to deny any meaning whatsoever to the words of the reservation.

28. The rest of the legislation deals with enforcement, which is also specifically expressly covered by the reservation. There are detailed provisions on enforcement personnel, boardings, inspections, searches and seizures, judicial search warrants, arrests; use of lawful force; and on the preservation of evidence. As with the case of any regulatory legislation, there are penalties for violations. There is also a section on the application of Criminal Law, which is strictly limited to cases where offences are committed in the course of enforcing this legislation, the *Coastal Fisheries Protection Act* — again, therefore, a provision that is directly linked to the enforcement of conservation and management measures. Each and every one of these provisions, Mr. President, relates to the enforcement of conservation and management measures with respect to the NAFO Regulatory Area and they are accordingly covered by the reservation. I will come later to Spain's arguments with respect to Bill C-8 which Spain filed this week.

29. The Spanish Memorial quoted the words of the Canadian Minister in the parliamentary debates — "this is not an extension of jurisdiction", he said "this is a *conservation régime* that we are introducing today" (Spanish Memorial, para. 17). The legislation had no purpose but to address the fisheries crisis of the Northwest Atlantic and the collapse of the stocks. It defies both logic and imagination to suggest that such an initiative could be anything other than a conservation and management measure.

30. I turn next to the regulations made under this legislation — first, the initial set of regulations passed soon after the legislation was adopted in 1994, and then the 1995 amendments that extended the application of the legislation to Spain and precipitated the dispute.

31. It is elementary in Canadian legislation, as in many legal systems, that regulations are simply legal instruments for carrying out the general directives of statutory legislation, and all their legal force is derived from the legislation. If the legislation is concerned exclusively with

conservation and management measures — which we believe is clear — the same must logically be true of the regulations.

32. And so it is. The initial regulations under this legislation were passed in May 1994. They appear at Annex 17 to the Spanish Memorial. They were made applicable only to vessels without nationality, and to vessels registered in certain open registry States because of the "re-flagging" problem — the practice of switching a vessel to an open registry in order to avoid NAFO restrictions. The regulations identify the relevant straddling stocks, including Greenland halibut, and impose a prohibition on fishing for the designated stocks in the NAFO Regulatory Area.

33. This was patently a conservation and management measure. Its only function was to protect the designated stocks from unregulated over-fishing. Annex 17 of the Spanish Memorial includes an explanatory statement called a Regulatory Impact Analysis Statement, which in Canadian legislative practice accompanies any federal regulation, but does not actually form part of it. This explanatory document sets out the purpose of the prohibition on fishing for the designated straddling stocks. It explains under the heading "Benefits and Costs" that the measures are required to prevent the commercial extinction of fragile fish stocks. The introduction to the explanatory statement also states that the primary threat to the recovery of these stocks, as of the spring of 1994, was posed by vessels without nationality as well as vessels operating under "flags of convenience" that are not subject to the NAFO Convention.

34. The remainder of this initial set of regulations under the 1994 legislation is concerned with enforcement — the enforcement of conservation and management measures, both within and beyond the 200-mile limit. The amendments provide for the use of force as a last resort, when nothing else will get the vessel to stop. They also provide for a series of warning shots at a safe distance to give the vessel a reasonable opportunity to comply, and for the use of the international signals L, SQ1 and SQ3 prior to boarding or to the use of warning shots. These signals, as the regulations indicate, are taken from the International Code of Signals, which has been approved and adopted by the International Maritime Organization.

35. These measures plainly deal with enforcement in the strictest and most traditional sense. International conventions bear this out — including the 1995 United Nations Straddling Stocks and Highly Migratory Species Agreement — the New York Agreement — cited by Spain (Spanish Memorial, para. 80; UN Doc. A/CONF. 164/37, 8 September 1995, adopted 4 August 1995). Article 22, paragraph 1 *(f)* of the agreement specifically contemplates the use of reasonable force where inspectors are obstructed in the execution of their duties. Professor Sánchez Rodríguez mentioned Article 73 of the 1982 Law of the Sea Convention (CR 98/9, p. 36, para. 18), which does not *expressly* refer to force; but it does refer to the *arrest* of foreign vessels; and it is common knowledge — and common sense — that arrests at sea of foreign vessels are not always voluntary and potentially require a use of force. It is also common knowledge and common sense that any kind of law enforcement against unwilling parties may sometimes involve a use of force. The use of warning shots at a safe distance is a well-known international practice, designed to minimize risks to the safety of life at sea. That is why the procedure is reflected in the International Code of Signals, as Signal SQ3, to which the regulations refer. And Spain overlooks something that is fundamental, but that is spelled out in all the documents — the whole purpose of these provisions is to *limit and restrict* the use of force, not to encourage it — to make sure that force is used only as a last resort, when nothing else will do. The Regulatory Impact Analysis in Spanish Annex 17, makes that absolutely clear.

36. We were surprised to hear Professor Sánchez Rodríguez say that the use of force can never be interpreted as being the enforcement of conservation and management measures (CR 98/9, p. 27, para. 6). He offered no reasons. The statement is contrary to international conventions, in particular Article 22, paragraph 1 *(f)*, of the United Nations Straddling Stocks Agreement — the New York Agreement. It is also contrary to common sense and practical experience, because foreign fishing vessels will not invariably comply and co-operate. There are obviously limits to the use of force by law enforcement authorities — it must not be excessive force, it must be proportionate, and so on. But there is no evidence the limits were exceeded here — all that was involved were warning shots at a safe distance, intended only to allow a boarding, not shot at the

ship, and only *after* resistance had been encountered — and, Mr. President, even if there were evidence of excessive force, that would be an issue for the merits, *not* jurisdiction.

37. I emphasize that the appropriateness or legitimacy of these provisions is not, cannot be, the issue at this stage. That would be an issue for the merits. What counts for present purposes is that all this is enforcement; it is the enforcement of conservation and management measures, and accordingly it is covered by the reservation.

38. The regulations I have just described were amended on 3 March 1995 to apply to Spain and Portugal (Spanish Memorial, Ann. 19). The amendment of course was the direct result of the dispute over the Greenland halibut quotas voted into effect by NAFO for the year 1995. The appropriateness of the quotas adopted by NAFO is not relevant to the issue of jurisdiction. But what is both relevant and indisputable is that the NAFO quotas were conservation and management measures, as that expression is used in Section 5.1 of the 1994 Canadian legislation.

39. The amended regulations of 3 March 1995 listed Spain and Portugal as States whose vessels would be subject to this legislation, and added a series of prescribed conservation and management measures for those vessels. The measure at the heart of this case was a prohibition on fishing for Greenland halibut in the NAFO Regulatory Area for the remainder of the year — a prohibition because, as Mr. Hankey said, the 1995 quota for the European Union had already been caught at that point in time, largely by Spain. In addition, the regulations imposed a restriction on the mesh size of nets, so that undersized fish cannot be caught, as well as size limits for certain species of fish — both, I may say, among the most traditional of all conservation measures. Finally, the regulations include a provision on the maintenance of fishing logs and a prohibition on removing gear from the water after a boarding signal has been given, both with the obvious purpose of facilitating enforcement.

40. These conservation and management measures, whose enforcement gave rise to this case, are found in Table V of the Regulations, which is in your materials today at Tab 9. It takes no more than a glance to see that these are the most standard, typical conservation and management measures one could imagine. I would invite the Court to compare them with the illustrative list of fisheries measures in the exclusive economic zone set out in Article 62, paragraph 4, of the 1982

Law of the Sea Convention. The list includes the species that may be caught, the areas that may be fished, gear types, fish sizes, quotas, seasons and so on. Or one may look simply at the Table of Contents of the Conservation and Enforcement Measures of NAFO at Annex 10 of the Canadian Counter-Memorial — this covers such matters as quotas, prohibitions on fishing, gear and size limits. In substance, in content, the Canadian conservation and management measures that are the object of this dispute are exactly the same. The *only* difference, I repeat, is *where* these measures were applied by Canada — the NAFO area, which is so precisely designated in the reservation.

41. One can agree or disagree with these measures, which are largely based on the measures adopted by NAFO. But it cannot be plausibly disputed that they were conservation and management measures. The explanatory statement or "Regulatory Impact Analysis" that accompanied the regulations, and which is also found in Annex 19 of the Spanish Annexes, describes the amendment as essential to deter overfishing of stocks threatened with extinction. Mr. President, I have about one minute before I finish this point, if I may go on. The Regulatory Impact Analysis statement at Annex 19 of the Spanish Annexes describes the warnings on the biological state of Greenland halibut given as early as 1989, and the unilateral quota set by the European Union at a level more than five times that established by NAFO. The object of the measures is as plain as the subject-matter. It is conservation and management.

42. It is self-evident, Mr. President, that it was the enforcement of these conservation and management measures that gave rise to this case. In fact, the pleadings of both sides make that clear. The conclusion that the dispute is indeed within the four corners of the reservation is therefore compelling — in fact, irrefutable.

Mr. President, that would be a convenient point at which to break until tomorrow, if that pleases the Court.

The PRESIDENT: Thank you very much. The Court will now rise and resume sitting in these proceedings tomorrow at 10 a.m.

The Court rose at 1 p.m.