CR 98/13 (traduction)

CR 98/13 (translation)

Lundi 15 juin 1998

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Le PRESIDENT : Veuillez vous asseoir. Je donne la parole au distingué agent de l'Espagne.

Mr. PASTOR RIDRUEJO: Mr. President, Members of the Court.

I. The subject-matter of the dispute: the question of title

1. In the light of the renewed efforts by counsel for Canada to circumvent or redefine the subject-matter of the dispute, we are obliged to point out, once again, that this case does not concern the question of the conservation and management of fishery resources in the NAFO Regulatory Area. That is what Canada would like, but we have made it abundantly clear to the Court that what we are attacking, both in the Application and in the Memorial, is Canada's lack of entitlement to act against ships flying the flag of another State on the high seas. That is the subject-matter of the dispute. Naturally, it entails the inapplicability of Canadian domestic legislation to Spanish and other vessels on the high seas. It also entails our demand for compensation for damage caused by the unlawful acts of Canada.

In any event, there is no doubt that, in proceedings before the Court, it is not the respondent State, in this case Canada, which defines the subject-matter of the dispute. It is the Applicant, in this case Spain, which enjoys that right and that privilege.

2. However, as regards the principal subject, the Agent of Canada stated in his presentation on 11 June that: "it is abundantly clear that the principal subject is a matter going to the merits and not to jurisdiction" (CR 98/7, p.17, para. 41).

No, that is not the case. We cannot agree with the Respondent. It is clear that the question of Canada's lack of entitlement to take action on the high seas against foreign ships does, it is true, pertain to the merits of the dispute, but it also pertains to the question of the Court's jurisdiction. If, as Spain contends, the dispute does not relate to measures for the conservation and management of fish stocks in the NAFO Regulatory Area, but to Canada's lack of "title" to take action on the high seas against ships flying the flag of another State, it is indisputably not covered by its reservation to the acceptance of the Court's jurisdiction. That is the first main argument of Spain which I had announced in my presentation on 9 June.

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3. Canada has also argued that, as the reservation to its declaration of acceptance of the Court's jurisdiction is drafted in very broad terms, the question of title is covered by it and is not subject to the jurisdiction of the Court.

Spain, for its part, is firmly convinced that that is not the case. It is obvious that the question of entitlement to take action on the high seas against ships flying the flag of another State is a preliminary issue, a fundamental premise, and that as such it is not covered by the Canadian reservation to the jurisdiction of the Court. It cannot be connected to a question as specific as fisheries conservation and management measures on the high seas, and the enforcement of such measures. If Canada had wished to exclude from the jurisdiction of the Court any dispute relating to its entitlement to take action on the high seas against ships flying the flag of another State, it should have done so explicitly.

4. Let me illustrate this argument with an example taken from the law relating to outer space, and in particular the legal régime applicable to the moon.

We all know that international law gives States no sovereign title or right of appropriation on the moon. That much is clear from the general international law, as set out in the Treaty of 27 January 1967 on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies. But that is also the case for the high seas, according to the principles of general international law set forth in the 1982 Convention on the Law of the Sea.

Let us now suppose that a State excludes from its unilateral declaration of acceptance of the Court's jurisdiction disputes which could arise from measures for the conservation and management of the natural resources of the moon, and the enforcement of such measures. Would such a reservation remove from the jurisdiction of the Court a dispute relating to a question as fundamental as State sovereignty over a certain area of the moon?

The answer is undoubtedly *no*, as this question — the question of sovereign *title* or any other form of jurisdiction over the moon — would in fact be a premise, a preliminary issue with a status quite separate from measures for the conservation and management of its natural resources.

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II. Requirement that any optional declaration of recognition of your jurisdiction should be in conformity with your Statute

5. Any reservation whose meaning and scope are entirely subject to the exclusive appreciation of the declarant State prevents the Court from exercising its own jurisdiction. For that reason alone, it is accepted by your jurisprudence, as by the most eminent legal writers, that such a reservation is inconsistent with your Statute. I shall not here elaborate on this fundamental point, which will be taken up by my colleague Professor Dupuy in a little while.

III. The use of force

6. In order to show that the Court has jurisdiction in this case, I had also put forward another main argument in my oral pleadings on 11 June.

Act C-29 and Act C-8 amending the Criminal Code of Canada provide for the use of force against foreign ships on the high seas, and even for causing the death, under certain circumstances, of the persons on board such ships. I had also said that such behaviour was at variance with international law, under which the declarations establishing the jurisdiction of the Court must be interpreted. It is clear that the use of force is not covered by the Canadian reservation (CR 98/9, pp. 16-17).

I note that no counsel for Canada has taken issue with this argument, at least not head-on.

7. In addition, in reply to the discussion of this matter at greater length by counsel for Spain, the Agent of Canada informed you in his oral arguments that:

> "the enforcement measures that were applied to the *Estai* can in no way be regarded as a use of force in relations between States in the sense referred to in the Charter of the United Nations" (CR 98/11, p. 18, para. 45).

8. Following the efforts by counsel for Canada to conceal the actual importance of the use of force by the Canadian patrol boats, counsel for Spain will be obliged to show the Court in due

course that the force used on 9 March 1995 against the *Estai* was contrary to international law. The same applies to the severe harassment of other Spanish boats some days later. They will show in particular that our line of argument does not relate exclusively to the use of force in these specific cases. It concerns more generally the use of force provided for in Acts C-29 and C-8 amending the Criminal Code, which Canada enacted without international authority. As my colleague Professor Sánchez Rodríguez has already demonstrated to the Court, the combined effect of these laws makes it possible to apply against a person subject to arrest, even on the high seas, in the NAFO Regulatory Area, a level of force capable of causing death or grievous bodily harm.

9. It is true that, in its oral arguments, Canada attempted to minimize the importance of these provisions, asserting that they apply to fisheries "only incidentally" and that their "main purpose has nothing to do with fisheries" (CR 98/12, p. 9, para. 47). The fact remains, however, that Canada has admitted that its Criminal Code is applicable in the NAFO Regulatory Area.

Is what is involved in that case, as the Agent of Canada asserted in his oral arguments of 11 June, a means of enforcement "of conservation and management measures which are absolutely standard in State practice"? (CR 98/11, p. 18, para. 45).

We do not think so. There is no doubt that the death of a person attempting to escape the action of a Canadian authority in the NAFO Regulatory Area, carried out in such circumstances without international authority, is not a standard measure under the legal régime relating to fisheries.

10. In any event, as counsel for Spain will explain, the military coercion prohibited by international law is not confined to armed aggression. The use of force means the use of armed coercion by one State against another, whether in respect of territory, individuals or objects placed under the sovereignty or exclusive jurisdiction of the latter State. The most traditional definition of the use of force on the high seas confirms the above definition. It is contrary to the United Nations Charter, and cannot therefore be covered by a legal interpretation of the Canadian reservation.

IV. The question of the persistence or continued existence of the dispute

11. I now turn to a subject which will be dealt with in detail by my colleague, Professor Remiro Brotóns.

In Chapter IV of the Counter-Memorial, Canada bluntly maintained that the Agreement of 20 April 1995 between the European Union and Canada had settled all aspects of the Spanish-Canadian dispute. Thus, in its conclusions (para. 230), Canada told us that: "The matters in dispute between Canada and Spain have been settled . . . The Spanish Application is now without object."

However, in his oral arguments, the Agent of Canada criticized the "inordinate importance" (CR 98/11, p. 21, para. 56) that we have given this subject. He added that: "the question to which these proceedings are devoted is the Court's jurisdiction . . . Whether the dispute has been settled, as Canada believes, or persists, as Spain contends, is immaterial for the purposes of the present proceedings" (*ibid.*, para. 59).

Mr. President, Members of the Court, it is with pleasure that we observe that Canada seems thus to have dropped its allegations concerning the disappearance of the object of its dispute with Spain.

V. Links between the merits of the dispute and the jurisdiction of the Court

12. In the oral arguments of its Agent and counsel, while dwelling at length on substantive matters, Canada once again held against Spain the fact that our contentions addressed the substance of the dispute to a considerable extent.

13. In any event, Canada appears to forget that paragraph 7 of Article 79 of the Rules of Court enables the Court to declare that a preliminary objection to its jurisdiction does not possess, in the circumstances of the case, a preliminary character. In other words, it may, at its discretion, combine consideration of the objection with consideration of the merits of the case, as it has done on several occasions. If we mention this possibility, it is in order to remind Canada of the close

links that may exist between the merits of a dispute and the jurisdiction of the Court. Those links are manifest in this case.

14. In this connection, I would also observe that Canada has not disputed the validity of the argument which I raised in my presentation of 9 June, concerning the yardstick of the existence of reasonable links, within a case, between the substance of the dispute and the jurisdiction of the Court. In this case, I repeat, the links in question are three in number.

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First, the terms of the Canadian reservation to the jurisdiction of the Court contain substantive definitions.

Second, the need for Spain to define, for the Court, the real subject-matter of the dispute also calls for substantive reasoning.

Third, the rebuttal of Chapter I of the Canadian Counter-Memorial also requires this type of reasoning.

I repeat, this argument has not been rebutted by counsel for Canada.

Professor Dupuy will in any case come back to the analysis of your jurisprudence in this area.

VI. The accusation of excess in the Spanish oral arguments

15. In his address on 11 June, the Agent of Canada ventured to deplore "the extremes which have been a feature of the Spanish arguments" (CR 98/11, p. 9, para. 6). We assume that Canada is here referring to hypothetical verbal excesses or concepts, excesses which, if they actually occurred, would count for little when compared with the inspection by its patrol boats, on the high seas, of a ship flying the Spanish flag, and the harassment of other vessels flying the same flag.

16. However, we are no longer shocked by the vocabulary used about us by Canada, both in its Counter-Memorial and in its oral arguments. Of course, Canada is fully at liberty to choose to use such terms. However, and in conclusion, I ask myself the following question in this regard:

Would not Canada have also employed expressions of indignation in the event — and I emphasize, in the event — that a Spanish patrol boat or that of another State had inspected a ship flying the Canadian flag on the high seas?

Mr. President, Members of the Court, I shall read out my submissions at the end of our oral arguments.

That concludes my statement and I thank you for your kind attention.

Mr. President, I would ask you to give the floor to my colleague, Professor Sánchez Rodríguez. Thank you.

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Le PRESIDENT : Merci beaucoup. Je donne la parole á Monsieur Sánchez.

Mr. SÁNCHEZ RODRÍGUEZ: Mr. President, Members of the Court. The task that falls to me here this morning requires me, once again, to refer to the facts. Given the short time available to me, I am sure that you will understand my proceeding straight to the specific points I consider most important. I shall, moreover, do so as briefly as possible, so that there can be no possibility of theatricality or dramatization.

1. You will all no doubt be surprised by the first point, at this stage in the proceedings, as it involves going back to the full text of paragraph 2 of the Canadian declaration of 1994, so frequently cited by the other Party but never considered as a whole.

The intention is to affirm, once again, that any interpretation of the Canadian reservation must take account of all the terms used in the declaration, of the full text of the latter. On the other hand, our opponents continue stubbornly to refer to it as little as possible and maintain an eloquent silence. The clearest example is to be found in the painstaking and systematic analysis carried out by the Canadian counsel in these proceedings last Thursday (CR 98/11, pp. 36-43, paras. 44-59). Not a word about statements as important as the one that Canada *"accepts as compulsory* ipso facto . . . *the jurisdiction of the International Court of Justice . . . over all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration, other than"*; well, I shall talk to you today about situations and facts. No allusion to the very interesting paragraph *(c)* which explains, for example, that the Canadian legislation of 1994 is not covered by its wording because that legislation, "by international law", does not fall "exclusively within the

jurisdiction of Canada". Indeed, if the 1994 legislation did not fall within the purview of international law, the new paragraph *(d)* would be totally superfluous as it would constitute a matter coming under the exclusive jurisdiction of Canada and would therefore be covered by paragraph *(c)*. Consequently, if it comes under international law, paragraph *(d)* must be interpreted in accordance with the said international law.

015 Members of the Court, allow me to ask you this question: did you hear, on Thursday and Friday last, a single explanation, a single word from the Canadian delegation concerning its declaration, apart from paragraph *(d)* thereof? Spain considers that a truncated interpretation which is confined to the text of paragraph *(d)*, separate from the full text of the declaration, is utterly unacceptable because it is inadequate and incomplete.

2. The second point that I would like to take up right away is directly connected to the first. Our colleagues in the other Party lay constant stress, in every possible way, on paragraph *(d)* of the declaration, that is to say, on the reservation, the crux of the dispute. In substance, they are merely pursuing a manoeuvre which has already been denounced by the Agent of Spain in his first statement (CR 98/9, pp. 14 and 15, para. 4): they are seeking to redefine or circumvent the subject-matter of the dispute. In what way? By attempting to convince the Members of this Court that the true subject of the dispute lies in the reservation, and is not the one described by Spain. Far be it from me to remind the Members of this Court that it is the Applicant who establishes the subject-matter, even if that is not to the liking of the Respondent; however, it never lies with the latter to take the place of the Applicant in the definition of the subject-matter of the dispute. The subject is the one described by Spain, not the one suggested by Canada because it is more to its liking and offers it better possibilities of defence.

3. The third point relates to one of the favourite subjects of our opponents: the text of the reservation. I wonder therefore what has become of the new category created in the Counter-Memorial, the category of "enforcement measures". Last Thursday and Friday, my Canadian colleagues made no reference to it. But they also remained scrupulously silent on the

term "enforcement"; is this a word that they like or not? Even Professor Weil adroitly suggests that this thorny problem should be excluded. Indeed, he tells us "that the measures in dispute are measures of conservation and management of the resources of the sea" (CR 98/12, p. 44, para. 49) and he adds that "the question is exclusively whether or not the dispute brought before the Court by Spain arises out of, or concerns, conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" (CR 98/12, pp. 46-47, para. 55). Why does our distinguished opponent make this assertion? Because he has suddenly changed the rules of the game.

Up until its statement last Friday, the use of force against fishing boats on the high seas was defined by Canada as "enforcement measures", but now this is no longer so. One of the Canadian counsel even spoke to us on Thursday about "measures" and "coercive measures" (CR 98/11, p. 42, para. 57), an expression which is not used in the Canadian reservation. The following day, Professor Weil told us that: "Boarding a vessel, and inspecting and seizing its cargo, is a management and conservation measure" (CR 98/12, p. 33, para. 18), while a few moments later he slipped in the term "enforcement measures" (CR 98/12, p. 39, para. 31) and referred precisely to the use of force against ships on the high seas. This calculated ambiguity requires the Court to be given an explanation. It is essential for Canada to take a stand, once and for all, and tell us whether the use of force is a management measure, a conservation measure, an enforcement measure, the enforcement of a management and conservation measure, all of the above or none of the above. Is the use of force covered by the Canadian reservation? Where is it mentioned? Or is it simply not contained in the terms of the reservation and is the other Party doing everything possible to conceal that fact?

4. The fourth point also conceals an obvious element. Please excuse me but, in view of the silences of the opposing Party, the patent facts must be highlighted. I have listened carefully to my Canadian colleagues and I have hardly heard any mention from them of the high seas. They try as much as possible to avoid referring to the fact that the Canadian legislation applies to the high

seas. And they prefer to speak of the NAFO Area or the area beyond the 200-mile limit. It is a way for them of fudging the issue (CR 98/11, pp. 11, 16-17, 40, 46, 58, etc.)! Since our opponents do not do so, it falls to me to remind you that the theatre of the Canadian actions is in fact the high seas, and that the law applicable to this case is that which governs the high seas. It is not the norms relating to the exclusive economic zone and still less those concerning the territorial sea or other areas under State sovereignty or jurisdiction that interest us, but those which concern the high seas.

In this context, our Canadian colleagues have no hesitation in quite naturally applying to the high seas the legal régime of national areas in an attempt to justify certain coercive powers of the State against foreign fishing vessels. Furthermore, they deny that Canada has extended its national jurisdiction or that it has created a new, supplementary space adjacent to the exclusive economic zone. Two Canadian counsel (CR 98/11, p. 59, para. 35; CR 98/12, p. 33, para. 19) also do not hesitate to assert that the measures taken by Canada against Spanish ships on the high seas are consistent with Article 73 of the 1982 Convention on the Law of the Sea.

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Quite frankly, Members of the Court, the Canadian position on this point is almost insolent. They altogether naturally recognize that the measures provided for in the 1982 United Nations Convention for the exclusive economic zone are applied on the high seas, while denying that Canada has extended its jurisdiction to the high seas. On the one hand, they implicitly recognize this extension of jurisdiction since they justify and explain the application of Canadian criminal legislation, the most territorialized of all national legislations, on the high seas. On the other, it is alarming that they make such an incomplete reading of the Convention, forgetting Articles 86 to 89, 92, 110, 111, 116, 118 and 119, in addition to the obligation of co-operation of Article 63, paragraph 2, for straddling stocks. It comes as no surprise that Canada has not ratified the 1982 Convention, but this does not prevent the Articles mentioned from already reflecting norms of customary international law. Canada has extended its jurisdiction without formally establishing a new area, as implicitly acknowledged by Minister Tobin (Memorial of Spain, Annexes, Vol. I,

p. 172; Counter-Memorial of Canada, Anns, p. 365), but by increasing its jurisdiction materially and in actual fact. My eminent French colleague cannot confine himself to the strictest formalism by arguing that Canada has not established a zone formally. Such legal formalism would be the very negation of law; but he knows the law and knows it very well. Fitzmaurice was right and his 1973 affirmation validates the Spanish views.

Finally, the high seas have disappeared not only to a great extent from the nautical charts but also from the arguments of the opposing Party.

5. The fifth point refers to the inclusion of Spanish and Portuguese ships in the Canadian Regulations of 1995. Our opponents have tried to justify this inclusion by using professedly conservationist arguments which are insulting to my country and our Iberian neighbour and, what is more, are false. Our colleagues now accuse us of overfishing and of breaching NAFO Rules (CR 98/11, p. 47, para. 75) and — what is surprising — because Spain had exhausted the entire quota for the European Union (CR 98/11, p. 60, para. 39). I wish to emphasize, Mr. President, that this quite new accusation, which incidentally is not backed by any documentary evidence, is in flagrant contradiction with the recognition, in paragraph 41 of the Canadian Counter-Memorial, that at the time of the facts the Spanish catches fell short of the quota limit set by the European Union.

All this of course was in 1995. Nevertheless a year earlier, in 1994, on the occasion of parliamentary debates, the Parliamentary Secretary to the Minister of Fisheries and Oceans stated in the House of Commons that the danger came from flags of convenience, particularly of Panama, Honduras, Belize and Sierra Leone (Canada *Gazette*, Part III, Tuesday 12 July 1994, p. 1316, copy in section 2 of the file presented by Spain last Monday and of which the Members of the Court have a copy). The same day, Minister Tobin stated in the Senate that "Spain and Portugal, indeed, live within NAFO quotas. Spain and Portugal participate fully as NAFO member States", although some Portuguese — and not Spanish — vessels were described as pirate vessels because they flew flags of convenience of Panama, Honduras or Sierra Leone (Memorial of Spain, Annexes, Vol. I, p. 470 of Senate Debates and p. 278 of Vol. I).

If Spain was fishing lawfully in the NAFO Area in 1994 (according to Minister Tobin), how can our colleagues of the opposing Party assert today that in 1995 Spain suddenly became a dangerous predatory and pirate country? In this respect, the word "pirate" has, in "Tobinian" jargon, a meaning at odds with what international law regards as pirate vessels. The only possible conclusion is that the assertion of Canada is completely wrong, according to its own statements, and that the mention of Spain and Portugal in connection with pirate vessels is quite inadmissible and unjustifiable.

6. Let us now go on directly to point six. Let us now enter a terrain to the liking of our opponents, the field of conservationist ecology, of protection of the species, of environmental concerns. In other words, a politically correct terrain. The Agent of Canada even complains that Spain does not recognize this (CR 98/11, pp. 9-10, paras. 9 and 10). In this regard, the opposing Party comes before the Court as a respectable country concerned about stocks. About stocks or about *its* stocks? Spain, on the other hand, is made out to be a public danger for the species. Canada even suggests the existence of a kind of state of environmental necessity or of also environmental preventive self-defence (CR 98/11, pp. 46-48, paras. 72-77).

Nothing of all that is true. In the first place, because the one to have depleted the bulk of the straddling stocks in question is in fact Canada itself, as it implicitly acknowledges in its Counter-Memorial.

For Chapter I of that document (Counter-Memorial of Canada, pp. 9 *et seq.*, paras. 17 *et seq.*) is based on the image of a country presenting itself as the champion of environmental conservation "for the world" (*ibid.*, p. 16, para. 29). On the other hand, it at the same time acknowledges that in the early 1990s its own fishermen were guilty of depredation in "almost all of the commercially significant groundfish stocks entirely within its 200-mile zone" and that "the conservation crisis continues" still today (*ibid.*, p. 9, para. 17).

However, to protect the halibut in its decline, since it is a straddling stock, overfishing has to be eliminated beyond the 200-mile limit (*ibid.*, p. 19, para. 36), even though a few pages earlier

the opposing Party had no hesitation in asserting that a mere "10% [of the stock] . . . lies beyond Canada's 200-mile fishing zone"! Continuing this reasoning it further asserts that: "Due to the biological unity of straddling stocks, overfishing them beyond the 200-mile limit will also deplete them within the zone under national jurisdiction" (*ibid.*, p. 11, para. 19). This means that those who fish 10 per cent of the stock contribute to the depletion of the remaining 90 per cent under Canadian jurisdiction. After all, Canada has no qualms about accusing Spain of depletion and depredation of resources during the period from the early 1990s up to the fateful year of 1994 whereas the Spanish fleet was fishing solely outside the 200-mile limit! Canada lays all the responsibility on Spain (10 per cent of the stock in four years) and rules out its own (90 per cent throughout the period). It has to be seen to be believed.

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We must be grateful to the opposing Party for its sincerity when it finally acknowledges the efforts made to maintain "'Canada's ability to protect the *[its]* stocks' beyond the 200-mile zone" (p. 46, para. 108, repeated on p. 71, para. 185).

In the second place, its assertions concerning the NAFO quotas are also incorrect and inadmissible. Canada must prove its assertions or refrain from making them; for Spain has always respected the catch limits legally established within the NAFO system.

As regards the suggestion of a hitherto unheard of preventive self-defence, or of a conservationist state of necessity, said in fact to be circumstances precluding wrongfulness, that has nothing to do with Articles 33 and 34 of the draft of the International Law Commission, as the Court had occasion to say in its Judgment in the *Gabčíkovo-Nagymaros Project* case. Questions of conservation of marine species have in fact been studied by the International Law Commission and it is interesting to note that in the case concerning *Hunting of Fur Seals in the Bering Sea*, the Agent of the British Government denied "that a State had the right in time of peace to do on the high seas, as an act of 'self-defence' or 'self-preservation', whatever it might conceive to be necessary to protect its property or its interests". And the Tribunal of Arbitration bore him out and:

> "did not, therefore, allow itself to be influenced by the argument that there was a danger of the seals being massacred by Canadian sealers; it viewed the American measures as action

taken primarily for the purpose of protecting the economic interests of a United States industry against competition from a foreign industry by giving it an impermissible monopoly to take fur-seals in certain areas of maritime space which must remain accessible to everyone" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part I, p. 28 for the quotation and pp. 26 *et seq.* for a full analysis of the two cases mentioned).

7. The point that I now go on to concerns the facts, the facts which actually took place. The mutilation of the facts practised by our opponents is striking when they refer to the fishing incidents. Those incidents occupy a mere half dozen or so lines in their oral arguments (CR 98/11, p. 9, para. 7 and p. 48, para. 76) and, what is more, the account is inaccurate. According to Canada, all that happened was the inspection and seizure of the *Estai*. That is all.

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The facts were actually more complex and more brutal. To begin with, the Agent of Canada asserted in his statement that: "The only firing that took place was a warning shot across the vessel's bows" (CR 98/11, p. 19, para. 47). That is untrue. The "Note Verbale from the Canadian Department of Foreign Affairs and International Trade to the Embassy of Spain in Ottawa" of 10 March 1995 belies the words of the Agent of Canada by stating that: "The Canadian patrol boat was therefore obliged, after obtaining the necessary authorizations, to resort to firing four warning shots" (Memorial of Spain, Annexes, Vol. I, Ann. 9, p. 45, English in Application of Spain, Ann. 4, p. 25).

But this is only a detail. Between 17 March and the month of June 1995, six Spanish warships (the vessels *Vigía, Serviola, Centinela, Atalaya, Mahón* and *Las Palmas*) were sent to the area in question. Such mobilization was commensurate with the protection due to Spanish fishing vessels exposed to harassment from a pack of several Canadian patrol boats engaged in fisheries law enforcement. This presence of warships of both countries in the high seas area where the facts occurred implied an imminent and real danger of armed conflict on a scale that cannot exactly be called minor.

Furthermore, between 17 and 31 March 1995 several Canadian patrol boats harassed and had recourse to force against other Spanish fishing vessels in the same area. In particular, the fishing vessels *Monte Agudo, Freiremar Uno, José Antonio Nores, Verdel, Arosas* and *Mayi Cuatro* were

subjected to various measures of surveillance, inspection and harassment by different Canadian patrol boats. As for it, the Spanish vessel *Pescamaro Uno*, after an extremely dangerous manoeuvre by the Canadian patrol boat *Leonard J. Cowley*, had its trawl warps sliced through, with the subsequent loss of its entire gear and a deadly risk to the seamen on deck at the time. Too much is too much, gentlemen counsel of Canada!

Mr. President, Members of the Court, you must take account of the fact that these serious incidents took place in very difficult weather conditions, with winds of 80 knots, in a snow storm and with waves of over 14 metres. In most cases, the Canadian patrol boats did not respect the International Regulations for Preventing Collisions at Sea and the Convention for the Safety of Life at Sea (Memorial of Spain, Annexes, Vol. I, Ann. 5, pp. 7-12), without forgetting the provisions of the 1982 United Nations Convention on the Law of the Sea, many of which are binding on Canada under customary law.

In short, without seeking to dramatize the matter, we must emphasize the complexity and extent of the fishing conflict in the period in question. There was a serious, imminent and real risk of losses of human life and of ships. Therefore the Canadian assertion that the incident simply involved the inspection and seizure of the *Estai* seems to be very far from reality. The facts are there and the Court must have the certainty of their gravity and of the fact that a serious armed conflict could have broken out.

8. Finally, we shall go on to the decisive question of the Canadian Criminal Code. Counsel of the opposing Party expressed surprise at several Spanish assertions relating to the use of force and to Canadian penal measures. Leaving aside the 1995 United Nations Straddling Stocks [and Highly Migratory Species] Agreement, for it is not relevant since neither Spain nor Canada is a contracting State, he gives us an almost idyllic picture of the amendment introduced by Act C-8 to Section 25 of the Canadian Criminal Code. The idea is said to be to limit the use of force to serious cases in situations of self-defence, or *légitime défense*, but he expressly acknowledges that it permits the so-called peace officers to use force to cause death or serious bodily harm in certain

circumstances; for the purpose of course of protecting human life and only exceptionally, not every day (CR 98/12, p. 9, para. 48). Let us see whether the facts tally with such a favourably reductionist diagnosis. Clearly, Spain knows the problem of unconstitutionality of Canadian penal legislation, for it runs counter to the Canadian Charter of Rights and Freedoms, which is significant in itself (*Commons Debates*, 14 February 1994, p. 1312, section 2 of the file presented by Spain on 8 June last).

In the House of Commons, Mr. Dhaliwal, Parliamentary Secretary to the Minister of Fisheries and Oceans, expressly acknowledged the application to fishing vessels on the high seas of Canadian penal legislation permitting the causing of death or serious bodily harm. He even added the extravagant assertion that that would be corroborated by international practice as to the use of

deterrent force at sea against foreign vessels (*ibid.*, p. 1316). Deputy Bernier, for his part, recalled that the application was going to take place outside the 200-mile limit in waters [not] under Canadian jurisdiction, namely on the high seas (*ibid.*, p. 1317). Deputy Cummins said that, in view of the permission given "peace officers" to use weapons, there would sooner or later be deaths (*ibid.*, p. 1318). Deputy Benoît Sauvageau stated, in respect of the *Concordia*, a vessel flying the flag of the United States, that the use of force on the high seas would not solve any problem (*ibid.*, p. 1325). And several deputies referred to Canada's lack of legal title to legislate on the high seas concerning foreign vessels (*ibid.*, pp. 1325 and 1333).

The basic conclusions of this debate are: first, Canada has no legal title to extend its penal legislation to the high seas; second, the use of force at sea carries an obvious risk of loss of human life; third, the Canadian parliamentarians did not perceive the application of criminal law on the high seas as an exceptional hypothesis, as the opposing Party is trying to present it, without self-defence being able to justify, in terms of international law, the recourse to force against foreign fishing vessels beyond the 200-mile limit.

Our Canadian opponent, making an altogether logical effort to minimize the impact of his country's penal legislation, makes some surprising assertions: that its main purpose has nothing to

do with fisheries (CR 98/12, p. 9, para. 47). I put the following question to him: Is it applied, in certain circumstances, to foreign vessels on the high seas, yes or no? He goes on imperturbably to state that the amendments to Section 25 of the Criminal Code are intended to protect human life (CR 98/12, p. 9, para. 49), given that the previous legislation was too permissive regarding the use of force (CR 98/12, p. 9, para. 49). This approach leaves us perplexed. What kind of human life can one protect by firing on foreign fishing vessels in non-Canadian maritime areas? Or does our opponent maintain that it is a Canadian maritime area? A yes-or-no answer is required.

In connection with this, we can emphasize an assertion common to our Canadian colleagues. The Agent of Canada said that what was involved were "conservation and management measures which are absolutely standard in State practice" (CR 98/11, p. 18, para. 45); the second counsel also slipped in the contention that such enforcement "measures" as Canadian officers may adopt on the high seas are normal and customary practice (CR 98/11, p. 42, para. 58); our third opponent makes a fine point that it is common knowledge — and common sense — that arrests at sea of foreign vessels require the use of force and that they are permitted under Article 22, paragraph 1 *(f)*, of the 1995 United Nations Straddling Stocks [and Highly Migratory Species] Agreement, without any heed for the fact that the Agreement is not in force and is not binding on any State (CR 98/11, p. 59, paras. 35 and 36). The stratagem of the opposing Party is finally crowned by Mr. Weil, who, after asserting that the Canadian Act of 1994 says "nothing about State jurisdiction over areas of the high seas" (CR 98/12, p. 30, para. 10), immediately contradicts himself by stating that the measures adopted during the incidents constitute "acts . . . common and traditional" in this connection (CR 98/12, p. 33, para. 19), and that they are "eminently traditional measures of the law of the sea" (CR 98/12, p. 39, para. 33). But are you really sure that this is truly the case on the high seas?

This set of assertions slipped into last week's Canadian statements is extremely serious. They presuppose a real recognition of the material extension of Canadian jurisdiction to the high seas. The point is that there can be no countenancing the application of national laws to foreign vessels

in a non-"nationalized" area. Can our distinguished colleagues explain where this practice is, even if customary, traditional or well-known, that permits the use of force on the high seas against foreign vessels, in defiance of the restrictive provisions imposed by Articles 110 and 111 of the 1982 United Nations Convention on the Law of the Sea? What is the origin of these so usual and common practices of which you all tell us? What our colleagues are doing, quite simply, is extending the powers of inspection of States over the maritime areas under their jurisdiction or sovereignty to the high seas. On the high seas there is no practice of inspection such as that you mention which does not contravene international law.

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Mr. President, Members of the Court, I am going to conclude my statement. It was a great responsibility and a great honour for me to defend the interests of my country before you. I should like to thank you very sincerely for the attention and courtesy of all Members of the Court during the hearings. Thank you very much.

Mr. President, I would ask you kindly to give the floor to my colleague, Professor Remiro Brotóns.

Le PRESIDENT : Merci, Monsieur Sánchez. Je donne la parole à Monsieur Remiro.

Mr. REMIRO BROTÓNS: Mr. President, Members of the Court,

I. Persistence of the dispute

1. Last Thursday, we heard the Agent of Canada say: "Whether the dispute has been settled, as Canada believes, or persists, as Spain contends, is immaterial for the purposes of the present proceedings". He went on to say: "it was quite deliberately and in full awareness of the facts that Canada limited its objection to the question of the jurisdiction of the Court with respect to the reservation". Canada, the Agent concluded, "had no intention, and does not intend today, to base its objection to the jurisdiction of the Court on anything but the reservation. It is on this problem, and no other that the Court is called upon to rule". (CR 98/11, pp. 21-22, paras. 56-62.)

2. Spain therefore considers that, without prejudice to the statutory duty which the Court has to verify whether there is indeed a dispute between States in order to exercise its function, Canada has abandoned the claims of inadmissibility, such as the claim that the Application merely calls for a declaratory judgment.

II. The dispute brought before the Court by Spain does not concern the conservation and management of fisheries; these come under the jurisdiction of the European Community.

3. Since it focuses its opposition to the jurisdiction of the Court on the last-mentioned of its of its positions, that contained in subparagraph *(d)* of paragraph 2 of its Declaration, Canada now finds itself in a tricky situation. Spain contends that, as a sovereign State, it is not a direct party

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to any dispute with Canada on the conservation and management of fisheries, a matter over which jurisdiction has been fully transferred to the European Community by its member States. The dispute between Spain and Canada is of a different nature, as may be seen from the object of the Application. However, if the dispute is different in nature, it has no place in the Canadian reservation. If there is a dispute, the Court has jurisdiction (CR 98/9, p. 43, paras. 10-11).

4. Counsel for Canada, in covering this problem, understood this full well, but when it came to a reply, he found only epithets not arguments; worse, he was obliged to resort to simplification and made elementary errors of law. A brief look back at the arguments set forth by Spain in the first round of oral arguments is sufficient to convince us of this (CR 98/9, pp. 41-45, paras. 6-16). Nevertheless, let us clarify a few points.

5. First, there are various categories of jurisdiction, some of which, such as jurisdiction over fisheries, have been fully transferred to the Community, whereas others remain under national jurisdiction exclusively. This is sufficiently illustrated by the declaration on the jurisdiction of the European Community concerning all matters governed by the Agreement on Straddling Fish Stocks. This declaration was made by the Community and by each of its member States in application of Article 47 of the Agreement.

6. The declaration states *expressis verbis*:

> "The Community *recalls* that its member States have transferred to it their powers with regard to the conservation and management of the living resources of the sea. Consequently, in this field, it for the Community to adopt the relevant rules and regulations (which are applied by the member States) and it falls within its powers to institute external activities with third States or competent organizations. These powers apply to waters coming under national jurisdiction for fisheries purposes, *as well as to the high seas*" (para. 5; emphasis added). *[Translation by the Registry.]*

7. The Canada-European Community Agreement of April 1995 is based on this exclusive jurisdiction. The Agreement on Straddling Fish Stocks is, on the other hand, a *joint* agreement, one to which the Community and the member States in their sovereign right must all be parties, since it also covers powers belonging to the States. In that respect, the above declaration states:

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> "the measures relating to the exercise of the jurisdiction of the flag State over its vessels on the high seas, particularly provisions concerning *inter alia* the taking control of or abandoning control of fishing vessels by States other than the flag State, and international cooperation with regard to the enforcement and recovery of control of their vessels, fall within the jurisdiction of member States in line with Community law" (para. 7, subparagraph 2). *[Translation by The Registry.]*

8. The Community and all the member States all agree that the facts behind Spain's Application have given rise to disputes with both the Community and with Spain.

9. The diplomatic notes of 12 May 1994 and 10 March 1995, reproduced in the Memorial of Spain, are particularly explicit in this regard (cf. Memorial of Spain, Ann. 18, Vol. I, p. 301; Ann. 11, Vol. I, p. 53). The latter note affirms that the arrest of a vessel in international waters by a State which is not the flag State is a "serious breach of international law [which] goes far beyond the question of fisheries conservation. The arrest is a lawless act against the sovereignty of a member State of European Community".

10. Despite errors in the dates, these notes were also referred to by Counsel for Canada as being notes from the Community (CR 98/12, pp. 53-55, para. 75 etc.). Yet, as he knows full well, these notes are from the Community *and its member States*. Moreover, they are *joint* notes, precisely because they concern powers which belong partly to the Community and partly to the States. The adoption of joint positions is typical of the inter-governmental cooperation between

member States of the European Union in matters which have not been transferred to the Community.

11. Further, the fact that the above-mentioned notes of protest echo the Spanish notes in their concept is hardly surprising. Are coordination and consistency to be penalized? Contrary to what Counsel for Canada advances, the two series of notes show that the Community and its member States are aware of the existence of specific, distinct disputes, one of which is between Spain and Canada.

12. Seeking to withdraw from that position, Counsel for Canada stated that "it is impossible to isolate a dispute relating to matters of general international law, and more particularly State jurisdiction, from a dispute relating to measures for the conservation and management of the living resources of the sea" (CR 98/12, pp. 57-58, para. 89).

13. This argument, which annihilates the sovereign rights of member States of the Community deriving from their flag, appears worthless; I shall merely recall what the Court said in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The Court stated — in its Order of 15 December 1979 — that

> "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects" (*I.C.J. Reports 1980,* p. 19, para. 36).

"Were the Court", it is said in the Judgment of 24 May 1980 in the same case,

> "contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in peaceful solution of international disputes" (*ibid.*, p. 20, para. 37).

14. Lastly, Counsel for Canada (CR 98/12, pp. 57-58, para. 89) believed that he had found the argument which, for him, "irremediably condemns the Spanish theory of the two disputes". He thought he had found it in the fact that Canada would have had no need of the reservation introduced in its declaration of 10 May 1994 in order to exempt disputes with the European

Community from the jurisdiction of the Court, since the Community, which, as you know, is not a State, has no capacity to act before the Court.

15. I am sorry to spoil the pleasure of my illustrious colleague on the Canadian side because on the high seas adjacent to Canada's economic zone, the Spaniards (and the Portuguese) are not the only so-called "pirates". There are also vessels which fly the respectable flags of other States which are, or might be, parties to the optional clause system. In 1994, the Canadian provisions were directed at them and not at the Spaniards, as can be seen from the parliamentary debates.

16. Mr. President, Members of the Court, had Canada been convinced of the worth of its arguments, it would have challenged the *locus standi* of Spain before the Court. However, it has not yet dared to do so and, finding itself out of ammunition, it is now obliged to launch puffs of smoke.

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III. The object of the application is the not the subject-matter of Canada's reservation

17. According to Canada, the Court is called upon to give a ruling on the objection to the Court's jurisdiction based on the reservation contained in subparagraph *(d)* of paragraph 2 of its declaration, and *on no other*.

18. This crystal-clear assertion allows us to note that the Respondent has no wish to reply to points relating to the object of the Spanish Application. In fact, Mr. President, it is as if Canada had transformed its argument on mootness, or lack of object, making it no longer a ground for inadmissibility but indeed a ground for lack of jurisdiction. Canada now appears to be satisfied with saying that there is no longer any object since the only object which counts is the subject-matter of its reservation as Canada itself defines it.

19. Barricaded behind its reservation, Canada wishes to have the object of the application identified with the subject-matter of the reservation; all this with the aim of replacing the debate on the title of jurisdiction and the use of force by a another kind of debate, on the conservation and management of fisheries.

20. Spain deeply regrets that Canada has not yet undertaken to renounce the use of force against vessels flying a foreign flag on the high seas, and particularly those flying the Spanish flag. Quite the reverse! Pursuant to a specious interpretation of the New York Agreement on Straddling Fish Stocks, Bill C-27 confirms the most unacceptable provisions of the legislation in force, imposing a jurisdiction for which the Respondent has no title. Bill C-27 violates the New York Agreement, which Canada claims to have instigated, (CR 98/11, p. 11, para. 14), even before its entry into force.

IV. Jurisdiction: Principles

21. There is one revealing fact on jurisdiction. The Agent of the Respondent requests the Court to adjudicate on Canada's reservation (CR 98/11, p. 22, para. 62), that and nothing more. Counsel for the opposite Party asserted, wrongly in my view, that Spain accused Canada of interpreting the reservation as a separate pleading without offering proof of this (CR 98/11, p. 52, para. 9). Here is proof: the Agent's very words. The Agent requests the Court to adjudicate on the reservation. We would consider that, on this point, the Court must adjudicate on the declaration of which the reservation forms part.

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22. Under these circumstances, it appears to me wise of Spain to have recalled that reservations must be given *the most restrictive scope permitted within the general rule of interpretation of international legal texts* (CR 98/9, p. 58, para. 11). Canada seeks to do the opposite.

Mr. President, I still have some comments to make but, in view of the time, perhaps you would wish to take a break now?

Le PRESIDENT. Merci beaucoup. L'audience sera levée pendant 15 minutes.

L'audience est suspendue de 11.15 à 11.30

Le PRESIDENT. Veuillez vous asseoir. Professeur Remiro, vous avez la parole.

Mr. REMIRO BROTÓNS: Mr. President, Members of the Court, as I was saying before the break, reservations must be given the most limited scope permitted by their interpretation in accordance with the general rule of interpretation of international legal texts.

23. Counsel for Canada has attacked this principle, a principle of sound common sense, using the well-known device of splitting it in two, thus discarding the part which gives it its full meaning. It is said that Spain argues for the *most restrictive scope permitted* of reservations, namely a restrictive interpretation of them (CR 98/11, p. 52, paras. 6 and 9). This is not true. Spain supports the most limited scope permitted in the context of observing of the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties. Mr. President, Members of the Court, beware of selective quotations.

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24. Counsel for Canada, a different speaker this time, echoing a view expounded in the Counter-Memorial, spoke of the generic character of *measures of conservation and management* and their inexhaustible ability to evolve (CR 98/11, p. 39, para. 52). "A generic category", it was said in the Counter-Memorial:

> "is never limited to the known examples it contains. No one would tell a naturalist that a newly discovered species is not a mammal, a fish or an insect because no such specimen had ever been encountered". (Counter-Memorial of Canada, p. 40, para. 91.)

That is true, on condition, naturally, that it is not claimed that a mammal is an insect or that a insect is a fish. If not, the categories would be as arbitrary as those found in the *Celestial Empire of Voluntary Knowledge,* the Chinese encyclopedia which made a distinction between animals according to a classification beginning with *those belonging to the Emperor* and finishing with *those which, from afar, look like flies*. On the other hand, clearly, generic terms may be adapted to circumstances. However, in the present case, less than one year elapsed between the deposit of the new Canadian declaration and the facts which prompted the Application. The evolution of the meaning of terms is one thing, their volatility is another. My colleague Keith Highet will come back to this point.

25. Counsel for Canada, a third speaker, proposed a reservation which I would describe as "highly polluting". On coming into contact with it, any manifestation of jurisdiction would become sterile. The Canadian reservation is a black hole in the firmament of the optional clause, an optional clause which must be respected — so it is repeated endlessly (CR 98/11. pp. 12-13, para. 22) — if a cataclysm in the system is to be avoided. Fortunately, the Court has not let itself be influenced by such dire predictions in the past.

26. The time for common sense has come. The subject-matter of the debate concerning jurisdiction is not just the reservation advanced by the Respondent but the Respondent's declaration of acceptance of the Court's jurisdiction *in its entirety*. My colleague, Mr. Sánchez Rodríguez, has already spoken on this point.

27. Counsel for Canada has sought to disregard the main pillar of Spain's argument, premise of Spain's line of reasoning, namely the existence of a properly deposited declaration, claiming instead that Spain advocates the existence of a general rule of consent to the jurisdiction of the Court (CR 98/11, pp. 52, para. 7). Counsel has neither read properly, nor heard properly. A State

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is free to deposit a declaration of acceptance to the Court's jurisdiction, but, should it do so, it must consider — this is a question of consistency and good faith — that its objective, in making reservations, is to have the least possible effect on the scope of the jurisdiction which has in principle been accepted. All this whilst, of course, abiding by the general rule of the interpretation of international legal texts. It is in this manner that the declaration, including reservations, achieves its "*effet utile*".

28. Twenty years ago, Counsel for Greece argued the same point brilliantly, in terms which we can only applaud. He reviewed the question of interpretation of reservations and asked: "should such interpretation be extensive or restrictive? Extensive interpretation of the reservation amounts to restrictive interpretation of jurisdiction, and restrictive interpretation of the reservation is extensive interpretation of jurisdiction". He answered his own question, noting that it seemed more correct to say that the interpretation "should be strict, that is to say that it should be directed to

giving effect to the exclusion by Greece of certain disputes, and to the whole of that exclusion, but to nothing but that exclusion . . . To extend that exclusion beyond what is necessarily implied by it would be to compromise the role of the resolution of conflicts, the importance of which has recently been emphasized by several members of the Court" (*Aegean Sea Continental Shelf* case, *I.C.J. Pleadings*, pp. 392-393). I am sure that Mr. Weil will not deny this point of view today.

29. International law is the normative frame of reference for the interpretation of Canada's declaration, as it would be for any other declaration. In that sense, the Judgment in the *Aegean Sea* case is an unambiguous precedent (*I.C.J. Reports 1978*, pp. 31-32, paras. 74-76). The Judgment, which concerns the interpretation of a reservation to the jurisdiction of the Court contained in a treaty, apparently caught the Respondent's fancy. Indeed, the Respondent repeatedly relies on this Judgment, despite the — unjustified — criticism it voices with regard to the analogy between these reservations and those of the declarations, for the purposes of interpretation (CR 98/11, p. 31 *et seq.*, para. 28 *et seq.*; p. 52, para. 8).

30. During first round of oral arguments, Spain advanced reasons, reasons which were not contradicted by the Respondent, for taking the NAFO system as the practical frame of reference for interpreting Canada's reservation (CR 98/10, p. 12, para. 28). Canada has not established any special meaning for the terms of its reservation. It has not denounced the NAFO Convention. It expressly referred to the Convention in order to determine the scope of its territorial application. Therefore, the concept of conservation and management measures for fisheries and the enforcement of such measures can only be NAFO concepts. Moreover, let us recall that at the time Act C-29 was enacted, Canada did not claim that it wished to divest NAFO of its powers to adopt conservation and management measures; on the contrary, it claimed to become, unilaterally, the *champion* of the Organization in a area beyond its jurisdiction.

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31. Within the NAFO system, we must establish, in the framework of the declaration, the ordinary meaning of the terms of the reservation, in good faith, whilst awaiting its objective and its purpose. This is what meets the true, objective, legally material intention of the declarant.

Seeking its intention in the *travaux préparatoires* or in the circumstances surrounding the deposit of the declaration serves to confirm the interpretation deduced from the application of the general rule or to eliminate doubts in the event of any ambiguousness; however it cannot become superimposed on the conclusion arrived at, unless the conclusion is absurd. This is what the settled jurisprudence of the Court says.

32. In the present case, the Respondent endeavours to place the general rule and certain circumstances surrounding the deposit of the declaration on the same footing for the purposes of interpreting the reservation (CR 98/11, p. 14, para. 27). We know about the parliamentary debate on Act C-29, which took place after the declaration had been deposited and which, of course, the reservation does not mention. However, and this must be emphasized, we do not know anything at all about the *travaux préparatoires* of the declaration of 10 May 1994.

33. This said, Spain considers that, within the framework of international law and more particularly within that of NAFO, the natural meaning of the terms used in Canada's reservation, even if their meaning is generic, does not and cannot include under measures of conservation and management the object of an application concerning the legal title of a State to exercise its jurisdiction over vessels flying the flag of another State on the high seas, a space, a concept and a term which the Respondent has little time for.

34. Moreover, it is obvious that since *title* is a logical *prerequisite* to any *measure* in the international order, it is impossible for a dispute concerning the title to be envisaged as a dispute *arising out of or concerning* a measure for the conservation and management of fisheries. I wonder

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if it was for that reason that counsel for Canada, in one speech, slid towards using more favourable linking verbs, for example, that used in the reservation to the declaration of Greece which refers to disputes *relating to* . . . (CR 98/12, p. 49, para. 64; see also CR 98/11, p. 19, para. 48).

35. Canada has repeated ad nauseam that Act C-29 was not intended to extend Canada's jurisdiction but to take urgent measures on a provisional basis (CR 98/11, p. 11, para. 18 and p. 16, para. 37). If Canada had no intention to extend its jurisdiction, how did it hope to put the

provisions of Act C-29 into effect? In reality, this jurisdiction has been exercised in an improper, coercive manner, Act C-29 is still in force and the Acts proposed to replace it are still wrongful from the point of view of international law. The law enforcement process remains in place, as does the threat it constitutes.

36. Moreover Spain has laid emphasis on the differences between subparagraph *(d)* of paragraph 2 of the declaration of 10 May 1994 and the same subparagraph of the same paragraph of the declaration of 7 April 1970. These differences are *wholly conclusive* (CR 98/10, p. 12, para. 26). In 1970, when Canada wished to exclude "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada" (*I.C.J. Yearbook 1970-1971, No. 25,* pp. 50-51) in relation to the conservation, management and use of the biological resources of the sea in maritime zones adjacent to the Canadian coastline, it did so expressly.

37. Had it wished in 1994 to exclude from the jurisdiction of the Court the conduct which it now denounces, Canada should have framed its reservation differently; however, it chose a minimalist form of wording in order to allay the suspicions of both its domestic parliamentarians and of its partners on the international stage. Counsel for Canada told us with *subtlety* that the 1994 reservation *"describes the matters at issue more specifically, and more concretely"* than did the 1970 reservation (CR 98/12, p. 21, para. 91). That is the least one can say, bearing in mind that in 1970 the Government of Canada considered that its reservations involved only *"limited and clearly defined exceptions"* (ILM, cit., p. 612). Canada had the 1970 declaration in front of it but deliberately put it to one side. It must surely regret that now, in view of its present situation. However it is already too late and Canada cannot argue that the judges should alter or complement the terms of the declaration by interpreting it.

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38. Although the parliamentary declarations are not lacking in contradictory elements, it may be asserted that the intention of the Canadian Government in defending Bill C-29 in Parliament was primarily to combat, within the NAFO Regulatory Area, the activities of vessels flying flags of convenience and the activities of pirate vessels (which are today ghost ships, having vanished from

the Canadian statements). It is true that, if we examine the actual terms used, Canada's reservation affects all vessels fishing within the NAFO Regulatory Area, on condition, obviously, that there are disputes relating to measures for the conservation and management of fisheries. Yet if the words went beyond the intention, Canada should in any event reply to the expectations they aroused in third parties of good faith. The least that can be said about the message of the Canadian Government's parliamentary statements is that they were ambiguous and deceptive (and not only for Spain), appearing to restrict the application of its legislation to "pirate vessels".

V. Conclusion

39. In the course of the hearings Canada has shown that it lacks willingness to act before the Court but that it has given its consent thereto; it is Spain which is today entitled to rely on the declaration of 10 May 1994, including subparagraph *(d)* of paragraph 2, in order to contend that the Court has jurisdiction in this case. Declarations, like treaties, are not *scraps of paper* and States cannot and must not jettison so easily the obligations which they took the risk of undertaking. Counsel for Canada has complained that the respondent's conduct was described as "barbarous" (CR 98/12, p. 38, para. 29). How else could it be described? All in all, it was perhaps not such a bad description, the barbarians had their moments of glory. They put an end to the Roman Empire and plunged us into darkness for centuries.

Mr. President, Members of the Court, this brings me to the end of my statement. Thank you for your kind attention. Mr. President, I request you to give the floor to my colleague Keith Highet.

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Le PRESIDENT : Je vous remercie, Monsieur Remiro. Je donne la parole à M. Highet.

M. HIGHET : Je vous remercie, Monsieur le président. Madame, Messieurs de la Cour.

Introduction

1. En écoutant la réponse du Canada la semaine dernière, nous avons été surpris d'entendre que ses représentants estimaient que la présente affaire était simple. Nous ne pensons pas qu'il

s'agisse d'une affaire facile. Elle est loin d'être sans objet. Et, bien que le conseil du Canada semble penser que «la cause est entendue», nous ne pouvons être d'accord avec lui.

2. Notre opinion est probablement partagée par des membres de la Cour. Il y a des arguments complexes, certaines zones grises, et des questions délicates de compréhension et d'appréciation. Des questions comme cela ne peuvent être évacuées comme «faciles» à trancher.

3. Ma tâche aujourd'hui est donc de me pencher sur certaines des principales questions qui posent problème sur lesquelles le Canada a appelé l'attention relativement à la position de l'Espagne sur l'interprétation. Nous espérons que cela sera utile à la Cour. J'expliquerai ensuite comment, pour nous, il faut se pencher sur ces questions et y répondre. Après quoi, j'exposerai de nouveau et confirmerai l'argumentaire de l'Espagne en ce qui concerne l'interprétation de la réserve canadienne.

4. Monsieur le président, je dois d'abord faire une observation procédurale mineure. L'Espagne a assurément accepté, en mai 1995, l'ordonnance dans laquelle la Cour a décidé d'entendre les Parties. Elle ne soulève en aucune manière la question d'un point de vue négatif au stade actuel, mais fait observer que l'ordre des plaidoiries et les positions relatives des Parties ne peuvent que donner l'impression que l'Espagne affirme quelque chose, et que le Canada y répond en position défensive. En fait, c'est le contraire qui est vrai : c'est le Canada qui doit être considéré comme affirmant quelque chose — c'est-à-dire que sa réserve exclut la compétence de la Cour — et l'Espagne qui s'efforce d'établir quelque chose de négatif — c'est-à-dire que cette réserve n'exclut pas la compétence de la Cour.

5. Bien que la notion de «charge de la preuve» ne soit guère pertinente en l'occurrence, il est néanmoins impossible, dans un procès — comme nous le savons tous —, de faire disparaître la «charge de la persuasion», ou de la faire peser également — comme la rosée du matin — sur les deux Parties. Il faut donc s'efforcer de garder constamment à l'esprit que c'est le Canada qui a la charge de la persuasion en ce qui concerne sa réserve. C'est le Canada qui essaie d'établir une large dérogation à un engagement plus vaste qu'il a pris en ce qui concerne la compétence de la Cour.

Réponses aux critiques du Canada

6. Il semble y avoir cinq domaines principaux dans lesquels le Canada voit des difficultés dans la position de l'Espagne.

La réserve est inutile

7. Premièrement, le Canada se plaint que notre interprétation de sa réserve prive celle-ci de toute signification et la rend absurde. La réserve figurant au paragraphe 2, alinéa *d)*, prévoit expressément l'application de «mesures de gestion et de conservation» dans des zones qui par définition font partie de la haute mer. Le conseil du Canada nous demande comment nous pouvons prétendre que les mesures de conservation et de gestion ne peuvent par définition être appliquées en haute mer sans également conclure que la réserve canadienne ne peut s'appliquer à rien du tout[1].

8. La réponse est que l'intention subjective du Canada ne correspond pas nécessairement aux prescriptions objectives du droit international. Si ces prescriptions indiquent que les actes qui entravent la liberté des mers ne peuvent jamais être légitimement considérés comme des «mesures de conservation et de gestion», il en découle que la réserve canadienne est nulle *pro tanto*. Elle n'a pas abouti au résultat qu'elle visait — pour la simple raison que les mots qu'elle utilise ne peuvent être utilisés dans ce contexte de manière compatible avec le droit international.

9. En outre, la doctrine de l'effet utile n'exige pas de la Cour qu'elle comble une lacune ou corrige une erreur. Ceci est particulièrement vrai, Monsieur le président, lorsqu'un Etat a formulé une réserve pour répondre à des préoccupations internes, en oubliant que c'est le droit international et non son droit interne qui doit régir l'interprétation de la portée et du sens des mots utilisés.

10. Permettez-moi une fois de plus d'exposer mes distingués collègues à quelques «si» de plus. Supposons qu'un Etat X a fait une réserve excluant «les différends découlant de tout incident dans sa zone économique exclusive», et que cet Etat a aussi promulgué une «zone économique

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[1]Voir M. Willis, point *b)*, CR 98/12, p. 12-15, par. 59-67.

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exclusive» de 500 milles marins. Si un incident se produit en mer à quelque 350 milles des côtes de l'Etat X, cet Etat sera-t-il protégé par sa réserve ou ne le sera-t-il pas ?

11. La Cour devrait décider si elle doit ou non remplacer, au nom de l'effet utile, la «zone» non existante de 500 milles par la «haute mer». Une telle substitution reviendrait néanmoins à greffer sur la réserve un contenu qui aurait été étranger à l'intention de l'Etat déclarant.

12. En la présente espèce, il y a un autre problème. Le Canada a visé la «zone de réglementation de l'OPANO» — c'est-à-dire la haute mer. Mais le Canada a fait plus qu'identifier (à tort) un endroit. Il a aussi précisé la nature des actes qui seraient couverts par la réserve, sous une rubrique non existante. Les actes que le Canada cherche à protéger n'existent pas en droit international.

13. En bref, on ne peut rendre effectif ce qui, en droit, est ineffectif. Ceci n'est pas contraire au principe de l'effectivité et ne va pas non plus à l'encontre de l'effet utile. Depuis le début, il n'y a jamais eu aucun «effet» à rendre «utile». L'absence d'utilité de l'effet incombe au Canada, pas à l'Espagne. L'obligation de fournir une interprétation utile à la lumière des normes contemporaines du droit international est à la charge du *Canada*, et non de la Cour. L'incohérence était là depuis le début.

14. On peut aussi répondre que du point de vue du Canada, il y a bien un effet utile. Le Canada a la possibilité d'opter pour des mesures de conservation et de gestion de nature non coercitive, en demandant aux bateaux se trouvant dans la zone de réglementation de l'OPANO de se conformer dans cette zone aux règles de conservation et de gestion qu'il estime pouvoir édicter afin d'éliminer la surpêche. Ainsi que je l'ai fait valoir lors de ma première plaidoirie, le Canada a déjà bénéficié d'un *effet utile* puisqu'il lui a été possible de soulever une exception à la compétence sans que cette exception soit écartée *in limine*. C'est peut-être là un effet utile un peu bancal, mais de l'avis de l'Espagne, il s'agit, permettez-moi l'expression, d'une réserve très bancale. Ici encore, il n'incombe ni à l'Espagne ni à la Cour de réparer ce qui est fondamentalement une

erreur juridique qui fera date, à savoir une formulation incorrecte par le Canada de sa propre réserve, dans le feu de la discussion concernant le projet de loi C-94 en mai 1994.

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La réserve couvrirait toutes les éventualités

15. Le second argument avancé par le Canada (M. Willis) consiste à demander à l'Espagne d'expliquer comment la promulgation de la loi canadienne et l'exercice éventuel par l'Etat de son pouvoir, envisagé en 1994, pourrait constituer un différend *«autre»* qu'un différend tombant sous le coup de la réserve. Il y a deux réponses.

16. Tout d'abord, s'agissant de l'incident concernant l'*Estai*, quoique le différend entre l'Espagne et le Canada au sujet de l'exercice de son pouvoir par l'Etat puisse être considéré comme découlant de l'application et de l'exécution de «mesures» dans la zone de réglementation de l'OPANO, ou comme concernant cette application et exécution, ces mesures n'ont trait à la conservation et à la gestion qu'*aux yeux du Canada*. En droit international, il ne s'agit ni de «conservation et gestion», ni de «mesures».

17. La seconde réponse serait que l'incident de l'*Estai* est né de l'application d'une loi, au sujet de laquelle il existait manifestement déjà un différend avant l'incident. Ces questions auraient fort bien pu faire l'objet d'une contestation devant la Cour de la part de l'Espagne *avant même* que les autorités canadiennes aient agi à l'encontre de l'*Estai* ou d'autres bateaux. Et d'ailleurs, il ressort du dossier que l'Espagne a vigoureusement protesté contre le fait qu'au début de mars 1995, c'est-à-dire *avant* l'incident, il avait été décidé que la réglementation viserait aussi l'Espagne et le Portugal.

18. Dès lors, ces questions se seraient trouvées relever du cadre général de l'acceptation de la compétence par le Canada et n'auraient été exclues de cette compétence par aucune réserve. Elles auraient de toute évidence donné lieu à un «différend juridique» concernant «*b)* tout point de droit international» au sens du paragraphe 2 de l'article 36 du Statut.

19. En outre, Monsieur le président, même si la question de l'*Estai* était aujourd'hui «réglée», l'Espagne pourrait maintenir son instance devant la Cour. L'Espagne aurait qualité pour agir en son propre nom; un «différend» subsisterait; un «point de droit international», au sens du paragraphe 2 de l'article 36 du Statut, resterait à résoudre; et l'on serait en présence de l'un de ces «différends qui s'élèveraient après la date de la présente déclaration, au sujet de situations ou de faits postérieurs à ladite déclaration», dont il est question au paragraphe 2 de la déclaration faite par le Canada le 10 mai 1994 en vertu de la clause facultative.

20. Pourtant, le Canada maintient que même si le différend ne découle pas *(«arise out of»)* des mesures de conservation et de gestion prises par le Canada il les concerne *(«concerns»)* — et par conséquent tombe sous le coup de la réserve. (M. Hankey, CR 98/11, p. 36-37, par. 45.)

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21. La réponse essentielle à cela est que le différend n'a pas trait aux mesures de conservation et de gestion, ni à leur exécution, et que par conséquent, il ne peut ni en «découler», ni les «concerner». Nous avons déclaré d'emblée qu'il n'est pas question de poissons dans cette affaire — du moins pas pour l'instant. Nul ne parle ici du flétan du Groenland. Le débat ne porte pas sur la taille des poissons, sur la largeur, la taille ou la longueur des filets, ni sur le volume maximum des prises autorisées. Le différend ne touche à aucun aspect des mesures de conservation et de gestion si minutieusement décrites par le conseil du Canada, dont l'exposé était intéressant mais tout à fait hors sujet.

22. C'est tout le contraire : ces mesures — qu'il s'agisse des actions abusives des autorités canadiennes, ou de la réglementation, ou même des dispositions techniques de la loi elle-même — ne spécifient nullement, ni ne mentionnent, ni même ne comportent quoi que ce soit qui pourrait évoquer les points sur lesquels porte effectivement le différend. Dans son libellé, la réglementation ne revendique nullement le pouvoir d'agir en haute mer. La loi ne proclame pas la souveraineté du Canada sur la haute mer. *Ni la loi, ni les règlements ne font même mention de la «haute mer».* Partout, la zone visée est désignée par un euphémisme, l'expression «zone de réglementation de l'OPANO».

23. En fin de compte, Monsieur le président, *le différend, dans cette affaire, porte sur le bien-fondé de l'exercice par un Etat de son pouvoir*, et non sur des points de détail concernant la conservation et la gestion des ressources halieutiques. Il a trait à la revendication fondamentale par le Canada d'une compétence extra-territoriale qui lui a permis de promulguer cette loi et de prendre la position que l'on sait. Le différend porte sur la loi elle-même, sur les principes et les normes généralement reconnus en matière de non-ingérence, de respect de la souveraineté des autres Etats, d'observation des règles du droit international, de reconnaissance des règles internationales relatives à la liberté des mers et de respect du droit international en ce qui concerne le recours à la force dans des cas autres que la légitime défense.

Les arguments quant au fond empiéteraient sur les arguments quant à la compétence

24. Il n'est pas nécessaire de s'attarder sur le troisième point, selon lequel les questions de fond empiéteraient sur celle de la compétence : l'argumentation de l'Espagne obligerait la Cour à examiner l'affaire quant au fond pour déterminer si la réserve est ou non applicable. Et ceci, nous dit-on, est en contradiction avec l'objectif même des exceptions préliminaires à la compétence, qui est d'éviter qu'une affaire soit examinée au fond alors que la compétence n'est pas établie.

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25. Il est avancé que cela crée une situation paradoxale, puisque l'Espagne pourrait «l'emporter» sur la question de l'exception préliminaire puis, après examen plus approfondi quant au fond, «perdre» dans la mesure où la Cour pourrait être amenée à retenir l'argumentation fondamentale du Canada. On est en présence d'un raisonnement circulaire pernicieux et pervers, affirme le Canada. Mon collègue, M. Pierre-Marie Dupuy, exposera tout à l'heure à la Cour comment, dès les années 20, cette objection était perçue comme mauvais artifice.

26. On peut évidemment répondre brièvement à cela que l'exception du Canada est *ratione materiae* et qu'elle comporte donc ce «risque» par définition — un risque quasiment inévitable ainsi que je l'ai souligné la semaine dernière.

27. En outre, les procédures de la Cour sont tout à fait adéquates pour protéger les intérêts des parties. Il est toujours loisible à la Cour de décider qu'une exception «n'a pas dans les

circonstances de l'espèce un caractère exclusivement préliminaire» et qu'elle pourra par conséquent être tranchée lors de l'examen au fond[2]. Vous le savez, cela s'est encore produit la semaine dernière puisque dans son arrêt sur les exceptions préliminaires relatives à l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria*, opposant le Cameroun au Nigéria, la Cour a conclu que la huitième exception préliminaire du Nigéria ne présentait pas «dans les circonstances de l'espèce un caractère exclusivement préliminaire»[3].

La définition restrictive

28. Mon quatrième point porte sur la définition restrictive. Le Canada formule une objection connexe : selon l'interprétation que l'Espagne donne de la réserve, celle-ci ne s'appliquerait qu'aux mesures «conformes au droit international» (M. Willis, CR 98/12, point *b)*, p. 11-17, par. 55-78).

29. A cela nous répondons que nous ne disons pas que certaines mesures ne peuvent être *incluses* que si elles sont «acceptables» en droit international. La question dont il s'agit, c'est qu'elles ne peuvent *constituer* des «mesures de conservation et de gestion» que si elles sont reconnues comme telles par le droit international et la pratique et c'est alors et alors seulement qu'elles sont incluses. Le Canada omet la démarche essentielle, celle de la définition.

30. Le fait est qu'il ne pouvait pas y avoir là des «mesures» du genre *requis*, sauf selon la façon de voir du Canada.

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Le fil sans fin

31. Le cinquième point porte sur ce que l'on pourrait qualifier de fil sans fin. Autrement dit, si l'interprétation donnée de la déclaration du Canada par l'Espagne était exacte, toute réserve serait une sorte de fil sans fin et les litiges seraient interminables.

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[2]Règlement de la Cour, art. 79, par. 7.

[3]Arrêt du 11 juin 1998 (texte dactylographié), p. 55, par. 117.

32. Mon ami M. Prosper Weil a présenté la métaphore charmante d'une baguette magique *(a magic wand)*[4] que l'Espagne peut brandir au-dessus de toute réserve connue pour faire disparaître cette réserve[5], rien qu'en surimposant ou extrapolant des allégations de violations de normes internationales par dessus les termes de son libellé exprès. On ne peut pas, nous dit-on, pour tourner les termes clairs d'une réserve telle que celle du Canada, verser notre vieux vin dans une bouteille plus grande, plus récente, et y apposer une étiquette nouvelle[6].

33. Selon mon ami M. Weil, là réside l'essence même de notre cause — «le coeur même de la thèse espagnole»[7]. Il ajoute que ce que l'Espagne ne reconnaît pas, c'est «l'unité fondamentale entre les données concrètes d'une question soumise aux juges et les règles de droit qui lui sont applicables».

34. On nous invite à rappeler des affaires antérieures, dans lesquelles la Cour ou ses chambres n'ont pas estimé nécessaire de s'assurer de leur compétence pour examiner et appliquer des principes de droit international dépourvus de tout lien, par exemple avec les délimitations maritimes, notamment l'*estoppel* et l'acquiescement, ou d'autres principes et règles du droit international général, tels que le droit international du territoire, les règles des effectivités ou de l'*uti possidetis*, les règles de l'interprétation des traités et la règle qui interdit l'emploi de la force.

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35. M. Weil infère de ces exemples une «unité essentielle, fondamentale, entre la compétence pour connaître d'un différend donné et la compétence pour faire application des principes et règles fussent-ils de portée plus vaste, gouvernant ce différend...»[8]

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[4]CR 98/12, p. 43, par. 45.

[5]«Suffirait-il ... de constater qu'un différend ainsi exclu de la compétence de la Cour en raison de son objet met en cause des normes de portée plus large, applicables à d'autres chapitres du droit international, pour que, par un coup de baguette magique, la Cour se trouve investie de la compétence pour en connaître ?» (*Ibid.*, p. 43, par. 45.)

[6]CR 98/12, p. 34-37, par. 21-27.

[7]«L'Espagne soutient que la réserve canadienne, qui interdit à la Cour de se prononcer sur les mesures canadiennes de gestion et de conservation et sur leur exécution, n'interdit pas à la Cour de se prononcer sur le respect ou la violation par le Canada des normes qui déterminent la licéité internationale de ces mesures, en particulier le principe de la liberté de la haute mer et le principe de l'interdiction du recours à la force. *C'est cela le coeur même de la thèse espagnole.*» (CR 98/12, p. 40, par. 35; les italiques sont de moi.)

[8]*Ibid.*, p. 42, par. 43.

36. Cependant ce qu'a peut-être oublié mon ami, c'est qu'il ne suffit pas d'établir une distinction entre; i) les principes juridiques utilisés pour analyser et apprécier les questions de droit international; et ii) les règles juridiques de fond appliquées pour décider de l'issue de différends. Les questions litigieuses évaluées et interprétées par l'application des principes ne sont pas les mêmes que les différends dans lesquels on applique des règles rigoureuses pour décider s'il y a ou non une violation de ces règles. Telle est la clé.

37. De plus, les réclamations de l'Espagne relatives à l'emploi de la force, à la souveraineté et à l'absence de titre pour exercer la juridiction en haute mer ne font pas que répéter ou formuler de nouveau des «règles de droit» applicables[9]. Ce sont des réclamations fondées sur les règles de fond du droit de la mer et du droit international général et non des réclamations fondées sur le droit en matière «de conservation et de gestion».

«L'autodestruction»

38. Un dernier point mentionné par le conseil du Canada, c'est qu'une réserve, si elle s'attache à une question, soustrait cette question en totalité à la compétence de la Cour. C'est comme la règle d'exclusion des éléments de preuve viciés devant les juridictions fédérales des Etats-Unis : la doctrine connue sous le nom de «fruit of the poisoned tree».

39. Ainsi M. Weil a-t-il déclaré : «dès lors que le différend se rapporte à l'objet défini par la réserve, il est exclu de la compétence de la Cour quelle que soit la nature ou la portée des règles dont la violation est alléguée par l'Etat demandeur»[10]. Tel est l'effet que mon collègue M. Remiro Brotóns a qualifié de «trou noir» de la compétence. Selon les termes de M. Weil : «[d]ès lors que l'Espagne admet que le différend se rapporte aussi aux mesures de gestion et de conservation prises par le Canada, elle admet qu'il est couvert par la réserve»[11].

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[9]M. Weil, *ibid.*, p. 41, par. 38.

[10]*Ibid.*, p. 44, par. 48.

[11]*Ibid.*, p. 28-29, par. 5.

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40. Il existe peut-être un moyen de venir à bout de cette difficulté : faire une autre distinction, cette fois entre les faits qui donnent lieu à un différend et les règles de droit international appliquées pour le résoudre. S'il n'y a qu'une seule série de faits et un seul différend, alors une réserve efficace fait obstacle à son examen. S'il y a plusieurs séries de faits, de telle sorte que l'on puisse discerner plus qu'un seul différend autonome, comment en ce cas l'examen d'un différend peut-il être bloqué par une réserve qui s'applique seulement à l'autre ?

41. Par exemple la réclamation de l'Espagne relative à l'exercice illicite de pouvoirs en haute mer par le Canada n'est pas un simple moyen de tourner une réserve qui serait sans cela fatale à la cause de l'Espagne. Ce n'est pas une manière de demander à la Cour d'examiner les mêmes points litigieux sous des appellations différentes. C'est un droit que l'on invoque de façon tout à fait indépendante en vertu du droit international en soulevant des questions juridiques d'ordre général indépendantes des activités spécifiques du Canada qui se rapportent à ce qu'il considère comme ses efforts «de conservation et de gestion».

42. Cette réclamation ne se rapporte pas, en fait, «aussi aux mesures de gestion et de conservation prises par le Canada», car cela placerait les deux motifs d'action à peu près sur le même plan. Tout cela dépend donc de ce que l'on entend par le mot «aussi», ou le mot *«also»*.

43. Si, par «aussi», M. Weil veut dire que l'un des différends est effectivement identique à l'autre, alors il doit avoir raison. Mais il s'agit là d'une pétition de principe. Si, par «aussi», on veut dire que le deuxième différend peut accessoirement ou de surcroît être décrit comme comportant «aussi» des éléments du premier et si tous les éléments du second ne sont pas inclus dans le premier, il y a donc manifestement des éléments qui ne sont pas viciés, qui ne sont pas aspirés dans le trou noir du fait que la requête est «autodestructrice»[12].

44. Pour qu'elles s'autodétruisent, il faut que les demandes aient la même portée et soient identiques. Si leur identité n'est qu'accessoire et que l'une puisse conserver son autonomie sans être «viciée» par l'autre, nous échappons alors à l'autodestruction et la Cour a compétence.

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[12] *Ibid.*, p. 29, par. 5.

Analyse de la thèse du Canada

45. La ligne de défense adoptée par le Canada, telle qu'elle ressort de tous les exposés de ses conseils, fait essentiellement appel à la subjectivité et non pas à l'objectivité dans l'interprétation des

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réserves. Elle se borne ainsi à définir les mesures de conservation et de gestion par rapport aux «intentions» du Canada, «par leur objet» — par le but poursuivi par le Canada, plutôt que par les moyens employés.

46. La formulation employée par M. Weil, «différends définis par leur objet», est intéressante. Elle semble certainement mener à de nombreux raisonnements circulaires potentiellement vains. L'idée avancée dans la définition téléologique qu'il donne des différends exclus[13] est intéressante, mais illusoire. L'intention d'un gouvernement peut certes être très importante pour déterminer le sens de mots ambigus dans une réserve, mais elle ne saurait opérer requalification de la nature et du genre de différends que cette réserve vise.

47. L'intention peut être erronée ou elle peut reposer sur de mauvais éléments d'appréciation. Il est possible d'identifier l'«objet» d'un différend. On peut se servir de l'*objectif* que vise un gouvernement en rédigeant une réserve pour cerner ou préciser l'*«objet»* contre lequel on veut faire jouer la réserve, mais ce n'est pas la même idée.

48. Les mesures en cause n'étaient pas des mesures «de conservation et de gestion». Elles n'ont pas été prises dans un territoire relevant de la compétence du Canada ni au Canada même, sauf pour ce qui est de l'adoption de la loi. Les mesures prises contre l'*Estai* l'ont été en haute mer dans une zone ne relevant pas de la compétence du Canada. Elles ont été prises sur le pont d'un navire battant pavillon espagnol. Elles ne se justifiaient en vertu d'aucun pouvoir[14]. Lors de ma dernière intervention, j'ai formulé certaines observations au sujet de l'accusation de résistance à autorité portée contre le capitaine de l'*Estai*. Comment on a pu porter pareille accusation me dépasse complètement. Plutôt que d'être une action cohérente du gouvernement ou de constituer des

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[13]*Ibid.*, p. 43, par. 44.

[14]Cf. M. Hankey, CR 98/11, p. 37-40, par. 46-53; M. Willis, *ibid.*, p. 54-57, par. 18-29.

«mesures» prises par le gouvernement, les agissements concernant l'*Estai* constituaient au regard du droit des actes de brigandage injustifiés en haute mer. Ce n'étaient pas des actes émanant d'une autorité étatique.

49. Leur classement dans la catégorie des mesures «de conservation et de gestion» ne dépend dès lors pas des «buts» poursuivis par le Canada, mais des «moyens» que celui-ci a choisis. Sinon, une loi restreignant les importations d'acier, par exemple, pour la fabrication d'hameçons pourrait être considérée comme entrant dans le champ d'application de la réserve puisqu'elle concernerait les mesures de conservation et de gestion des ressources halieutiques prises par le Canada.

50. L'analyse téléologique adoptée pour déterminer la teneur de la réserve — l'«objet» du différend ou le genre de différend — ne détermine pas nécessairement la nature réelle du différend lui-même. Dans la présente affaire, les Parties s'opposent manifestement à la fois sur la teneur de la clause de réserve ainsi que sur la nature du différend que l'on veut soumettre à la compétence de la Cour. On ne fait pas progresser la résolution du conflit en définissant les moyens par la fin.

Les précédents

51. Monsieur le président, l'analyse développée par le Canada est aussi curieusement en contradiction avec les précédents applicables qui, curieusement aussi, appuient — et ne sapent pas — la thèse de l'Espagne.

52. L'affaire de l'*Anglo-Iranian Oil Co.* a été rappelée fréquemment à notre attention[15]. Que nous apprend-elle ? Elle nous apprend en fait que le sens de la réserve de l'Iran devait être dicté par l'intention du Majlis telle qu'elle s'était exprimée à l'époque. Et dès lors que le sens de la réserve en l'espèce doit être dicté par l'intention du Gouvernement du Canada, mais que cette appréciation doit se faire en mai 1994 et non pas en mars 1995.

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[15]Voir M. Hankey, *ibid.*, p. 30-31, par. 23-27.

53. Le conseil du Canada nous a aussi reproché d'avoir «laiss[é] pratiquement de côté» l'affaire du *Plateau continental de la mer Egée*[16]. Et on nous a obligeamment fourni un excellent résumé d'une partie — mais pas de l'ensemble — du raisonnement suivi par la Cour dans cette affaire[17]. Tirant la leçon de cette remontrance gentiment administrée, nous nous sommes précipités sur les recueils et nous avons relu avec grande attention l'affaire du *Plateau continental de la mer Egée* et nous avons découvert, à notre joie et à notre surprise, que l'élément central du raisonnement de la Cour — la clé de voûte de son analyse — semble avoir échappé à l'attention de nos collègues canadiens. Cet arrêt appuie précisément la thèse de l'*Espagne*. Et en voici les raisons.

54. L'élément clé du raisonnement de la Cour au sujet de la réserve de la Grèce à l'Acte général se fondait sur le fait qu'elle reconnaissait que le droit international régissait l'interprétation

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des termes employés dans cette réserve et l'amenait à conclure que «le régime territorial ... d'un Etat riverain comprend *ipso jure* les droits d'exploration et d'exploitation du plateau continental *qu'il tient du droit international*»[18]. Or si le droit intertemporel peut élargir la portée d'un objet concret, comme les droits territoriaux de la Grèce, du fait de son extension ultérieure aux terres submergées situées au large des côtes, il ne saurait transformer un objet donné (la conservation et la gestion) en un autre (l'abus de droit en haute mer).

55. Nous pourrions ajouter ici qu'il est possible d'adapter l'affaire du *Plateau continental de la mer Egée* à la situation qui nous occupe d'une manière intéressante et riche d'enseignements. La Cour se rappellera que la réserve *b)* de la Grèce excluait «les différends ayant trait au statut territorial de la Grèce».

56. Imaginons qu'un Etat X voisin ait *envahi* la Grèce et que celle-ci ait introduit une instance en vertu de l'Acte général de 1928. L'Etat X pourrait-il alors invoquer (par voie de réciprocité) la réserve de la Grèce ?

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[16]Voir M. Hankey, *ibid.*, p. 31, par. 28.

[17]Voir M. Hankey, *ibid.*, p. 31-32, par. 28-33; voir aussi *ibid.*, p. 37, par. 45; et p. 40, par. 52; M. Willis, p. 52, par. 8.

[18]*Plateau continental de la mer Egée, arrêt, C.I.J. Recueil 1978,* p. 36, par. 86; les italiques sont de moi.

57. L'Etat X soutiendrait que cette invasion ne peut donner lieu à l'introduction d'aucune instance parce qu'elle a eu lieu *sur* «le territoire grec» et parce que certains des droits de l'Etat envahisseur — notre hypothèse se situe évidemment avant 1945 — (par soumission ou conquête) seraient des droits «ayant trait au statut territorial de la Grèce». Le différend ou le motif d'action aurait «aussi» — pour dire comme mon ami Prosper Weil — trait au statut territorial de la Grèce.

58. Et pour paraphraser ses propos dans ce contexte hypothétique : «[d]ès lors que la Grèce admet que le différend se rapporte aussi» — et j'insiste sur le mot «aussi» — «au statut territorial de [la] Grèce affecté par les actions de l'Etat X, elle admet qu'il est couvert par la réserve»[19].

Nouvel exposé de la thèse espagnole

1. L'idée selon laquelle la réclamation liée spécifiquement à l'arraisonnement de l'Estai n'est que l'une des réclamations de l'Espagne à l'encontre du Canada est au coeur de la thèse espagnole

59. Les réclamations de l'Espagne liées à l'atteinte abusive à sa souveraineté en haute mer, à l'emploi de la force dans les eaux internationales et, de manière générale, à l'exercice d'une autorité gouvernementale en haute mer ne sont pas simplement fondées sur la violation de principes juridiques généraux susceptibles d'entrer en jeu lorsqu'il s'agit d'apprécier et d'analyser des questions juridiques, mais elles ont pour origine la violation de règles juridiques de fond.

60. Les réclamations de l'Espagne qui n'ont pas trait à la gestion ou à la conservation reposent sur des normes et des règles de fond, comme le droit de la mer, le droit de la responsabilité des Etats, et les règles concernant la non-intervention, la non-ingérence et l'emploi de la force dans les eaux internationales.

2. La réserve canadienne n'a aucune réalité ou validité objective en droit international et elle ne devrait pas être considérée par la Cour comme ayant pour effet de faire obstacle à la requête de l'Espagne, sauf si on lui reconnaît une telle réalité ou validité

61. En conséquence, la «réserve sur la conservation» n'exclut rien, parce qu'elle ne trouve pas à s'appliquer. Il est déplacé, de la part du Canada, de demander que son intention subjective

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[19] *Ibid.*, p. 28-29, par. 5.

s'impose à la Cour. L'intention subjective peut être importante, si ce n'est décisive, pour ce qui est de la question de l'objet et du but d'une réserve dans «l'esprit» de l'Etat déclarant. Mais suivre l'argument du Canada jusqu'à permettre que cette intention subjective s'impose — en ce qui concerne à la fois l'interprétation de la motivation et l'identification ou la validation de l'objet — serait forcer à l'extrême la jurisprudence de la Cour et violer le paragraphe 6 de l'article 36 du Statut. Si «l'intention et le but» peuvent se confondre avec «la portée et l'autorité», tout raisonnement concernant l'interprétation devient circulaire. La compétence de la compétence serait remplacée par l'intention de l'intention.

62. Ainsi, c'est au regard du droit international qu'il y a lieu d'examiner et d'interpréter la réserve canadienne 2 *d)*, particulièrement s'agissant de sujets aussi délicats que le recours à la force et le fait de se réserver la liberté des mers. C'est ce que confirme pleinement l'arrêt rendu dans l'affaire du *Plateau continental de la mer Egée (Grèce c. Turquie)* où la Cour a dit, il y a juste vingt ans : «Le différend a trait à la détermination des zones de plateau continental sur lesquelles la Grèce et la Turquie sont respectivement habilitées à exercer *les droits souverains consacrés par le droit international.*»[20]

63. C'est la seule option qui s'offre à la Cour aux termes de son Statut, dont l'article 38 dispose en son premier paragraphe que «la mission [de la Cour] est de régler conformément au droit international les différends qui lui sont soumis». En l'espèce, la législation nationale canadienne, dont la loi C–29, d'après laquelle le Canada peut exercer un pouvoir réglementaire à l'égard de navires étrangers en haute mer, ne saurait l'emporter ou primer sur la règle traditionnelle de droit international qui consacre la liberté de la haute mer. Une règle d'interprétation canadienne — comme une règle de droit interne de conflit de lois — ne saurait pas davantage s'appliquer pour faire échec à la règle internationale d'interprétation qui prévoit l'application du droit international et non celle du droit canadien.

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[20] *Plateau continental de la mer Egée (Grèce c. Turquie)* , *C.I.J. Recueil 1978*, p. 35, par. 85. Les droits consacrés.

64. Pour l'interprétation de la réserve canadienne en application du droit international, il est indifférent que le Canada ait omis au paragraphe 2 *d)* l'expression «d'après le droit international», alors qu'elle figure au paragraphe 2 *c)* de sa déclaration d'acceptation de la juridiction obligatoire de la Cour, mais l'on comprend aisément la raison d'une telle omission. L'introduction de cette expression dans le paragraphe 2 *d)* aurait été manifestement absurde. Cela aurait exposé le talon d'Achille de la réserve canadienne aux flèches de Paris.

3. Même si la Cour devait estimer que la réserve trouve à s'appliquer, elle ne saurait s'appliquer en l'espèce puisque l'action à l'origine de l'incident de l'Estai ne se justifie en vertu d'aucun pouvoir

65. L'incident a pu, *aux yeux du Canada*, découler de «l'exécution de telles mesures», mais il n'en est ainsi qu'en droit canadien. Il n'en va pas de même en droit international. Au plan international, le Canada a agi sans en avoir le pouvoir. Lorsque les agents de la force publique ont arraisonné l'*Estai*, ils l'ont fait sans en avoir le pouvoir. Quand ils sont montés à bord de l'*Estai*, ils l'ont fait sans en avoir le pouvoir. Quand ils ont arrêté le capitaine et l'équipage, ils l'ont fait sans en avoir le pouvoir. Quand ils ont détourné l'*Estai* vers St John's, ils l'ont fait sans en avoir le pouvoir.

66. Ces actions, qui ne se justifient en vertu d'aucun pouvoir reconnu en droit international, peuvent ou ont pu sembler aux responsables politiques canadiens des mesures valables «de gestion et de conservation», mais elles ne l'étaient que d'après le droit canadien et aux yeux du Canada et de son opinion publique. Elles continuent de l'être aujourd'hui, comme la Cour l'a entendu à maintes reprises. Il n'en demeure pas moins qu'elles ne sauraient constituer des «mesures de gestion et de conservation» au regard du droit international et de la pratique internationale.

4. En outre, dans le différend qui l'oppose au Canada, l'Espagne a au moins trois autres réclamations à faire valoir : extension illicite de la compétence nationale sur la haute mer, emploi illicite de la force et violation de la souveraineté espagnole en haute mer

67. Chacune de ces trois réclamations est indépendante des réclamations portant expressément sur l'incident de l'*Estai* et sur l'application spécifique aux navires espagnols se trouvant dans la zone

OPANO de la loi de 1994 modifiant la loi sur la protection des pêches côtières et ses règlements d'application.

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68. Ces trois réclamations se rapportent toutes à un différend qui existait avant l'incident de l'*Estai* et qui demeurerait, même si l'incident de l'*Estai* était «réglé» ou résolu d'une manière ou d'une autre.

69. Aucune de ces trois réclamations ne résulte d'un contournement de la réserve ou de la superposition de principes généraux qui pourraient se retrouver dans de nombreux différends, comme le principe de la «bonne foi» ou celui selon lequel *pacta sunt servanda*. Ce sont des règles d'application de fond qui sont en jeu : les règles tirées du droit de la mer qui président aux décisions dans ce domaine et les normes juridiques relatives à la non-intervention, à la non-ingérence et au respect de la souveraineté.

70. Ce sont des motifs d'action, Monsieur le président, qui sont indépendantes de l'application au cas particulier de ce que le Canada considère comme de simples «mesures de gestion et de conservation» ou la simple «exécution» de ces mesures.

71. Mon intervention, la semaine dernière, était consacrée aux questions d'interprétation de la clause facultative du Canada. Je me suis efforcé de démontrer que notre affaire est loin d'être simple et qu'elle n'est pas sans objet; que la réserve 2 *d)* du Canada doit être interprétée en appliquant les normes du droit international de même qu'en tenant compte des «intentions» déclarées du Canada; que le Canada doit assumer la responsabilité du fait que l'effet utile de la réserve n'est pas aussi large qu'il l'aurait souhaité; que la réserve aurait pu être rédigée de manière à atteindre les objectifs du Canada tels qu'on nous les a présentés; et que l'affaire n'empiète pas davantage sur le fond qu'on ne pouvait s'y attendre s'agissant d'une réserve de ce type.

72. Plus important encore, j'ai cherché à expliquer à la Cour en quoi cette affaire ne se limite pas à une simple question «de gestion et de conservation» et en quoi elle comporte certains motifs d'action importants, qui échappent au champ d'application de la réserve, et à l'égard desquelles la Cour est et devrait se déclarer compétente.

73. Monsieur le président, Madame et Messieurs de la Cour, ces conclusions, d'après moi, n'ont pas été réfutées en quoi que ce soit par les arguments en défense présentés avec talent par nos amis de la Partie adverse. En examinant les arguments complexes et vigoureux avancés par le Canada la semaine dernière et en y répondant nous avons été confortés dans la conviction que la thèse de l'Espagne est bien fondée.

Monsieur le président, je voudrais vous remercier, ainsi que les Membres de la Cour, de votre attention et vous prie de bien vouloir appeler à la barre mon ami et collègue, M. Pierre-Marie Dupuy.

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Le PRESIDENT : Merci, M. Highet. Je donne la parole à M. Dupuy.

Mr. DUPUY:

1. "In accepting the jurisdiction of the Court, Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the acceptance which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do. Their right to append reservations which are not inconsistent with the Statute is no longer in question. *But the question whether that little that is left is or is not subject to the jurisdiction of the Court must be determined by the Court itself.* Any conditions or reservations which purport to deprive the Court of that power are contrary to an express provision of the Statute and to the very notion, embodied in Article 36, paragraph 6, of conferment of obligatory jurisdiction upon the Court."[21]

2. It was in these terms, Mr. President, Members of the Court, that Sir Hersch Lauterpacht expressed himself in his separate opinion (separate, not dissenting) appended to the Judgment of the Court in the case of the *Norwegian Loans*. The citation is long, I agree, but it says it all, or almost all!

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[21]Case concerning *Certain Norwegian Loans, Judgment of 6 July 1957, I.C.J. Reports 1957*, p. 46, emphasis added.

In particular it confirms the *corpus juris* applicable to declarations of recognition of your jurisdiction, of which I had the honour to recapitulate the main elements in my oral argument before you last Wednesday[22]: the principle of consent to jurisdiction; the character *sui generis* of declarations; the need to seek out and identify the precise intention of the declarant at the time when the declaration was made; the integrity of the declaration; the importance to be attached to the principle of good faith; the application "by analogy" of treaty law; and, finally, the unavoidable obligation of respect for the provisions of the Statute and of the Charter.

3. You will have noted that not one of the distinguished counsel of Canada called this *corpus juris* into question last week. All of the rules evoked by Spain were implicitly recognized as applicable and in some cases reiterated, as Mr. Hankey did in his speech before you on Thursday morning[23].

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However, at the same time, our opponents' oral arguments taken as a whole eloquently demonstrated that Canada remains more attached than ever to the notion of *absolute freedom* on the part of the declarant, as I analyzed it before you the other day. Her talented counsel repeated it to us often enough: what counts is the purpose of the measures, as established by Canada[24].

If we allow Canada to decide for herself, *on the sole basis of her own domestic law*[25], whether an action comes within the scope of "conservation and management measures", the right to determine the lawfulness of those measures and of their enforcement would inevitably escape your jurisdiction.

4. The central question in this second round of oral argument is the following: *How does Canada reconcile this radical position with the at least implicit acceptance that her declaration must respect your Statute and hence the Charter of the United Nations?*

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[22]CR 98/10, pp. 36-56; for the requirement that the declaration must be compatible with the Statute, see more particularly paras. 19-22 and 33-37.

[23]CR 98/11, pp. 24 *et seq.*

[24]CR 98/12, p. 32, para. 16.

[25]CR 98/11, pp. 56-57, para. 27.

5. I had the honour to remind you last week of the consistency of your jurisprudence in this regard. A moment ago I cited to you the words of Sir Hersch on this subject.

No one in this courtroom doubts that Canada had in mind "fisheries conservation and management measures" when she adopted her new declaration. But that raises two questions.

First, in view of the manner in which she formulated this declaration, of which the reservation is but a part, and having regard also to the way in which her political leaders expressed themselves at the time, can you allow yourself to rely solely on this statement in order to hold that this premeditated course of action by Canada escapes your jurisdiction? This will be the subject of the first part of my speech.

Can you then, in view of the circumstances and manner in which the *Estai* was seized and other Spanish fishing vessels harassed during the same period, accept that the construction which

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Canada places on "conservation and management measures" allows you to uphold her reservation without derogating from the Charter itself? That will be the subject of the second and final part of my speech.

I. The Canadian Strategy and its Legal Implications

6. Last Thursday Mr. Hankey told you that the principles governing the interpretation of optional clauses had been set out by the Court in two cases, your Judgment in the case of the *Anglo-Iranian Co.* and that given in the *Aegean Sea* case[26]. He left out quite a number of others, but we won't worry about that! These two cases are indeed important, as we ourselves had been the first to point out[27], and they are important for the reasons which he himself gave, at least as far as the first two of those reasons are concerned, since they came from the Court itself, while the third one was "home-grown": those cases show that a declaration under Article 36, paragraph 2, must, on the one hand, be construed in accordance with the ordinary and reasonable meaning of its

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[26]CR 98/11, pp. 30-33, paras. 22 *et seq.*

[27]Oral argument of Mr. P.-M. Dupuy, CR 98/10, p. 40, para. 8; p. 45, para. 18; p. 47, para. 24; Spanish Memorial, p. 78, para. 62 [p. 58 in the English translation].

terms, so that the "objectified" intention — as he put it — may be ascertained from the text itself; at the same time they illustrate the rule whereby the search for this intention may be illuminated by an examination of the historical and political circumstances which obtained at the time when the declaration was formulated[28].

Canada invokes this jurisprudence in pursuit of a strategy which I am not so much going to challenge here as to analyse. It will be for the Court to draw from my analysis such conclusions as it considers appropriate.

A. The elements of the Canadian strategy:

7. While claiming to apply the criteria of the *Anglo-Iranian Co.*, and *Aegean Sea* cases, over which they will not be the first to have burnt their fingers, our opponents allow the purpose of the "conservation and management measures" to override all other considerations. However, the distinguished counsel of Canada apply to this notion a treatment somewhat along the lines of that which the Jivaro tribe used to mete out to the heads of their enemies: as everyone knows, first they severed them from the body, then they shrank them down to the chosen size.

Our opponents concern themselves only with the content of the reservation, without regard for that of their own declaration; without regard, moreover, for the large number of statements made at the time by their own Government; they concentrate their efforts on the object of the reservation without concerning themselves with whether or not it coincides with that of the Application filed with you by Spain.

8. Thus, playing, as it were, the Jivaro witch-doctor, one of Canada's counsel tells us: "the phrase 'conservation and management' covers the whole range of measures taken by States with

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[28]See Note 6, *supra.*

respect to the living resources of the sea"[29], and, again, that "the geographical area where these measures apply will, of course, vary"[30].

However, neither Mr. Hankey, any more than Mr. Willis before him, places the reservation in the context of the Canadian declaration "as a whole", notwithstanding that one of them had affirmed his faith in the integrity of declarations, of which reservations are but a part[31], while the other told us that the principle that reservations should be interpreted restrictively derives from the misconception that the Court's jurisdiction is the general rule from which the reservation constitutes an exception[32].

This is a serious error of interpretation and runs precisely counter to the principle of the integrity of the declaration.

The formal recognition of jurisdiction is not a general principle but a specific undertaking. It is specific to the Canadian declaration, the first paragraph of which reads as follows: "Canada accepts as compulsory *ipso facto* and without special convention . . . the jurisdiction of the International Court of Justice . . . over all disputes arising after the present declaration."

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If the integrity of the declaration is to be respected, then the reservation must be interpreted by reference to the obligation in relation to which it derives its meaning, and not by reference to general international law, which merely provides that the declarant's consent must have been freely given[33].

9. Furthermore, not one of the counsel of Canada dared mention — still less dispute the fact — that the Minister of Fisheries, and still more so his colleague at Foreign Affairs, had

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[29]CR 98/11, p. 38, para. 48.

[30]*Ibid.*, p. 39, para. 51.

[31]*Ibid.*, pp. 26-28, paras. 10-14.

[32]CR 98/11, p. 52, para. 7.

[33]See oral pleading of Mr. Dupuy. CR 98/10, pp. 47-48, para. 24.

deliberately emphasized, in order to alleviate the concern and scruples of their Members of Parliament, the distinction between "pirate vessels" and vessels of member States of NAFO.

Thus, in a deliberately "clean" version the Canadian Government sanitized its intentions and all we learn of this from Mr. Willis' speech, where he relies this time on the text of the Canadian legislation itself, is that it applies to all vessels[34].

10. However, last week we were treated to a new attempt to reduce the legal scope of your right of intervention. On Friday morning Professor Weil told you:

> "When a State attaches to its declaration of acceptance of the compulsory jurisdiction of the Court a reservation excluding disputes on a certain subject, on that ground alone, necessarily and automatically, it rejects the Court's jurisdiction to apply the principles and rules which would have governed the dispute had it not been exempted from the jurisdiction of the Court — even though the field of application of such principles and rules is wider than the specific subject-matter of the disputes concerned."[35]

11. This statement must be quietly but firmly challenged. Contrary to appearances, it contributes nothing to a solution of the problem of law before the Court — that of the legal rules governing its determination of its own jurisdiction — but on the contrary helps to obscure it. Moreover, its author produced it solely on his own authority, without being able to find support for it either in jurisprudence or in the doctrine.

It derives from a truncated conception of the manner in which the International Court proceeds. Just as this latter is the sole arbiter of its own jurisdiction, in the same way it is in no
• 056 way limited with regard to the legal means which it may employ in order to confirm or deny such jurisdiction. It is free to choose for itself, from the sources set out in Article 38, the rules of law which it considers appropriate to this operation.

12. We must not confuse the procedural and substantive rules applicable to the determination of jurisdiction with those to which the Court may have recourse in order to rule on the merits. It is one thing to apply the Statute or the provisions of the Charter in order to determine whether a

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[34]CR 98/12, p. 21, para. 94.

[35]CR 98/12, p. 43, para. 44.

reservation may be invoked, quite another to examine subsequently — for example — the substantive question of the jurisdiction of a State over vessels flying its flag.

But, in both cases, the Court has absolute freedom in its choice of the rules of law applicable. Moreover, the Court has itself made it clear that the determination of its own jurisdiction must be governed by certain substantive rules of law. Thus, in the case concerning the *Right of Passage over Indian Territory* this Court stated:

> "In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid, and whether such invalidity entails the invalidity of the Declaration in which it is contained, the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording *and applicable principles of law*."[36]

These are principles which the Court itself derives, on its own determination, not only from the Statute but also from the Charter.

13. Furthermore, the need for a declaration of recognition of jurisdiction to comply with the Charter may lead the Court, even at the jurisdiction stage, to undertake a preliminary examination of the substantive rules which it may be called upon to apply in the event that the case reaches the merits stage. Obviously, there can be no question of the Court being subject to any estoppel in this regard.

This applies in particular, in the present case, to the Court's power to rule on a coastal State's title to legislate over the high seas, or on the unlawful use of coercive force on those same high seas. As Sir Gerald Fitzmaurice put it:

> "le fait qu'un tribunal, lorsqu'il examine la question de la compétence, ne peut se prononcer ou statuer sur des questions relevant du fond, ne veut naturellement pas dire qu'il ne peut en connaître lorsqu'il est essentiel qu'il agisse ainsi pour décider de la compétence"[37]. *[Translation by the Registry.]*

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[36]Case concerning the *Right of Passage over Indian Territory, Preliminary Objections, Judgment of 26 November 1957, I.C.J. Reports 1957,* pp. 125-153, at 142.

[37]Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* 1986, Vol. II, p. 450.

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14. It is also to deal with this type of case precisely, when there is a particular degree of intermingling between merits and jurisdiction, that the Court gave itself the possibility of declaring that an objection does not have an exclusively preliminary character. However, ours is not such an extreme case. Rather, we are in a situation illustrating another remark by Sir Hersch Lauterpacht, when a question of jurisdiction has direct links with the merits: *"if in such cases the [tribunal] declines jurisdiction there is the danger it may have done so by reference to pleadings which lack completeness"*[38]. In this way, the Court has to make an initial appraisal of the validity either of the declaration itself, or, as is the case here, simply of the admissibility of the interpretation given of it by the declarant under substantive rules, whose full use it will discover at the merits stage. An illustration of this procedure may be found, for example, in the *Interhandel* case[39].

15. But let us also hear what the Permanent Court of International Justice said in its Judgment No. 6, when considering the objection to its jurisdiction raised by Poland in the case concerning *Certain German Interests in Polish Upper Silesia*:

> "In the circumstances . . . the Court cannot in its decision on this objection in any way prejudge its future decision on the merits. On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction — which could not be dealt with without recourse to arguments taken from the merits — have the effect of precluding further proceedings simply be raising it in *limine litis*; this would be quite inadmissible."[40]

And the Permanent Court added:

> "The Court, therefore, for the purposes of the decision for which it is now asked, considers that it must proceed to the enquiry above referred to, even if this enquiry involves touching upon subjects belonging to the merits of the case; it is, however, to be clearly understood that nothing which the Court says in the present judgment can

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[38] *H. Lauterpacht, The Development of International Law by the International Court*, rev. ed., 1958, p. 113, quoted by Sir Gerald Fitzmaurice, *op. cit.*, p. 450.

[39] *I.C.J. Reports 1959*, p. 24.

[40] *Judgment No. 6, P.C.I.J., Series A, No. 6*, p. 15.

be regarded as restricting its entire freedom to estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits."[41]

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Since this important matter of links between rules of jurisdiction and substantive rules which may be invoked at the jurisdictional stage has been considered, I now turn to the implications of the Canadian strategy.

B. The implications of the Canadian strategy

16. The position reiterated again by distinguished counsel of Canada last week that everything defined as a "conservation and management measure" by Canada itself inevitably falls within the scope of its reservation and, by virtue of this, therefore falls outside your jurisdiction has a very simple implication. The upshot of it is that it gives the declarant total power over your jurisdiction. In reality, the reading of Canada's reservation which it proposes you should follow presupposes the following addition: "Conservation and management measures are measures which are defined as such by the Canadian Government."

In this, you will no doubt have recognized an almost literal transposition of the reservation France wished to invoke against Norway in 1957, the very reservation which your Court rejected. It is one of those reservations which are said to be "automatic", because they leave the appraisal of their substantive scope to the sole discretion of their authors, or *"they operate in such a way as to leave no scintilla of jurisdiction to the Court"*, to use the words of Sir Robert Jennings, which I referred to the other day[42]

17. The fact that the scope of the reservation, precisely, has varied over time since it was made is all the more reason, Canada claims, to subject the Court to Canada's own appraisal of the reservation. In 1994, Canada adopted a declaration qualified by subparagraph *(d)*. Application of

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[41] *Ibid.*, pp. 15-16.

[42] See oral argument of Mr. P.-M. Dupuy, CR 98/10, pp. 46-47, paras. 25-27.

the Anglo-Iranian + Aegean Sea test enables us to refer not only to the literal text of the reservation but also to the parliamentary debates having given rise to its adoption[43].

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As I have already said, this could raise a legitimate expectation by Spain that it was not the subject of the Canadian revision of its legislation[44], since a clear distinction was drawn therein between pirate vessels and others. Not until 3 March the following year did a new regulation add Spanish and Portuguese vessels to those covered by the legislation.

18. As Mr. Willis was saying to you the other day, legislation is nothing without regulations and vice-versa[45]. The substantive scope of the legislation thus changed between the time of its adoption and that of the regulatory complement applied to it. However, in the meantime, the actual text of the declaration had not been modified.

According to Canada, there is nothing wrong in these successive extensions of the authority of its legislation, and its reservation must adapt to the fluctuations of its intentions, since it is solely from those intentions that it derives. You, the Judges of this distinguished Court, must remain silent and accept without a word this "elastic" recognition of your Court!

19. Then, as the third stage in this Canadian operation, a few days later, the *Estai* is seized and other Spanish vessels threatened, their nets cut, *even though they were not in breach of the NAFO legislation.* Once again, what this means is resigning oneself willy nilly to the exclusion of your jurisdiction, by this species of declarant monarch, in whom Canada recognizes itself. This monarch commands you to respect the *diktat* of his exclusion of your jurisdiction, measured by the sole yardstick of his sovereign will.

20. So for my part, I shall merely echo your own words by replying with a quotation from your Judgment of 1953, in the *Nottebohm* case:

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[43]See oral argument of Mr. P.- M. Dupuy, CR 98/10, pp. 46-47, paras. 25-27.

[44]Oral argument of Mr. P.-M. Dupuy, CR 98/10, pp. 47-49, paras. 28-31.

[45]CR 98/11, pp. 56-57.

> "Any State which has proclaimed its adherence to the optional clause cannot reserve to itself the power to make its opinion on the jurisdiction of the Court prevail once the Court has been seised of the case: any finding on jurisdiction falls exclusively within the power of the Court. In this regard, *no government can impose its point of view on the Court.*" *[Translation by the Registry.]* (Emphasis added.)

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Any opposite conclusion would, as I think I have sufficiently emphasized, be contrary to your Statute, to its Article 36, paragraph 6. Moreover, Sir Percy Spender also certainly shared this view himself, when he stated:

> "An obligation to recognize the jurisdiction of the Court, the existence or extent of which obligation in respect to any particular dispute is a matter which can be determined by the State concerned, is not a legal obligation at all."[46]

Mr. President, I now come to the second aspect, which this time concerns the question as to whether the modalities of the measures actually taken by Canada can genuinely fall within its reservation, the nature of the facts allegedly covered by the Canadian reservation. This part will be shorter than the previous one.

II. The nature of the facts allegedly covered by the Canadian reservation

21. Last Friday, eminent counsel of Canada strongly deplored Spain's insistence on the fact that the fisheries "conservation and management measures" cannot include the use of force[47], because that would allow an interpretation of the Canadian reservation incompatible with the United Nations Charter — that was our argument — and, more particularly, with its Article 2, paragraph 4. Seemingly ill-informed of the precise nature of the measures actually taken on the high seas against Spanish vessels by the State he is defending, that counsel saw them as unwarranted dramatization on our part, taking the form, he said, of a real "verbal bludgeoning"[48]. His evidence on this point raises problems of fact, a point already adequately dealt with by Professor Sánchez Rodríguez. But it also raises question of law, as follows: first, what is the legal definition of the use of force in

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[46]Separate opinion in *Interhandel* case, *Preliminary Objections, Judgment of 21 March 1959, I.C.J. Reports 1959,* pp. 55-56.

[47]CR 98/12, pp. 33-34, para. 30.

[48]*Ibid.*

public international law? Secondly, inasmuch as such use is generally prohibited, what are the circumstances in which force can nevertheless be used and used on the high seas? Our case typically concerns such matters of substance, whose preliminary examination, as I was saying a few moments ago, following in the footsteps of the Permanent Court, while it can be resumed in greater depth at the merits stage, is necessary to establish your jurisdiction. And I shall therefore very briefly consider the definition of the use of force, then its regulation.

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A. Definition of the use of force

22. In a contemporary international law, the use of force prohibited by Article 2, paragraph 4, of the Charter is by no means limited to the perpetration of an act of aggression, as defined in General Assembly resolution 3314. As Mr. Krzysztof Skubiszewski, for example, said in the Manual of Public International Law published by Max Sorensen, *"there is use of armed force when the latter acts against another State through military forces under its command"*[49]. So the criterion is a dual one. It is the criterion of the genuinely coercive character, in the military sense of the term, of the forces deployed. Then it is the placing of these forces under the authority of agents of the State. Hence, the use of force can be defined as the use of military coercion by agents of one State against another, whether it is the territory, the people or the objects placed under the jurisdiction of that State, which is affected.

If the Court agrees with this classic definition and applies it to appraising the means and the nature of the means deployed by Canada, there can be no doubt about its conclusion.

23. Perhaps so, detractors will reply; but anyway — according to them, that is — it is a reasonable, balanced use of military coercion[50]. I shall not embark upon this topic, Mr. President, not only because time is running out, but because it is a typical case of consideration of the merits,

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[49]M. Soerensen, *Manual of Public International Law*, 1968, p. 747.

[50]CR 98/11, p. 59, para. 35.

which would form part of the subsequent stage, the one concerned, precisely, with the merits of our case, in the English sense of the term.

For the time being, the specifically legal reply is as follows: the question of the appraisal of the "reasonable" or proportionate character of the use of force leads us to the question of its regulation on the high seas. Only legally authorized use can be balanced. However, the fact is precisely that the conditions in which Canada, on the high seas, used force against Spanish vessels cannot be accepted as part of the interpretation of its reservation.

B. Regulation of the use of force on the high seas

24. The use of force is strictly regulated on the high seas and on a very solid basis of customary law. It presupposes that the possession of a legal title is established with the greatest precision and I would summarize what it means by saying simply: no police without a title, in international spaces, whether on the sea or in the air. So no right to use force either. Furthermore, as regards this force which we are told is included in the composition of the English term *"enforcement"*, we are not told that it in no way forms part of the official French term which translates it and which, in the reservation, is *"exécution"*.

Remaining within the law of the high seas, Gilbert Gidel tells us that "by an age-old custom, warships have the right to recognize the identity and nationality of private vessels they encounter. But this right does not go beyond simple 'recognition'"[51]. No trace here of the use of armed force.

25. The cases in which the new Law of the Sea — in this respect very faithful to the old one — contemplates the seizure of a vessel or an aircraft on the high seas, are Article 105 of the Montego Bay Convention, which is supplemented by Article 110, relating to the right of visit. Without explicitly mentioning the use of coercion, the former, and perhaps even both of them, can be presumed to implicitly accept it. But to whom do these two Articles actually apply? The latter to vessels without nationality, or — both Articles — to "pirate" vessels!

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[51] *G. Gidel, Le droit international public de la mer, Vol. I*, p. 289.

Goodness me, have we not already encountered this term somewhere? "Pirate vessels"! that sounds familiar! Is it not precisely on this category that Mr. Ouellet originally said he wished to unleash the wrath of his fisheries police patrol boats in their packs[52]?

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But does this not mean that, even more than Mr. Tobin perhaps, he was very well-versed in law of the sea matters? Without wishing to make unfounded insinuations, I now better understand why, to mollify the scruples or the outright opposition of the Canadian Members of Parliament, whose opposing counsel so cautiously avoided addressing you last week, the two ministers should have spoken only of "pirate vessels" in order to designate their target.

26. Where "pirate vessels" are concerned, the customary law of the sea no doubt authorizes the use of force on the high seas. But only where they are concerned. So there is a serious problem. The Minister of Foreign Affairs and the Minister of Fisheries used this expression notwithstanding the fact that the relative imprecision of their comments barely concealed their full awareness that neither NAFO third State vessels, nor, *a fortiori*, vessels flying the flags of its member States, corresponded to the definition given by the law of the sea. There are only two alternatives: either, as one must always suppose to begin with, Mr. Ouellet — and through his voice Canada — were in good faith when they intimated, on making the reservation, that it referred only to pirate vessels, in which case Spain's legitimate expectation continued to be in favour of its security[53]. Or else by using this term according to the admittedly very precise usage of the law of the sea, Mr. Tobin was seeking to deceive his public, which once again brings us face to face with the problem of good faith, which we discussed at such length the other day that everybody, the Court, Spain and Canada included, agreed to recognize the application to the interpretation of the declarations establishing your jurisdiction; the dual *Anglo-Iranian Co.*, and *Aegean Sea* text, as you will recall, militated in favour of placing the text of the reservation back in the context of its adoption!

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[52]Memorial of Spain, p. 72, para. 112.

[53]See oral argument of Mr. P.-M. Dupuy, CR 98/10, pp. 41-42, paras. 15-17 and pp. 45-49, paras. 24-31.

Conclusion

27. At the end of this oral argument, I realize that the actual use of military coercion against Spanish vessels, which Canada claims escapes your knowledge, cannot be interpreted as falling within the legally relevant interpretation of the Canadian declaration. Any other decision would be to adopt an interpretation which, the other day, I termed *contra Cartam,* incompatible with the terms of the Charter. The Charter is an inescapable datum, as is your Statute. But you would only need to find that there is incompatibility with one of these, for example under Article 36, paragraph 6, or with other, under Article 2, paragraph 4, to reject not the validity of the reservation, which we have never called for, but the strictly unilateral interpretation Canada makes of it.

28. As you will have realized, throughout this oral phase of our pleadings, my colleagues, like me, have sought to base ourselves on the most settled, the most ancient, case-law and the most firmly-established principles. In this case at least, there is no question of leading you along the unknown paths of I know not what "relative normativity", so disparaged by counsel of our opponents, for whom I have the greatest respect, recognition and friendship. This is simply a matter of calmly inviting you, in conformity with the most firmly-established rules and principles, not to renounce the exercise of your judicial function.

Mr. President, Members of the Court, I thank you for your kind attention throughout this oral argument. May I ask you to give the floor to the Agent of Spain.

Le PRESIDENT : Je vous remercie, Monsieur Dupuy. Je donne la parole à l'agent de l'Espagne.

Mr. PASTOR RIDRUEJO: Thank you, Mr. President.

At the end of our oral arguments, we once again see that Canada has abandoned its allegation that the dispute between itself and Spain has become moot. At least, it appears to have understood that it cannot be asserted that the Spanish Application, having no further purpose for the future,

merely amounted to a request for a declaratory judgment. Nor does it say — a fact we note — that the agreement between the European Union and Canada has extinguished the present dispute.

Spain's final conclusions are therefore as follows:

065 We noted at the outset that the subject-matter of the dispute is Canada's lack of title to act on the high seas against vessels flying the Spanish flag, the fact that Canadian fisheries legislation cannot be invoked against Spain, and reparation for the wrongful acts perpetrated against Spanish vessels. These matters are not included in Canada's reservation to the jurisdiction of the Court.

We also noted that Canada cannot claim to subordinate the application of its reservation to the sole criterion of its national legislation and its own appraisal without disregarding the jurisdiction you hold under Article 36, paragraph 6, of your Statute.

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

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

Thank you, Mr. President.

Le PRESIDENT : Je vous remercie beaucoup. La Cour se réunira de nouveau mercredi à 10 heures.

L'audience est levée à 13 h 15.