

Fisheries Jurisdiction Case (Spain v Canada)

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Table of Contents

[A. Factual Background](#)

[B. History of Proceedings](#)

[C. Judgment of the Court](#)

[D. Assessment of the Reasoning and of the Separate and Dissenting Opinions](#)

[E. Relevance](#)

[Select Bibliography](#)

[Select Documents](#)

A. Factual Background

- 1 The judgment of the → *International Court of Justice (ICJ)* in the Fisheries Jurisdiction Case between Spain and Canada relates to a series of events which have become known as the 'Turbot War' in the media. In 1994, Canada and the → *European (Economic) Community ('EC')* could not agree on the total allowable catch for certain straddling stocks covered by the Northwest Atlantic Fisheries Organization's ('NAFO') Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries (see also → *Straddling and Highly Migratory Fish Stocks*). Disagreement centred on fishing activities in the Grand Banks area off the Canadian coast at Newfoundland, which in part belongs to the → *high seas*.
- 2 On 12 May 1994, Canada amended its Coastal Fisheries Protection Act by extending its area of application to also cover parts of the high seas in the Grand Banks area. The amendment made it illegal for vessels flying the flag of certain States, all of them → *flags of convenience*, to fish in that particular area between 9 March and 31 December in any year, and accorded Canadian authorities respective enforcement powers. These powers included the right to board, inspect, and search vessels, and to use force to arrest the master of a vessel. In 1995, Spain and Portugal were added to the list of flag States concerned.
- 3 On 10 May 1994, Canada had deposited the Declaration by Canada Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Art. 36, Para. 2, Statute of the International Court of Justice ('Canada's Declaration of Acceptance'), thereby revoking its prior declaration. The new declaration differed from the old one merely in that it contained one additional reservation which excluded jurisdiction for all: 'disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area... and the enforcement of such measures.'
- 4 On 9 March 1995, the *Estai*, a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles from the Canadian coast, in the Grand Banks area by Canadian Government vessels. Several warning shots were fired. The vessel was seized and the master arrested on charges of violations of Canadian fisheries regulations. Part of the ship's catch was confiscated. The members of the crew were released immediately. The master was released following the payment of bail, and the vessel was released following the posting of a bond.
- 5 After vehement → *protest* from Spain and the EC, on 20 April 1995, the EC and Canada agreed on fisheries control and enforcement measures. Canada agreed to remove Spain and Portugal from the list of flag States covered by its amended fisheries legislation. Following the Agreed Minute on the Conservation and Management of Fish Stocks between Canada and the European Community, all proceedings against the *Estai* and its master were discontinued; subsequently, the confiscated portion of the catch was returned. A lawsuit brought by the owners of the *Estai* against Canada was, however, unsuccessful (*Pereira v the Attorney General of Canada*).

B. History of Proceedings

- 6 On 28 March 1995, Spain instituted proceedings against Canada. Both parties appointed ad hoc judges. Canada argued that the ICJ lacked jurisdiction (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*). The Court thus decided to first address the question of jurisdiction.
- 7 Canada argued that the ICJ had no jurisdiction pursuant to the reservation contained in its declaration of acceptance. Spain argued that the Canadian reservation could not cover the subject matter of the dispute because of Canada's lack

of title to act on the high seas against vessels flying the Spanish flag. Furthermore, Spain argued that Canada could not subordinate the application of its reservation to the sole criterion of its national legislation and its own appraisal. Thirdly, the use of force by Canada against the *Estai* on the high seas could not be included in the Canadian reservation because it contravened the provisions of the UN Charter. On 4 December 1998, the Court delivered its judgment.

C. Judgment of the Court

- 8 The ICJ held that it lacked jurisdiction, because it was excluded by the reservation in Canada's Declaration of Acceptance.
- 9 The Court began its reasoning by stating that it was not for the parties but for the Court itself to determine the subject matter of the dispute on an objective basis, by examining the position of both parties. Also, the establishment of jurisdiction was not a matter for the parties, but a question of law to be resolved by the Court itself; thus, there was no burden of proof to be discharged for the establishment of jurisdiction.
- 10 The Court then turned to the rules for interpretation of declarations of acceptance by first addressing the relationship between a declaration and a reservation contained therein. As the Court's jurisdiction could only exist within the limits within which it had been accepted, a reservation did not derogate from a wider acceptance already given, but served to define the parameters of acceptance. There was thus no reason to interpret reservations restrictively, even in cases when the declaration had replaced an earlier declaration with wider limits.
- 11 Declarations under Art. 36 ICJ Statute were unilateral acts of State sovereignty and could thus not be interpreted according to the régime established in the → *Vienna Convention on the Law of Treaties* (1969) ([concluded 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331). Instead, the Court would interpret declarations in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction. It followed that in this regard the rule that a text must be construed against the party who drafted it when the text is ambiguous—*contra proferentem*—had no role to play. As concerned the principle of effectiveness, the Court noted that for reservations to a declaration of acceptance it was most important that these be interpreted in a manner compatible with the effect sought by the reserving State. The Court expressly asserted that reservations to a declaration of acceptance might be made precisely because States felt vulnerable about the legality of their position or policy. However, this did not change the fact that States remained in all cases responsible for acts that violate rights of other States.
- 12 The Court then turned to applying these principles of interpretation to the terms and expressions used in the reservation contained in Canada's Declaration of Acceptance. The Court concluded that the reservation excluded all disputes which would not have come into being in the absence of conservation and management measures.
- 13 The amendments to the Coastal Fisheries Protection Act by Canada constituted 'conservation and management measures' in the sense in which that expression was commonly understood in international law and practice. Since the dispute had its origin in these amendments and in the pursuit, boarding, and seizure of the *Estai* which resulted therefrom, the dispute fell within the categories of disputes excluded from the Court's compulsory jurisdiction.
- 14 President Schwebel and Judges Oda, Koroma, and Kooijmans appended separate opinions to the judgment. Vice President Weeramantry, Judges Bedjaoui, Ranjeva, and Vereshchetin, and Judge ad hoc Torres Bernárdez appended dissenting opinions. President Schwebel pointed out that if a reservation was considered void or ineffective, this would entail the nullity or ineffectiveness of the declaration as a whole. According to Judge Oda, the only issue really in dispute was whether Canada was justified in exercising fisheries jurisdiction on the high seas because there was an urgent need for conservation of fish stocks. Judge Koroma emphasized that the judgment was not an abdication of the Court's power to pronounce on the validity of a declaration and that the Court may also hold that a reservation had been invoked in bad faith. Vice President Weeramantry considered it to be a matter for the Court's discretion as to whether a dispute fell within the general part of the declaration, or under a reservation to such declaration. Where violations of basic principles of international law, extending even to violation of UN Charter principles were alleged, the dispute fell within the general referral rather than the particular exception. Judge Bedjaoui was of the opinion that a violation of a basic principle of international law, namely the exclusive jurisdiction of a flag State over vessels flying its flag, constituted the subject matter of the dispute, which the Court was not allowed to modify. Secondly, a declarant State owed certain duties to the clause 'system'. Although the possibility of withdrawing from it remained fully open, it was unacceptable that a State should distort or pervert it, or compromise its existence or operation while remaining within it.

D. Assessment of the Reasoning and of the Separate and Dissenting Opinions

- 15 Two major issues which the Court dealt with in the judgment are of interest: the identification of the subject matter of the dispute by the Court and the assessment of the Canadian reservation.
- 16 The ICJ has not redefined, changed, or modified the subject matter. Rather, the majority rightly draws the important distinction between the facts which are the basis for the Court's judgment on the one hand—and it goes without saying that it is the applicant who chooses the set of events that is presented to the Court—and the legal evaluation of this set of facts on the other hand. The evaluation of the facts and issues presented is the task and responsibility of the Court if the parties disagree about the nature of their dispute; the applicant cannot impose its own assessment of a series of events on the Court (and the respondent). In consequence, Spain could decide which events to present to the Court, but it could not decide whether these events arose out of or concerned measures for conservation and management of fisheries.
- 17 States are free whether or not to subject themselves to the compulsory jurisdiction of the Court, as reservations may be made when declaring acceptance. So it follows that States are free to decide on the extent that they wish to subject themselves to compulsory jurisdiction. Judge Bedjaoui makes an important point in stating that a reservation may not pervert the acceptance. However, considering the wide range of issues still covered by Canada's Declaration of Acceptance, the limitations are hardly so far-reaching as to assume a perversion of the acceptance in the present case. In addition, the acceptance of compulsory jurisdiction is not of a contractual nature but a unilateral and voluntary limitation to the declarant State's sovereignty.
- 18 The judgment makes the weaknesses in the optional clause system visible but at the same time evidences the high regard which the Court holds for the intentions of the States concerned. One may argue whether the optional clause system as a whole is weakened or strengthened by this approach. However, it is not too far-fetched to assume that States are more easily prepared to accept compulsory jurisdiction at all if they can rest assured that the Court will respect the limits they intended to set to their acceptance.

E. Relevance

- 19 The significance of the judgment lies in the clear and precise guidance on how the ICJ will interpret declarations of acceptance and reservations contained therein. All States which have submitted to the compulsory jurisdiction at all have added reservations to their declarations of acceptance; it can thus be expected that there will be future disputes on the extent of such reservations.

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