Third, the provisions referring to the institutional aspects of arbitration range widely. Several METS spell out in great detail the composition of the arbitral tribunal, its powers, its procedure and the effects of the judgment. Others merely contain a general reference to arbitration, leaving it to the parties to determine the tribunal's composition, powers and applicable law[79]. Finally, a few METs provide for arbitration to take place under the auspices of a specific institution[80]. For example, the 1968 African Convention on the Conservation of Nature and Natural Resources refers to dispute settlement through the Organisation of African Unity's Commission of Mediation, Conciliation and Arbitration[81]. The 1992 Baltic Convention provides that, upon common agreement, disputes may be submitted, *inter alia,* to ad hoc arbitration or to an unidentified "permanent arbitration tribunal"[82]. It is not clear whether the intention of the negotiators of the Baltic Sea Convention intended to refer to the Permanent Court of Arbitration or not[83]. This uncertainty does not exist, however in the case of the 1973 CITES[84] and the 1979 Bonn Convention on Migratory Species[85], which provide that where a dispute has not been settled by negotiation nor by mutual consent of the parties to the dispute, it may be submitted to

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79 E.g. 1954 International Convention for the Prevention of Pollution of the Sea by Oil, (11); 1980 Convention on the Physical Protection of Nuclear Material, (64); 1986 Convention on Early Notification of Nuclear Accidents, (83); 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, (84).

80 Only in very few METs is specific institutional support to arbitration provided. For instance, under paragraph 1 of Annex II, Part I, to the Biodiversity Convention, the claimant Party in a dispute is to notify the Convention Secretariat that the Parties are referring a dispute to arbitration. The Secretariat is to forward the information contained in the notification to all Contracting Parties to the Convention (or to the relevant protocol). See also, for example, the 1989 Basel Convention, the 1985 Vienna Convention and the 1991 Convention on Environmental Impact Assessment. In most METs, however, it is not explicitly provided that the Secretariat or Bureau of the relevant convention is to provide administrative or logistical support to any arbitration under the relevant agreement. This might be so because many secretariats may not have the financial and human resources to do so. Sands, "Settlement of Disputes", *op.cit.*, para. 28, at 9.

81 1968 African Convention on the Conservation of Nature and Natural Resources, (38), art. 18. See also article 7 of the 1963 Act Regarding Navigation and Economic Cooperation between the States of the River Niger Basin, (30). The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, (110), gives to the Parties the possibility of submitting the dispute, *inter alia*, to the International Tribunal for the Law of the Sea. The Convention Creating the Niger Basin Authority and the International Tropical Timber Agreement, find themselves at the very border between judicial and diplomatic means of settlement. Indeed, article XV of the 1980 Convention Creating the Niger Basin Authority, (68), provides that disputes, in case of the failure of diplomatic means, shall be referred to the Summit of Head of State and Government, a purely political organ, whose decision shall be final. Article 29 of the 1993 International Tropical Timber Agreement, (120), provides that disputes "shall be referred to the Council", another political organ, "for decision". "Decisions of the Council on these matters shall be final and binding."

82 The 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, (52), which was replaced by the 1992 Baltic Convention, (103), contained a similar provision in article 18.

83 On the Baltic Sea conventions, see: Fitzmaurice, M., *International Legal Problems of the Environmental Protection of the Baltic Sea*, Dordrecht, Nijhoff, 1992, pp. XXIX-313.

84 1973 Convention on the International Trade of Endangered Species of Wild Fauna and Flora, (49), art. 18.2.

85 1979 Convention on the Conservation of Migratory Species of Wild Animals, (62), art. 13.

binding arbitration, "...in particular that of the Permanent Court of Arbitration at The Hague".

Some common features among the arbitration clauses contained in METs exist. First, the overwhelming majority of agreements providing for arbitration acknowledge the competence of the arbitral tribunal to lay down its own rules of procedure[86]. Second, the great majority of treaties do not allow third States, whose legal interests may be at stake, a right to intervene in the procedure. Admittedly, arbitration is, by its very nature, bilateral. The parties to the dispute create an ad hoc body to settle it. Usually each appoints an arbitrator and the two arbitrators jointly agree on a third arbitrator, who shall act as President of the tribunal. The costs of the procedure (fees for the arbitrators and the registrar, rent for the tribunal's room, etc.) are borne only by the parties. An arbitration is, therefore, very much a private affair between two States.

However, the "closed" nature of arbitration is at variance with the ultimate unity of the global environment. Indeed, environmental problems, including those which by definition are addressed by METs, usually involve more than two States at the same time. It should be no surprise, therefore, that some METs, in particular those concluded since the beginning of the 1990s, grant third States having a legal interest in the dispute, the possibility to intervene[87]. In this respect, the conventions adopted at the beginning of the 1990s under the aegis of the Economic Commission of Europe seem to break new ground[88]. The 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1992 Convention on the Transboundary Effects of Industrial Accidents all provide that:

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86 A notable exception is art. 28 of the 1993 North American Agreement on Environmental Cooperation that provides that the Council shall establish Model Rules of Procedure and that, unless the Parties otherwise agree, panels convened under the dispute settlement clause of the agreement shall be established and conduct their proceedings in accordance with them. Another instance is that of the 1994 Energy Charter Treaty whose art. 27(e) provides that disputes between contracting Parties shall, in absence of an agreement to the contrary, be governed by the UNCITRAL Arbitration Rules.

87 I.e. article 61 of the 1956 Convention on the Canalization of the Mosel, (13); art. 16 of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, (41); Protocol II, article 7 of the 1973 International Convention for the Prevention of Pollution from Ships, (50); Annex for an Arbitral Tribunal of the 1980 Convention on Conservation of Antarctic Marine Living Resources, (67); 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, (107); the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, (94); 1992 Convention on Biological Diversity, (106); 1993 North American Agreement on Environmental Cooperation, (109), art. 24.2; 1995 Convention to Ban Importation into Forum Island Countries of Hazardous Wastes, (126), Annex VII, art. 9.

88 The 1997 Agreement on International Humane Trapping Standards, and the 1993 Convention for the Conservation of Southern Bluefin Tuna, contain also similar provisions for intervention. However, since these two agreements bind only three parties (European Community, Canada and the Russian Federation in the case of the former, Australia, New Zealand and Japan, in the case of the latter), they cannot be regarded as evidence of a larger trend. Agreement on International Humane Trapping Standards, (139), art. 15; Convention for the Conservation of Southern Bluefin Tuna, (109), art. 16.

"Any Party to this Convention having an interest of a legal nature in the subject-matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal"[89].

METs do not differ substantially from other international agreements regarding the appointment of the arbitrators. The only peculiar feature is that among the METs providing for arbitration, there is a conspicuous tendency towards three-member tribunals. Indeed, only six agreements opt for other formulae[90]. Again, much like other multilateral agreements, the overwhelming majority of METs contain provisions for by-passing any attempt by the parties to deadlock the constitution of the arbitral tribunal. If one of the parties refuses to designate its own arbitrator, or there is no agreement on the arbitrators to be appointed in common, the UN Secretary-General[91], the IMO Secretary-General[92], the President of the European Court for Human Rights[93], the Secretary-General of the PCA[94], the President of the

89 1991 Convention on Environmental Impact Assessment in a Transboundary Context, (95), Appendix VII, para. 15; 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (101), Annex IV, para. 15; 1992 Convention on the Transboundary Effects of Industrial Accidents, (102), Annex XIII, para. 15.

90 This is the case, for instance, of the "Special Commission" of art. 9 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, (17). Even though this organ is not called an arbitral tribunal by the treaty itself, it has, nevertheless, all its characteristics. In this case the arbitral tribunal is composed of five members. The 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, (85), provides for a single arbitrator (Annex on arbitration, art. 3.1). Finally, the 1980 Convention on the Physical Protection of Nuclear Material, (64); 1986 the Convention on Early Notification of a Nuclear Accident, (83); and the 1986 Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, (84), leave it to the parties to the dispute to determine the number of the judges that will compose the arbitral tribunal. The 1993 North American Agreement on Environmental Cooperation, (109), provides for a five-members arbitral panel.

91 Annex B, art. 4 of the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources, (53); Annex A, art. 4 of the 1976 Convention for the Prevention of the Mediterranean Sea Against Pollution, (54); Annex, art. 4 of the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, (74); Annex on Arbitration, art. 4 of the 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, (79); Annex VI, art. 4 of the 1989 Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, (92); 1992 Convention on Biological Diversity, (106); Convention for the Conservation of Southern Bluefin Tuna, (109); Convention on Supplementary Compensation for Nuclear Damage, (136).

92 Annex, chapter II, art. 15 of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, (41); Protocol II, art. IV of the 1973 International Convention for the Prevention of Pollution from Ships, (50); Annex on arbitration, art. 4.2. of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, (85).

93 Art. 47.2 of the 1968 European Convention for the Protection of Animals during International Transport, (39); Annex B, art. 3 of the 1976 Convention for the Protection of the Rhine Against Chemical Pollution, (57); Chapter VII, art. 18.2 of the 1979 Convention on the Conservation of European Wildlife and Natural Habitats, (63); Annex B, art. 2 of the 1976 Convention on the Protection of the Rhine Against Pollution by Chlorides, (58).

94 Annex for an Arbitral Tribunal of the 1980 Convention on the Conservation of Antarctic Marine Living Resources, (67).

International Court of Justice[95], the Executive Secretary of the Economic Commission for Europe[96] and others[97] are empowered to appoint the missing members or the President of the arbitral tribunal.

Regarding the applicable law, it goes without saying that the majority of METs do not contain provisions to this end. By virtue of the principle *lex specialis derogat generali*, the arbitrators are expected to look *in primis* at the text of the agreement which provided for that particular arbitration[98]. Yet, some METs are more detailed. For instance, article 9 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas explicitly requires the arbitral tribunal to take into account any special agreement concluded between the parties to the dispute[99].

Finally, almost all METs state that the arbitral award is binding on the parties to the dispute, and almost everywhere it is expressly stated that the award is definitive and cannot be appealed[100]. However, certain treaties add that, should there be a

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95 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, (107); Convention on Supplementary Compensation for Nuclear Damage, (136). The conventions concluded under the aegis of the International Atomic Energy Agency offer the alternative between the President of the ICJ and the UN Secretary-General. Nevertheless in case of conflicting requests by the parties to the dispute, the request to have the Secretary-General of the United Nations appoint the judges shall have priority: art. 17.2 of the 1980 Convention on the Physical Protection of Nuclear Material, (64); art. 11.2 of the 1986 Convention on Early Notification of a Nuclear Accident, (83); art. 13.2 of the 1986 Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, (84). Moreover, see Annex on an arbitral tribunal, art. 3.d of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, (90). It is worth noting that art. 3(e) provides that "If the President of the International Court of Justice is unable to perform the functions accorded to him under subparagraph (d) above or is a national of a party to the dispute, the functions shall be performed by the Vice-President of the Court, except that if the Vice-President is unable to perform the functions or is national of a Party to the dispute the functions shall be performed by the next most senior member of the court who is available and is not national of a Party to the dispute". On the dispute settlement procedure in the Antarctic Treaty system see: Auburn, F.M., "Dispute Settlement under the Antarctic System", *Archiv des Voelkerrechts*, Vol. 30, 1992, pp. 212-221; Kuperus, S., "The Antarctic Treaty: A Peaceful Solution for a Disputed Continent?", *Thesaurus Acroasium*, Vol. 18, 1991, pp. 613-622; Bosco, G., "Settlement of Disputes under the Antarctic Treaty", Francioni, F./Scovazzi, T., *International Law for Antarctica*, Milan, Giuffré, 1987, pp. 23-26; Kock, K.H., "Present Knowledge of Antarctic Marine Living Resources and Means of Ensuring the Compliance with Protection Measures", Wolfrum, R. (ed.), *Antarctic Challenge II*, Berlin, Duncker & Humblot, 1986, pp. 47-63.

96 1991 Convention on Environmental Impact Assessment in a Transboundary Context, (95); 1992 Convention on the Transboundary Effects of Industrial Accidents, (102), at 31; 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (101), at 161.

97 In the case of art. 19.1 of the 1988 Agreement on the Network of Acquaculture Centers in Asia and the Pacific, (89), it is the Chairman of the Governing Council. In the case of the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, (94), it is the Secretary-General of the OAU.

98 *Cf.* Annex B, art. 5.1 of the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources, (53); Annex A, art. 5.1 of the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, (54); Annex B, art. 6 of the 1976 Convention on the Protection of the Rhine Against Chemical Pollution, (57).

99 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, (17).

100 Art. 11 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, (17), does not consider the award definitive. Moreover, it adds that in case of recommendations added to the decision, they will have to receive "the greatest possible consideration".

need to do so, the Parties have the possibility to ask the arbitral tribunal to adjust the award[101].

4.2. The International Court of Justice

The International Court of Justice (ICJ) is "the principal judicial organ of the United Nations"[102]. As such, it is the only existing international judicial body endowed with general jurisdiction of universal scope[103] with regard to inter-State disputes[104]. While the ICJ was formally born in 1945, its antecedents extend as far back as the end of World War I. As a matter of fact, it is usually regarded as the moral and material successor of the Permanent Court of International Justice, which operated under the auspices of the League of Nations, in the same Peace Palace at The Hague, from 1922 until the outbreak of World War II[105]. It is not by chance, therefore, that the institution is generically referred to as the World Court.

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101 I.e. Art. 19 of the 1969 International convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,(41); Art. 5 of the 1980 Convention on the Conservation of Antarctic Marine Living Resources, (67); Annex VII, art. 3 of the 1995 Convention to Ban Importation into Forum Island Countries of Hazardous Wastes, (126).

102 UN Charter, art. 92; Statute of the International Court of Justice, art. 1. There is an immense and ever growing literature on the International Court of Justice. For an assessment of the World Court's prospects, see:, in general, Peck, C./Lee, R.S., *Increasing the Effectiveness of the International Court of Justice*, Nijhoff, The Hague, 1997; Abi-Saab, G., "De l'évolution de la Cour internationale. Réflexions sur quelques tendances récentes", *R.G.D.I.P.*, Vol. 96, 1992, pp. 273-298; Rosenne, S., "The Role of the International Court of Justice in Inter-State Relations Today", *Revue belge de droit international*, Vol. 20, 1987, pp. 257-289; Rosenne, S., *The World Court: What Is and How It Works*, Dordrecht, Nijhoff, 5th ed., 1995, XVIII-353 pp.; Gross, *op.cit.*; Lauterpacht, E., *Aspects of the Administration of International Justice*, Cambridge, Grotius, 1991, pp. XXXIV-166; Jiménez de Aréchaga, E., "The Work and Jurisprudence of the International Court of Justice, 1946-1986", *B.Y.I.L.*, Vol. 58, 1987, pp. 1-38; Janis, M.W., "The International Court", *idem*, *International Courts for the Twenty-First Century*, Dordrecht, Nijhoff, 1992, pp. 13-41; Damrosch, L.F. (ed.), *The International Court of Justice at a Crossroads*, Dobbs Ferry, NY, Transnational, 1987, XXVII-511 pp.

103 Art. 93 of the UN Charter provides: "All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". As almost all States are members of the UN (at present 185) it is not rash to say that the ICJ is the only true universal court. Were this not enough, however, paragraph 2 of the same art. 93 adds that: "A State which is not a Member of the United Nations may become a Party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon recommendation of the Security Council". Hence, two States which are not members of the UN (Nauru and Switzerland) have in the past (on January 29, 1998 and July 28, 1948 respectively) allowed themselves to become party to the Court's Statute.

104 Art. 36.1 of the Statute provides that the jurisdiction of the Court comprises "all cases which the Parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

105 From the legal point of view, the succession of the ICJ to the PCIJ has been provided for by art. 37 of the Statute of the ICJ. "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the Parties to the present Statute, be referred to the International Court of Justice".

The World Court is a sort of international judicial Uranus. As the ancestor of all gods of the Pantheon, for a long time it had no rivals[106]. Until the beginning of the 1950s, the only potential contender was the Permanent Court of Arbitration. But the PCA was neither permanent nor a court, and, in any event, had already been shadowed in the 1920s by the establishment of the PCIJ. However, since the end of World War II, two factors conspired to enlarge the number of international judicial fora: the evolution of international law into highly specialized and self-contained areas (e.g. international trade law, human rights law, law of the sea, etc.) and the coagulation of States into regional organizations. These elements, reinforced by recurrent criticism towards the World Court as inaccessible and unreliable, eventually led to the burgeoning of a large number of international judicial and quasi-judicial bodies[107].

Admittedly, none of these bodies has tried to challenge the monopoly of the World Court, which remains the only forum before which States, and only States, can bring virtually any legal dispute, no matter whether it arose out of the alleged violation of an international agreement or out of customary international law. Moreover, the World Court still retains the exclusive power to render advisory opinions on legal questions referred to it by "duly authorized international organs and agencies" (i.e. several UN bodies and agencies)[108]. No other fora are as overarching as the ICJ, for their jurisdiction is restricted either *rationae materiae, personae or loci*. This consideration by itself, therefore, might justify regarding it as a *primus inter pares*, if not placing the ICJ much like the sun at the center of the existing galaxy of international judicial fora. But, in a world where generalists invariably succumb to specialists, can the ICJ prevail over other international courts and tribunals, or even *ad hoc* arbitration in the struggle to attract international environmental disputes? The answer to this question will be provided only after taking a hard look at the ICJ's environmental judicial record. However, before introducing the cases, while keeping in mind the peculiar features of international environmental disputes, it is necessary to put forth here a few observations on the way the World Court is accessed and by whom.

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106 In Greek mythology, Uranus was the personification of the sky and the son and mate of Gaia (the Earth). Their children were the Hecatonchires, the Cyclopes and the Titans. Since Uranus was jealous of the future power of his children and feared he would lose his command to them, he threw them in the underworld. At the instigation of Gaia, her son Cronus castrated his father and dethroned him. When Uranus' blood fell upon the Earth (Gaia), several other divinities sprang forth, populating the Pantheon. <http://www.pantheon.org/mythica/> (Site last visited April 27, 1998).

107 On the issue of the proliferation of international judicial bodies see, in general, the special issue of the *NYU Journal of International Law and Politics*, 1999, Vol. 31, No.4, containing the finding of the symposium convened in New York in October 1998 by the NYU School of Law and the Project on International Courts and Tribunals entitled "The Proliferation of International Tribunals: Piecing Together the Puzzle". For an overview of the state of development of the international judicial system, see: Romano, C.P.R., "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", *ibid.*, pp.709-752. See also Lauterpacht, E., *Aspects of the Administration of International Justice*, *op.cit.*, pp. 9-22; Treves, T., *Le controversie internazionali: Nuove tendenze, nuovi tribunali*, Milano, Giuffrè, 1999.

108 UN Charter, art. 96. On the Court's advisory function and its limits, see, in general, Sohn, L. B., "Broadening the Advisory Jurisdiction of the International Court of Justice", *A.J.I.L.*, Vol. 77, 1983, pp. 124-129.

4.2.1. The Basis of the Court's Jurisdiction

The Court's function is twofold: to settle in accordance with international law the legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. The advisory function of the Court is not within the purview of the present study, as it is not necessarily exercised in conjunction with international disputes as defined here. Suffice to say that the Court's advisory procedure is by and large modeled on that of contentious proceedings, and the sources of applicable law are the same. In principle, the Court's advisory opinions are consultative in character and are therefore not binding as such on the requesting bodies, even though certain international legal instruments can provide in advance that the advisory opinion shall be binding.

The Court's contentious jurisdiction, conversely, is of a greater interest. The Court is competent to settle disputes only between States and only if those States have accepted its jurisdiction[109]. There are three fundamental ways in which a dispute can be brought before it. One after the dispute has emerged (again, the *a posteriori* approach) and the other two beforehand (the *a priori* approach)[110].

4.2.1.1. Special Agreement

First, the parties to a dispute can decide to refer it to the Court by a "special agreement" concluded expressly for this purpose[111]. While direct agreement between the parties would seem to be a natural and straightforward way to bring disputes to the attention of the World Court, in the past this avenue has been resorted to quite rarely. As of the end of 1999 only 14 cases (out of a docket of more than 80 contentious cases submitted since 1945) have been brought before the Court by

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109 The contentious jurisdiction of the Court depends on the consent of all parties to the dispute. Yet, formal consent to jurisdiction does not necessarily indicate a willingness to appear in a particular matter. In fact, States have the possibility not to appear. Jurisdiction of the Court will not, however , thereby be denied. Statute of the International Court of Justice, article 53. On the issue, see, in general, Fitzmaurice, G.G., "The Problem of the "Non-Appearing" Defendant Government", *B.Y.I.L.*, Vol. 51, 1980, pp. 89-122; Eisemann, P.M., "Les effets de la non-comparution devant la Cour internationale de Justice", *A.F.D.I.*, Vol. 19, 1973, pp. 351-375; Stillmunkens, P., "Le 'forum prorogatum' devant la Cour permanente de justice internationale et la Cour internationale de Justice", *R.G.D.I.P.*, Vol. 68, 1964, pp. 665-686; Scott, G., "Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ", *Denver Journal of International Law and Policy*, Vol. 16, 1988, pp. 377-392.

110 See, in general, McWhinney, E., *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making in the Contemporary International Court*, Dordrecht, Nijhoff, 1991, XIX-189 pp.; Szafarz, R., *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, XII-189 pp.

111 Statute of the ICJ, art. 36.1.

way of ad hoc agreement[112]. Of these only one, the *Gabcíkovo-Nagymaros* case between Hungary and Slovakia, was related to the environment[113].

It is worth looking at the text of the special agreement concluded on April 7, 1993 between the two countries (actually between Hungary and the Czech and Slovak Federal Republic which, on January 1, 1994, split into the Czech Republic and the Slovak Republic)[114]:

"The Republic of Hungary and the Slovak Republic,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabcíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';...

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;...

Desiring that these differences should be settled by the International Court of Justice;...

Desiring further to define the issues to be submitted to the International Court of Justice, have agreed as follows:

Article 1

The Parties submit the questions contained in article 2 to the International Court of Justice pursuant to article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

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112 They are the following cases: *Asylum* (Colombia/Peru); *Minquiers and Ecrehos* (France/United Kingdom); *Sovereignty over Certain Frontier Land* (Belgium/Netherlands); *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands); *Continental Shelf* (Tunisia/Libya); *Delimitation of Maritime Boundary in the Gulf of Maine Area* (Canada/USA); *Continental Shelf* (Libya/Malta); *Frontier Dispute* (Burkina Faso/Mali); *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras); *Territorial Dispute* (Libya/Chad); *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia); *Kasikili/Sedudu Island* (Botswana/Namibia); *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia). In the *Corfu Channel* case (UK v. Albania), the parties to the dispute concluded a special agreement after the delivery of the Court's Judgment on the Preliminary Objection. In addition, the case concerning the *Arbitral Award Made by the King of Spain on December 23, 1906* (Honduras v. Nicaragua) was submitted by means of an application, but the parties had previously concluded an agreement on the procedure to be followed in submitting the dispute to the Court.

113 *Infra*, Ch.III.7.

114 Hungary-Slovak Republic: Special Agreement for Submission to the International Court of Justice of the Differences between them Concerning the Gabcíkovo-Nagymaros Project. Done at Brussels, April 7, 1993, *ILM*, Vol. 32, 1993, pp. 1293-1297.

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometer 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.
(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.
(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court."

A few points of the Special Agreement of April 7, 1993, deserve comment. First, from a technical point of view, it may be remarked that the acceptance of the Court's jurisdiction has been effected by treaty and not by way of a unilateral declaration, as happens in the case of so-called optional declarations. The very fact that the Agreement was subject to ratification by the national parliaments (art. 6.1) was evidence of the fact that the two States held that the decision to submit the dispute to an international judicial body was politically momentous. Moreover, the preamble makes it clear that the parties had exhausted diplomatic remedies before resorting to the Court. Again, recourse to international judicial bodies is, as in domestic systems, a matter of last resort[115].

Second, pursuant to article 40.1 of the Court's Statute, the Agreement identifies the parties and the subject-matter of the dispute (preamble and art. 1)[116]. The dispute is not only described in the preamble but the parties also detail the questions that they ask the Court to decide (article 2). This is probably the most critical and contentious part of a compromissory agreement, for it determines the way the Parties characterize the dispute and also the logical route the judges will have to follow to decide the case.

Third, by submitting the dispute by common agreement rather than compulsion, the parties were able to determine the timetable of litigation, much as in international arbitration. This is a factor that has a direct impact not only on the cost but also on the length of the proceedings. Since time is a crucial element in environmental problems, being able to shorten proceedings as much as possible is an element States should keep in mind when deciding which avenue to pursue to settle their disputes. The need to avoid wasting time also explains why at article 4 the parties decided to give up the possibility of asking the Court to indicate provisional measures. By doing so, they committed themselves to elaborate an interim water management regime and, quite interestingly, any disputes arising out of its implementation would be settled through non-judicial means (i.e. consultation and reference to experts, including the Commission of the European Communities).

Finally, the parties not only reached an agreement covering the submission of the dispute and its treatment by the Court, but also extended its reach beyond the Court's judgment, leaving open the door for a sequel to the case in the event they could not agree within six months on the modality of the execution of the judgment (article 5). Had the case been brought through other avenues (e.g. optional declarations), it probably would have a hard time re-entering the Court, since typically the defeated party's reflex is to withdraw its optional declaration[117]. As the *Trail Smelter* and the *Nuclear Tests* disputes demonstrate, keeping the court-room open

115 *Supra*, Ch.II.4.
116 "Cases are brought before the Court, as the case may be, either by notification of the special agreement or by written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated". Statute of the ICJ, art. 40.1.
117 E.g. the United States in the Nicaragua Case and France after the First Nuclear Tests case.

might play a crucial role in the solution of international environmental disputes because of the complexity of the terms of settlement and the often unforeseen problems that might arise when abstract plans are implemented in the field.

4.1.2.2. Cases Provided for in Treaties

Alternatively, instead of waiting for the emergence of a dispute to accept the Court's jurisdiction by special agreement, States can indicate their willingness to appear before the Court betimes. This can be done by including in the dispute settlement clause of a treaty a provision whereby, in the event of a disagreement over the interpretation or implementation of the agreement, the case may be referred to the Court[118]. Despite this option, the "Yearbook of the International Court of Justice" of 1994-1995 reported only 267 treaties and other instruments notified to the Court's registry containing clauses relating to the jurisdiction of the Court on contentious proceedings[119]. Admittedly, to these treaties must be added other treaties and conventions concluded before 1945 and conferring jurisdiction upon the PCIJ[120]. Nonetheless, the figure is rather unimpressive, considering that there are tens of thousands of international agreements, both bilateral and multilateral.

With regard to METs, the possibility for States to submit disputes on their implementation or interpretation, either unilaterally or by common agreement, to the International Court of Justice is relatively rare. Only 38 METs provide for recourse to the World Court, either unilaterally or by common agreement, and the Court is usually offered as an alternative to arbitration[121].

The only international environmental dispute that to date has been brought before the ICJ on the basis of a compromissory clause inserted into an international agreement is the *Fisheries Jurisdiction* cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), which will be examined in detailed later on in this study[122]. In that instance the compromissory clause contained in the 1961 Exchange of Notes, on which London and Bonn relied to bring Reykjavik before the Court read:

> "The Icelandic Government ... shall give to the United Kingdom Government [and the Federal Republic of Germany] six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice"[123].

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118 It is interesting to note that in the case of the Comprehensive Nuclear Test Ban Treaty, the Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Comprehensive Nuclear-Test-Ban Treaty Organization. Comprehensive Nuclear-Test-Ban Treaty, (129), art. 6.5. This is the only instance of multilateral environmental agreement providing for advisory opinions by the ICJ.

119 *ICJ Yearbook*, 1994-1995, Sec. III, pp. 120-137.

120 *Supra*, note 104.

121 *Supra*, note 78.

122 *Infra*, Ch.III.2.

123 Exchange of Notes Constituting an Agreement between Iceland and the United Kingdom Settling the Fisheries dispute, March 11, 1961, *UNTS*, Vol. 397, at 275; Exchange of Notes Constituting an Agreement between Iceland and the Federal Republic of Germany Concerning the Fishery Zone Around Iceland, July 19, 1961, *UNTS*, Vol. 409, at 47.

The Exchange of Notes did not specify whether and how it could be terminated. On February 15, 1972, the Icelandic Parliament denounced it for reasons related to the vital interests of the nation and to changed circumstances[124]. Nonetheless, this did not prevent the United Kingdom and Germany from asking the Court to adjudicate nor the Court from doing so, despite the refusal of Iceland to appear before it. The judgment rendered by the Court on July 25, 1974, was eventually made irrelevant by further expansion of the dispute[125].

4.1.2.3. Optional Declaration

Third, the Statute of the ICJ provides that at any time a State may recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the Court in legal disputes[126]. To date 62 States have filed such declarations (in ICJ jargon "optional declarations", to stress their voluntary nature)[127].

The typical optional declaration would declare that the State X...

> "recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes..."[128]

By reading only these few lines, one might become convinced that those States which filed optional declarations with the Registry of the Court, moved by the ideals of the Charter of the United Nations, have fully embraced the cause of international justice. Alas, nothing could be more erroneous since, after such a sweeping statement, the "optional declarations" are usually replete with ifs and buts[129].

In the environmental field, one of the first States to exclude environmental issues from the reach of the World Court was Australia. The Australian declaration of February 2, 1954, excepted all

> "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia

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124 *Infra*, Ch.III.2.5.

125 *Infra*, Ch.III.2.7.

126 Statute of the ICJ, art. 36.2.

127 On "optional declarations", see, in general, Merrills, J.G., "The Optional Clause Today", *B.Y.I.L.*, Vol. 50, 1979, pp. 87-116; Kebbon, N., "The World Court's Compulsory Jurisdiction under the Optional Clause: Past, Present and Future", *Nordic Journal of International Law*, Vol. 58, 1989, pp. 257-286; Kooijmans, P.H., "Who Tolled the Death-bell for Compulsory Jurisdiction? Some Comments on the Judgments of the ICJ", Bos, A./Siblesz, H., *Realism in Law-Making: Essays on International Law in Honor of Willem Riphagen*, Dordrecht, Nijhoff, 1986, pp. 71-87; McWhinney, E., "Acceptance and Withdrawal or Denial of World Court Jurisdiction: Some Recent Trends as to Jurisdiction", *Israel Law Review*, Vol. 20, 1985, pp. 148-166.

128 E.g. see, among many others, the declaration of Switzerland of July 28, 1948; Uganda of October 3, 1963; Great Britain, of January 1, 1969. *ICJ Yearbook* 1994-1995, pp. 116, 117 and 118..

129 See, in general, Briggs, H.W., "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *Hague Academy of International Law, Collected Courses*, Vol. 93, 1958-I, pp. 223-367; Crawford, J., "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", *B.Y.I.L.*, Vol. 50, 1979, pp. 63-86.

(a) in respect of the continental shelf of Australia and the Territories under the authority of Australia, as that continental shelf is described or delimited in the Australian Proclamation of September 10, 1953 or under the Australian Pearl Fisheries Acts;
(b) in respect of the natural resources of the sea-bed and subsoil of that continental shelf, including the products of sedimentary fisheries; or
(c) in respect of Australian waters, within the meaning of the Australian Pearl Fisheries Acts, being jurisdiction or rights claimed or exercised in respect of those waters by or under those Acts, except a dispute in relation to which the Parties have first agreed upon a *modus vivendi* pending the final decision of the Court in the dispute"[130].

The reason why Australia included such a detailed reservation in its declaration of acceptance of the World Court jurisdiction can be traced to the dispute that in those years was pitting it against Japan over access to pearl-shell fishing grounds in the Timor and Arafura Seas, situated off the northern coast of Australia and beyond its territorial waters[131]. The dispute was precipitated first by the Australian enactment of the Pearl Fisheries Act, providing for regulations to be issued enforceable "on all pearlers and ships engaged in pearling in Australian waters irrespective of nationality"[132], and then by the 1953 Proclamation, whereby Australia claimed exclusive sovereign rights over the continental shelf sea-bed and its subsoil[133]. After unsuccessful negotiations, in a *note verbale* of October 8, 1953, Japan proposed to submit the matter to the ICJ[134]. The Australian government agreed to refer the dispute to adjudication on condition that the Governments could reach an agreement on a provisional pearl-fishing *modus vivendi*[135]. A Draft International Convention for the Conservation of Pearl Oyster Resources was signed in Canberra in May 1954[136], but was never ratified. In the meantime, heralding a similar move by Canada forty years later in the *Turbot* dispute[137], Australia terminated its previous optional declaration and replaced it with a new one containing the above mentioned reservation to shield itself from any possible unilateral submission of the dispute to the World Court[138]. Much as it happened in the case of the *Icelandic*

130 Declaration of February 6, 1954, *UNTS*, Vol. 186, at 77.
131 On the dispute between Australia and Japan over pearl-fisheries, see O'Connell, D.P., "Sedentary Fisheries and the Australian Continental Shelf", *American Journal of International Law*, Vol. 49, 1955, pp. 185-209; Macalister-Smith, P., "Pearl Fisheries", *Encyclopedia of Public International Law, op.cit.*, Vol. 11, pp. 256-258. During the 1953 season, Japanese pearlers were reported to have taken in the Arafura Sea 1,100 tons of pearl shell, while Australia harvested only 170 tons. O'Connnell, *op.cit.*, at 187-188.
132 *Commonwealth of Australia Gazette*, 1953, No. 38.
133 *Commonwealth of Australia Gazette*, 1953, No. 56, at 2563; reprinted in *American Journal of International Law*, Suppl., Vol. 48, 1954, at 102.
134 Macalister-Smith, *op.cit.*, at 257.
135 As Great Britain and the USA had done more than half century before in a similar case. See *Bering Sea Fur Seals* dispute, *infra*, Ch.III.1.
136 Taoka, R. "Japan and the Optional Clause", *Japanese Annual of International Law*, No. 3, 1959, pp. 1-11, at 9. However, according to Macalister-Smith such an agreement was never signed.
137 *Infra*, Ch.III.3.
138 At that time, Japan was not yet a member of the United Nations, but that would have not prevented it from eventually applying to become a Party to the Statute of the International Court of Justice, as Nauru will do in the Phosphates dispute. See *infra*, Ch.III.10.

Fisheries and *Turbot* disputes[139], the subsequent evolution of the international regime of the continental shelf, propelled by the UN conferences on the Law of the Sea, eventually strengthened Australian claims and extinguished the dispute.

Canada provides a second insightful instance of the use of focused reservations in conjunction with the enactment of disputed environmental regulations. To protect the State from legal actions in the World Court, in connection with the enactment of the Canadian Arctic Waters Pollution Prevention Act[140], on April 7, 1970, the Canadian Government filed a new optional declaration excluding:

> "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in areas adjacent the coasts of Canada"[141].

That reservation was withdrawn in 1985[142], but nonetheless was a further blow at the capacity of the ICJ to address international environmental disputes. Indeed, the incertitude surrounding the international law of the sea all through the 1970s and well into the 1980s, in conjunction with the sluggish progression of the Third Conference of the Law of the Sea, prompted other States to echo the Australian and Canadian declarations by keeping disputes over the conservation, exploitation and management of marine resources and the prevention and control of marine pollution out of the courtroom.

As a consequence, on January 18, 1972, the Philippines opted out of disputes

> "in respect of the natural resources, including living organisms belonging to sedentary species, of the sea-bed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago..."[143].

El Salvador excluded disputes concerning

> "the territorial sea and the corresponding continental slope or continental shelf and the resources thereof, unless El Salvador accepts the jurisdiction in that particular case"[144],

India those regarding

> "the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels"[145],

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139 *Infra*, Ch.III.2 and III.3.

140 Canadian Arctic Waters Pollution Prevention Act, *Statutes of Canada*, Ch.47, 18-19 Eliz. II, 1969-1970. For a commentary on the rationale of the Arctic Waters Pollution Prevention Act, as well as of the Canadian reservation to the acceptance of the ICJ jurisdiction, see Pharand, D., *The Law of the Sea of the Arctic*, Ottawa, University of Ottawa Press, 1973, pp. XXII-367.

141 Declaration of April 7, 1970, para. 2.d, *UNTS*, Vol. 724, at 63.

142 Declaration of September 10, 1985, *ILM*, Vol. 24, 1985, at 1729.

143 Declaration of January 18, 1972, para. e.I, *ICJ Yearbook* 1994-1995, at 109.

144 Declaration of November 26, 1973, para. III.2, *UNTS*, Vol. 899, at 99. This declaration expired on November 26, 1988. *ICJ Yearbook*, 1987-1988, pp. 70-72.

145 Declaration of September 18, 1974, para. 10.b, *UNTS*, Vol. 950, at 15.

New Zealand

> "disputes arising out of or concerning the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[146]

Barbados excepted

> "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Barbados in respect of the conservation, management or exploitation of the living resources of the Sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Barbados"[147], while

Malta excluded

> "the following categories of disputes, that is to say: disputes with Malta concerning or relating to: a) its territory, including the territorial sea, and the status thereof; b) the continental shelf or any other zone of maritime jurisdiction, and the resources thereof; c) the determination or delimitation of any of the above; d) the prevention or control of pollution or contamination of the marine environment in marine areas adjacent the coast of Malta."[148]

Finally, Honduras reserved

> "all rights of sovereignty or jurisdiction concerning the contiguous zone, the exclusive economic zone and the continental shelf and the legal status and limits thereof"[149].

In a situation of uncertainty as to the content of the law, understandably these States did not whish to be exposed to the risk of being brought before the ICJ. Even more so since one of the tasks of the Third UN Conference on the Law of the Sea was to develop a dispute settlement procedure to address disputes arising out of the future international regime for the Law of the Sea. This point is graphically illustrated by the declaration of Norway, which states that

> "the Royal Norwegian Government, having regard to article 95 of the Charter of the United Nations, reserves the right at any time to amend the scope of this declaration in the light of the results of the Third United Nations Conference on the Law of the Sea in respect to the Settlement of Disputes"[150].

Eventually, the 1982 UNCLOS instituted the International Tribunal on the Law of the Sea, the most serious rival to the ICJ.

More recently, and apart from the context of UNCLOS negotiations, two other declarations have been filed which contain exceptions potentially affecting the

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146 Declaration of September 22, 1977, para. II.3, *UNTS*, Vol. 1055, at 323.
147 Declaration of August 1, 1980, para. D, *UNTS*, Vol. 1197, at 7.
148 Declaration of September 2, 1983, para. 2, *ICJ Yearbook* 1994-1995, at 101.
149 Declaration of June 6, 1986, para. 2.d.ii, *UNTS*, Vol. 353, at 309.
150 Declaration of April 2, 1976, *ICJ Yearbook* 1994-1995, at 107.

capacity of the World Court to hear and settle environmental disputes. The first one, which replaces Canada's previous 1985 declaration, was filed on May 10, 1994, and purports to keep out of the reach of the ICJ all

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO [North Atlantic Fisheries Organization] regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."[151].

The extremely narrow focus of this proviso warrants some explanation. Indeed, the declaration of acceptance of the Court's jurisdiction was filed with the Registry two days before Canada passed an act to amend the Coastal Fisheries Protection Act because overfishing by foreign vessels in the NAFO Regulatory Area – on the high seas, beyond the Canadian Exclusive Economic Zone (EEZ) – was endangering certain migratory species, turbot (*Greenland Halibut*) foremost, and, therefore, threatening the economic viability of fishing activities in the Canadian EEZ and its coastal waters. As Canada foresaw that the amendment of the Act might attract the wrath of other fishing nations, the reservation contained in the new declaration purported to just keep any dispute on the issue outside the reach of the ICJ. It was, in other words, a tactical legal move.

Despite this precaution, Canada was drawn into litigation before the World Court when, on March 28, 1995, Spain, following the seizure of one of its fishing vessels in the NAFO Regulatory Area, decided to file an application instituting proceedings. The dispute will be analyzed in detail in Chapter Three. Of course Canada contested the Court's jurisdiction precisely because of the reservation attached to its optional declaration, and the Court ruled in its favor on December 4, 1998[152]. Leaving aside the issue of the soundness of the judgment reached by the Court[153], the very existence of the proviso contained in paragraph 2.(c) of the 1994 Declaration and, even more so, its tactical use just before a challenged piece of legislation was adopted, admittedly does not bear witness to the willingness of States to have international environmental disputes litigated before the World Court.

A second, broader, and in some respect more ominous, reservation is that attached by Poland to its declaration of September 25, 1990. Paragraph (c) excludes from the Court's jurisdiction

> "... disputes with regard to pollution of the environment unless the jurisdiction of the International Court of Justice results from the treaty obligations of the Republic of Poland"[154].

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151 Declaration of May 10, 1994, para. 2.d, *ICJ Yearbook* 1994-1995, at 85.

152 *Fisheries Jurisdiction* (Spain v. Canada), Preliminary Objections, Judgment, <http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ijudgment_981204_frame.htm> (Site last visited April 15, 1999).

153 Judges Weeramantry, Bedjaoui, Ranjeva, Vereshchetin and Torres Bernárdez voted against and each appended a dissenting opinion.

154 Declaration of 25 September 1990, para. C, *ICJ Yearbook* 1994-1995, at 109-110. On the Polish declaration, see Lamm, V., "Quatre nouvelles déclarations d'acceptation de la juridiction obligatoire de la CIJ emanant d'Etats d'Europe Centrale (Bulgarie, Estonie, Hongrie, Pologne)", *R.G.D.I.P.*, Vol. 100, 1996, at 336-365.

As compared to the Canadian reservation, it is much more momentous. Indeed, while the former was tactical, as it focused on shielding the enactment of a particular piece of legislation from international suits, the latter can be defined as strategic, as it purports to keep out of reach of the World Court a whole category of disputes, if not to prevent the Court from applying a whole body of law, namely international environmental law.

The immediate justification of such an extensive reservation can be found in the factual situation of Poland in the aftermath of the fall of the Berlin Wall. Handicapped by the heritage of communism, which immolated the environment on the altar of industrialization, Poland could not take the risk in the early 1990s of having a major international dispute with any of its neighbors litigated before the World Court. This applied most of all to Germany, perhaps one of the States in Europe with the most stringent environmental standards and the strongest "green" constituency, and also a sentry at the entrance to the European Union. Hence the reservation[155].

The broader implications of the Polish reservation, and its impact in an area heavily affected by industrial polluting activities, still have to be assessed[156]. Its timing was even more regrettable, for, as has already been explained in Chapter One, at the beginning of the 1990s the international community was becoming aware of the role played by environmental factors in the maintenance of international peace and security, and the World Court was taking steps to prepare itself better to process international environmental disputes.

4.2.2. The Court's Chamber on Environmental Matters

Article 26.1 of the Statute of the International Court of Justice provides that:

> "The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases, for example labor cases and cases relating to transit and communications".

The formulation of this article can be traced back to the similar provision contained in the Statute of the PCIJ. The latter had provided for the establishment of a five-judge chamber to deal with labor cases[157] and another one for transit and communication issues[158]. A third five-judge chamber was to hear and determine cases by summary procedure[159]. Admittedly, labor conditions and transit and communications (in particular through ports, waterways and railways) issues were fundamental aspects of the settlement that ended World War I. As such, they were

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155 Góralczyk prefers to explain the Polish reservation by pointing to the fluid state of international environmental law. Góralczyk, W., "Changing Attitudes of Central and Eastern European States towards the Judicial Settlement of International Disputes", Bardonnet, D. (ed.), *The Peaceful Settlement of International Disputes in Europe: Future Prospects*, Workshop of The Hague Academy of International Law, Dordrecht, Nijhoff, 1991, pp. 477-482.

156 On environmental issues in Central and Eastern Europe, see Gabrowska, *op.cit.*.

157 Statute of the PCIJ, art.26.

158 *Ibid.*, art. 27.

159 *Ibid.*, art. 29. Art. 29 of the Statute of the ICJ provides for the establishment of the Chamber of Summary Procedure, as well. However, to date it has not been called upon to meet.

the subject of specific sections of the Treaty of Versailles (Parts XII and XIII)[160]. In the 1920s, environmental disputes were not a matter of concern for the World Court.

Some seventy years later environmental disputes had greater importance. On July 19, 1993 the ICJ, acting under article 26.1 of its Statute, established the "Chamber of the Court for Environmental Matters" (CEM)[161]. This special chamber is composed of seven judges who have been elected by secret ballot and serve for an initial period of six months. Since the date of its creation the CEM has been constantly renewed, but to date it has received no cases. Why? Answering this question implies, to a great extent, solving the larger problem raised in this study, namely the capacity of adjudicative means of settlement to deal with and resolve international environmental disputes. This issue will be dealt with only in the general conclusions, contained in Chapter Four. Nonetheless, a few limited considerations, relating to the origins of the CEM, can be put forth here to explain its failure to attract litigants, at least so far.

The idea of establishing a special chamber, admittedly, was not a novelty. In the past, the Court, particularly its President Nagendra Singh (1985-1988), had considered the question of the constitution of a chamber to deal with environmental matters[162]. Austria had made a similar proposal in the framework of the preparatory work of the UNCED[163]. It was only in the aftermath of the Rio Conference, however, that, thanks to the then-President of the Court, Sir Robert Jennings, these ideas developed into something concrete[164]. Hence,

> "in view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction",

the establishment of the seven-member CEM was announced[165]. *Prima facie*, by taking this new attitude towards the issue, the Court intended to encourage States to cast away their actual or alleged resistance against submitting environmental disputes to the Court. Moreover, it intended to speed up the process of the appointment of chamber judges — in case States wanted to have the dispute referred to a

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160 Treaty of Peace between the British Empire, France, Italy, Japan and the United States (The Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, Versailles, June 28, 1919, *CTS*, Vol. 225, at 188.

161 *ICJ Press Communiqué*, No. 93/20, July 19, 1993. The Chamber was ready to receive applications as of August 6, 1993.

162 Jennings, R. "The Role of the International Court of Justice in the Development of International Environment Protection Law", *RECIEL*, Vol. 1, 1992, pp. 240-244, at 243.

163 See no. II, para. 4 of the paper which was presented at the Substantive Session of the UNCED Prep.Com. (Nairobi, 6-13 August 1990), published in Bundesministerium für Auswärtige Angelegenheiten, *Österreichische Aussenpolitische Dokumentation*, October 1990, edited by the, Vienna 1990, at 39. See also the *Brundtland Report*, *op.cit.*, at 17-18.

164 The immediate origins of the establishment a Court Chamber for Environmental Matters can be traced to the statement made by Sir Robert Jennings and read to the plenary session of the UNCED, June 11, 1992, by the Registrar of the Court, E. Valencia-Ospina. The statement has been reprinted in Jennings, R. "The Role of the International Court of Justice...", *op.cit.*; *idem*, "Need for Environmental Court?", *E.P.L.*, Vol. 22, 1992, pp. 312-314.

165 *ICJ Press Communiqué*, No. 93/20 of July 19, 1993.

chamber rather than the full Court— by providing them with a "package" of selected judges who were allegedly particularly keen on the environment and apt to deal with issues related to it.

Nonetheless, by taking a hard look at the CEM, it is impossible not to come to the conclusion that the whole operation, far from being ground-breaking, ultimately consisted of repackaging an old, familiar product to tease unwilling customers. What, indeed, will the parties to a dispute gain by referring it to the CEM rather than to the full court, or even an *ad hoc* chamber constituted under article 26.2 of the Court's Statute[166]?

During the last two decades, four cases have been heard in chambers, with quite good results, as the disputes were eventually settled[167]. Quite interestingly, the relative success of the Court's *ad hoc* chambers is usually explained as being the result of the 1972 and 1978 amendments to the Rules of Court[168], which provide, in theory, for the parties' views to be ascertained on the composition of a chamber[169]; in fact, the amendments permit these views to be decisive[170]. However, this special feature, which allegedly has made the Court's chambers so attractive in the past, does not exist in the case of the CEM, because the parties to a dispute will find the seven judges already sitting on the bench when they address the Court. Who are those judges?

The first CEM was to serve for an initial period of six months, beginning August 6, 1993. Since then it has been constantly renewed to take into account variations in the membership of the full Court. In June 1998 it was composed as follows: President Schwebel, Vice-President Weeramantry, Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer and Rezek.

Article 16.1 of the Court's Rules of Procedure, referring to the establishment of special chambers under article 26.1 of the Statute, provides that:

> "The members of the Chamber shall be elected ... having regard to any special knowledge, expertise or previous experience which any of the Members of the Court may have in relation to the category of case the Chamber is being formed to deal with".

Judging from the biographies and bibliographies of these members of the CEM, none of them seems to offer any particularly greater knowledge, expertise or

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166 "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such chamber shall be determined by the Court with the approval of the parties". Statute of the ICJ, art. 26.2.

167 They are: *Delimitation of the Maritime Boundary in the Gulf of Maine* (Canada/USA) (1981-1984); *Frontier Dispute* (Burkina Faso/Republic of Mali); *Elettronica Sicula S.p.A. (ELSI)* (USA v. Italy) (1987-1989); *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua, as from September 13, 1990, intervening) (1986-1992).

168 Cooper, *op.cit.*, at 257. See also, in general, Brauer, R.H., "International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute", *Virginia Journal of International Law*, Vol. 23, 1983, pp. 463-486; Zoller, E., "La première constitution d'une chambre spéciale par la Cour internationale de Justice: Observations sur l'Ordonnance du 20 janvier 1982", *R.G.D.I.P.*, Vol. 86, 1982, pp. 305-324.

169 Rules of the Court (as revised on April 14, 1978), art. 17.2. Text in United Nations, *Handbook*, *op.cit.*, Annex III; ICJ Acts and Documents No. 4 (1978), at 92, reprinted in Rosenne, S., *Documents on the International Court of Justice*, Dobbs Ferry, NY, Oceana, 1979.

170 Brauer, *op.cit.*, at 463 and 481.

previous experience in international environmental disputes than their colleagues who are not members of the Chamber (i.e. Judges Oda, Guillaume, Jiuyong, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans). Moreover, since the procedure in chamber does not differ substantially from that before the full Court (having less judges hear the case does not even reduce the cost of the procedure, as happens in the case of arbitration, nor does it seem to speed it up), States could legitimately wonder what special service they might get from referring disputes to the CEM rather than to the full Court or an *ad hoc* chamber of their choice.

A much subtler but by no means less important reason why States might refrain from bringing a dispute before the CEM is that they are unlikely to agree that their dispute is actually an environmental one[171]. A very illustrative example is that provided by the *Gabcíkovo-Nagymaros* dispute[172]. In the proceedings before the Court, while Hungary was mainly appealing to principles of international environmental law as justification of its non-compliance with the 1977 Treaty, Slovakia tried to remain aloof of environmental issues and accordingly focused on the law of the treaties. The same is true, *mutatis mutandis*, in the case of the *Turbot* dispute, where the disagreement between the parties on the correct characterization of the issue was even more blatant[173].

In all international environmental disputes, there is invariably a State suffering the consequences of an alteration of the ecosystem (applicant) and another allegedly causing the deleterious alteration (respondent). By admitting that the issue at stake is the protection of the environment rather than anything else (e.g. the respect of international treaties, or the right to economic development, or the freedom of the high seas), the respondent implicitly admits to be the source of a problem. All of a sudden the issue at stake will no longer weighing of one right against the other (e.g. protection of marine living species v. freedom of the high seas), but rather the extent of the damage and the ensuing compensation. The point is more psychological than legal, but it is nonetheless likely to be important. The only way out would be for the Court itself to decide that a given dispute is environmental and authoritatively refer it the CEM; but this is not permitted by the Statute of the Court, nor does it seem to be a viable solution.

4.2.3. An International Court for the Environment?

If, therefore, the establishment of the CEM does not seem to serve any practical purpose, what was its real aim? Supposedly it aimed at turning the World Court into the only genuine forum to address international environmental issues. Two elements presumably gave the Court the impression that its capacity to attract environmental litigation was threatened. First, the imminent coming into force of the UNCLOS[174] and, with it, the establishment of the International Tribunal for the

171 See the intervention by Ph. Sands in the colloquium organized on the occasion of the 50th anniversary of the ICJ, in Peck/Lee, *op.cit.*, at 439.

172 *Infra*, Ch.III.7.

173 *Infra*, Ch.III.3.

174 The 1982 UNCLOS entered into force on November 16, 1994.

Law of the Sea, and, second, rumors about the possible establishment of an international environmental court[175].

The idea of establishing a permanent international tribunal to address environmental disputes and ensure the implementation of international environmental law dates back to the end of the 1980s[176]. Its main thrust was granting non-State entities, and in particular individuals and NGOs, access to international courts and tribunals to protect their rights, in particular their right to a clean

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175 For some articulated arguments, by judges of the ICJ, against the proliferation of international courts and tribunals, see: Jennings, R., *op.cit.*; Jessup, Ph. C., "Do New Problems Need New Courts?", *Proceedings of the American Society of International Law,* Vol. 65, 1971, at 261-268.; Lachs, M., "Some Reflections on the Settlement of International Disputes", *ibid.,* Vol. 68, 1974, at 328. See also Jessup, Ph. C., "Do New Problems Need New Courts?" in Rao, K./ Nawaz, M.K., *op.cit.*, at 206-213. For different views, see, in general, Boisson de Chazournes, L. (ed.), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution. Proceedings of a Forum Co-Sponsored by the American Society of International Law and the Graduate Institute of International Studies, Geneva, Switzerland, May 13, 1995*, Washington, D.C., American Society of International Law, 1995; Charney, J., "The Impact on the International Legal System of the growth of International Courts and Tribunals", *NYU Journal of International Law and Politics*, Vol. 31, 1999, pp. 697-708; Dupuy, P.-M., "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", *ibid.*, pp.791-808; Abi Saab, G., "Fragmentation or Unification: Some Concluding Remarks", *ibid.*, pp. 834-843; Hafner, G., "Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?", Caflisch, L., (ed.), *Le règlement pacifique des différends entre États: Perspectives universelle et européenne: The Peaceful Settlement of Disputes between States: Universal and European Perspectives*, *op.cit.* ; Bothe, M./ Ronzitti, N./ Rosas, A., *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management, and Peaceful Settlement of Disputes*, *op.cit.*.

176 The most fervent supporters of the establishment of an International Court of the Environment are, undoubtedly, Alfred Rest and Amedeo Postiglione. Rest, A., "Need for an International Court for the Environment? Underdeveloped Legal Protection of the Individual in Transnational Litigation", *E.P.L.*, Vol. 24, 1994, pp. 173-187; *Idem,* "The Indispensability of an International Court for the Environment", Paper presented at the International Environmental Law Conference, *Is there a Need for a Body to Resolve International Environmental Disputes? Why, What and How?*, Washington D.C., April 15-17, 1999; *Idem*, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control", *Environmental Policy and Law*, Vol. 29, 1999, pp. 32-42; *Idem,* "A New International Court of Justice for the Environment to Implement Environmental Responsibility/ Liability Law?" in Postiglione, A. (ed.), *Per un Tribunale Internazionale dell'Ambiente*, Milan, Giuffré, 1990; *Idem,* "New Legal Instruments for Environmental Prevention, Control and Restoration in Public International Law", *E.P.L.*, Vol. 23, 1993, pp. 260-272, at 260. Postiglione, A., *The Global Village without Regulations: Ethical, Economical, Social and Legal Motivations for an International Court of the Environment*, 2nd ed., Florence, Giunti, 1994; *Idem*, "An International Court for the Environment?", *E.P.L.*, Vol. 23, 1993, pp. 73-78; Postiglione, A., *The Global Environmental Crisis: The Need for an International Court of the Environment*, Florence, Giunti, 1996. More information about the proposed International Court of the Environment can be found at: <http://www.greenchannel.com/icef/> and <http://www.xcom.it/icef/about.html> (Sites last visited April 14, 1998).

Although the International Court of the Environment was never launched, in 1994 a group of twenty-eight lawyers from twenty-two countries established in Mexico D.F., Mexico, the International Court of Environmental Arbitration and Conciliation, a non-governmental organization whose aim is to facilitate, through conciliation and arbitration, the settlement of environmental disputes submitted by States, natural or legal persons. Http://www.greenchannel.com/iceac/ (Site last visited January 22, 2000).

environment[177]. Indeed, very rarely do the interests of States in this area coincide with those of their citizens. States can (and very often do for foreign policy considerations) refuse to support their injured nationals by espousing their claims[178].

Those advocating the establishment of such an international court, therefore, resorted to the Chernobyl and Sandoz catastrophes to substantiate their arguments[179]. As a matter of fact, despite the circumstance that both accidents affected the lives and prosperity of tens of thousand of individuals all across Europe (though on different scales), none of the affected States ever went beyond mass media-oriented indignation about the damage suffered. No law suit was filed either before a national or international court by them, and the few individuals who did sue saw their efforts frustrated by the doctrine of State immunity from jurisdiction and by the huge costs of litigation. Hence, it was argued, an international court of the environment could offer a viable alternative to the World Court, as it would fill a significant gap in the international judicial machinery by providing non-State entities with an international forum to seek redress for the violation of their rights.

In 1992, the UNCED partly responded to these concerns by incorporating in its final declaration Principle 10, whereby:

> "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be available"

Principle 10 fell far short of recommending the establishment of new international fora or the enlargement of existing ones to accommodate non-State needs. Nonetheless, it was a sign that the issue had finally been put on the agenda. Since then, several developments have taken place that have quenched the idea of establishing an international environmental court. Admittedly, the number of

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177 On human rights and protection of the environment, and the possibility of folding the latter into the former, see, in general, Boyle, A.E./ Anderson, M. (ed.), *Human Rights Approaches to Environmental Protection*, Oxford, Clarendon Press, 1996, 313 pp.; Dejeant-Pons, M., "L'insertion du droit de l'homme à l'environnement dans les systèmes régionaux de protection des droits de l'homme", *Revue universelle des droits de l'homme*, Vol. 3, 1991, pp. 461-470; Desgagné, R., "Integrating Environmental Values into the European Convention on Human Rights", *A.J.I.L.*, Vol. 89, 1995, pp. 263-294; Kiss, A., Ch., "Le droit à la conservation de l'environnement", *Revue universelle des droits de l'homme*, Vol. 2, 1990, pp. 445-448; Kromarek, P. (ed.), *Environnement et droits de l'homme*, Paris, UNESCO, 1987, 178 pp.; Shelton, D., "Human Rights, Environmental Rights, and the Right to Environment", *Stanford Journal of International Law*, Vol. 28, 1991, pp. 103-138; Shutkin, W.A., "International Human Rights Law and the Earth: The Protection of Indigenous People and the Environment", *Virginia Journal of International Law*, Vol. 31, 1991, pp. 479-511. See also the Final Report by Fatma Zohra Ksentini entitled "Human Rights and the Environment", prepared for the UN Economic and Social Council. UN Doc. E/CN.4/Sub.2/1994/ 9 et Corr. 1.

178 The Permanent Court of International Justice provided the classical definition of espousal in the *Panevezys-Saldutiskis Railway* case, by stating that diplomatic protection is a situation in international law whereby "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law". Panevezys-Saldutiskis Railway, *PCIJ*, Ser. A/B, No. 76 (1939), at 16.

179 Rest, A., "Need for an International Court for the Environment?", *op.cit.*, at 174–183.

international judicial and quasi-judicial bodies where non-State entities have a *locus standi* is on the rise. During the Cold War, a number of fora, both regional (i.e. the European Court of Human Rights and the Inter-American Court of Human Rights) and universal (i.e. the International Committee on Civil and Political Rights), were established to grant individuals redress for the violation of their human rights. Since the beginning of the 1990s, the abandonment of Westphalian dogmas has gained momentum. Nowadays, individuals can also be held answerable for their acts by international criminal tribunals. International organizations, NGOs and individuals may claim compensation for damages caused by the unlawful acts of a sovereign State[180]. Various treaty regimes allow international organizations (more precisely their secretariats) to ask States why they have failed to comply with international agreements and eventually to trigger redress procedures[181]. Individuals can ask international organizations to respect their own policies and guidelines when they have been adversely affected by their neglect[182].

Admittedly, so far all these developments have had only a limited impact in the environmental sphere. The French series of nuclear tests in the South Pacific region in 1995 made it crystal-clear that, despite the relative abundance of international courts and tribunals at the end of the twenty-first century individuals still have a hard time finding an international judge to hear their claims[183]. Claims made by individuals and NGOs before the European Commission of Human Rights[184], the Human Rights

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180 This is the case of Iraq for the damages caused by the invasion of Kuwait. Romano, C.P.R., "Woe to the Vanquished? A Comparative Analysis of the Reparations Process after World War I (1914-1918) and the Gulf War (1990-1991)", *Austrian Review of International and European Law*, Vol. 2, 1998, pp. 361-390. On the UNCC, see, in general, Affaki, B.G., "The United Nations Compensation Commission: A New Era in Claims Settlements", *Journal of International Arbitration*, Vol. 10, 1993, pp. 21-57; Crook, J.R., "The UNCC: A New Structure to Enforce State Responsibility", *A.J.I.L.*, Vol. 87, 1993, pp. 144-157; Gold, S.J., "International Claims arising from Iraq's Invasion of Kuwait", *International Lawyer*, Vol. 25, 1991, pp. 713; Whelton, C., "The UNCC and International Claims Law: A Fresh Approach", *Ottawa Law Review*, Vol. 25, 1993, pp. 607-627; Caron, D.D., "The UNCC and the Search for Practical Justice", Lillich, R.B., *The United Nations Compensation Commission*, Irvington, NY, Transnational Publishers, 1995, pp. 367-378; Gattini, A., "La riparazione dei danni di guerra causati dall'Iraq", *Rivista di Diritto Internazionale*, Vol. 76, 1993, pp. 1000-1046.

181 This is the case of the non-compliance procedures. *Supra*, Ch.II.3.

182 This is the case of the World Bank Inspection Panel (WBIP). The WBIP was established on September 22, 1993 by a joint resolution of the Executive Directors of the International Bank for Reconstruction and Development (IBRD) and of the International Development Association (IDA). Resolutions of the Executive Directors Establishing the Inspection Panel (Res. No. IBRD 93-10 and Res. No. IDA 93-6), reproduced in IBRD-IDA, *The Inspection Panel: Report August 1994-31 July 1996*, Washington D.C., 1996, Annex I. See also "IBRD-IDA Review of the Resolution Establishing the Inspection Panel. Clarification of Certain Aspects of the Resolution". Text in <http://www.worldbank.org/htlm/ins-panel/resolut.htlm> (Site last visited on February 1, 1997). On the Inspection Panel see: Shihata, I.F., *The World Bank Inspection Panel*, Oxford, Oxford University Press, 1994, pp. XIV-408.

183 Bothe, M., "Challenging French Nuclear Tests: A Role for Legal Remedies", *RECIEL*, Vol. 5, 1996, pp. 253-258.

184 Inhabitants of Tahiti and Mangareva claimed violation by France of arts. 2, 3, 8, 13 and 14 of the European Convention on Human Rights and of art. 1 of the Additional Protocol (right to property). Decision of 4 December 1995, *Noël Narvii Tauira and others v. France*, No. 28204/95.

Committee[185] and the Court of Justice of the European Communities[186] were all turned down for lack of jurisdiction. The establishment of the CEM did not answer the pleas of the so-called international civil society to have access to international justice, and much of the future of the World Court seems to lie in its capacity to face the challenge coming from the rapidly changing composition of the international community[187].

185 The plaintiffs claimed violation of art. 6 and 17 of the Covenant on Civil and Political Rights. *Vaihere Bordes and John Temeharo v. France*, Decision of 30 July 1996 on Communication No. 645/1995. UN Doc. CCPR/C/57/D/645/1995.

186 Inhabitants of Tahiti challenged before the Court of Justice of the European Communities the decision of the European Commission not to use the powers the plaintiff claimed it possessed under the Euratom Treaty in relations to the French tests. The individual rights to life and health protected by the law of the European Communities formed the basis for the action. Order of the President of the Court of First Instance of 22 December 1995, *Danielsson, Largenteau and Haoa v. Commission of the European Communities*, Case T 219/95 R.

187 On the issue of the access by non-State entities to the International Court of Justice see Garrett, S.M., "Resolving International Disputes between Private Parties and States", *Emory Journal of International Dispute Resolution*, Vol. 1, 1986, pp. 81-99, at 91; Janis, M.W., "Individuals and the International Court", Muller, A.S./Raic, D./Thuránszky, J,.M. (ed.), *The International Court of Justice: Its Future Role after Fifty Years*, The Hague, Nijhoff, 1997, pp. 205-218. In 1954, the Institute of International Law resolved: "It is a matter of urgency to widen the terms of article 34 of the Statute so as to grant access to the Court to international organizations of States of which at least a majority of the members of which are members of the United Nations or parties to the Statute of the Court". *IDI Annuaire*, Vol. 45, II, at 298.

III. Case Studies

After having elucidated the term "international environmental dispute" in the first Chapter, and having reviewed, from the point of view of multilateral environmental treaties, the means available to States to settle such issues in the second Chapter, the present chapter will examine several international environmental disputes settled by adjudication. In order to compare how similar problems have been addressed in different ways by arbitration and by the International Court of Justice at different stages of the evolution of international environmental law, these cases will be grouped in three clusters. The first group will include disputes concerning marine biological resources (*Bering Sea Fur Seals*; *Icelandic Fisheries Jurisdiction*; *Turbot;* and *Southern Bluefin Tuna*). The second group will encompass disputes relating to international watercourses (*Lake Lanoux*; *Diversion of the Meuse*; *Gabcíkovo-Nagymaros*). The third group will comprise disputes originating from environmental degradation and transboundary pollution (*Trail Smelter*; *Nuclear Tests*; *Phosphates of Nauru*). These cases represent all the international environmental jurisprudence (as here defined) available to date.

While there is substantial literature on each of these disputes, there are no comparative studies to date reviewing all of them from the same perspective. In order to produce meaningful conclusions, all cases have been approached using the same methodology. As a general rule, this study describes the settlement machinery used and assesses the impact judgments had on the environmental problems that started the dispute. For this reason, States' pleadings and the awards will be analyzed only insofar as they might be useful to illuminate the consequences, legal and material, of the settlement of the dispute.

A brief introduction will detail the *dramatis personae* and the scene of the dispute. Then, the subject-matter of the dispute will be presented. After having examined how the dispute has been brought before the adjudicatory body, we will analyze how the parties decided to conceptualize, or better translate into legal terms, the object of the controversy; how, the agents and counsels of the parties characterized it; how the judges and arbitrators interpreted it; and what conclusions they reached. Moreover, we will follow the parties out of the courtroom to determine whether the adjudication has been material in the settlement of the dispute and, most of all, whether the environmental problem which precipitated the dispute has in reality been resolved; and if so, whether adjudication has played a significant role.

In each case, a summary conclusion will wrap up the main lessons to be learned. Sometimes, as some cases present similarities, there will be cross-references and joint deductions. Many points, however, are postponed to Chapter four, which will contain the general conclusions of this study.

A. Marine Biological Resources

1. THE *BERING SEA FUR SEALS* DISPUTE (GREAT BRITAIN V. USA)

1.1. Introduction

The *Bering Sea Fur Seals* dispute is the oldest instance of an international dispute over the appropriation of natural resources that has been settled through judicial means[1]. It took place about a century ago, between 1880 and the beginning of the twentieth century, between the United States and Great Britain, which, at that time, was conducting foreign affairs for the Dominion of Canada and, thus, for British

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1 For the documents pertaining to the *Bering Fur Seal* arbitration, see *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration convened at Paris under the Treaty between the United States of America and Great Britain, concluded at Washington, February 29, 1892, for the determination of Questions between the Two Governments concerning the Jurisdictional Rights of the United States in the Waters of the Bering Sea*, Washington D.C., Government Printing Office, 1895, 16 vols.; "Correspondance concernant l'arbitrage pour examiner le litige relatif aux pêcheries dans la mer de Behring et protocoles des séances du Tribunal d'arbitrage", Martens, G. Fr., *Nouveau recueil général de traités*, 3 Sér, Vol. 21, 1897, pp. 300–435.

For a detailed account of the diplomatic aspects of the dispute, see Gay, J.T., *American Fur Seal Diplomacy: the Alaskan Fur Seal Controversy*, New York, P. Lang, 1987, IX–180 pp.. For a shorter but detailed account of the arbitration, see: Moore, J.B., *History and Digest of the International Arbitrations to which the United States has been a Party, together with Appendices containing the Treaties relating to such Arbitrations, and Historical and Legal Notes*, Washington D.C., Gov. Print. Off., 1898, 6 Vols., Vol. 1, at 755–951. See also, in general, De Martens, F. F., "Le tribunal d'arbitrage de Paris et la mer territoriale", *R.G.D.I.P.*, Vol. 1, 1894, pp. 32–43; Gregory, Ch. N./ Lansing, R./ Bassett Moore, J, et al., (Editorial Comment), "The Fur Seal Question", *A.J.I.L.*, Vol. 1, 1907, pp. 742–748; Williams, W., "Reminiscences of the Bering Sea Arbitration", *A.J.I.L.*, Vol. 37, 1943, pp. 562–584; Leonard, L.L., *International Regulation of Fisheries*, Washington DC, Carnegie Endow., 1944, pp. 55–98; Engelhardt, E., "De l'exécution de la sentence arbitrale de 1893 sur les pêcheries de Behring", *R.G.D.I.P.*, Vol. 5, 1898, pp. 193–207 and 347–358; Corbett, P.E., *The Settlement of Canadian–American Disputes*, New Haven, Yale University Press, 1937, pp. 41–71; Wishart, A., *The Bering Sea Question: The Arbitration Treaty and the Award*, Edinburgh, W. Green, 1893, 54 pp.; Pauncefote, J., *Bering Sea Correspondence, April 20-June 27, 1891, Including Modus Vivendi signed on June 15, 1891*, London, H.M.S.O., 1891, 38 pp.; Stanton, S.B., *The Bering Sea Controversy*, New York, A.B. King, 1892, 102 pp.; Blowitz, H.G., *The Bering Sea Arbitration*, London, W. Clowes & Son, 1893; Williams, G.O., *The Bering Sea Fur Seal Dispute: A Monograph on the Maritime History of Alaska*, Eugene, Or., Alaska Maritime Publications, 1984, IV–85 pp.; Murray, P., *The Vagabond Fleet: A Chronicle of the North Pacific Sealing Schooner Trade*, Victoria B.C., Canada, Sono Nis Press, 1988, 260 pp.; Barclay, M.T., "La question des pêcheries dans le mer de Behring", *Revue de droit international et de législation comparée*, Vol. 25, 1893, pp. 417–465; Höpfner, M., "Behring Sea Arbitration", *Encyclopedia of Public International Law, op.cit.*, Vol. 2, pp. 36–37; Sands, Ph., *Principles of International Environmental Law*, Manchester, Manchester University Press, 1995, pp. IXX–773, at 415–419.

Columbia. The dispute was caused by the threatened extinction of the Pacific stock of the Northern Fur Seal[2]. The United States claimed that the decrease in the number of fur seals dwelling on the Pribilof Islands[3], under U.S. sovereignty, was caused by the killing, mainly by British Columbian sealers, of vast numbers of females on the high seas (pelagic sealing[4]), either along the migration route to their reproductive site on those islands or while out at sea in search of food when nursing their new offspring[5]. Great Britain, conversely, both contested the figures provided by American sources as exaggerated and blamed over-catching of fur seals on the Pribilof Islands by U.S. sealers for the decrease in the fur seal herds. The dispute broke out in 1886, when the United States tried to enforce protective legislation in the waters surrounding the Pribilof Islands as far as the whole Bering Sea, and in any event beyond the customary limit of territorial sea which at that time was fixed at three miles[6].

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2 The term "Northern Fur Seals" is generically used to indicate fur seals dwelling in the northern hemisphere as compared to those fur seals that live in the southern hemisphere. The term "Northern Fur Seals" comprises three different species, known as *Callorhinus alascanus, Callorhinus ursinus,* and *Callorhinus kurilensis.* These three species, as their names reveal, dwell respectively on American, Russian and Japanese territory. While the dispute was caused by the threatened extinction only of the *Callorhinus alascanus,* the problem subsequently extended to the Russian and Japanese herds. For this reason, although not strictly correct, we will employ throughout the presentation of this case the generic term "Northern Fur Seal".

3 The Pribilof Islands are an archipelago formed by the islands of St. Paul, St. George, Walrus and Otter located in the Bering Sea, north of the Aleutian Islands (74° 24' N and 17° 01' W). Northern Fur Seals exist from Southern California north to the Bering Sea and west to the Okhotsk Sea and Honshu Island, Japan. During the breeding season, approximately 74 percent of the world-wide population is found on the Pribilof Islands, with the remaining animals spread throughout the North Pacific Ocean, from the western regions of the Bering Sea and North pacific Ocean on the Commander, Robben and Kurile Islands. In winter the fur seals migrate southward. The herds from the Commander, Robben and Kurile Islands move south along the coast of Japan, while the Pribilof herd moves southward through the eastern passes of the Aleutian chain as far as the California coast. Small, R.J./De Master, D.P., *Alaska Marine Mammal Stock Assessments 1995,* (NOAA Tech. Memo NMFS-AFSC-57), Washington D.C., U.S. Department of Commerce, 1995, 93 pp. See also the Web Site of the U.S. Department of Commerce <http://kingfish.ssp.nmfs.gov/tmcintyr/mammals/sa_rep/alaska/nfs.html> (Site last visited on May 1, 1998); Gay, *op.cit.*, at 3.

4 Article 9 of the Convention for the Preservation and Protection of Fur Seals, of July 7, 1911, defines pelagic sealing as "killing, capturing or pursuing in any manner whatsoever of fur seals at sea". *Infra*, note 67.

5 The U.S. case against pelagic sealing was a very straightforward one. Fur seals are highly polygamous, and bulls get to surround themselves with up to 80 females. There are, therefore, large numbers of males who, from a reproductive point of view, remain idle and can be killed without endangering the species. However, while on land it is possible to drive males from females, on the sea it is impossible to exercise such discrimination. Killing a female seal during summer months frequently means the death of three animals: the nursing pup on land, the pregnant seal's unborn pup and the female seal herself. At this time of year, the female must make numerous trips to the feeding grounds in order to sustain herself, her unborn pup and her pup on land. This means that a greater number of females are at sea than males. Thus, females often made up 90 percent of the pelagic kills. For an account of the U.S. case against pelagic sealing, see: Williams, *op.cit.*, at 568–569. Pelagic sealing was also considered wasteful because many more seals were killed than actually retrieved, as many sunk before their bodies could be recovered. Gay, *op.cit.*, at 15.

6 See Map 1, figures 4–6.

1.2. The Issue

On March 30, 1867, Russia ceded to the United States, for the sum of $7,200,000, "all territory and dominion on the continent of America and the adjacent islands"[7]. The limits of the cession were on the east the boundary between the Russian and British territories, as defined in the Anglo-Russian Convention of 1825[8], and on the west a line running due north from a point in the middle of the Bering Strait and southwest from the same point, passing to the west of St. Lawrence Island and the Aleutian archipelago[9]. With the Alaska purchase, however, the United States acquired not only the rich fur seal industry on the Pribilof Islands but also the problem of preventing over-exploitation[10]. Indeed, a few months after the American acquisition, several fur companies arrived on the islands. Fights broke out over the possession of sealing materials and buildings abandoned by the Russians, and sealers started to compete fiercely[11]. Although there are no accurate figures, estimates generally range around 250,000 seals indiscriminately killed during the summer of 1868 alone[12].

As a consequence, between 1868 and 1873, the U.S. Congress enacted a series of statutes extending to the newly acquired territories the laws of the United States on customs, commerce, fishing and navigation, prohibiting any person, under penalty of fine and imprisonment, *inter alia*, from killing female fur seals "within the limits of the Alaska territory or in the waters thereof"[13]. The indefinite

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7 Convention ceding Alaska between Russia and the United States, Washington, March 30, 1867, *CTS*, Vol. 134, at 331–335.

8 Convention between Great Britain and Russia concerning the Limits of their respective Possessions on the North-West Coast of America and the navigation of the Pacific Ocean, St. Petersburg, February 16 (28), 1825, *CTS*, Vol. 75, at 95–101. On the 1825 Russo-British Convention, see Moore, *op.cit.*, at 762.

9 To be precise, the western limit of the Alaska purchase was defined by a line on water, beginning at a point in the Bering Straits, on the parallel of 65°30' N at its intersection by the meridian which passes midway between the Islands of Krusenstern or Ingalook and the Islands of Ratmanoff or Noonarbook. From this point the waterline proceeds due north without limitation into the "Frozen Ocean" and southwest through the Bering Straits and the Bering Sea, as to pass midway between the northwest point of the Island of St. Lawrence and the southeast point of Cape Choutkotski, to 172° W. It then proceeds southwest passing midway between the Island of Attou and the Copper Island of the Kormandorski group in the North Pacific Ocean to 193° W, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian. Convention ceding Alaska between Russia and the United States, art. 1.

10 The sealing industry in the Bering Sea had begun as early as the beginning of the 18th century. Sealing was regulated until the United States took possession by Russian authorities who allowed land-killing of seals only by the Government's lessee: the Russian American Company. Gay, *op.cit.*, at 1–2.

11 *Ibid.*, at 21.

12 Idem

13 The Act of July 27, 1868, made it unlawful to kill any fur-bearing animal within these limits in contravention with the regulations promulgated by the Secretary of the Treasury. *Revised Statutes of the United States (R.S.)*, Section 1956. The Act of March 3, 1869, made the Pribilof Islands special protection areas. *R.S.*, Section 1959. On July 1, 1870, an act made it unlawful to kill fur seals on these islands except during June, July, September and October. It also prohibited the use of firearms at any time for the killing of seals and the killing of female and puppies. *R.S.*, Section 1960 and 1961. Finally, a maximum of 100,000 young non-breeding seals were allowed to be captured annually by lessees under a 20 year lease which the Secretary of the Treasury was authorized to make with "proper and responsible parties". *R.S.*, Section 1962. In 1870, the Secretary of the Treasury leased the Alaska Commercial Company for 20 years the privilege of killing 100,000 seals annually on the Pribilof Islands. These Statutes can be found in: *Fur Seal Arbitration*, *op.cit.*, Vol. II, Appendix, at 92–99. also Moore, *op.cit.*, at 763–764.

expression "in the waters thereof" contained in Section 1956 of the Revised Statutes was to become the source of much confusion in determining the extent of the jurisdiction which the United States might claim over the Bering Sea. In 1872 the U.S. Treasury Department restricted its meaning to the U.S. territorial waters, that is to say, to three miles from the coast[14]. However, towards the end of the 1870s, pelagic sealing boomed. Sealers from British Columbia and Alaska increasingly competed for the apportionment of a rapidly shrinking seal-herd. With this consideration in mind, in 1881 the U.S. Treasury Department overturned its precedent-setting interpretation to extend the purview of Section 1956 of the Revised Statutes to all the waters in the Bering Sea lying east of the water boundary line referred to in the 1867 Treaty[15].

On the basis of this interpretation of Section 1956, on August 1 and 2, 1886, the U.S. Coast Guard revenue cutter *Corwin* seized two sealing schooners flying the British flag (the *Carolina* and the *Thornton*) in the waters of the Bering Sea, more than 70 miles from the closest land (southeast of St. George Island)[16]. A third one, the *Onward*, was seized the following day 115 miles southeast of St. George. On a charge of killing seals in violation of Section 1956 of the Revised Statutes of the United States, Judge Dawson, of the U.S. District Court at Sitka, condemned the vessels to be sold and sentenced their officers to fines and imprisonment[17]. In the case of the skipper and mate of the *Thornton*, the jurisdiction of the Court was challenged since the *locus delicti* was claimed to be beyond the U.S. jurisdictional limits. However, Judge Dawson dismissed these objections by pointing to the Russian claim to jurisdiction in the whole region prior to the purchase of Alaska by the United States[18]; a claim which, in the words of Judge Dawson, "had been tacitly recognized and acquiesced in by other maritime powers of the world for a long series of years prior to the Treaty of March 30, 1867"[19]. In other words, the U.S. claimed the right to prescribe and enforce sealing regulations within the whole of the Bering Sea on the basis of the fact that Russia did so without having been challenged by other States, least of all by Great Britain. As we will see, this interpretation played a momentous role in the settlement of the dispute.

The British Government immediately lodged a protest with the State Department against "this violation of the admitted principles of international law",

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14 Moore, *op.cit.*, at 767–768.

15 This interpretation was first made in 1876 by Acting Secretary of the Treasurer H.F. French. In March 1881, French, in a letter to the Collector of the Port of San Francisco, repeated this interpretation without any consultation with the State Department. *Fur Seal Arbitration*, *op.cit.*, Vol. IV, at 85–86; Gay, *op.cit.* at 25–26; Moore, *op.cit.*, at 769.

16 *Ibid.*, at 770–772; Gay, *op.cit.*, at 27–28.

17 Moore, *op.cit.*, at 771.

18 On September 7, 1821, the Emperor Alexander of Russia issued an ukase by which he gave his sanction to certain regulations adopted by the Russian American Company respecting foreign commerce in the waters bordering on its establishment. By these regulations "the pursuit of commerce, whaling, and fishing, and of all other industry, on all islands, ports and gulfs, including the whole of the northwest coast of America...[were] exclusively grated to Russian subjects". Moore, *op.cit.*, at 756. The Ukase was promptly contested by the United States and Great Britain as inconsistent with international law. *Ibid.*, at 756–760.

19 *Fur Seal Arbitration*, *op.cit.*, Vol. III, at 65 ff.; Vol. IV, at 5–9; Earl of Iddesleigh to Sir Lionel Sackville West, October 30, 1886, *ibid.*, Vol. II, App., at 153–54; *United States v. Gutormson and Norman*, *ibid.*, pp. 113–15; Vol. XIII, 91 ff.

requesting reasonable reparation[20]. The British protests caused President Cleveland to order the release of the captured ships and officers. However, on October 12, 1887, before this order had been executed, seven more schooners had been seized and condemned by the same zealous judge. By this time feelings on the Canadian Pacific coast were running high over what was considered an arrogant assumption of sovereignty in the open seas on the part of the United States, a wanton disruption of a prospering industry from which a considerable number of British subjects gained their living, and a not-so covert attempt to establish a U.S. monopoly over the fur seals industry.

1.3. First Attempts to Settle the Dispute: Diplomatic Means at Work

Before resorting to arbitration, the United States and Great Britain tried, between 1887 and 1890, to defuse a diplomatic crisis by negotiating an international convention to protect the Northern Fur Seals. On August 19, 1887, U.S. Secretary of State Thomas F. Bayard addressed to the U.S. ambassadors to the main Pacific fishing powers —Great Britain, Japan, Russia, France, Germany, and the Kingdom of Sweden and Norway (the last three having only a marginal interests in the regional sealing industry)— instructions directing them to request the Governments to which they were respectively accredited to conduct negotiations with the United States,

> "in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind"[21].

Bayard's proposal was short-lived. It failed in 1888, soon after the U.S. Senate, where a majority was opposed to the Cleveland administration, refused to ratify a treaty with Great Britain to settle similar fisheries issues in the North Atlantic[22].

After a failed attempt to restart negotiations, on June 27, 1890, the British Government suggested that the dispute be submitted to arbitration[23]. In order to avoid a deterioration of the situation while negotiations for an arbitration agreement were under way, a *modus vivendi* was signed on June 15, 1891, which prohibited British and U.S. nationals from sealing within the area east of the 1867 Treaty line[24]. The *modus vivendi* was to be enforced by the authorized vessels of the two Governments, but eventual offenders were to be turned over to their authorities for punishment. Moreover, the British Government was to be permitted to send suitable persons to the Pribilof Islands in order to investigate the sealing

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20 Earl of Iddesleigh to Sir Lionel Sackville West, October 30, 1886, left at the Department of State on November 12, 1886, in *ibid.*, Vol. II, App., at 153–55.

21 Moore, *op.cit.*, at 776.

22 *Ibid.*, at 784.

23 Sir Julian Pauncefote to Mr. Blaine, in *Fur Seal Arbitration*, *op.cit.*, Vol. II, App., at 223.

24 Some 7,500 seals, believed essential for the subsistence of people indigenous to the Pribilof Islands, were excepted from this provision. *U.S. Treaties*, Vol. I, at 743. For the details of the negotiation of the *modus vivendi*, see Gay, *op.cit.*, at 58–65.

conditions to facilitate the work of their Government in preparation of its case for arbitration. On February 29, 1892, six years after the first British vessels were seized, an arbitration agreement was concluded in Washington[25].

1.4. The Arbitration

Article 1 of the Treaty of Arbitration provided that questions which had arisen between the two Governments

> "concerning the jurisdictional rights of the United States in the waters of the Bering Sea, and concerning also the preservation of fur seal in, or habitually resorting to, the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur seal in, or habitually resorting to, the said waters"[26]

should be submitted to a tribunal of seven arbitrators: two appointed by Great Britain (Lord Hannen, Lord of Appeal of Great Britain; and Sir John Thompson, Minister of Justice and Attorney-General of Canada); two by the United States (John M. Harlan, Justice of the U.S. Supreme Court; and John T. Morgan, U.S. Senator of Alabama), and one each by Italy (Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy), the Kingdom of Sweden and Norway (Gregers Gram, Minister of State of Norway), and France (Baron Alphonse de Courcel, Senator and Ambassador of France, who eventually chaired the Tribunal).

According to article 6 of the Arbitration Treaty, the Tribunal had to answer five questions, each requiring a distinct decision:

> "1. What exclusive jurisdiction in the sea known as the Bering Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?
>
> 2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?
>
> 3. Was the body of water now known as the Bering Sea included in the phrase "Pacific Ocean", as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after said treaty?
>
> 4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in the Bering Sea east of the water boundary, in the Treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that Treaty?

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25 Treaty between Great Britain and the United States for submitting to Arbitration the Questions relating to the Seal Fisheries in the Bering Sea, Washington, February 29, 1892, *CTS*, Vol. 176, at 477; Moore, *op.cit.*, at 799–802.

26 1892 Arbitration Treaty, art. 1.

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?"[27]

The first four questions dealt with the jurisdictional rights exercised by Russia prior to the purchase by the United States. They did not present any technical difficulty for the arbitrators. It was merely a question of evaluating the wealth of evidence submitted by parties in the light of well-established rules of international law. Quite unsurprisingly, therefore, the parties' agents and counsels did not spend a great amount of time on these issues.

Conversely, the fifth question, which addressed an issue which nowadays would be tagged as environmental, became the central point of contention. In many respects it was an unprecedented question and, by and large, international law at the end of the nineteenth century did not offer an answer. The issue was, therefore, if and how the arbitrators would fill that legal vacuum. The uncertainty of the legal situation was compounded by the fact that the arbitration agreement did not indicate what was the proper law for the settlement of the dispute. There was no indication of international or domestic law, of general principles of law or equity, nor of any specific treaty provisions.

This situation was perfectly clear both to the arbitrators and to the parties' counsel. The U.S. counsel argued again and again that the novelty of their position should not be viewed by the Tribunal as an indication that the property rights claimed by the Unites States over the seals were untenable[28]. Conversely, the British counsel seized the opportunity whenever possible to stress the lack of precedent. Only the existence of well established and positive rules of international law would have justified the restriction of the freedom of all States, and of Great Britain in particular, to harvest the fruits of the high seas[29]. It was, in short, a clash of two international legal doctrines. While the United States pointed towards the naturalist view[30], Great Britain embraced a positivist position[31]. In any event, both parties resorted to lengthy citations and counter-citations, from both the private and international law domains, to make their own point on the right of property of the seals and sealing industry and on the interpretation of the question of protective jurisdiction under international law.

To summarize, the arguments made by the agents of the two Governments, both in the written and in the consecutive oral pleadings held at Paris, were as follows: The United States based its claims upon the habits of the seals, that is to say, upon the fact that they were born on and returned year after year to the

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27 *Ibid.*, art. 6.

28 The U.S. agent was John W. Foster (U.S. Secretary of State after Blaine's resignation). Counsel were Edward J. Phelps, James C. Carter, Henry M. Blodgett and Frederick R. Coudert.

29 The British agent was Charles H. Tupper, who was assisted by R. P. Maxwell and Charles Russell. The counsel were Sir Charles Russell, Sir Richard Webster and Christopher Robinson of Canada.

30 "It is thus, continued Mr. Carter [U.S. counsel], that international law as well as municipal law is developed; and if a case arises for which the usages and practice of nations furnish no precedent, it is not to be inferred that no rules exists. A rule is then to be drawn from the dictates of natural justice, to which nations are presumed to yield their consent". Moore, *op.cit.*, at 827–828.

31 For the British reply to Mr. Carter's statement, see *ibid.*, at 870–872.

Pribilof Islands. This made them, according to the U.S. argument, the subject of property[32]. Moreover, the Unites States emphasized the importance of the sealing industry to its economy and pointed to the existence in international law of the principle of protective jurisdiction, as revealed in the legislation of several States and repeatedly asserted by legal scholars, which gave the U.S. the right to protect both this industry and the fur seal property[33]. Furthermore, the United States claimed a right to protect the seals and the sealing industry in the name of an alleged trust conferred by mankind on all those nations which happen to have on their territory unique goods the protection of which human kind as a whole has an interest in[34]. Finally, as Russia had asserted the right of protection in the fur seals and sealing industry, Great Britain, by acquiescing in these rights, was estopped from preventing the assertion of similar jurisdiction on the part of the United States[35].

On the other hand, Great Britain argued that Russian rights of exclusive jurisdiction in the Bering Sea had not been recognized either by itself or by the United States[36]. Moreover, with the Alaska purchase the United States had not acquired jurisdictional rights outside those recognized by international law[37]. The assertion of property in the fur seals or in the sealing industry was novel to international law[38]. The fur seals were to be regarded as *ferae naturae* and their habits were such that they could not be considered susceptible of appropriation[39]. Finally (and this was the decisive argument), international law had recognized the rights of all nations freely to use the seas and its products, and no nation could restrict those rights unless it did so under an agreement freely negotiated among nations[40].

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32 *Ibid.*, at 831–839.
33 *Ibid.*, at 839–844 and 864–868.
34 *Ibid.* at 852–854 and 875–876.
35 *Ibid.*, at 810–811.
36 *Ibid.*, at 816–818.
37 *Ibid.*, at 819–821
38 *Ibid.*, at 876.
39 *Ibid.*, at 879–888.
40 "...but the "great point", said Sir Charles Russell, "which we are here contending for, and which is the real point between us, is this: whether, in time of peace, there is any justification upon the ground that the ship of one nation has got hold of property of another nation – the right in time of peace, and outside the territorial limits upon the high seas – for the claim to search that vessel, seize that vessel, bring it into a prize court, which is in fact a war tribunal, and there condemn it". *Ibid.*, at 902. "The British Case...maintained that the Bering sea is an open sea in which all nations of the world have the right to navigate and fish; and that the rights of navigation and fishing cannot be taken away or restricted by mere declaration or claim of any one or more nations, since they are natural rights, and exist to their full extent unless specifically modified, controlled, or limited by treaty". *Ibid.*, at 816.

1.5. The Award

The Arbitral Tribunal assembled in Paris on February 23, 1893 and rendered its award less than seven months later, on August 15, 1893[41]. The five questions as presented in article 6 of the Arbitration Agreement were considered independently. The first four questions, dealing with jurisdictional rights exercised by Russia prior to the U.S. purchase, in the opinion of six judges out of seven (only Morgan, a politician, dissented on several points) did not justify the American claim to "exclusive rights in the seals fisheries beyond the ordinary limit of territorial waters"[42]. Yet these were the less controversial issues. Indeed, once it was established that Russia did not enjoy exclusive jurisdictional rights over that body of water, the logical conclusion was, consistent with the principle *nemo plus iuris ad alium transferre potest quam ipse habet*, that the United States could not claim similar rights. Therefore, the 1867 Treaty did not purport to transfer to the United States sovereignty over any non-territorial waters; the waterline through the Bering Sea served only to delimit the territory on either side of it.

The most heated discussions, however, took place concerning the fifth question. The Tribunal decided by majority vote (five to two, with the two American arbitrators, Senator Morgan and Justice Harlan, dissenting) that:

> "The United States has not any right of protection or property in the fur seals frequenting the islands of the United States in the Bering Sea, when such seals are found outside the ordinary three-mile limit"[43].

41 For the text of the award see, *ibid.*, at 945–951.

42 On the first point, concerning Russian jurisdiction in the Bering sea, the Tribunal by six to one (Morgan dissenting) declared that the Treaties of 1824 between the United States and Russia and of 1825 between Great Britain and Russia recognized Russian jurisdiction in the Bering Sea "to the reach of a cannon shot from shore". *Ibid.*, at 914–916. On the second point, again by six to one (Morgan dissenting), the Tribunal decided that Great Britain had not recognized or conceded any claim by Russia to exclusive jurisdiction as to the seal fisheries in Bering Sea, outside of ordinary territorial waters. *Ibid.*, at 916. The third point, whether the term "Pacific Ocean" as used in the Treaty of 1825 between Great Britain and Russia included the Bering Sea, was unanimously decided in the affirmative, but by six to one (Morgan dissenting) the Tribunal concluded that Russia held "no exclusive rights of jurisdiction in Bering Sea and no exclusive rights as to the seal fisheries therein, after the Treaty of 1825". *Ibid.*, at 916–917. The arbitrators were unanimous on the fourth point. They declared all Russian rights as to jurisdiction and seal fisheries in Bering Sea, east of the water boundary, did pass unimpaired to the United States in the Alaska Treaty of Mach 30, 1867. *Ibid.*, at 917.

43 *Ibid.* 918–920.

In other words, the Tribunal rejected *in toto* the American thesis, inflicting a stinging defeat on the United States[44].

The majority of the Arbitral Tribunal unfortunately did not feel compelled to explain how they reached that conclusion. However, as Senator Morgan declared upon rendering of the award:

> "My colleague [Justice Harlan] and I concurred in the view that the [Arbitration] Treaty presented this subject for consideration in its broadest aspect. Our honorable colleagues, however, did not so construe the scope of the duty prescribed to the tribunal by the [Arbitration] Treaty. They considered that these questions of the right of property and protection in respect to the fur seals were to be decided upon the existing state of law, and finding no existing precedent in the international law, they did not feel warranted in creating one"[45].

The President of the Tribunal, Baron De Courcel, in a similar, though somewhat more poetical way, recognized that:

> "We have felt obliged to maintain intact the fundamental principles of the august law of nations, which extends itself like the vault of heaven above all countries, and which borrows the laws of nature herself to protect the people of the earth, one against another, by inculcating in them the dictates of good will"[46].

This concise and conservative judgment, totally in favor of the position of Great Britain, sanctioned the freedom of the British Columbia sealers (but implicitly also those of any other nation) to pursue, hunt and kill fur seals anywhere in the Pacific

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44 The legal consequence of the rejection of the U.S. thesis by the Arbitral Tribunal was U.S. liability for the seizure of British vessels from 1886 to 1890 period. Under article VIII of the Treaty of Arbitration, the Tribunal could not rule over issues of liability for the injuries allegedly sustained by the parties, or by their citizens, in connection with the claims. However, either party could submit to the arbitrators any questions of fact involved in the claims and ask for a finding. These findings would have formed the basis of further negotiation between the parties. The issue of damages was addressed in a second *modus vivendi*, concluded on April 18, 1892, which by and large embodied the provisions of the first *modus vivendi*. However, its fifth article provided, with regard to the subject of damages, that if the arbitrators were to determine that the British sealers had the right to take seals within the bounds claimed by the United States, then compensation would have been paid by the United States for abstaining from sealing during the pendency of arbitration. If the result, however, was in favor of the United States then Great Britain was to pay compensation for any catch exceeding the amount that, in the opinion of the arbitrators, might have been taken without an undue diminution of the seal-herds.

The arbitrators unanimously, and in agreement with the U.S. agent, found that 20 ships had been seized, by order of the U.S. Government, outside U.S. territorial waters. Since the Tribunal rejected U.S. claims for protective jurisdiction outside the three-mile territorial waters, it followed that the United States was responsible for the damage inflicted upon Great Britain by the seizure. In subsequent negotiations, Great Britain agreed to accept $425,000 in full and final settlement. However the U.S. Congress failed to appropriate this money and an *ad hoc* Convention was concluded on February 8, 1896, setting up a commission, composed of two judges (George King of the Supreme Court of Canada and William Putnam of the U.S. Circuit Court) to investigate and determine all claims for the seizure of shipping, imprisonment of officers and any other injuries inflicted by U.S. officials. In December 1897, this commission awarded to Great Britain the sum of $473,151.26. Corbett, *op.cit.*, at 47–48.

45 Moore, *op.cit.*, at 934.

46 *Ibid.*, at 932.

beyond a three-mile zone around the U.S. territory, with any means humanly conceivable and without any quantitative restriction, until the ultimate extinction of the species. However, such an outcome of the arbitration could hardly have been accepted by the United States and even less by Great Britain. At no time had the extinction of the Pribilof Islands seal herd been an objective of British diplomacy. Both States had an interest in preserving a lively and wealthy fur industry. The problem was the apportionment of the burden of preservation. This is the reason why the 1892 Treaty of Arbitration included article 7.

1.6. Designing an International Regime for the Protection of the Fur Seals

According to article 7 of the Treaty of Arbitration, if the determination of the questions submitted "left the issue in such position that the concurrence of Great Britain was necessary to the establishment of regulations for the proper protection and preservation of the fur seals in question"[47], or, to put it plainly, the judgment was favorable to the British thesis and to unrestrained freedom of hunting, the arbitrators were to determine what regulations outside the jurisdictional limits of either Government were necessary to preserve the fur seals from extinction and define the waters within which these regulations would be applicable.

Therefore, having decided that the United States had no property rights over the fur seals, the arbitrators were faced with the problem of establishing regulations for their protection, which would be binding on Great Britain and the United States by virtue of the Treaty of Arbitration. Article 7, therefore, constituted the Tribunal as a sort of joint legislature for the two parties within defined limits; an unusual and interesting procedure which would have sequels[48]. To help the arbitrators in their task, the Treaty of Arbitration further provided for the establishing of a Joint Commission consisting of two commissioners appointed by each Government, which was to investigate all the facts relating to seal life in the Bering Sea and the measures necessary for its proper protection and preservation. The Commission's findings, in the form of recommendations of the Commissioners and joint and individual reports, were to be submitted to the arbitrators as a guide to the necessary regulations[49].

The result of the regime designed was a series of drastic restrictions on the sealing industry, enacted as a whole by a surprisingly slim majority of four to three.

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47 1892 Arbitration Treaty between Great Britain and the United States, art. 7.

48 E.g. in the case of the *Trail Smelter* arbitration, *infra* Ch. III.8.

49 1892 Arbitration Treaty between Great Britain and the United States, art. 9. The Commission was the same appointed under the 1891 *modus vivendi*. Incidentally, it should be noted that the Joint Commission was unable to make more than a formal joint report. While the commissioners agreed that the marked diminution of the number of seals on and habitually resorting to the Pribilof Islands had taken place and that such diminution had been cumulative in effect and that it was the result of excessive killing by man, they could not agree on the source of the problem. While the British commissioners indicated the raids made on the breeding islands, chiefly by citizens of the United States, and the methods of driving and killing with clubs the seals as the cause of the diminution of the seals, the U.S. Commissioners blamed the pelagic sealing, mainly practiced by the British sealers.

Indeed, the two U.S. arbitrators (Harlan and Morgan) were joined in their dissent by the British arbitrator representing British Columbia's interests (Thompson)[50]. These regulations, to be applied outside the jurisdictional limits of the respective Governments and extending over the waters of the Bering Sea, may be summarized as follows: First, both Governments had to restrict sealing at all times within a zone of 60 miles around the Pribilof Islands, inclusive of the territorial waters[51]. Second, outside the 60-mile zone (in the part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of 35° N and eastward of 180°, until it strikes the water boundary described in article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to the Bering Straits), sealing had to be suspended each year between May 1 to July 31[52]. Third, only sailing vessels and canoes could be used in seal hunting[53], no power-boats. Moreover, no nets, fire-arms or explosives were allowed[54]. In other words, only harpoons. Finally, each sailing vessel authorized to hunt in the zone of the award had to be provided with a special license and a distinguishing flag[55].

1.7. The Aftermath

Both the United States and Great Britain accepted the award (though grudgingly in Canada) and in 1894 passed legislation to give effect to the regulations[56]. Yet, within a year of the adjournment of the Tribunal, it became apparent that, notwithstanding the restrictions imposed, the new regime had sanctioned pelagic sealing to an extent that still meant the gradual extinction of the seals, with the pelagic catch exceeding 61,000 in 1894 and 56,000 in 1895[57]. The arbitrators, well aware of this risk, upon rendering the award and the regulations, vainly urged the litigants further to strengthen the regulations, suggesting a prohibition of all fur seal killing for "a period of two or three years, or at least one year" because of the critical conditions of the herd[58].

In an attempt to reverse the downward trend of the seal population, by an Act of Congress approved on December 29, 1897, the United States prohibited American citizens and vessels and everyone owing allegiance to the American flag (i.e. foreign crews on board U.S. vessels) from pelagic sealing anywhere in the Bering Sea or the Pacific Ocean north of 35° N[59]. However, the prohibition for American citizens and ships of pelagic sealing gave the Canadian sealers a complete monopoly of that business in the Bering Sea, except for the restrictions imposed by

50 For the reasons of the dissenting arbitrators, see Moore, *op.cit.*, at 922–929.
51 Regulations, art. 1, *ibid.*, at 949.
52 *Ibid.*, art. 2.
53 *Ibid.*, art. 3
54 *Ibid.*, art. 6
55 *Ibid.*, art. 4
56 For U.S. legislation, see "Loi destiné à donner exécution à la sentence du tribunal d'arbitrage…", *Martens*, *op.cit.*, Vol. 22, 3 Sér., at 557–561.
57 Williams, *op.cit.*, at 584.
58 Moore, *op.cit.*, at 929.
59 Gay, *op.cit.*, at 105–106.

the 1893 award. Considering that the pelagic sealing was carried out mostly by sealers from British Columbia, the measure had no practical effect but to give the United States the moral high-ground if seals became extinct.

The regime created by the 1893 regulations had two main loopholes. First, it did not extend to the whole fur seal occurrence area, that is to say, to the whole North Pacific. Admittedly, the Tribunal could not design a regime applicable to the whole Pacific north of 35° N, because that would have included seal herds dwelling on Japanese and Russian territories. Neither of these two countries was a party to the 1892 Treaty of Arbitration. But a geographically limited regime had the perverted effect of driving pelagic sealers to Asiatic waters during the closed season in the Bering Sea. Second, a regime applicable only to British and American sealers created an inducement for free-riders, such as Japan, to seal in the affected area. Since Japan was not a party to the arbitration, it was not subject to its regulations. It goes without saying that, as of 1901, Japanese sealers started sealing within the affected area. Obviously, the Canadians felt that the restrictions imposed by the regulations had placed the Canadian sealing industry at a disadvantage when competing with the Japanese, and the number of violations of the regime by Canadian vessels consequently increased. As a result, the size of the Pribilof Islands herd sunk from an estimated figure of 1,000,000 seals in 1891[60], shortly before the arbitration, to a total estimated number of 185,000 in 1906[61], 13 years after the arbitration.

As Marquis Visconti Venosta, the Italian arbitrator at Paris, with much wisdom had foreseen:

> "In order to secure the preservation of the fur seals, the regulations ought to provide a system of enactments applicable to the whole area, where, on land as well as on sea, is developed the life of the seals resorting to the Bering Sea, and to be equally accepted by all nations the citizens of which might compete in pelagic sealing"[62].

As it was said above, both the United States and Great Britain recognized from the very outset the importance of securing the cooperation of all nations interested in the fur seals to enforce restrictions for their protection. This is the reason why, between 1887 and 1890, the early attempts to settle the dispute concentrated on negotiating a convention open to all fishing powers of the region[63]. Moreover, these concerns had been incorporated in article 7 of the Treaty of Arbitration itself, whereby the High Contracting Parties agreed "to cooperate in securing the adhesion of other Powers to such Regulations" as might be prescribed by the Tribunal[64].

If the Arbitral Tribunal had failed to resolve the problem of the shrinking fur seal herds, diplomacy did not perform better for 15 years[65]. It was only on January 21, 1909, that U.S. Secretary of State Elihu Root addressed identical notes to the British, Russian and Japanese ambassadors calling attention to the continued

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60 Editorial Comment, *op.cit.*, at 746.
61 *Ibid.*
62 Fur Seal Arbitration, *op.cit.*, Vol. I, at 58.
63 *Supra*, Ch. III.1.3.
64 1892 Arbitration Treaty between Great Britain and the United States, art. 7.
65 For the reasons of the diplomatic deadlock, see Gay, *op.cit.*, at 95–124.

decrease in the seal herds in the Pacific and urged their countries to enter into negotiations with the United States to conclude an international convention to ensure their protection[66]. Negotiations were accelerated by the continuously diminishing number of seals dwelling on the Pribilof Island. In 1911, 25 years after the beginning of the dispute, the number of seals fell to a mere 123,600, the lowest registered level and only a few years from extinction. Faced with a no-win situation, the acceptance by Great Britain of the American invitation (both Japan and Russia having accepted earlier), led to the convening of an *ad hoc* conference in Washington that concluded the Convention on the Preservation and Protection of Fur Seals on July 7, 1911[67].

Under the terms of the 1911 Convention, pelagic sealing was banned in an extensive area of the Pacific north of 30° N and including the Bering, Kamchatka, Okhotsk and Japan seas. The use of ports and harbors of the Contracting Parties was denied to vessels engaged in pelagic sealing, and seals caught by this method were prohibited from being shipped into the territory of the parties. Enforcement of the Treaty was to be guaranteed by U.S., Russian and Japanese vessels, but violators were to be turned over to the authorities of their flag State, which alone would have jurisdiction to try the offenses. Moreover, in order to compensate the countries affected by the restriction on pelagic sealing, the 1911 Treaty established an articulated system of compensation[68]. The Convention was to remain effective for 15 years and it would have been automatically renewed, unless one of the parties denounced it with 12-months notice[69].

As a result, the Northern Fur Seal population increased steadily during the period 1912–1940, because, after the ban of pelagic sealing, the commercial harvest no longer included pregnant females. During this period, the rate of population growth was approximately 8.6 percent per year, the maximum recorded for this species[70]. In 1939 fur seals were back to 2,338,312. However, because of the general deterioration of the diplomatic relations among the 1911 Convention Parties (the United States, Canada, Japan and the USSR, which had succeeded to Russia) following the outbreak of World War II, on October 23, 1940, the Japanese Government gave the other Parties twelve months' notice of its intention to abrogate the Convention. The Japanese attack on Pearl Harbor, on December 7, 1941, overshadowed the fur seal problem. Between 1941 and 1957, with the exception of a U.S.–Canadian Agreement in 1942[71], the signatories of the 1911 Convention had

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66 *Ibid.*, at 124–125.

67 Convention on the Preservation and Protection of Fur Seals, Washington, D.C., July 7, 1911, *CTS*, Vol. 214, at 81–87.

68 Both Great Britain and Japan were to receive each $200,000 as well as 15 percent of the catch carried out on-shore within the area defined by the United States and Russia. Similarly, Japan was to deliver to the to the other three States 10 percent of the number of sealskins that were caught in the areas of the Convention and under Japanese sovereignty. Finally, if any seals frequented the shores of waters within the defined area that was subject to British sovereignty, 10 percent of those seals caught were to be delivered to each of the other parties.

69 Quite interestingly, despite the intricacies of the sealskins' redistribution, there was no dispute settlement procedure in the Convention. Not even for arbitration, which, after all, contributed to the creating of the sealing legal regime.

70 Small /De Master, *op.cit.*.

71 Text in *UST*, Vol. 6, pp. 297–302. Basically its provisions were the same as those of the Fur Seal Convention of 1911 except they applied only to the eastern region of the Bering Sea and North Pacific. Pelagic sealing by citizens of the two countries was prohibited except "in the event of emergency circumstances". Canada's annual share of the fur sealskins was 20 percent.

no formal sealing agreement. While during this period the USSR, Canada and the United States abstained from pelagic sealing, Japanese sealers continued hunting at sea. The tense political relations between the USSR and the United States and the peculiar international juridical status of Japan, under U.S. occupation until 1952, prevented the conclusion of a new agreement. In 1955, the development of the so-called peaceful co-existence in East-West relations allowed for fresh start of negotiations on the establishment of a new sealing regime, which eventually led, on February 9, 1957, to the conclusion of the Interim Convention for the Conservation of North Pacific Fur Seal Herds[72]. The 1957 Convention, while to a large extent continuing the principles established nearly 50 years earlier in the 1911 Convention (i.e. a ban on pelagic sealing and the sharing of land-kills) established a permanent institution, the North Pacific Seal Commission, to coordinate scientific research and make recommendations to the contracting Parties[73].

The Alaskan population of Northern Fur Seals, after the disruption of the regime caused by World War II and the ensuing uncertain years, recovered to approximately 1,250,000 in 1974. Yet, if seal hunting no longer represented a threat, in the 1980s the population began to decrease once again, with a total stock estimate in 1983 of 877,000. While the exact causes of this new decline remain uncertain, there are signs that over-fishing on the high seas may be cutting into the fur seal herd's food source. Moreover, old netting and debris, coupled with a deterioration of the water quality, has undoubtedly taken a toll. These considerations pushed the Reagan administration to ban commercial harvesting in 1984 and in 1988 and to designate the Northern Fur Seal as depleted under the U.S. Marine Mammal Protection Act[74] because population levels had declined to less than 50 percent of those observed in the late 1950s.[75] Nowadays, the estimated number of fur seals on the Pribilof Islands is 1,014,019[76], approximately the same figure as that registered in 1892, at the height of pelagic sealing and when Washington and London concluded an international agreement to arbitrate their dispute and prevent extinction. Ironically, more than a century of diplomatic fencing and one arbitration were able to resolve the problem of the apportionment of seal skins among the four regional key players (USA, Canada, USSR and Japan), but were unable to protect the Northern Fur Seals from the threat of extinction.

1.8. Assessment of the Fur Seals Arbitration

The *Bering Sea Fur Seals* case is the first instance of an international environmental dispute having been settled by international adjudication. In many regards, it represents a milestone in the history of international relations and

72 Interim Convention on Conservation of North Pacific Fur Seals, Washington, February 9, 1957, *UST*, Vol. 8, Part 2, at 2285–2293.

73 The Convention was amended on October 8, 1963. For the 1963 amendments see *UST*, Vol. 15, Part I, pp. 316–335.

74 Marine Mammal Protection Act, Pub. L. No. 92–522, 86 *Stat.* 1029 (1972), (codified at 16 *U.S.C.* §§ 1361–1421h (1994)).

75 Small /De Master, *op.cit.*

76 *Ibid.*

law. At the end of the nineteenth century, the fact that two States could dispose of a nasty dispute on the extension of their sovereign rights over parts of the high seas without resorting to force was widely praised as a great achievement[77]. Praise for the *Bering Sea Fur Seals* arbitration eventually ignited the process that led to the conclusion of the 1899 and 1907 Conventions on the Pacific Settlement of International Disputes and the establishment of the Permanent Court of Arbitration. Moreover, the 1911 Convention on the Preservation and Protection of Fur Seals can be regarded as a major breakthrough, because it set an example for further cooperation in other environmental domains.

Nonetheless, the *Bering Sea Fur Seals* arbitration still belongs to the pre-history of international environmental law. The dispute took place much before the environment and environmentalism could become popular concepts. This was still the age of conservationism[78]. The issue was to preserve seals from extinction *qua* economic resource and not because they were a fundamental link in the ecosystem or an important tessera of the biodiversity mosaic. This point is graphically illustrated by the following statement made by the President of the Tribunal, Baron de Courcel.

> "[T]he preservation of species of animals should be regulated not in the absolute interest of the species, but in the interest of the human industries of which it is the object, without the Tribunal having to distinguish between the nature of these different industries, whether they be exercised on land or whether they be engaged upon the sea, and without having to favor one to the detriment of the other"[79].

In the eyes of the arbitrators gathered in Paris to settle the dispute, it was not a matter of weighing British Columbia's sealing industry on one hand and the preservation of seals from extinction on the other, but rather of assessing the interests of one sealing industry against the other, *via* the rights of the respective national States. Again, none of the parties invoked issues of environmental protection. The United States claimed the right to protect the seals not because they were particularly interested in their preservation *per se*, but because their extinction threatened the American fur industry.

The chasm dividing contemporary views of the international environmental problems and those prevailing at the time of the Paris Arbitration is measured by a statement made by U.S. President Theodore Roosevelt, a future Nobel Peace Prize laureate. In his annual message of December 3, 1906, he boldly stated:

> "In case we are compelled to abandon the hope of making arrangements with other Governments to put an end to the hideous cruelty now incident to pelagic sealing, it will be a question for...serious consideration how far we should continue to protect and

77 Incidentally, it should be remarked that at no point had the use of the Royal Navy to resist the enforcement of U.S. legislation been an option for London. However, this was not so in the *Icelandic Fisheries Jurisdiction* dispute. *Infra*, Ch.III.2.

78 *Supra*, Ch. I.2.3.2.

79 Fur Seal Arbitration, *op.cit.*, Vol. I, at 58.

maintain the seal herd on land with the result of continuing such practices, and whether it is not better to end the practice by exterminating the herd ourselves in the most humane way possible"[80].

This "let-me-die-with-the-Philistines" posture was understandable for a passionate hunter, especially of big game, and an ardent believer in the wild outdoor life, at a time in which nature was a mere element of the landscape or a harvestable gift. Yet, the same attitude would be absurd at the end of the twentieth century. Although less then 90 years separate Roosevelt's speech from the Rio Declaration, the two are worlds apart.

From a strictly legal point of view, the Paris arbitration did settle the dispute. It resolved for good the issue of the extension of U.S. jurisdiction and disposed of the question of compensation due to Great Britain for the unlawful seizure of its vessels. It did not, however, deal with the problem that precipitated the dispute: the diminution of the seal herd of the Pribilof Islands. Somehow the parties to the dispute were aware that resolving the jurisdictional issue would not resolve the underlying problems, since they asked the Tribunal to go beyond its mere adjudicative role to design a protection regime. The resulting regulations, however, where deeply flawed, because they were the result of a bad compromise. The arbitrators felt that they could not "...withdraw by the regulations all that [the Tribunal] had conceded by its decisions on the questions of right..."[81] for fear of a rejection of the award by Great Britain. The reasoning was that if *de jure* British Columbian sealers were recognized as having the right to hunt in the waters surrounding the Pribilof Islands up to three nautical miles from the coast, the same Tribunal could not *de facto* deprive them of their right by imposing too strict regulations. Yet the narrow scope of the regulations sanctioned their ineffectiveness. First, they restricted the technical ability of sealers to carry out pelagic sealing by limiting the means of its use, without fixing any quantitative limits on the catch. Power-boats could not be employed to hunt, but they could bring canoes on the spot and simply launch them when needed.

Second, the regulations did not cover the whole area of existence of the Northern Fur Seals, with the result of merely displacing sealing to other areas of the Pacific during the restricted periods. This point can be better illustrated by the fact that during the summer of 1891, while the *modus vivendi* between the United States and Great Britain banning pelagic sealing within the contested area was in force, sealing moved close to the Russian shore. Hunting increased so much that the Russian authorities, concerned that the extinction of fur seals "would be only a question of a short time unless efficacious measures for their protection were taken without delay", decided that for the ensuing season and pending the adoption of international regulations, as a measure of "legitimate self-defense", sealing would have to be prohibited 10 miles off the Russian coast and within 30 miles off

80 Quoted in Editorial Comment, *op.cit.*, at 747.

81 This was the view of the Marquis Visconti Venosta. Fur Seal Arbitration, *op.cit.*, Vol. I, at 59; Moore, *op.cit.*, at 923.

Commander Island and Robben Island[82]. In 1892, six vessels were seized accordingly[83].

Third, and perhaps more decisively, the regulations were binding only upon Great Britain and the United States, but left unaffected the sealing activities of Russia and, foremost, Japan. Since the latter was not bound by the award, it became a free-rider of the regulations, catching the share that British Columbia's sealers had to relinquish in the area. This provided an incentive for the Canadian sealers to violate the regime more and more frequently to the point at which it become a dead letter. Arbitration is bilateral by nature, but the problem of over-hunting seals could be resolved only multilaterally. Obvious as it seemed, it took 25 years (between the beginning of the dispute caused by the seizing of the vessels and the Convention of 1911) to negotiate an agreement.

There were several reasons why an agreement was concluded in 1911 rather than in 1892, and they involve the larger diplomatic framework of the relations between the four key players (Russia, Japan, United States and Great Britain). Two elements, however, can be singled out. First, the Paris arbitration had been instrumental in clearing legal ambiguities. Until then the United States had thought that the problem could be addressed by unilateral actions and that there was no real incentive to make concessions. Similarly, it was only when Great Britain obtained a favorable judgment from an international tribunal on a matter of vital national interest (freedom of the high seas) that the issue could be scaled down from a large matter of principle to a narrower technical one; and in any event to something in which only the British Columbians were interested and on which London was much more willing to yield.

Second, only when the fur seals were on the verge of extinction did States cease to procrastinate and take resolute steps. Uncertainty on how close seals were to the point-of-no-return justified delay in negotiations. Scientific data thus plays an essential role in environmental disputes. Obviously neither the U.S. nor the British sealers had any interest in extinguishing the Northern Fur Seals. However, the two parties disagreed over the extent of the depletion rate. British sealers suspected that the U.S. conservationists' zeal was a fig-leaf for excluding competition from the market. Until extensive scientific data was gathered, the U.S. and British Governments had no real incentive to settle the dispute.

82 *Ibid.*, at 826.
83 *Ibid.*, at 825.

2. THE *ICELANDIC FISHERIES JURISDICTION* DISPUTE (UNITED KINGDOM *ET AL.* V. ICELAND)

2.1. Introduction

The *Icelandic Fisheries Jurisdiction* dispute, or simply *Icelandic Fisheries* dispute or the "Cod War" as it has sometimes been called, involved on the one side Iceland and on the other a number of North Atlantic fishing States, Great Britain foremost, between 1952 and 1976[1]. It was caused by the Icelandic authorities establishing fisheries jurisdiction zones in the waters surrounding the island and attempting to enforce them against foreign vessels. The dispute had four different stages corresponding to as many extensions of fishing regulations: originally, up to four nautical miles (1952–1956), and subsequently to 12 (1958–1961), 50 (1971–1975) and 200 miles (1975–1976). On several occasions, the navies of the United Kingdom and Iceland (both NATO members) confronted each other in a war of

1 Since Iceland and the United Kingdom alone accounted in the early 1970s for about three-fourths of the total fish catch in the seas off the Icelandic coasts, and since the United Kingdom, out of all States having substantial interest in the fishing activities in the area, was the only one to eventually resort to economic and military force to settle the dispute, this exposé of the case will focus mainly on these two States. Other States fishing in the area, like West Germany, will come into the picture only when particular facts (e.g. proceedings before the ICJ or fishing agreements with Iceland) require it.

On the Icelandic Fisheries dispute see, in general, Hart, J. A., *The Anglo–Icelandic Cod War of 1972–1973. A Case Study of a Fishery Dispute*, Berkeley, CA., Institute of International Studies, University of California, 1976, pp. vii – 76; Bilder, R. B., "The Anglo–Icelandic Fisheries Dispute", *Wisconsin Law Review*, Vol. 37, 1973, pp. 83–108; Katz, S. R., "Issue Arising in the Icelandic Fisheries Case", *I.C.L.Q.*, Vol. 22. 1973, pp. 83–108; Favoreu, L., "Les ordonnances des 17 et 18 août 1972 dans l'affaire de la competence en matière de pêcheries", *A.F.D.I.*, Vol. 18, 1972, pp. 291–322; Favoreu, L., "Les affaires de la compétence en matière de pêcheries. Arrêts du 25 juillet 1974 (fond)", *A.F.D.I.*, Vol. 20, 1974, pp. 253–285; Goy, R., "La nouvelle affaire des pêcheries islandaises. La procédure devant la Cour", *Journal de droit international*, Vol. 101, 1974, pp. 279–322; Martin, P.M., "L'affaire de la compétence en matière de pêcheries", *R.G.D.I.P.*, Vol. 78, 1974, pp.; 435–458; Churchill, R. R., "The Fisheries Jurisdiction Cases. The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", *I.C.L.Q.*, Vol. 24, 1975, pp. 82–105; Langavant, E./ Pirotte, O., "L'affaire des pêcheries islandaises", *R.G.D.I.P.*, Vol. 80, 1976, pp. 55–103; Obozuwa, A.U., "The Icelandic Fisheries Cases", *Nigerian Annual of International Law*, Vol. 1, 1976, pp. 101–123; Young, D. A., "Contributions to International Law and World Order by the World Court's Adjudication of the Icelandic Fisheries Controversy", *Boston College International and Comparative Law Journal*, Vol. 1, 1977, pp. 175–196; Kurlansky, M., *Cod: A Biography of the Fish that Changed the World*, New York, Penguin, 1997, pp. 158–173; Goy, R., "Le règlement de l'affaire des pêcheries islandaises", *R.G.D.I.P.*, Vol. 82, 1978, pp. 434–536; Rama Rao, S., "The ICJ Judgment in the Fisheries Jurisdiction Case – A Critique", *Indian Yearbook of International Affairs*, Vol. 18, 1980, pp. 124–159; "The Cod War", <http://gurukul.ucc.american.edu/ted/ICEFISH.htm> (Site last visited on January 6, 1998). The most comprehensive, even if rather biased, account of the Icelandic Fisheries dispute has been given by an Icelander. Jónsson, H., *Friends in Conflict*, London, Hurst & Co., 1982, pp. XI–240. For the basic documents concerning the dispute as well as German and British views, see *ICJ Pleadings* 1972, *Fisheries Jurisdiction* , Vols. I and II.

nerves and seamanship. In 1972, the United Kingdom and West Germany decided to challenge Iceland's extension of its fisheries jurisdiction to 50 miles before the International Court of Justice. However, despite the energies lavished on the case (indication of provisional measures[2], confirmation of the measures[3], two sets of orders on procedural issues[4], judgment on its jurisdiction[5] and judgment on the merits[6], all of which were double since the Court decided not to join the two cases), the World Court failed to settle the dispute[7].

2.2. The Issue

Iceland is a large island, more than twice the size of Switzerland[8], situated in the North Atlantic in proximity of the Arctic Circle, about 1,000 kilometers northeast of the United Kingdom and 400 kilometers from Greenland. Despite its size, Iceland is barely populated. In the 1970s, when the *Icelandic Fisheries* dispute reached its zenith, it was inhabited by slightly more than 200,000 people[9]. Because of its location at high latitudes and its geophysical structure, Iceland is extremely unsuitable for agriculture. Indeed, it is a geologically recent volcanic island, neither fertile nor rich in minerals or fuels. Only one percent of its land is arable and barely one percent is covered by forests[10]. The rest is made of barren volcanic rocks. However, Iceland's scarcity of natural resources and arable land is in part compensated by its extreme fertile coastal sea[11]. The island rests upon a broad continental shelf extending between 50 and 70 nautical miles from the coastline. The relatively

2 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Interim Protection, Order of August 17, 1972, ICJ Reports 1972, pp. 12–28; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Interim Protection, Order of August 17, 1972, ICJ Reports 1972, pp. 30–44.

3 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Interim Protection, Order of July 12, 1973, ICJ Reports 1973, pp. 302–311; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Interim Protection, Order of July 12, 1973, ICJ Reports 1973, pp. 313–318.

4 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Order of August 18, 1972, ICJ Reports 1972, pp. 181–186; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Order of August 18, 1972, ICJ Reports 1972, pp. 188–193; *Fisheries Jurisdiction* (United Kingdom v. Iceland), Order of February 15, 1973, ICJ Reports 1973, pp. 93–95; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Order of February 15, 1973, ICJ Reports 1973, pp. 96–98.

5 *Fisheries Jurisdiction* (United Kingdom v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, ICJ Reports 1973, pp. 3–47; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, ICJ Reports 1973, pp. 49–91.

6 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment of July 25, 1974, ICJ Reports 1974, pp. 3–173; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment of July 25, 1974, ICJ Reports 1974, pp. 175–251.

7 See Map 2.

8 Its surface is 102,846 square kilometers. *The Europa Yearbook*, London, Europa Publ. Ltd., 1971, Vol. I, pp. 848–860, at 849.

9 *Ibid.*

10 *Ibid.*

11 Vigdis Finnbogadottir, Iceland's President, describing her country, wrote: "A prominent Icelander once cynically described the country as being simply a rock surrounded by fish. An equally honest reply to such assertion would be a hesitant – yes, but ... – as this generalization focuses on the essential; namely the total dependency on fish". Finnbogadottir, V., "The Foreign Policy of Iceland", *European Yearbook*, Vol. 38, 1990, pp. 1–9.

shallow waters above the continental shelf, warmed by the Gulf stream, form an exceptionally good breeding ground for fish, making Iceland's coastal waters one of the most productive fisheries in the North Atlantic. The Icelandic fisheries host a number of pelagic species, such as herring, haddock, plaice and cod (*Gadus morrhua*), which are also the main products of fishing activities in the area.

Since 874 A.D., when the first human beings, coming from Norway, landed on the island, Icelanders have depended on fishing as the only viable source of food and trading goods to compensate for the absence of other natural resources. And this is still valid nowadays since the fishing industry provides nearly 75 percent of Iceland's export earnings and employs 12 percent of the work force, accounting for between 15 and 20 percent of Iceland's GNP[12]. These figures make Iceland more dependent on fishing than any other independent nation of the world[13] and explain why the sustainable exploitation of the fisheries in the waters surrounding the island are of paramount importance for Icelanders. Should marine biological resources be depleted, there would hardly be a future for the island as an independent nation.

Iceland's interests in coastal fisheries, however, have long been shared by fishermen of other countries, who, in the 1970s, accounted for about half of the annual catch in those waters; British fishermen took about 25 percent of the catch and other foreign fishermen the remaining 25 percent[14]. British trawlers from Hull, Grimsby and, to a lesser extent, Fleetwood, have fished in these waters for several centuries[15]. In 1972, the British fishing industry based on Icelandic fish employed several thousand workers[16], producing £23.5 million worth of catch[17]. These figures amounted to about one-fifth of the total catch of the British fishing fleet and nearly half the total catch of the British distant-water fleet[18].

From 1901 through 1951, the question of Icelandic fisheries limits was governed by a convention concluded in 1901 between Denmark (which at that time controlled Iceland's international relations) and the United Kingdom, the main competitor in the area, which fixed Iceland's territorial sea and exclusive fishing rights as extending three miles from the low-water mark of its coast[19]. Within the three-mile limit, Icelanders enjoyed exclusive fishing rights and could adopt all conservation policies they deemed appropriate. Beyond the three-mile limit, they competed with foreign trawlers for the stock of fish.

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12 Jónsson, *op.cit.*, at 7; Bilder, *op.cit.*, at 43.

13 OECD, *Fisheries Policies and Economies: 1957–1966*, Paris, OECD, 1970, 514 pp., at 215.

14 *Ibid.*, at 5 and 35. In the years just before 1972 of 100 non-Icelandic vessels sailing in the disputed waters, 60 were British, 30 German and the remaining 10 from other countries including Belgium, Poland, Portugal, Norway, Denmark and the Soviet Union. Jónsson, *op.cit.*, at 7.

15 Bilder, *op.cit.*, at 44–45. For an excellent history of cod fisheries in the region see, in general, Kurlansky, *op.cit.*

16 The agreement reached in 1976 to settle the dispute between Great Britain and Iceland allegedly caused about 1,500 fishermen to become unemployed, and about 7,500 people on shore were left briefly unemployed. "Trawlermen Forecast Loss of 9,000 jobs", *The Times*, May 31, 1976, at 1. In the United Kingdom in the early 1970s there were about 20,000 full time fishermen. Bilder, *op.cit.*, at 45.

17 Jónsson, *op.cit.*, at 7.

18 Bilder, *op.cit.*, at 44.

19 Convention between Denmark and Great Britain regulating the Fisheries outside Territorial Waters in the Ocean surrounding the Faröe Islands and Iceland, London, June 24, 1901, *CTS*, Vol. 189, at 429–436.

Iceland became independent from Denmark on June 17, 1944. Since political independence cannot be severed from the maintenance of a viable economy, and since Iceland's economy depended solely on fishing, in the aftermath of gaining independence Iceland undertook measures intended both to preserve from extinction the fisheries in the waters surrounding the island and to increase its share of nature's harvest so as to fuel its economic development. To this end, on April 5, 1948, Iceland's Parliament (Althing) enacted a law authorizing the Icelandic Ministry of Fisheries to

> "issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland, wherein all fisheries shall be subject to Iceland rule and control"[20].

These regulations were to be revised in the light of scientific research[21] and, in any event, were to be enforced only to the extent compatible with agreements with other countries to which Iceland was or might become a party[22].

Since Iceland's continental shelf extended between 50 and 70 miles off the coast of the island, the Law of 1948 Concerning the Scientific Conservation of the Continental Shelf Fisheries laid the legal foundations of a series of enlargements of Iceland's jurisdiction that would have eventually put Iceland on a collision course with the United Kingdom, its main rival for marine living resources in the area. The first step was to get rid of the limits set in the 1901 Convention. Accordingly, on October 3, 1949, Iceland denounced the 1901 Convention and, in compliance with the terms of that Convention, which required a two-year notice, its denunciation became effective on October 3, 1951[23].

That same year the International Court of Justice rendered its judgment on the *Fisheries* case[24], recognizing Norway's system of straight baselines to determine the point from which its territorial waters, extending four miles from the baselines, were to be measured. The Court found the system of straight baselines – which allowed Norway to close its deeply indented coastline by linking prominent points thereon by straight lines and thereby pushing outward the limits of its exclusive jurisdiction – consistent with international law[25]. This was the first victory of coastal States in their long struggle against maritime powers engaged in distant-water fishing. The truce which eventually put an end to this competition was signed only 31 years later, on December 10, 1982, at Montego Bay, Jamaica, where the United Nations Convention on the Law of the Sea (UNCLOS) was concluded[26]. The UNCLOS,

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20 Law of April 5, 1948, Concerning the Scientific Conservation of the Continental Shelf Fisheries (hereafter referred to as "1948 Fundamental Law"), reprinted in: United Nations Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea*, New York, United Nations, 1957, pp. 513–561. The Icelandic Law of 1948 closely followed the blueprint of the Truman Proclamation on Coastal Fisheries of September 28, 1945. On the striking similarities between the two acts see Jónsson, *op.cit.*, at 52–54.

21 *Ibid.*, article 1.

22 *Ibid.*, article 2.

23 UK Application, *Fisheries Jurisdiction* , *ICJ Pleadings* 1972, , Vol. I, at 3–68.

24 *Fisheries* case (United Kingdom v. Norway), Judgment, ICJ Reports 1951, pp. 116–206.

25 *Ibid.*, at 143.

26 1982 United Nations Convention on the Law of the Sea, (73). The UNCLOS entered into force on November 16, 1994. As of December 23, 1997, 123 States have ratified, acceded or succeeded to the UNCLOS.

probably the largest negotiating effort in the history of the United Nations, established, *inter alia*, an exclusive economic zone 200 nautical miles wide, within which coastal States enjoy exclusive or near-exclusive rights over marine living resources[27]. As we will see, Iceland, acting as an extremely proactive forerunner, was to make its contribution to the progressive enlargement of coastal State jurisdiction.

2.3. The Dispute: Phase One

Encouraged by the Court's finding in the *Fisheries* case and by the enactment of legislation by a number of other States establishing exclusive fishery jurisdiction zones[28], on March 19, 1952, Iceland issued Regulations, under the authority of the 1948 Fundamental Law, extending its exclusive fisheries limits to four miles measured from straight baselines drawn along its coasts (as opposed to three miles from the low-water mark as in the 1901 Anglo–Danish Convention)[29]. Article 1 of the Regulations stated that:

> "All trawling and Danish seine-netting is prohibited off the Icelandic coasts inside a line which is drawn four nautical miles from the outermost points of the coasts, islands and rocks and across the opening of bays..."[30].

In this area, all foreign fishing activities were prohibited[31]. These measures were taken not only because, in the light of the then-recent ICJ judgment and State practice the Icelandic Government deemed itself entitled to do so, but also because statistics were showing that catches of haddock and plaice, which breed in the bays, fjords and sheltered areas of the coasts of Iceland, were rapidly declining[32].

Iceland's extension of its fisheries limits to four miles was promptly protested not only by the British Government, in a note of May 2, 1952[33], but also by France, Belgium and The Netherlands, claiming an encroachment on the freedom of the high seas[34]. In an attempt to bring pressure on Iceland, the British fishing industry, with the acquiescence of the Government, organized a boycott against the landing of fish caught by Icelandic vessels[35]. As the British market absorbed a large share

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27 Part V of the UNCLOS (art. 55–75).

28 In 1952 17 States supported the three-mile rule, either alone or in combination with a contiguous zone for customs, fiscal or sanitary control not exceeding 12 miles; Four States supported a four-mile zone (Iceland, Finland, Norway and Sweden); 14 States supported a six-miles territorial sea and in some cases a wider contiguous zone; Six others supported a 12-miles rule. Finally, 10 States (Argentina, Chile, Costa Rica, Honduras, Iceland, Korea, Mexico, Nicaragua, Panama and Peru) raised special claims concerning the continental shelf, and special rights concerning navigation and fishing. Jónsson, *op.cit.*, at 42–43.

29 UK Application, at 4.

30 Regulations of March 19, 1952 Concerning Conservation of Fisheries off the Icelandic Coasts, art. 1. Text reproduced in United Nations Legislative Series, *op.cit.*, at 516.

31 *Ibid.*, art. 2.

32 Jónsson, *op.cit.*, at 59.

33 *Ibid.*, at 60–61.

34 *Ibid.*, at 61.

35 UK Application, at 4; Jónsson, *op.cit.*, at 62–63.

of Iceland's fish exports, the measure was particularly severe[36]. For four years the dispute stalled. A pristine idea of referring the dispute to the World Court for adjudication was aborted, mainly because of the United Kingdom's refusal[37]. Discussions held in 1954 at the Consultative Assembly of the Council of Europe were fruitless[38]. Yet, as the dispute continued, the British boycott was losing effectiveness, since Iceland had found new customers, mainly the Soviet Union, willing to buy its catch.

Iceland, therefore, had no reason to back off, while Great Britain had a strong incentive to prevent further extensions of fisheries regulations. For these reasons, on November 14, 1956, the two countries reached an agreement under the auspices of the Organization for European Economic Cooperation which provided, *inter alia*, that landings in the United Kingdom of fish caught by Icelandic vessels were to be resumed in exchange for a halt to further extensions of fisheries limits pending the outcome of the ongoing discussions in the UN General Assembly relating to the International Law Commission Report on the codification of the law of the sea[39]. The first phase of the *Icelandic Fisheries* dispute, therefore, saw Iceland prevail over the United Kingdom.

The dispute between Iceland and the United Kingdom over the width of the territorial sea and fisheries limits was but one example of the wider contrast between the few maritime powers, able to sail and fish all around the globe, and a large number of States, generally developing, with small fleets largely employed in activities close to home waters. While the former pledged to maintain narrow limits of the territorial sea and other special jurisdictional areas, the latter, striving to defend coastal waters from industrialized countries' fleets, gradually came to claim wide areas of the high seas by enlarging their territorial sea and asserting exclusive jurisdiction over the natural resources above, on and under their continental shelves. A number of attempts to extend jurisdictional limits over the high seas purportedly to preserve marine resources from over-exploitation had been made in the past, but they were all bitterly contested – as in the case of the *Bering Sea Fur Seals* dispute[40] – and they were too few to modify the traditional limit of three nautical miles. However, after the end of World War II, an increasing number of States started proclaiming larger areas of the high seas to be within their jurisdiction. Claims on the extent of the territorial sea and special jurisdictional areas in the late 1950s varied widely, ranging from three nautical miles (Great Britain) to as many as 200, with most of the claims centering around three, six and 12-mile limits and variations on these figures.

Because of the dramatic inconsistency of States' practice, the UN General Assembly, feeling that the issue was too controversial to be dealt with directly, decided nearly unanimously (Iceland alone voting against) to refer the issue to an *ad hoc* conference (The First UN Conference on the Law of the Sea), to be convened in

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36 The United Kingdom used to be the sole export market of cod – used to make Fish and Chips, the British national dish – for Iceland until the landing ban. "The Cod War", <http://gurukul.ucc.american.edu/ted/ICEFISH.htm> (Site last visited on January 6, 1998).

37 Jónsson, *op.cit.*, at 64.

38 *Ibid.*, at 64.

39 UK Application, at 3 and 4.

40 *Supra*, Ch. III.1.

Geneva, to deal with the matter. However, while the 1958 Geneva Conference on the Law of the Sea succeeded in adopting four Conventions on a number of issues (on the Fishing and Conservation of the Living Resources of the High Seas[41], on the Continental Shelf[42], on the High Seas[43] and on the Territorial Seas and the Contiguous Zone[44]), it failed to reach agreement either on the limit of the territorial sea or on the zone of exclusive fisheries. While it was clear that the three-mile limit could no longer be considered more than a possible minimum limit, it was also evident that the majority of States, as well as the majority of scholars in the field, were of the opinion that the maximum limit could be set at around twelve miles[45].

2.4. Phase Two

In view of the failure of the 1958 Geneva Conference on the Law of the Sea to fix the breadth of the zones of fisheries jurisdiction and of the constantly looming danger of over-fishing[46], on June 30, 1958, on the basis of the Fundamental Conservation Law of 1948, the Icelandic Government issued a regulation extending Iceland's fisheries limit from four to twelve miles, stating that this extension was to come into force on September 1, 1958[47]. Again several States protested, including Belgium, The Netherlands, Spain, Sweden and West Germany[48], but only Great Britain took the bold step of dispatching several units of the Royal Navy to escort British trawlers fishing within the 12-mile limit. Between September 1958 and February 1961, a number of incidents and rammings took place between Icelandic coast guard ships trying to board British trawlers to enforce Icelandic regulations, and the Royal Navy, which was attempting to keep Icelanders at bay[49]. The confrontation was obviously unequal, with the Icelanders being outnumbered by five to one in tonnage dispatched to the area[50].

However, time was working for Iceland. Indeed, if from the military point of view Iceland had no hope of bending the Royal Navy, it could nonetheless resist long enough to cause the cost of protecting the British trawlers to outweigh any possible political or economic gain for the United Kingdom. Moreover, as the dispute was diverting forces of the two NATO countries which were originally intended to keep Soviet submarines at bay in Murmansk and Arkangelsk, pressure from NATO allies to stop the dispute was mounting. Finally, while a Second Law of the Sea Conference, convened in Geneva in 1960, once again could not reach an

41 Convention on the Fishing and Conservation of the Living Resources of the High Seas, Geneva on April 29, 1958, *UNTS*, Vol. 559, at 285.
42 Convention on the Continental Shelf, Geneva on April 29, 1958, *UNTS*, Vol. 499, at 311.
43 Convention on the High Seas, Geneva on April 29, 1958, *UNTS*, Vol. 450, at 82.
44 Convention on the Territorial Sea and Contiguous Zone, Geneva on April 29, 1958, *UNTS*, Vol. 516, at 205.
45 Jónsson, *op.cit.*, 75–80.
46 For data of fish stocks in Icelandic waters in the late 1950s, see *ibid.*, at 73–75.
47 UK Application, para. 4 and 5, at 4; Jónsson, *op.cit.*, at 83–84.
48 *Ibid.*, at 83–84.
49 Bilder, *op.cit.*, at 53; Jónsson, *op.cit.*, at 91–95.
50 *Ibid.*, at 95.

agreement on the maximum breadth of the territorial sea or the width of fishery zones, the idea of an exclusive fisheries zone of twelve miles was rapidly gaining ground.

Negotiations between Iceland and the United Kingdom resumed and eventually resulted in an Exchange of Notes on March 11, 1961[51]. A similar agreement was concluded between Iceland and the Federal Republic of Germany (another of the States having objected, though without using force, to Iceland's extension of jurisdiction)[52]. By the Exchange of Notes, the United Kingdom explicitly renounced its objection to a twelve-mile fishery zone around Iceland[53]. In return, it obtained agreement that for a period of three years and in certain months of the year after that, Iceland would not object to British vessels fishing in specified areas off its shores between six and 12 miles from Icelandic straight baselines[54]. However, the implications of the Exchange of Notes were much larger. Paragraph 4 of the agreement read:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of the fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice"[55].

The resolution passed by the Althing on May 5, 1959, read:

> "The Althing resolves to protest against those violations of the Icelandic fisheries jurisdiction, which British authorities have prompted by continuous aggressive action by British warships inside the Icelandic fisheries limits, recently and repeatedly inside the four-mile fisheries limits from 1952. Since such actions are obviously intended to force the Icelanders to retreat, the *Althing* declares that it considers that *Iceland has unequivocal right to the entire continental shelf*, as was aimed at by the Law concerning the Scientific Conservation of the Continental Shelf Fisheries from 1948, and that fishery limits of less than twelve miles from baselines around the country are out of question"[56].

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51 Exchange of Notes Constituting an Agreement between Iceland and the United Kingdom Settling the Fisheries Dispute, March 11, 1961, *UNTS*, Vol. 397, at 275. It should be noted that the UK's note confirming its acceptance of the terms of the Icelandic note is prefaced by a statement that the settlement under the terms stated was reached "in view of the exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development". *Fisheries Jurisdiction* (UK v. Iceland), Jurisdiction, Judgment, para. 23, at 16; *Fisheries Jurisdiction* (Germany v. Iceland), Jurisdiction, Judgment, para. 24, at 34; *Fisheries Jurisdiction* (UK v. Iceland), Merits, Judgment, para. 59, at 26–27; *Fisheries Jurisdiction* (Germany v. Iceland), Merits, Judgment, para. 51, at 195.

52 Exchange of Notes Constituting an Agreement between Iceland and the Federal Republic of Germany Concerning the Fishery Zone Around Iceland, July 19, 1961, *UNTS*, Vol. 409, at 47.

53 *Ibid.*, para. 1.

54 *Ibid.*, para. 3.

55 *Ibid.*, para. 4.

56 Althing, *Parliamentary Records*, A 478, 1958, quoted in Jónsson, *op.cit.*, at 106. [Emphasis added]

Thus the United Kingdom implicitly recognized Iceland's right to extend its fisheries jurisdiction zone up to the outer limit of the continental shelf (about 50 miles), provided that it received six-month's notice before the extension was enacted. Moreover, should a dispute arise over a further extension of the fisheries limits, the United Kingdom gained the right to bring the case unilaterally before the International Court of Justice. Finally, and this was an element that would play an enormous role in favor of the United Kingdom, the Exchange of Notes remained silent both as to when and how the parties could terminate the agreement.

2.5. Phase Three

The 1961 Exchange of Notes, therefore, was more along the lines of an armistice than a permanent settlement. In 1964, after the end of the three-year period, both British and German trawlers went outside Iceland's 12-mile limit all around the country. In the same year, both States plus Belgium, Denmark, France, Ireland, Italy, Luxembourg, The Netherlands, Poland, Portugal, Spain and Sweden, concluded the European Fisheries Convention, which established a six-mile exclusive fishing zone around their coasts, plus a further six-mile zone where the right to fish was to be exercised only by coastal States and other Contracting Parties the vessels of which had habitually fished in that area between January 1, 1953, and December 31, 1962[57]. With the addition of this group, the total number of States claiming a 12-mile or larger territorial sea or exclusive economic zone grew to thirty-eight.

Over the next 10 years the dispute subsided. However, in 1970, the data on herring caught in the waters around Iceland once again set off the alarm, raising doubts about the effectiveness of fisheries zones limited to a mere 12-mile belt. Herring, long a principal catch of Icelandic fishermen, had plummeted from 736,000 tons in 1965, comprising more than 60 percent of Iceland's total catch of all species, to 50,700 tons, a mere seven percent of its total catch[58]. Moreover, in 1967 and 1968 the Icelandic national income fell by about 17 percent[59]. Natural factors, such as a change in the average temperature of the sea, as well as intense fishing by distant-water foreign fleets, may have played a role in the dramatic decline of the herring stocks. Whatever the source of the decline, a wave of panic went through the Icelandic population, who dreaded that the same thing might happen to cod stocks.

These facts deeply influenced the outcome of the 1971 Icelandic general elections. A new left-wing coalition, headed by the Agrarian Progressive Party and including the Communist Labor Alliance, ousted the conservative Independence Party and the Social Democrats, strongly pro-NATO and, what is more, authors of the 1961 deal with the United Kingdom and West Germany[60]. Accordingly, on July

57 Fisheries Convention, London on March 9, 1964 (entered into force on March 15, 1966), *UNTS*, Vol. 581, at 57. Articles 2 and 3.

58 Bilder, *op.cit.*, at 46, note 40.

59 Iceland White Paper, *op.cit.*, at 19.

60 Jónsson, *op.cit.*, at 122–124; Bilder, *op.cit.*, at 54–55.

14, 1971, the day it took office, the new Government issued a policy statement which included the following passage:

> "The Fisheries Agreement with the United Kingdom and the Federal German Republic shall be terminated and a resolution be made about the extension of the fishery limit up to 50 nautical miles from the baselines, effective not later that September 1, 1972. At the same time a zone of jurisdiction of 100 nautical miles shall be enacted for protection against pollution"[61].

The United Kingdom promptly indicated its strong concern with respect to this policy statement[62]. While negotiations between Iceland on one side and the United Kingdom and West Germany on the other did not produce any tangible result, Iceland reached agreements with Denmark, Belgium[63] and Norway[64], allowing the fishermen of these countries to fish within 50 miles of the coast only in certain areas at given times. On February 15, 1972, the Althing transformed into law the policy statement of the new Government. "[F]ishery limits will be extended to 50 miles from baselines around the country, to become effective not later than September 1, 1972."[65] However, before doing so, Iceland had to free itself from the commitments undertaken in the 1961 Exchange of Notes. Therefore, the Althing stated that

> "because of the vital interests of the nation and owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and [therefore] their provisions do not constitute an obligation for Iceland..."[66].

In the meantime, the Althing pledged that

> "efforts to reach a solution of the problems connected with the extension [will] be continued through discussions with the Governments of the United Kingdom and the Federal Republic of Germany [and] effective supervision of the fish-stocks in the Iceland area [will] be continued in consultation with marine biologists and...necessary measures [will] be taken for the protection of fish-stocks and specified areas in order to prevent over-fishing."[67]

2.6. The Proceedings before the Court

As neither the United Kingdom nor West Germany intended to recognize Iceland's claims to a 50-mile fisheries jurisdiction zone, the possible alternatives were either try to challenge them by continuing to fish in the zone or to bring the dispute before the International Court of Justice. Initially, they decided to pursue the latter. By a

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61 UK Application, para. 10, at 6; Jónsson at 122–123.
62 UK Application, para. 11, at 6 and Annex B.
63 Agreement on Fishing within Fifty-Mile Limit off Iceland, Reykjavik, September 7, 1972, *ILM*, Vol. 11, at 941.
64 Agreement concerning Fishing Rights, Reykjavik, July 10, 1973, *ILM*, Vol. 12, at 1313.
65 Resolution of the Althing on Fisheries Jurisdiction (para. 1), *ILM*, Vol. 11, 1972, at 643.
66 *Ibid.*, para. 2.
67 *Ibid.*, para. 3 and 4.

letter of April 14, 1972, the United Kingdom filed an application with the International Court of Justice formally instituting proceedings against Iceland[68]. The Federal Republic of Germany filed a similar application on June 5, 1972[69].

Basing their application on the compromissory clause contained in the 1961 Exchange of Notes, the United Kingdom and West Germany on the whole asked the Court to adjudge and declare first that Iceland's claim to a zone of exclusive fisheries jurisdiction extending 50-mile from baselines around the Icelandic coast was "without foundation in international law and invalid"; second, that Iceland was not entitled to unilaterally establish a zone of exclusive fisheries jurisdiction beyond the limits fixed by the 1961 Exchange of Notes (i.e. 12 miles), nor to exclude their fishing vessels from that area; third, that questions concerning the conservation of fish stocks in waters around Iceland were not susceptible in international law to regulation by the unilateral extension of Icelandic jurisdiction, but were matters that should be regulated by arrangements freely negotiated between the interested countries[70].

Iceland, however, did not have any intention of cooperating with the Court and denied the existence of the Court's jurisdiction, refusing to appoint its judge *ad hoc*, agents and counsels. In a letter of May 29, 1972, and June 27, 1972, in the case of the proceedings initiated by Germany, the Government of Iceland asserted that the 1961 Agreement was invalid *ab initio* since it was concluded under duress[71]. If, however, the Court was to regard the agreement as valid, a number of reasons stood for its expiration. First, Iceland had terminated the agreement, giving the parties six months notice[72]; second, fundamental changes of circumstance had taken place (e.g. increased catching capacity of fishing fleets due to technological improvements and rapidly decreasing catch in the area)[73]; third, the vital interests of the people of Iceland would be affected by its continued validity[74]; finally, the object of the agreement had been attained and, therefore, the agreement had been terminated[75]. For all these reasons, since the 1961 Exchange of Notes was void *ab initio* or had been voided, the Court could not base its jurisdiction on the compromissory clause contained therein.

2.6.1. Provisional Measures

In the meantime, the parties had continued to negotiate for a *modus vivendi* to be applied pending the settlement of the basic dispute. Yet, as no interim agreement was reached by July 12, 1972, Iceland announced that the new fisheries regulations, excluding all foreign vessels from fishing within a 50-mile belt around the country, would be enacted on July 14 and become effective on September 1, 1972[76]. The

68 UK Application, at 3–10.
69 Germany's Application, *Fisheries Jurisdiction* , *ICJ Pleadings* 1972, Vol. II, at 3–22.
70 UK Application, para. 21, at 10; Germany's Application, para. 20, pp. 10–11.
71 *Fisheries Jurisdiction* (UK v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 24, at 12; *Fisheries Jurisdiction* (Germany v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 24, at 13–14.
72 *Ibid.* (UK v. Iceland), para. 21, at 12; (Germany v. Iceland), para. 15–18, at 55–56.
73 *Ibid.* (UK v. Iceland), para. 30–45, at 16–22; (Germany v. Iceland), para. 25–45, at 59–66.
74 *Ibid.* (UK v. Iceland), para. 37–38, at 19; (Germany v. Iceland), para. 37–40, at 63–64.
75 *Ibid.* (UK v. Iceland), para. 25–29, at 14–16; (Germany v. Iceland), para. 25–29, at 59–60.
76 Regulations Concerning Fishery Limits off Iceland, July 14, 1972, *ILM*, Vol. 11, at 1112.

dispute, therefore, was spilling from the courtroom, where the legality under international law of Icelandic regulations was challenged, to the sea, where the Icelandic coast guard would have shortly taken measures to push foreign fishing fleets outside the 50-mile limit. To prevent this from happening, a few days later Great Britain and Germany filed an application asking the Court to indicate, under article 41 of the Statute and article 61 of the Rules of the Court, provisional measures of protection[77].

While Iceland was steadily contesting the Court's jurisdiction and refusing to cooperate, the Court dismissed Iceland's denials with ease, if not a certain brashness. Less than four weeks after the request had been filed, on August 17, 1972, the Court issued two identical orders, by 14 votes to one[78], indicating in substance that, pending the Court's final decision in the proceedings, the parties were to ensure that no action was to be taken that might aggravate or extend the dispute or prejudice the rights of the other party. In particular, Iceland was to refrain from taking any measures to enforce its 50-mile limit against the applicants, while the United Kingdom and West Germany were to limit their catch in the contested Icelandic waters respectively to 170,000 and 119,000 tons of fish a year; this figure was based on the average annual catch of their fleets in the area during the period 1967–1971[79].

Showing great self-confidence, the Court stated that it did not need, for the purpose of the indication of provisional measures, to satisfy itself of its jurisdiction on the case, but that it was sufficient that jurisdiction was not manifestly absent[80]. Moreover, it assented that the non-appearance of one of the parties could be no obstacle to ordering provisional measures[81]. As to the urgency of the measures, which in any event could be demanded by any of the parties at any stage of the procedure[82], the majority interpreted article 41 of the Court's Statute to the effect that its object was to prevent irreparable prejudice to the rights in dispute, and that

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77 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Interim Protection, Order of August 17, 1972, pp. 12–19; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Interim Protection, Order of August 17, 1972, pp. 30–36.

78 The Court was composed as follows: President Zafrulla Khan (Pakistan); Vice-President Ammoun (Lebanon); Judges Fitzmaurice (United Kingdom); Padilla Nervo (Mexico); Forster (Senegal); Gros (France); Bengzon (Philippines); Petrén (Sweden); Lachs (Poland); Onyeama (Nigeria); Dillard (USA); Ignacio-Pinto (Dahomey); de Castro (Spain); Morozov (USSR); Jiménez de Aréchaga (Uruguay). Since Iceland refused to appoint an *ad hoc* judge, Germany declined to do avail itself of the possibility to do so. Great Britain, however, maintained its judge (Sir Fitzmaurice) on the bench. *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 10, at 178. Only the Mexican Judge, Padilla Nervo, voted against. For the reasons of his contrary vote, see his dissenting opinion attached to the two judgments: *Fisheries Jurisdiction* (United Kingdom v. Iceland), Provisional Measures, Order of August 17, 1972, at 20–34; *Fisheries Jurisdiction* (Germany v. Iceland), Provisional Measures, Order of August 17, 1972, at 37–45.

79 *Ibid.* (United Kingdom v. Iceland), at 35; (Germany v. Iceland), at 17–18.

80 *Ibid.* (United Kingdom v. Iceland), para. 15, at 15; (Germany v. Iceland), para. 16, at 33.

81 *Ibid.* (United Kingdom v. Iceland), para. 11, at 15; (Germany v. Iceland), para. 11, at 32–33.

82 Article 73.1 of the 1978 ICJ Rules reads: "A written request for the indication of provisional measures may be made by a Party at any time during the course of the proceedings in the case in connection with which the request is made". At the time of the Icelandic fisheries dispute the number of this same article was 66.1. In the Statute of the PCIJ it was 61.1. On ICJ provisional measures, see, *inter alia*: Elkind, J.B., *Interim Protection: A Functional Approach*, The Hague, Nijhoff, 1981, pp. XXIV–287.

the impending enforcement of Iceland's regulations would, in view of the economic implications on the fishing industry, prejudice the possibility of full restoration of the British and German rights in case of a judgment in their favor[83]. As we will see, less than one year later in the *Nuclear Tests* cases, the Court showed much greater caution in dismissing a sovereign State's objection to its jurisdiction[84].

However, the brisk dismissal of Iceland's objections backfired. If provisional measures are ideally intended to cool down the dispute to allow the Court to work in a less tense environment, in this case they turned out to be an excellent fuel. Relying on the favorable order rendered by the Court, British and German trawlers entered the 50-mile zone around Iceland to fish. Since Iceland contested the Court's jurisdiction and considered itself as having all legal and moral rights to extend its regulations 50 miles off its coasts, as of September 1, the Icelandic coast guard started enforcing the new regulations against all non-complying vessels[85]. Incidents on the waters became increasingly frequent and the confrontation turned nasty. Many of the British trawler skippers had the names and the registration numbers of their vessels covered and some hoisted the Jolly Roger, the infamous skull-and-crossbones pirate flag[86]. Unlike what occurred in previous confrontations, this time the Icelandic coast guard did not go into action bare-handed but used specially designed devices called "trawl cutters" – an ingenious device that, towed astern of coast guard vessels, was employed to cut trawl's wires, causing considerable economic damage and therefore depriving delinquent vessels of all means of fishing[87]. Conversely, the Royal Navy vessels dispatched by London to protect British trawlers – Germany never dispatched navy vessels – would map out certain areas of operation, called "fishing boxes", for the British trawlers which they protected by fending off Icelandic vessels[88]. Collisions, both voluntary and involuntary, were quite frequent, with considerable damage on both sides[89]. Finally, airplanes of both parties, which were supposed to be on patrol duty for NATO as lookouts against Soviet submarines, were employed to monitor the movements of the opposite party. These were, in brief, the circumstances in which the Court was attempting to exercise its pacifying mission.

2.6.2. The Court's Judgment on Its Jurisdiction

As Iceland relentlessly contested the existence of the Court's jurisdiction, the Court considered that, before moving on the merits of the case, it had to hold hearings to deal with Iceland's objections. Accordingly, by orders dated August 18, 1972, by nine votes to six, the Court set the deadlines of October 13, 1972 for the filing of the United Kingdom's and West Germany's memorials, and December 8,

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83 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Provisional Measures, Order of 17 August 1972, para. 22, at 16; *Fisheries Jurisdiction* (Germany v. Iceland), Provisional Measures, Order of 17 August 1972, para. 23, at 34.

84 *Infra*, Ch. III.9.

85 Jónsson, *op.cit.*, at 134–136.

86 *Ibid.*, at 136–138. For a detailed portrait of British trawlers' resistance against the Icelandic coast guard, see Bilder, *op.cit.*, at 62, note 118.

87 *Ibid.* A picture of a trawl cutter can be found at Jónsson, *op.cit.*, at 188. See figures 7–8.

88 *Ibid.*, at 136–142.

89 *Ibid.*, at 137–138 and 143.

1972, for the filing of Iceland's counter-memorial[90]. Oral hearings on the jurisdictional issues were held on January 5[91] and 8[92], 1973. One month later, on February 2, 1973, in two identical judgments, the Court found, by 14 votes to one, that it had jurisdiction over the cases[93]. It began its reasoning by invoking article 53 of the Statute as well as its practice, pointing out that, despite the non-appearance of Iceland, it must nonetheless examine the question of its jurisdiction *proprio motu*[94]. To do so, it dealt thoroughly with the issue of the validity and interpretation of the compromissory clause contained in the 1961 Exchange of Notes, and examined in particular the various reasons advanced by Iceland for its termination[95]. The Court found in essence that the compromissory clause contained in the Exchange of Notes was a *sine qua non* condition of the whole agreement and not merely an accessory clause[96]. This had been an element essential in obtaining the United Kingdom's (and Germany's) renunciation to object to the 12-mile limit. If, on the one hand, Iceland had attained its part of the object of the agreement (i.e. to extend its fisheries jurisdiction limit to 12 miles), the United Kingdom (and Germany), on the other hand, had not given up their right to object to further extensions and to ask the Court to adjudge on their validity. As for the argument that the agreement was concluded under duress, the Court stated that the claim was too vague and unsupported by evidence[97]. However, it might be reasonably argued that if, because of Iceland's non-appearance, the Court had undertaken the examination of the existence of its jurisdiction on the given case *proprio motu*, it probably had a duty to investigate, again *proprio motu*, the truth of the Iceland's allegations. In other words, the fact that a State decides not to cooperate with the Court should not exclude the Court's duty to find the truth and administer justice. The ICJ did not do so and dismissed Iceland's allegations by observing that the negotiations which had preceded the 1961 Exchange of Notes revealed that the agreement had been negotiated freely on a basis of perfect equality and freedom of decision[98]. Finally, as to the argument that a fundamental change of circumstances had taken place that altered the fundamental *quid pro quo*

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90 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Order of August 18, 1972; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Order of August 18, 1972. Judges Jiménez de Aréchaga and Bengzon filed a Joint Dissenting Opinion, saying that the issue of the Court's competence had to be dealt with in the merits phase. *Ibid.* (UK v. Iceland), at 184–186; (Germany v. Iceland), at 191–193.

91 MM. Steel, Bowett, Johnson, Simpson, Slynn, Langdon-Davies and Sir Peter Rawlinson pleaded on behalf of the United Kingdom before the Court.

92 Mr. Jaenicke alone pleaded on behalf of the Federal Republic of Germany.

93 *Fisheries Jurisdiction* (United Kingdom v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 46, at 22; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 46, at 66.

94 *Ibid.* (United Kingdom v. Iceland), para. 12, at 7; (Germany v. Iceland), para. 13, at 54.

95 For Icelandic reasons denying the existence of the Court's jurisdiction, see *supra*, Ch. III.2.6.

96 *Fisheries Jurisdiction* (United Kingdom v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 23, at 13–14; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 23, at 58.

97 *Ibid.* (United Kingdom v. Iceland), para. 24, at 14; (Germany v. Iceland), para. 24, at 58–59.

98 *Fisheries Jurisdiction* (United Kingdom v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 24, at 14; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), (Jurisdiction of the Court), Judgment of February 2, 1973, para. 24, at 58–59.

at the basis of the agreement (not only technological developments, but also the fact that the 12-mile limit was now generally admitted), the Court found that these changes had not fundamentally altered the extent of the obligations to be performed by the parties[99]. In any event, the question of whether there was a dispute and whether the Court had jurisdiction, under article 36.6 of the Statute of the Court, is something that must be settled by the Court itself[100].

2.6.3. The Aftermath of the Court's Judgment on Jurisdiction

At this point the Court, which had hitherto proceeded relatively quickly (slightly more than six moths to emit to orders indicating provisional measures and resolve the issue of its jurisdiction), suddenly slowed down. On February 15, 1973, it fixed the deadline for the submission of the memorials for August 1, 1973, and that for counter-memorials for January 15, 1974, allowing the parties almost one year to substantiate their positions on the merits of the case[101]. A number of factors probably induced the Court to space its judgment on the issue of jurisdiction from its judgment on the merits. First, another tangled case was already appearing on the horizon of the Court. France had stated its intention to carry out a further series of atmospheric nuclear tests in the South Pacific and Australia and New Zealand were ready to prevent this by resorting to the Court[102]. Second, the judges had not abandoned the hope that, once its allegations concerning the lack of jurisdiction had finally been thoroughly settled, Iceland would decide to defend itself before the Court. As there were already signs that France would take the same non-cooperative stance as Iceland, most likely the ICJ hoped to limit the wounds inflicted on its credibility by cajoling the Icelandic Government back to the courtroom. Third, the international law of the sea was in a permanent state of flux. The issue of the extension of territorial sea and fisheries jurisdiction zones was a hot topic on the agenda of the United Nations, in particular of the Sea Bed Committee which had been entrusted with the preparatory work of the forthcoming Third UN Conference on the Law of the Sea. As international regulatory efforts were going on, ill-timed Court judgments on the issue might have undermined negotiating efforts. Fourth, while at sea Icelandic and British fleets were still confronting each other, the two countries were still looking for a mutually satisfactory solution, even though the margins for maneuver, particularly on the Icelandic side, were very narrow. All these considerations might have prompted the Court to take a cautious approach to the merits phase of the dispute.

Meanwhile, the tension between the Icelandic coast guard and the British navy in the North Atlantic was increasing. In May 1973, Iceland forbade the landing of British airplanes on the island and stated that all sick and injured sailors from the British fishing and naval fleets could be received in Iceland for treatment only if

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99 *Ibid.*, (United Kingdom v. Iceland), para. 30–45, at 16–22; (Germany v. Iceland), para. 35–45, at 62–66.

100 "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". Statute of the ICJ, art. 36.6.

101 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Order of February 15, 1973; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Order of February 15, 1973.

102 *Infra*, Ch. III.9.

they were brought ashore by the vessel on which they were registered and employed when the sickness or accident occurred[103]. This was tantamount to threatening injured and sick British sailors with arrest and trial if they landed. Finally, Iceland threatened to sever diplomatic relations with Great Britain if the navy insisted on protecting British trawlers within the 50-mile zone[104]. In these circumstances, on June 22, 1973, the United Kingdom requested the Court to reiterate the provisional measures indicated in the order of August 17, 1972; so did the Court, by eleven votes to three, on July 12, 1973[105].

Yet, as the standoff persisted, the dispute was moving toward compromise. On November 13, 1973, after a visit by the Icelandic Prime Minister to Downing Street, Iceland and the United Kingdom (but not Germany) reached an agreement, valid for two years and pending the settlement of the substance of the dispute by the Court[106]. The main points of the settlement were, first, that Great Britain agreed to exclude from fishing inside Iceland's 50-mile limits all freezer and factory vessels (the so-called vacuum-cleaners of the sea, because they shorten dramatically the time needed between when a trawler has loaded and unloaded its catch)[107]; second, the number of vessels licensed to fish within Iceland's fisheries limits was to be reduced and a number of areas were closed to fishing during given seasons[108]; third, any non-complying vessel could be crossed off the list of licensed vessels by the Ministry of Justice in Reykjavik without having to be replaced by others[109]. All these measures aimed at limiting the British catch to a maximum of 130,000 tons per year[110], 40,000 tons less than what was suggested by the ICJ in its order of August 17, 1972[111].

Obviously, as Iceland stubbornly continued to deny ICJ jurisdiction, the United Kingdom did not hope to obtain much from the Court but satisfaction on a point of law. An agreement on a reduced fishing quota was better than making a point on an abstract point of law for the future and maintaining an expensive and politically awkward fleet to defend the trawlers. The third phase of the dispute,

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103 Jónsson, *op.cit.*, at 145–147.

104 Government Press Release no. 33/1973, Reykjavik, September 27, 1973. Quoted in Jónsson, *op.cit.*, at 147.

105 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Interim Protection, Order of July 12, 1973; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Interim Protection, Order of July 12, 1973. Judges Ignacio-Pinto, Gros and Petrén dissented. Judges Gros and Petrén attached to the Order dissenting opinions criticizing the fact that the Court did not assess the new circumstances in which the request for confirmation was taking place (e.g. naval confrontations and an alarmingly decrease in catch). For these reason the two Judges held that hearings should be held and that the United Kingdom should have substantiated its request while Iceland should have been given a chance to present its observations or, if it failed to do so, the Court itself would have been bound under article 53 of its Statute to give due consideration to the indications which may favor that Party. See Judges Gros and Petrén dissenting opinions.

106 Iceland and United Kingdom: Exchange of Notes Constituting an Interim Agreement Regarding the Fisheries Dispute between these Countries, Reykjavik, November 13, 1973, *UNTS*, Vol. 899/900, at 93.

107 *Ibid.*, para. 1.

108 *Ibid.*, para. 1–4.

109 *Ibid.*, para. 5.

110 *Ibid.*, Preamble.

111 *Supra*, Ch. III.2.6.1.

over the extension of Iceland's fisheries jurisdiction limits to 50 miles was, therefore, *de facto* concluded, at least from the British perspective. Whether Iceland had the right under international law to extend its jurisdiction, however, was a question which was still pending before the Court.

2.6.4. The Court's Judgment on the Merits

Before opening the oral phase on the merits, the Court had to decide whether the two cases (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland) could and should be joined. On January 17, 1974, by nine votes to five, the Court found that, despite the similarity between the demands, the underlying legal positions and submissions remained distinguishable[112]. Therefore, it was decided not to join the two cases but to hold successive hearings. While this might have been defensible from a strict legal point of view, it did not make much practical sense. Indeed, while the two cases were made ready for trial and pleaded separately, the written and oral pleadings and answers to judges' questions were still prepared jointly by the agents of the two States[113]. Oral hearings on the merits of the cases were held from March 25 through April 2, 1974[114]. Once again, Icelandic agents and counsel did not appear before the Court to plead their case.

Between the end of the oral pleadings and the Court's judgment, however, two significant developments took place. First, on May 13, 1974, Iceland amended the 1948 Fundamental Conservation Law, which had been hitherto the legal basis of all successive extensions of fisheries jurisdiction limits, replacing reference to the continental shelf as the outer limit for which the Ministry of Fisheries could issue regulations by the specific figure of 200 nautical miles[115]. This act was clearly intended to pave the way for further extensions, as Iceland's continental shelf reaches only to about 50-70 miles from the coast. Second, work for the preparation of the first meeting of substance of the Third UN Conference on the Law of the Sea – in Caracas, Venezuela, June 20 to August 29, 1974 – was underway and there was already a large number of States supporting the idea of a 200-mile exclusive economic zone including the exclusive right to fish in that area[116].

It was within this context that on July 25, 1974, exactly halfway through the Caracas session of the Third Conference on the Law of the Sea, the Court delivered the judgments on the merits of both cases[117]. Quite obviously, all delegates were looking to The Hague to see what the position of the principal judicial organ of the

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112 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 8, at 5; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 8, at 177. In particular, the United Kingdom had, in the first point of its submissions, asked the Court to declare Iceland's 50-mile fishery zone without foundation in international law and invalid *erga omnes*, while Germany had only asked the Court to decide that Iceland's measures could not restrict Germany's fishing rights.

113 Goy, *op.cit.*, at 441.

114 MM. Anderson, Silkin, Slynn, Simpson, Johnson, Langdon-Davies, Bowett pleaded on behalf of the United Kingdom. MM. Jaenicke, Von Schenck, Möcklinghoff, Fleishhauer, Booss, Kaufmann-Bühler and Meyer pleaded on behalf of the Federal Republic of Germany.

115 Jónsson, *op.cit.*, at 155.

116 *Ibid.*, at 160.

117 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment.

United Nations would be on the issue of the extension of States' jurisdiction at sea. By 10 votes to four[118], the Court found, first, that the Regulations of 1972 extending Icelandic fisheries jurisdiction limits to 50-mile, were not opposable to the United Kingdom (and Germany) and that accordingly Iceland could not unilaterally exclude British (and German) fishing vessels from the zone between 12 and 50 miles from Icelandic coasts, nor restrict fishing activities in that zone[119]. Secondly, it held that the parties were under a mutual obligation to negotiate a settlement of the dispute which would take into consideration not only Iceland's entitlement to a preferential share of the fishing resources in the area (by virtue of its exceptional dependence on it) and the United Kingdom's and Germany's established rights over said resources (by virtue of long and customary fishing activities in the area and the fact that elements of its population depended on it for their livelihood and economic well-being), but also the interests of third States in the conservation and equitable exploitation of these resources[120].

The Court came to these conclusions through a broad analysis of the evolution of the international law of the sea. It began its discussion of coastal States' fisheries rights with the 1958 (First) and 1960 (Second) Conference on the Law of the Sea[121]. The Convention on the High Seas, which was adopted at the 1958 Conference, provides in its first and second articles that the high seas include all parts of the sea that are not part of a State's territorial sea or internal waters, and that in the high seas, fishing is free and open to all States[122]. Indeed, neither the 1958 nor the 1960 Law of the Sea Conferences succeeded in agreeing on provisions which would have given coastal States special rights with regard to fisheries in zones of the high seas beyond their territorial sea. However, the Court held that this rather absolute principle contained in the 1958 Convention had been modified by two new concepts which had emerged as rules of customary international law[123]. The first was the idea of fisheries zones, according to which States could exercise

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118 The Court was composed as follows: President Lachs (Poland); Judges Forster (Senegal); Gros (France); Bengzon (Philippines); Petrén (Sweden); Onyeama (Nigeria); Dillard (USA); Ignacio-Pinto (Dahomey); de Castro (Spain); Morozov (USSR); Jiménez de Aréchaga (Uruguay); Sir Humprey Waldock (United Kingdom); MM. Nagendra Singh (India); Ruda (Argentina). Vice-President Ammoun was absent. Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh, Ruda, Dillard, de Castro and Sir Humprey Waldock attached separate opinions. Judges Gros, Petrén and Oneyama, who had voted against together with Judge Ignacio-Pinto, attached dissenting opinions.

119 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 79, at 34–35; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 77, at 205–206.

120 *Ibid.*

121 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 50–52, at 22–23; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 41–44, at 191–192.

122 Article 1 of the 1958 Convention on the High Seas reads: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State". Article two follows: " The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States…freedom of fishing".

123 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 54, at 24; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 46, at 192–193.

exclusive jurisdictional competence concerning the management of biological resources in areas beyond the territorial sea. The second was the concept of preferential rights of fishing in adjacent waters in favor of the coastal State when that State is particularly dependent on these fisheries.

As to the concept of the general admissibility of exclusive fisheries zones, the Court did not dare go beyond stating that they were allowed by customary international law[124]. It shied away from the key question of determining how wide, according to international law, fisheries jurisdiction zones could be[125]. It did so because at the time of its deliberation, an international conference held under the aegis of the United Nations – of which, it should be stressed, the Court is an organ – was discussing exactly the same topic. In its own words, the Court "as a court of law, cannot render judgment *sub specie legis ferendae*, or to anticipate the law before the legislator has laid it down"[126]. However, this very issue was the essence of the dispute and it was exactly what the parties had asked the Court to determine. The compromissory clause contained in the 1961 Exchange of Notes from which the Court derived its jurisdiction stated that Iceland had to give the United Kingdom six months' notice of eventual extensions of its fisheries jurisdiction zones and that "in case of a dispute in relation to such extension, the matter [should], at the request of either Party, be referred to the International Court of Justice"[127].

The issue of preferential rights, on which the Court based much of its reasoning, was supererogatory. This point was raised by the four dissenting judges who held that the Court, by taking up the issue of preferential rights and deciding that the parties were under an obligation to negotiate an equitable agreement, went beyond its powers as circumscribed by the compromissory clause[128].

The judgments on the merits of the *Icelandic Fisheries Jurisdiction* cases are extremely ambiguous. The Court did not find Icelandic extension of its fisheries jurisdiction limits to 50 miles at variance with customary international law, as the parties requested. However, in two points of its judgment the Court reveals its real thoughts. First, it found that a 12-mile exclusive fishing zone was generally recognized[129], implying therefore that zones in excess of 12 miles were not generally recognized; and second, it said that Iceland had preferential rights in the contested area, implying therefore that these rights could not be exclusive, as Iceland had claimed[130]. In other words, while the Court was ostensibly refraining from touching the issue of the width of exclusive fishing zones, it was in reality implying that a

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124 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 52, at 23; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 44, at 191–192.

125 The Court vaguely stated that "the extension of…[a] fishery zone up to a 12-mile limit from baselines appears now generally accepted". *Ibid.*

126 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 53, at 23–24; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 45, at 192.

127 *Supra*, note 55.

128 See Judges' Gros, Petrén and Oneyama's Dissenting Opinions and Judge Ignacio-Pinto's Declaration.

129 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 52, at 23; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 44, at 191–192.

130 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, para. 67, at 29; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, para. 59, at 198.

50-mile limit was contrary to international law. This inference is justified not only from what is read from the conclusions reached by the majority of the judges, but also by the fact that three of the four dissenting judges plainly stated that a 50-mile claim was contrary to international law[131]. However, had the Court made such a statement in the midst of the Third UN Conference on the Law of the Sea, where more than half of the participants were already claiming fisheries jurisdiction limits equal if not wider than those claimed by Iceland, it would have probably either sentenced negotiations to a premature death or run the serious risk of being proven wrong by the majority of States at the negotiating table. These considerations explain, by and large, the sibylline nature of the Court's judgments.

The Court, therefore, did not settle the dispute but merely put it back into the lap of the parties with the generic recommendation that any solution they might find to the dispute had to accommodate not only both parties' interests but also those of third parties. Yet in doing so the Court overlooked two fundamental facts. First, Iceland and the United Kingdom had already reached an agreement[132]. Admittedly, the November 1973 agreement was to last only two years and was without prejudice to the legal positions of the parties, but believing that Iceland would submit to the Court's findings after the expiration of the agreement was wishful thinking, particularly considering what little regard Iceland had shown for the Court hitherto. Second, not only was Iceland already overtly preparing a further enlargement of its fisheries jurisdiction zone to 200 miles, but it was also clear that at the Third United Nations Conference on the Law of the Sea the tide was now flowing in favor of a 200-mile exclusive economic zone, including the exclusive right to marine living resources in that area. Indeed, the concept of a 200-mile exclusive economic zone entered into the Single Negotiating text during the 1975 Geneva session of the Conference[133], where it remained until the final adoption in 1982 of the UNCLOS[134].

2.7. Phase Four

Once again, as in previous phases of the dispute, alarming scientific data concerning the rapid depletion of marine living resources in the waters off Iceland triggered a reaction by the Icelandic Government. Indeed, both Icelandic and British marine biologists were in agreement that the cod was being vastly over-fished during the early 1970s and projected that, if the level of fishing continued unabated, there would likely be no cod left by 1980[135]. Bearing in mind these considerations, encouraged by the state of affairs at the Third Conference, and overtly ignoring the Court's judgments, the Icelandic Government issued regulations extending its fisheries jurisdiction to 200 nautical miles on July 15, 1975, to

131 Judge Gros, (UK) at 126–149, (Germany) at 234–239; Petrén, (UK) at 150–163, (Germany) at 240–243; Oneyama, (UK) at 164–174, (Germany) at 244–252.

132 *Supra*, Ch.III.2.6.3.

133 Jónsson, *op.cit.*, at 160.

134 1982 United Nations Convention on the Law of the Sea, (73).

135 Blair, J., "No Cod Left by 1980 ...", *The Times*, January 24, 1976, at 12. Quoted in "the Cod War, *op.cit.*.

take effect on October 15, 1975[136]. However, since the 1973 Interim Agreement with Great Britain was not to expire until November 14, 1975, the new regulations were for the moment not enforced against British trawlers fishing in Icelandic waters[137].

The dispute reignited following the pattern of previous stages. All States but the Federal Republic of Germany and Great Britain respected the new regulations, and while Germany limited itself to challenging Icelandic regulations with trawlers, Great Britain dispatched its navy to the area to allow its trawlers to fish in conformity with the judgment of the ICJ of July 25, 1974[138]. Several attempts were made to deal with this new phase of the dispute through negotiations and also by taking the matter up both in the UN Security Council[139] and in the NATO Council[140], but none of these efforts met with success. Because of the favorable judgment rendered by the World Court, the British felt that their case was even stronger, whereas Iceland was fighting for what it considered a vital interest, having also the present evolutionary trend of the law of the sea on its side. The Court had decided that even a 50-mile limit was not yet customary international law, but State practice was changing rapidly.

As the dispute was heating up, Iceland decided, on February 19, 1976, to break diplomatic relations with the United Kingdom[141]. Moreover, Icelandic public opinion was starting to doubt the usefulness of Iceland's NATO membership as a means of defending the country's interests[142]. The United States remained aloof, refusing to rent or sell patrol ships to Iceland, and the Icelanders wondered whether the American base at Keflavík, which was supposed to guarantee the island's defense (Iceland has no military forces except the coast guard), was aimed at the right threat. After all, the Soviet Union had not only offered Icelanders an alternative and lucrative market when Britain had refused the landing of Icelandic catch, but had also established good and friendly relations with them[143].

In one shot, on November 28, 1975, Iceland settled its dispute with West Germany over the issues of both the 50-mile and the 200-mile zones[144]. Forty German trawlers (freezers and factory vessels excluded) were granted permission to fish in certain areas inside the 200-mile limit provided that they did not exceed 60,000 tons, of which no more than 5,000 could be cod[145]. The Agreement was to last for two years, and when it expired on November 28, 1977, it was not renewed[146].

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136 Regulations concerning the Fishery Limits Off Iceland, July 15, 1975, *ILM*, Vol. 14, at 1282.
137 *Ibid.*
138 Jónsson, *op.cit.*, at 162–164.
139 Letter addressed to the President of the Security Council by Iceland, December 11, 1975, S/11905; Letter addressed to the President of the Security Council by Iceland, December 12, 1975, S/11907.
140 Jónsson, *op.cit.*, at 165.
141 *Ibid.*, at 169–173.
142 *Ibid.*, at 173–175.
143 *Supra*, Ch.III.2.3.
144 Fisheries Agreement on the Extension of the Icelandic Fishery Limits to 200 Miles, November 28, 1975, *ILM*, Vol. 14, at 43.
145 *Ibid.*, para. 2 and Annex II.
146 *Ibid.*, para. 9.

Similar Agreements were concluded with Belgium on November 28, 1975[147], and Norway on March 10, 1976[148].

The United Kingdom, therefore, was left alone in its fight. This fact, coupled with the constantly increasing number of States claiming a 200-mile exclusive fishing zone and the pressure brought to bear on the United Kingdom by its NATO allies, forced it to surrender, ending the fourth and last phase of the Icelandic Fisheries dispute. On June 2, 1976, the British drank from a cup far more bitter than that offered to West Germany[149]. Only 24 trawlers out of a list of 93 licensed vessels could fish at any given time within the 200-mile limit[150], while four conservation areas were completely closed[151]. Finally, the Agreement was to last only six months, expiring on December 1, 1976[152].

2.8. The Aftermath of the Icelandic Fisheries Dispute

The Agreement with the United Kingdom ended on December 1, 1976 and was not renewed. On December 10, 1976, the United Kingdom, consistent with the conclusions of an EEC Council meeting held on October 30, 1976, enacted its own 200-mile limit which, on January 1, 1977, was also to become the European Community limit[153]. On December 10, 1982, the Third UN Conference on the Law of the Sea concluded its work with the adoption of the UNCLOS. The Convention established, *inter alia*, an exclusive economic zone 200 nautical miles wide, within which coastal States enjoy exclusive rights with regard to marine living resources[154]. Iceland, which had played such a pro-active role in its development, ratified the UNCLOS on June 21, 1985, making it for a while the only European State to do so. The dispute between Iceland on the one hand, and Great Britain and West Germany on the other, over Icelandic claims of jurisdiction over the fishing grounds around its coasts, was, therefore, concluded in 1976. Six years later, the adoption of the UNCLOS sealed its conclusion.

Twenty years after the end of the dispute, there is no doubt that local jurisdiction has proven to be paramount for Icelandic conservation efforts. Currently, fishing vessels from Norway, Greenland, the Faeroe Islands and Belgium are allowed limited catches within the 200-mile zone, but the vast majority of vessels fishing therein are Icelandic (which is in contrast to the 1970s when one-half of the total catch was taken by foreign vessels). Yet, due to the imposition of a constraining

147 Fisheries Agreement on the Extension of the Icelandic Fishery Limits to 200 Miles, November 28, 1975, *ILM*, Vol. 14, at 1.

148 Agreement Concerning Norwegian Fishing in Icelandic Waters, March 10, 1976, *ILM*, Vol. 15, at 875.

149 United Kingdom and Iceland: Exchange of Notes constituting an Agreement Concerning Fishing in the Icelandic Fisheries Zone, Oslo, June 1, 1976, *UNTS*, Vol. 1032, at 147.

150 *Ibid.*, para. 1.

151 *Ibid.*, para. 2–4.

152 *Ibid.*, Annex III.

153 Fishery Limits Act 1976, *House of Commons Debates*, Vol. 921, December 3, 1976, cols. 1347–1351. On the issue see, Lowe, V., "The United Kingdom and the Law of the Sea", Treves/Pineschi, *op.cit.*, pp. 521–553, at 533–538.

154 United Nations Convention on the Law of the Sea, (73), Part V, arts. 55–75.

quota system to preserve marine species, the Icelandic fishing fleet is operating below its capacity, making further exemption for foreign vessels unlikely[155].

If the adoption of the UNCLOS ultimately concluded the dispute, Iceland's drive for off-shore economic resources was nonetheless far from exhausted; it was to become the origin of two further disputes. The first one concerned the status of the sea around the Norwegian island of Jan Mayen[156], and the second dealt with the continental shelf around the rock of Rockall[157], under British sovereignty. While these disputes do not belong in this study, it might be useful to briefly review them[158].

The dispute between Iceland and Norway over the legal status of the waters surrounding the Island of Jan Mayen[159] came about in 1978 when Icelandic fishermen made a large catch of capelin (*Mallotus Villosus*) off the island's shores[160]. The sudden discovery of the island's resource potential raised questions as to Jan Mayen's rights to an exclusive fisheries zone. Although Norway's title to the island was established by a 1930 act of the Norwegian Parliament[161], when Norway enacted legislation in 1977 to establish 200-mile exclusive economic zones around its mainland coasts, it omitted making reference to the island[162]. Following the 1978 bonanza, Norway immediately took steps to correct this lapse. But, since Jan Mayen lies 550 nautical miles from Norway and only 292 miles from Iceland, the Norwegian act obviously created a problem of overlapping of the exclusive fisheries zone claimed by Iceland in 1975[163].

Unlike in the case of the Cod War, negotiations between the two countries led to the conclusion in May 1980 of an Agreement establishing a Joint Fisheries Commission charged with fixing species catch quota[164]. The Agreement recognized that Iceland should benefit from the full extent of its 200-mile EEZ between Jan Mayen and Iceland, while giving Jan Mayen an EEZ extending to 200 miles only where it is not constricted by Iceland's zone[165]. The issue of mineral resources in the subsoil of the island's continental shelf, however, was more controversial. Although Norway was not ready to give in as easily as it did with the fisheries, a compromise was reached. The issue of mineral resources in the subsoil of the contested area was finally disposed of on October 11, 1981, after a conciliation

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155 Finnbogadottir, *op.cit.*, at 5.

156 On the Jan Mayen Dispute see, *inter alia*: Richardson, E.L., "Jan Mayen in Perspective", *A.J.I.L.*, Vol. 82, 1988, at 443–444.

157 On the Rockall Dispute see, *inter alia*: Symmons, C. R., "The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions", *I.C.L.Q.*, Vol. 35, 1986, pp. 344–373.

158 For the reasons of their exclusion, see *supra* Ch. 1.2.4.2.

159 Jan Mayen is a volcanic island 53 kilometers long and 15–20 kilometers wide, located 550 nautical miles from Norway and 292 miles from Iceland. It has a year-round population of 30 to 40 individuals, by and large employed at the local meteorological station. "Jan Mayen", *Encyclopedia Britannica*, 15th ed., Vol. 6.

160 Richardson, *op.cit.*, at 443–444.

161 Law No. 2 Concerning Jan Mayen, February 27, 1930. *Ibid.*, at 444, note 3.

162 *Ibid.*

163 *Supra*, Ch.III.2.7.

164 Agreement concerning Fishery and Continental Shelf Questions, May 28, 1980. Quoted in Richardson, *op.cit.*, at 444, note 4. On the Agreement see Churchill, R.R., "Maritime Delimitation in the Jan Mayen Area", *Marine Policy*, Vol. 9, 1985, at 16.

165 *Ibid.*, preamble.

commission recommended the establishment of a joint development zone covering virtually all areas offering any significant prospects of hydrocarbon production[166].

Iceland's search for off-shore natural resources extended to another contested area, located around the Rockall-Faeroe Plateau. Rockall, as its name implies, is a mere rock swept by the winds and waves of the North Atlantic, located about 230 nautical miles west of the Hebrides, 320 miles southwest of the Faeroe islands and 390 miles south of Iceland[167]. At its base it measures about 25 by 35 meters and it emerges 19 meters above the high-water mark[168]. On top of this granite rock there is a lighthouse; the United Kingdom has exercised undisputed sovereignty on Rockall since 1955. Since 1974, the United Kingdom and Ireland and have laid claims to the continental shelf surrounding Rockall, and since 1985 Iceland and Denmark (on behalf of the Faeroe Islands) have joined the litigants[169].

The question of whether Rockall is entitled to a 200-mile EEZ and continental shelf was at the origin of much trouble. The issue was finally clarified in 1982 by the UNCLOS, article 121.3 of which provides that rocks unable to sustain human habitation or an economic life of their own cannot claim an EEZ or a continental shelf. However, since the United Kingdom had neither signed nor ratified the UNCLOS, much of its claim to the Rockall Through (as the area surrounding the rock is designated) was based on the characterization of Rockall as an island. Ireland, Denmark and Iceland, conversely, were claiming the right to exploit the continental shelf in the surroundings of the rock on the basis that the area considered was the natural prolongation of their own continental shelves.

The problem of the delimitation of the Anglo–Irish continental shelf (at least in the area in question) was finally settled by an agreement concluded in Dublin on November 7, 1988[170], but the question of the legal status of the area, at least insofar as it concerns the relations between the United Kingdom, Denmark and Iceland, remains unresolved. The Rockall dispute is still very much alive and it is not clear how and when it will be settled. Considering the unfortunate precedents between Iceland and the United Kingdom, this is unlikely to occur very soon. Moreover, in this mosaic of four sovereign States disputing alleged valuable oil deposits, very recently the odd man out has appeared. Concerned by the threat to which the ecosystem would be exposed if oil fields in the area were developed, and opposed in general to fossil fuels as a source of global warming, Greenpeace activists occupied Rockall on June 13, 1997[171]. The activists symbolically declared the rock to be "The Global State of Waveland",

166 Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, *ILM*, Vol. 20, 1981, at 797. These recommendations were incorporated in a subsequent agreement entered into by the two Governments. Agreement on the Continental Shelf between Iceland and Jan Mayen, concluded on October 22, 1981, *ILM*, Vol. 21, 1982, at 1222.

167 "Rockall", *Encyclopedia Britannica*, 15th ed., Vol. 6.

168 *Ibid.*

169 Although Iceland and Denmark occasionally protested British claims, they advanced fully articulated claims to the area only in May 1985. Symmons, *op.cit.*, at 351–352 and 356–360.

170 Agreement on the Delimitation of the Continental Shelf, Dublin, November 7, 1988. Text reproduced in *B.Y.I.L.*, Vol. 59, 1988, at 531. For a detailed commentary on the Agreement, see Decaux, E., "L'Accord anglo–irlandais de délimitation du plateau continental", *A.F.D.I.*, Vol. 36, 1990, pp. 757–776.

171 "Greenpeace Seizes Rockall Island", *EnviroLink News Service*, June 16, 1997, <http://www.envirolink.org/archives/enews/o467.html> (Site last visited on January 10, 1998).

stressing that they did not want to claim ownership of the rock but that the issue of oil exploitation should be set aside for the common good[172].

The British Government's response was that Rockall is British territory and that the protesters were welcome to stay as long as they liked[173]. However, less than 48 hours after Greenpeace activists landed on Rockall, the British Government announced that it was ready to ratify the UNCLOS, which it did on July 25, 1997, thereby renouncing the designation of Rockall as an island and accepting the implied legal consequences. The United Kingdom has thus formally abandoned pretensions over the area based on a characterization of Rockall as an island rather than a mere rock[174]. Fisheries in the waters around the rock, thus, are on the high seas and are *res nullius*. However, the United Kingdom can still claim sovereign rights over its surrounding continental shelf by embracing, as Iceland and Denmark do, the "natural prolongation" thesis. The dispute, in other words, is still undecided.

2.9. Assessment of the Icelandic Fisheries Dispute

The *Icelandic Fisheries* dispute was a rout not only for the International Court of Justice but also for all those who envisage the establishment of a viable international judicial system. In the space of eight years, from 1966 to 1974, the Court ran up a series of crushing defeats, ranging from the *South West Africa* cases to the *Nuclear Tests* case. The *Icelandic Fisheries* dispute was particularly unsuccessful for two reasons: First, the stubborn refusal of Iceland to cooperate with the Court, and second, the shortsightedness of the bench in interpreting the international law of the sea.

The result of the dispute was already foreshadowed in 1941, when Iceland became independent. While the British Government was on a collision course with the Nordic country to defend the employment of a few thousand of fishermen and avoid an increase in the cost of cod for fish 'n chips by about six or seven pence a pound[175], Iceland was simply fighting for its life. The skyrocketing cost of defending the fishing fleet and NATO's embarrassment eventually determined how far Great Britain could go in its attempt to prevent the expansion of Iceland's EEZ. In these circumstances the ICJ was a mere spectator, for international adjudication can work only when there is a persistent willingness of both parties to initiate and continue the judicial process and to abide by its results.

When a State stubbornly objects to the Court's jurisdiction, there is not much the Court can do. But, when there is incontrovertible proof of the existence of its jurisdiction, it cannot back off. Not only does the Statute not contain a provision which might allow the Court to decline exercising jurisdiction, but most likely it would have to face the objections of the applicant. In any event, justice would be

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172 "Rockall Activists Declare New State", *The Courier and Advertiser*, <http://www.greenpeace.org.uk/atlantic/press/clippings/june16courier.htlm> (Site last visited on January 10, 1998). See figure 3.

173 *Ibid.*

174 In the 1988 Anglo–Irish agreement, in accord with the UNCLOS, Rockall did not influence in any way the delimitation of the respective continental shelves. *Supra*, note 170. Moreover, by ratifying the UNCLOS, the United Kingdom thereby accepted the provisions of article 121.3 of the Convention.

175 Hugh, C., "Dispute with Iceland Means Dearer Fish this Weekend", *The Times*, November 28, 1975, at 6.

the ultimate loser. If the Court decides that the exercise of jurisdiction is legitimate (event though politically not desirable) and proceeds to rule on the merits, the behavior of the persistent objector is an inevitable slap in the face. Arbitral tribunals are not caught in this dilemma because consent is written into their genetic code.

The second reason for the ICJ setback is that international adjudication is unsatisfactory when the law is in a state of flux. Indeed, the case was altogether ill-timed because it put the Court in a quandary. While its judges were debating whether a 50-mile EEZ was consistent with international law (finding that it was not), the members of the UN, gathered at the negotiating table of the UNCLOS, were discussing the possibility of creating exclusive economic zones extending up to 200 nautical miles. In other words, while the judiciary was looking backward, the legislature was looking forward. The result was a shaky judgment that did nothing but reinforce Iceland's determination to shun the World Court. Moreover, the parties to the dispute were the most representative of these two conflicting attitudes. The United Kingdom had for centuries been the adamant guardian of the freedom of the high seas, and in hundreds of occasions its navy had been dispatched to every recess of the globe to enforce it. Iceland, conversely, was the most pro-active advocate of the establishment of wide maritime areas closed to all fishing fleets but those of the coastal State. Finally, and by and large because of the polarization of the litigants, the *Icelandic Fisheries Jurisdiction* dispute is to date the environmental dispute in which tension between the disputants reached the highest point. It is the only instance in which litigants have actually severed diplomatic relations and resorted to force (even though at low intensity). The Court, therefore, can be regarded as a reluctant casualty of the crossfire.

3. THE *TURBOT* DISPUTE (SPAIN V. CANADA)

3.1. Introduction

Much like the case of the *Icelandic Fisheries Jurisdiction*, it is difficult to identify a definite time-frame for the *Turbot* dispute. While the problem of overfishing in the North West Atlantic already had become an issue requiring governmental attention by the beginning of the 1950s, the most virulent phase of the dispute took place only in 1994–1995[1]. The parties to the dispute are, on the one hand, a coastal State (Canada), and, on the other, a long-distance fishing State (Spain), plus a regional international organization (the European Union – EU[2]) of which Spain is a

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1 On the *Turbot* dispute see, in general, Teece, D.R., "Global Overfishing and the Spanish–Canadian Turbot War: Can International Law Protect the High-Seas Environment?", *Colorado Journal of International Environmental Law and Policy*, Vol. 8, 1997, pp. 89–125; Davies, P.G.G., "The EC/Canadian Fisheries Dispute in the Northwest Atlantic", *I.C.L.Q.*, Vol. 44, 1995, pp. 927–939; Davies, P.G.G./Redgwell, C., "The International Legal Regulation of Straddling Fish Stocks", *B.Y.I.L.*, Vol. 67, 1996, pp. 199–274; Colburn, J.E., "Turbot Wars: Straddling Stocks, Regime Theory, and a New UN Agreement", *Journal of Transnational Law and Policy*, Vol. 6, 1997, pp. 323–366; Schaefer, A., "1995 Canada–Spain Fishing Dispute (The Turbot War)", *Georgetown International Environmental Law Review*, Vol. 8, 1996, pp. 437–449; Kurlansky, M., *Cod: A Biography of the Fish that Changed the World*, New York, Penguin, 1997, pp. 207–217; Joyner, C. / Von Gustedt, A. A., "The Turbot War of 1995: Lessons for the Law of the Sea", *International Journal of Marine and Coastal Law*, Vol. 11, 1996, pp. 425–458; Song, Y.H., "The Canada–European Union Turbot Dispute in the Northwest Atlantic: an Application of the Incident Approach", *Ocean Development and International Law*, Vol. 28, 1997, pp. 269–311.

2 For simplicity sake, we will resort throughout this chapter to the term European Union, rather than to European Community. Indeed, as the *Yearbook of International Organizations* notes: "'Documentation on terminology describing the European (Economic) Community and/or the three Communities collectively can be confusing. Despite continuing research, it has not been possible to find precise definitions, as even official sources either do not know exact and/or current definitions or, if they do, tend to use colloquial but inaccurate terms as 'shorthand'. In the past the collective term used for the three Communities was frequently the European Community, an approach adopted by the European Parliament in a resolution of 16 Feb 1978, whereas other sources used the term to imply the EEC. With the coming into force of the Maastricht Treaty, the EEC is officially the 'European Community (EC)'; but the terms 'Community' or 'European Community' are still used, even in official documents, to imply the three Communities or even the European Union as such.In addition, with the renaming of several Community institutions ('Community institutions' is an officially used term) to recognize the existence of the Union, the term European Union or EU has come into far more general use. It is now frequently used where in the past reference would have been made to the European Communities, the European Community (EC), the European Economic Community (EEC) and even to the Commission of the European Communities or European Commission. Conversely, some documents refer to the European Commission when they mean the European Union." Union of International Associations, "European Community", *Yearbook of International Organizations and Biographies Plus (Version 4.0)*, 1998–1999, 35th ed.

member[3]. The dispute flared up when Canadian authorities enforced domestic legislation for the preservation of marine living resources on the high seas, and in any event beyond the 200-mile limit, against Spanish vessels.

The *Turbot* dispute is a perfect example of how the settlement of the legal aspects of a dispute and the resolution of the environmental problems which precipitated it do not necessarily coincide. As a matter of fact, while the issue of catch quotas and their enforcement, which was the very reason for the encounter between the Canadian navy and Spanish trawlers, was satisfactorily settled within a few months by means of negotiations and international agreements (one, bilateral, between Canada and the EU[4], and another, multilateral, concluded under the aegis of the United Nations[5]), the dispute, or better its legal fall-out, spilled onto the World Court. Indeed, while the EU and Canada were striving to find a mutually satisfactory solution to the issue of the preservation of turbot in

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3 The Union's exclusive competence regarding relations between the Union and non-member States on such matters as access to fishery limits, management of straddling stocks and membership in international fisheries commissions, as well as the power to conclude international treaties binding on member States on such matters is the combined result of provisions of the Treaty of Rome, which established the EC, and of jurisprudence of the Court of Justice of the European Communities (ECJ). Article 113 of the Treaty of Rome expressly gives the Community the competence to enter into agreements relating to trade and other aspects of the common commercial policy, fishery products included. Yet commercial matters fall outside the scope of this case. More pertinently, according to the jurisprudence of the ECJ, the Union enjoys treaty-making power in relations to all matters in which the EU treaties have endowed the Union institutions with competence on the internal plane. These powers can be used whenever participation by the Union in an international agreement is necessary for the attainment of one of the objectives of the Union. That these implied treaty-making powers cover questions concerning fisheries conservation and management was specifically confirmed by the ECJ in the *Kramer* case. See Joined Cases 3,4 and 6/76, *Officer van Justitie v. Kramer*, 1976 *E.C.R.* 1279, (1976) 2 *C.M.L.R.* 440. Churchill, R.R., "EC Fisheries and an EZ-Easy!", *Ocean Development and International Law*, Vol. 23, 1992, pp. 145–163. On the Union's exclusive competence to conclude fisheries agreements see, in general Treves, T./ Pineschi, L., *The Law of the Sea: The European Union and its Member States*, The Hague, Nijhoff, 1997, pp. XXIV–590. Buhl, J.F., "The European Economic Community and the Law of the Sea", *Ocean Development and International Law*, Vol. 11, 1982, pp. 181–200. On the EC Common Fisheries Policy see, in general Churchill, R.R., *EEC Fisheries Law*, Dordrecht, Nijhoff, 1987; Song, Y.H., "The EC's Common Fisheries Policy in the 1990s", *Ocean Development and International Law*, Vol. 26, 1995, pp. 31–55.

4 Agreed Minute on the Conservation and Management of Fish Stocks, Brussels, April 20, 1995, *ILM*, Vol. 34, 1995, pp. 1260–1272. On the Canada/EU Agreement, see Freestone, D., "The 1995 Agreement between Canada and the EU over Fishery Control and Enforcement in the NAFO Regulatory Area", *European Environmental Law Review*, Vol. 10, 1995, pp. 270–272.

5 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks, (121). On the Straddling Fish Stocks Agreement see: Lévy, J.P./Schram, G., *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents*, The Hague, Nijhoff, 1996, 840 pp.. For comment, see in general, Anderson, D.H., "The Straddling Stocks Agreement of 1995: An Initial Assessment", *I.C.L.Q.*, Vol. 45, 1996, pp. 463–475; Gherari, H., "L'Accord de 4 août 1995 sur les stocks de poisson grands migrateurs", *R.G.D.I.P.*, Vol. 100, 1996, pp. 367–390; Balton, D.A., "The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law*, Vol. 27, 1996, pp. 125–151; Hayashi, M., "The Role of the United Nations in the Managing of World Fisheries", Blake, G.H. (ed.), *The Peaceful Management of Transboundary Resources*, London, Graham & Trotman, 1995, XIX–513 pp., at 373–393; Hayashi, M., "Enforcement by Non-Flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", *Georgetown International Environmental Review*, Vol. 9, 1996, pp. 1–36.

the Grand Banks area, Spain filed an application with the Registrar of the ICJ[6]. Canada contested the Court's jurisdiction[7], and the Court decided that it could not rule on the matter because it lacked jurisdiction[8]. Because of this, unlike in the case of other disputes expounded in this study, the analysis of the impact of litigation on the environmental problem which caused the dispute necessarily will be limited.

Still, it could not have been easily excluded. Indeed, by all means the *Turbot* dispute is an *environmental dispute* caused by an environmental problem. Severe depletion of stocks in the North West Atlantic caused the dispute, and agreement on a new legal framework to carry out fishing activities in the region brought it to an end. This observation, by itself, justifies its inclusion in this investigation. Yet, the *Turbot* dispute is not an *environmental case*[9]. The issues that were raised before the ICJ were not the protection of valuable marine biological resources, or whether Spain and the EU were under a duty to cooperate with Canada towards their protection, but rather whether the pursuit and seizure of one particular trawler was lawful, and whether those who suffered a prejudice were entitled to compensation.

3.2. The Issue

The *Icelandic Fisheries Jurisdiction* and the *Turbot* disputes present several similarities. Although the parties are different, by and large, the *Turbot* case can be regarded as an extension of the former, for like the *Icelandic Fisheries Jurisdiction*, it is but a phase in the broader conflict between coastal States and long-distance fishing States over the apportionment of a limited and rapidly shrinking amount of marine living resources.[10]

As was explained in the previous section, the *Icelandic Fisheries Jurisdiction* dispute ended in 1976, when the United Kingdom surrendered to Iceland's claim to a 200-mile exclusive economic zone[11]. The Icelandic claim became law six years later under the 1982 UNCLOS. Yet the pressure on fisheries all around

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6 *Fisheries Jurisdiction* (Spain v. Canada), Application of March 28, 1995. The text of the Spanish application can be found at the ICJ's Web-Site: <http://www.icj-cij.org/idocket/iec/iecframe.htm> (Site last visited, May 21, 1998).

7 By a letter dated April 21, 1995, the Ambassador of Canada to the Netherlands informed the Court, *inter alia*, that, in view of his Government, the Court "manifestly lacks jurisdiction to deal with the Application filed by Spain…by reason of paragraph 2 (d) of the Declaration, dated May 10, 1994, whereby Canada accepted the compulsory jurisdiction of the Court". *Fisheries Jurisdiction* (Spain v. Canada), Order of May 2, 1995, *ibid.*

8 *Fisheries Jurisdiction* (Spain v. Canada), Preliminary Objections, Judgment, <http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ijudgment_981204_frame.htm> (Site last visited April 15, 1999).

9 The distinction between "case" and "dispute" is not devoid of relevance. For instance, the *Icelandic Fisheries Jurisdiction* is one dispute, but was actually litigated as two cases, since the ICJ decided not to join them. *Supra*, Ch.III.2.

10 On the issue, see: Scovazzi, T., "The Application of the United Nations Convention on the Law of the Sea in the Field of Fisheries: Selected Questions", *Annuaire de droit maritime et océanique*, Vol. 18, 1998, pp. 195–208.

11 *Supra*, Ch.III.2.

the globe did not decrease[12]. Catches kept on declining, when high-tech fishing fleets were gradually emptying the world oceans. On the one hand, State regulations within EEZ have been put under increasing pressure from coastal fishermen who strive to satisfy an increasing demand, both local and foreign[13]. On the other hand, the efficacy of special jurisdictional zones, much wider than a few decades ago, but still limited, has been increasingly questioned at a time when multimillion dollar fleets simply wait outside their limits for straddling fish stocks (i.e. stocks of fish which migrate between EEZs or between EEZs and the high sea) to swim through their nets. Since the conclusion of the UNCLOS, therefore, the struggle between fishing States, instead of subsiding, moved far off the coast, beyond the 200-mile limit. The *Turbot* dispute is one facet of this larger dispute.

While coastal States' exclusive rights over biological resources under the UNCLOS cannot extend beyond 200 nautical miles, the vast areas of sea lying beyond this artificial limit is not a "Far West" where States can fish until the ultimate destruction of every form of life contained in it. In particular, regarding straddling stocks, article 63.2 of the UNCLOS provides:

> "Where the same stock or stocks or associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek either directly or through appropriate sub-regional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent area".

For the North West Atlantic in particular, the fishing of stocks, including straddling stocks, has been regulated since January 1, 1979 by the Northwest Atlantic Fisheries Organization (NAFO)[14]. Both Canada and the EU (which exercises exclusive competence over fisheries matters in the name of its member States[15]) are parties, along with other fourteen States, to the Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries, which established NAFO[16]. Under article

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12 According to the FAO, about 70 percent of the world's fish stock is now fully fished, over-fished or depleted. In particular, nine of the seventeen major fishing grounds already have been devastated by overfishing, with another four under serious threat. Finally, the world's fishing fleet has been growing twice as fast as the increase in fish catches. Teece, *op.cit.*, at 91.

13 "With beef tainted and chicken under suspicion, average individual fish consumption in Britain rose to its highest level for over 20 years in 1996, when it rose 6.5 percent on the previous year. The trend has been for the past three decades and is gaining pace. In Canada, for instance, the increase between 1970 and 1990 was 47 percent". Wigan, M., "Out of Our Depth", *Financial Times*, May 9/May 10, 1998, (Weekend), at 1.

14 Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottawa, October 24, 1978, reproduced in Burhenne, *op.cit.*, 978:79. Information on the NAFO can be obtained directly at the organization's web site <http://www.nafo.ca/home.htm> (Site last visited on May 21, 1998).

15 *Supra*, note 3.

16 Canada deposited its instrument of ratification of the agreement establishing the NAFO on November 30, 1978. The EU did so on December 28 of the same year. Spain did on August 31, 1983, but withdrew from the organization when it acceded the EEC on December 31, 1986. *Ibid.*

XI.2 of the Convention, the Fisheries Commission[17] "may adopt proposals for joint action by the Contracting Parties designed to achieve the optimum utilization of the fishery resources in the Regulatory Area"[18].

The Fisheries Commission's proposals, which typically concern Total Allowable Catch (TAC) quotas or measures regulating the size of fish nets, are binding on a NAFO member State unless the latter objects to the measure within sixty days of its notification, or gives notice that it withdraws its acceptance of the proposal at any time after the expiration of one year from the date on which a measure enters into force[19]. Yet, it has become established practice within the Organization that whenever a State party objects to a NAFO measure, it proceeds to set its own catch quota unilaterally[20]. This fact is fundamental for understanding why and how tension grew on the two sides of the Atlantic, and why a dispute erupted on turbot catch. Indeed, since Spain and Portugal joined the EC in 1986, and brought with them their high-tech and large fishing fleets, Brussels not only has, on numerous occasions, objected to both NAFO's TAC quotas and the share-out of such quotas among State parties[21], but has also regularly determined unilaterally its own catch quotas, frustrating de facto the collaborative spirit of the Northwest Atlantic Fisheries Convention[22].

17 The Fisheries Commission is responsible for the management and conservation of the fishery resources in the Regulatory Area. To this end, it may adopt proposals for joint action by the Contracting Parties designated to achieve the optimum utilization of the fishery resources in the Regulatory Area. The Fisheries Commission consists of no more than three representatives of each Commission member; the members are Contracting Parties participating in the fisheries in the Regulatory Area. Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries, art. 9–14.

18 *Ibid.*, art. XI.2. See Map 3 and 3 Bis.

19 *Ibid.*, art. XII.1 and XII.3.

20 Davies/Redgwell, *op.cit.*, at 207. The text of the Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries makes no reference to the legitimacy of such unilateral action.

21 Sullivan, K.M., "Conflict in the Management of a Northwest Atlantic Transboundary Cod Stock", *Marine Policy*, Vol. 11, 1989, pp. 118–136.

22 *Ibid.*, at 126–127.

In September 1994, NAFO decided on TACs for eleven species of fish, including, for the first time, turbot (*Reinhardtius hippoglossoides*)[23], a deep water flatfish whose stock, NAFO's Scientific Council had noted, was in rapid decline[24]. The 1995 TAC for turbot was fixed to 27,000 tons, a cut of more than fifty percent from catches of around 60,000 tons in 1992, 1993 and 1994[25]; the European Union proceeded to incorporate the new TAC into Union law[26]. Yet, while NAFO members could agree that fishing had to be reduced to prevent the disappearance of turbot in the Northwest Atlantic, they could not agree on whose fishing fleet had to remain at bay. Until 1994, the EU (mainly Spanish and Portuguese) share of turbot fisheries in the NAFO Regulatory Area had been about 75 percent (45,000 tons) of the total catch. However, at a special meeting held from January 30 through February 1, 1995, the Organization, by a narrow majority of six to five, dramatically reallocated catch quotas within the new, reduced TAC, giving 60 percent to Canada, 12 percent to the EU (3,400 tons), the remainder to be shared mainly between Russia and Japan[27]. In other words, the EU fishing fleet was asked to cut its catch by more than 92 percent[28].

It goes without saying that the EU, acting under article XII.1 of the Northwest Atlantic Fisheries Convention, objected to the new quotas (indeed, the EU intended

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23 The *Reinhardtius hippoglossoides* is a deep water flatfish which is known by many names. To Americans it is the "Greenland halibut", to eastern Canadians the "Greenland turbot" or "Newfoundland turbot", to English fishermen the "blue halibut", to Danes the "hellefisk", to Greenlanders the "kaleralik", and to German fishermen, the "black halibut". This marine fish is similar to the common or Atlantic halibut, except that it is much smaller (reaching a maximum size of 120 cm and a weight of 25 kilos). The upper side is also darker in color. Hence, its other names: e.g. the "black" or "blue halibut", and the "lesser" or "mock halibut". The *Reinhardtius hippoglossoides* thrives in the cold, northern waters of the Pacific and Atlantic oceans, and is most plentiful wherever there are rich stocks of sea prawn. In the Northwestern Atlantic, it is especially abundant in the deep coastal bays or fjords of West Greenland, off the continental shelf of Baffin Island and in the Ungava Bay area of Hudson Strait. <http://www.ncr.dfo.ca/communic/ss-marin/turbot.htm> (Site last visited on May 23, 1998).

24 The General Council provides a forum for consultation and cooperation among the Contracting Parties with respect to the study, appraisal and exchange of scientific information and views relating to the fisheries of the Convention Area. It consists of representatives of each Contracting Party. The General Council has four standing committees: STACFIS (fishery science), STACREC (research), STACFEN (environment), and STACPUB (publications). Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries, art. 3–5.

25 Fisheries and Oceans Canada, "Canada Wins Critical Vote on Turbot at NAFO", *News Release*, February 2, 1995, <http://www.ncr.dfo.ca/communic/newsrel/1995/HQ10E.htm> (Site last visited on May 23, 1998). However, figures limited to the quinquennium 1990–1995 are misleading. In fact, during that period the catch of turbot in the NAFO Regulatory Area grew from 4,000 to 60,000 tons in just five years mainly because the cod, redfish and flounder off European coasts had been fished out. "Turbot Loss and Canada", <http://gurukul.ucc.american.edu/ted/turbot.htm> (Site last visited on June 12, 1998).

26 Council Reg. 3366/94/EC (1994), *Official Journal of the EC*, L. 363/60.

27 Davies, *op.cit.*, at 930–931.

28 The dramatic reduction of EU's catch can be understood only by taking into account that, by and large, the depletion of turbot in the NAFO Regulatory Area was attributed by other member States mainly to the fact that the EU regularly objected NAFO quotas and established unilaterally its own quotas well beyond those fixed by the organization. Thus, in the view of the majority of NAFO members (Canada foremost), if EU fishing vessels were at the root of the problem, they should be the ones to bear the burden of conservative measures.

to claim 75 percent of the TAC[29]) and proceeded to establish unilaterally its own quota of 18,630 tons, that is to say, 69 percent of the TAC, or 15,230 tons in excess of what was decided by the NAFO[30]. As endangered turbot stocks straddle the Canadian 200-mile exclusive fishing zone and the high seas, Canada had to decide whether to remain passive and let EU trawlers vacuum turbot stocks just outside their exclusive fishing zone, or to tackle the issue *à l'islandaise* (i.e. unilaterally and by resorting to force)[31].

Actually, Canada had already chosen its course of action. On May 12, 1994 (four months before the introduction of a TAC for turbot), the Canadian Government had enacted an amendment to the Coastal Fisheries Protection Act[32] to enable it

> "to take urgent action necessary to prevent further destruction of [straddling] stocks and to permit their rebuilding while continuing to seek effective international solutions"[33].

Section 5.2 of the revised Act provided that:

> "No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures"[34].

To this end, Canadian officers, in order to arrest individuals believed to have been acting in contravention to the amended Act[35], could

> "use force that is intended to be or is likely to disable a foreign fishing vessel if the protection officer...believes on reasonable grounds that the force is necessary for the purpose of arresting [the] master or other person"[36],

and seize the offending vessel[37]. Originally, the Act was directed against vessels flying flags of convenience, usually of States that were not members of NAFO and were fishing in the Regulatory Area[38]. However, on March 3, 1995, after the

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29 "Canada Wins Critical Vote on Turbot at NAFO", *op.cit.*.

30 Council Reg. 850/95/EC (1995), *Official Journal of the EC*, L. 86/1.

31 *Supra*, Ch.III.2.

32 Coastal Fisheries Protection Act, *Revised Statutes of Canada (RSC)*, 1985, Ch.C.–33, as amended by *RSC*, 1985, Ch.31 (1st supp.); Ch.39 (2 supp.); *Statutes of Canada*, Ch.44, 38–39 Eliz. II, 1990, Vol. 1; *Statutes of Canada*, Ch.1, 40–41 Eliz. II, 1992, Vol. 1.

33 *Ibid.*, section 5(1).d.

34 *Ibid.*, section 5(2).

35 *Ibid.*, section 8.

36 *Ibid.*, section 8(1). "Th[e use of force] is provided for again in paragraph 25(4) of the [Canadian] Criminal Code, as amended by the same Act, permitting "the peace officer", specific conditions, to use "force, which is either likely to cause death [of the person to be arrested] or serious bodily harm, or used with the intention of causing such" in cases such as those concerning foreign fishing boats engaging in activities on the high seas in waters covered by the Canadian legislation". Spanish Application, para. 1.A.(a).

37 Coastal Fisheries Protection Act, section 9.

38 In April 1994, Canadian authorities arrested the *Kristina Logos,* which had been fishing 228 miles from the Canadian coast. The fishing vessel, crewed by Portuguese fishermen, had been re-flagged as Panamanian, but had in fact also retained Canadian registration. Davies/Redgwell, *op.cit.*, at 211.

Canadian authorities monitoring the fleet of the Union had concluded that EU-registered trawlers had landed the 3,400 tons of turbot allocated to the EU for 1995 by NAFO[39], the Canadian Parliament further amended the Coastal Fisheries Protection Act designating Spanish and Portuguese trawlers as vessels prescribed under section 5.2 of the revised Act, thereby explicitly authorizing enforcement on the high seas against them[40]. At that point, it only remained to be seen when and where Canadian officers would intervene.

3.3. The Dispute

On March 9, 1995, the trawler *Estai*, flying the Spanish flag, with a Spanish crew, and which had been continuously fishing for turbot in the area of the Grand Banks for five months[41], was stopped and inspected on the high seas, some 245 miles off the Newfoundland coast[42], by the Canadian patrol boat *Cape Roger*, assisted by the patrol boat *Leonard J. Cowley* and the coast guard vessel *Sir Wilfred Grenfell*[43]. After "the necessary authorizations" had been obtained[44], Canadian officers attempted to board the trawler, but the crew threw the boarding ladders into the sea and then cut off the *Estai*'s massive 3.4 tons trawl net in order to flee[45]. Other Spanish trawlers surrounded the three Canadian vessels and attempted to obstruct the boarding operation[46]. Boarding could take place only after warning shots had been fired from a 50-mm gun by the patrol boat *Leonard J. Cowley* across the Estai bow[47]. In the immediate aftermath of the action Canada declared that "the arrest of the *Estai* was necessary to put a stop to the overfishing of [turbot] by Spanish fishermen"[48].

The boat and its crew were escorted away to the Canadian port of St. John's, Newfoundland, where the captain of the boat, Mr. Enrique Davila Gonzales, was imprisoned and subjected to criminal proceedings for overfishing under the domestic laws of Canada, and for resisting authority[49]. On board of the *Estai*, the Canadian authorities found and confiscated 440 tons of fish, valued at more than $2.25 million, fished and frozen over the five-month campaign[50]. Two bonds of 8,000 and 500,000 Canadian dollars were paid on March 15, 1995 by the owner of the *Estai* for the release respectively of the captain and the vessel[51].

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39 *Supra*, Ch.III.3.2; Davies/Redgwell, *op.cit.*, at 215.
40 Coastal Fisheries Protection Act, amended by SOR 95–136; Spanish Application, para. 1.A.
41 Teece, *op.cit.*, at 89.
42 Precisely at 48° 03' N 46° 26' W. Spanish Application, para. 1.B.
43 *Ibid.*
44 Note Verbale from the Department of Foreign Affairs and International Trade of Canada to the Embassy of Spain in Canada, Ottawa, March 10, 1995, *ibid.*, Annex 4.
45 Teece, *op.cit.*, at 95.
46 *Ibid.*
47 Spanish Application, para. 1.B.
48 Note Verbale of March 10, 1995.
49 *Ibid.*
50 Teece, *op.cit.*, at 95.
51 Spanish Application, para. 1.B.

Immediately, both the EU and Spain addressed strongly worded protests to the Canadian Government. Spain dispatched navy units to defend its trawlers, introduced visa requirements for Canadian tourists, and urged the Union to resort to trade sanctions[52]. In the next six weeks, tension remained high. Two more confrontations between the Canadian navy and Spanish fishing vessels followed. On March 27, Canadian patrol boats resorted to a trawl cutter, as Iceland had done in the 1970s, to slice the nets of a second Spanish trawler, the *Pescamaro Uno*, outside the 200-mile limit[53]. The action culminated in a general chase involving the Canadian navy and a dozen Spanish trawlers.

3.4. The Dispute Winds Down by Means of Negotiation: Two Agreements

3.4.1. The Agreed Minute on the Conservation and Management of Fish Stocks

While the Canadian navy and Spanish trawlers were confronting each other in the Grand Banks area, Canada and the EU, on behalf of its member States, were working for a swift and satisfactory settlement of the dispute. It is not unlikely that the prospect of an actual encounter of the navies of two NATO allies created an extra incentive, if needed, to find a middle ground[54]. The negotiations culminated in the conclusion of the Agreed Minute on the Conservation and Management of Fish Stocks on April 15, 1995, six weeks after the arrest of the *Estai*, and in its subsequent signing in Brussels on April 20, 1995[55]. At its annual meeting in September 1995, NAFO endorsed and adopted the main elements of the agreement, thereby widening its reach to the thirteen other NAFO parties[56].

On the catch issue, the parties confirmed their agreement with the 27,000 ton 1995 TAC quota for turbot, pending further scientific assessments. Yet the quotas were reallocated. The Agreed Minute allowed EU vessels, that is to say Spanish and Portuguese trawlers, to catch 5,013 tons of turbot during the rest of 1995, in addition to the 5,000 tons that had already been taken from January to mid-April. In other words, the agreement transferred 6,000 tons of Canada's 1995 turbot quota to the EU, so that both would get for that year about 10,000 tons. However, while this represented an increase of 6,600 tons as compared to what had been allocated

52 Davies, *op.cit.*, at 928,

53 Teece, *op.cit.*, at 95.

54 "Canadian Government sources say when the European Union accepted a standing Canadian offer to end the dispute…several Fisheries Department vessels, backed by two armed navy ships, were on their way to board and seize Spanish fishing vessels. Those trawlers were supported by two armed Spanish patrol ships. There was a possibility of confrontation, one source confirmed. The federal cabinet had authorized the navy to take any action necessary to protect other Canadian vessels and to ensure the success of the plan". Branswell, H./Shepard, J., "Force was 'Ruled In'. Canada was Ready to Shoot, Tobin Says", *The Canadian Press*, April 17, 1995, <http://dfomr.dfo.ca/science/mesd/he/lists/fisheries-0/msg00202.html> (Site last visited on May 23, 1998).

55 *Supra*, note 4.

56 Davies/Redgwell, *op.cit.*, at 253.

in the disputed NAFO decision, it was only one fifth of what Spain had netted in 1994, or three times of Canada's previous years catch[57]. This was a far cry from the re-establishment of the *status quo ante*.

In exchange for this meager increase in catch, the EU agreed to a number of safeguards that Canada had long been urging and that were deemed necessary if NAFO regulatory efforts were to be given any practical meaning. In particular, a pilot project was established providing for the posting of independent observers on all vessels fishing in NAFO waters[58]. Moreover, 35 percent of such fishing vessels had to be equipped with satellite tracking systems to provide continuous information as to a vessel's precise location. In addition to the observer scheme, each party having 10 or more vessels fishing in the NAFO Regulatory Area would provide an inspection vessel for NAFO purposes. If the inspection vessel detected an infringement of a given conservation measure, the breach of which was regarded as particularly serious, the flag State of the non-complying vessel itself would be required to inspect the vessel within 48 hours. In the meantime, the inspectors had the power to seal the vessel's hold and remain on board to secure evidence. In these circumstances, the flag State's inspector could require the vessel to proceed to a nearby port

> "for a thorough inspection under the authority of the flag State and in the presence of a NAFO inspector from any other Contracting Party that wishes to participate"[59].

Penalties for infringements of NAFO conservation and management measures "will be such as to provide effective deterrent"[60], including refusal, suspension or withdrawal of the authorization to fish in the NAFO Regulatory Area[61]. However, no obligation is placed on the flag State to prosecute alleged violations and it is ultimately left to the discretion of the flag State to determine the severity of any penalty imposed pursuant to the successful conclusion of any such proceeding.

These provisions admittedly went a long way towards reassuring Canada that NAFO conservation measures would not remain a dead letter, thereby eliminating the need for unilateral action. Indeed, in 1995, only one major violation of the NAFO regulations was reported, compared with about 25 in 1994[62]. The incident

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57 Branswell/Shepard, *op.cit.*.

58 The observer will monitor and report on the fishing activities of the vessels in question including the nature of catches, net sizes and the location of the vessel whilst fishing. If the observer detects an infringement of NAFO measures, the matter is to be reported within 24 hours to the NAFO Executive Secretary, who in turn will inform NAFO inspection vessels.

59 Agreed Minute, Annex I, para. II.9.ii.

60 *Ibid.*, para. II.10.

61 *Ibid.*

62 Cox, K., "Who Won the Great Turbot War?", *The Globe and Mail*, Saturday, March 16, 1996, <http://www.docuweb.ca/~pardos/globe.htm> (Site last visited June 8, 1998); Davies/Redgwell report one violation as compared to 19 during the same period of the previous year. Davies/Redgwell, *op.cit.*, at 254–255. In May 1995, the *Mayi Cuatro*, a Spanish trawler, approached by Canadian NAFO inspectors, was seen discarding one of its nets. The trawler was ordered to return home by Spanish fishing authorities. Canadian fisheries protection officers subsequently managed to retrieve the net from the sea-bed. The net, together with other evidence obtained by the Canadian authorities, was passed over to EU officials for use in the subsequent Spanish prosecution. *Idem*, at 255.

of the *Estai* therefore could be regarded as closed. Accordingly, Canada dropped all criminal charges against the master of the *Estai*, released the ship, returned the seized fish and canceled the amendment to the Coastal Fisheries Protection Act which had triggered the seizure of trawlers on the high seas.

However, if EU vessels had been forced to behave themselves, the threat still remained of trawlers flying flags of States not members of the NAFO, and, therefore, not bound by its measures (e.g. Belize, St. Vincent and the Grenadines, Panama, etc.). Spanish and Portuguese fishermen could re-register their vessels under flags-of-convenience or more simply operate vessels registered under such flags[63]. To avert this risk, the guarantees contained in the bilateral agreement between the EU and Canada, which were subsequently adopted by a regional organization, had to be universalized. It goes without saying that the most obvious forum for this kind of exercise was the United Nations.

3.4.2. The Straddling Stocks Agreement

On August 4, 1995, less than four months after the Agreed Minute, and after six sessions of negotiations spanning two years and involving 138 States, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement) was adopted without a vote[64]. Canada and 31 other nations signed the Agreement immediately. As of December 1, 1999, the number of signatories has grown to 59, of which 24 have ratified[65]. It will enter into force upon the deposit of 30 ratifications[66].

The origins of the Straddling Fish Stocks Agreement can be traced back to the 1992 Rio Conference[67], but undoubtedly the *Turbot* dispute speeded up the negotiating process by bringing the issue of the over-exploitation of high seas fisheries from the negotiating room to the mass media. The objective of the Straddling Stocks Agreement is to

> "ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the [UNCLOS]...beyond areas of national jurisdiction"[68].

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63 On April 18, 1995, just three days after the agreement was reached, a Canadian patrol boat was dispatched from Newfoundland to chase away two trawlers registered in Belize but operated and crewed by Spanish and Portuguese sailors, according to the Canadian Government. Teece, *op.cit.*, at 97.

64 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks, (121).

65 <http://www.un.org/Depts/los/los164st.htm> (Site last visited on April 8, 1998). Among the States that have ratified the Straddling Fish Stocks Agreement are the United States and Russia. The EC signed the agreement on June 27, 1996, as did Portugal. Spain signed on December 3, 1996, while Japan signed on November 19, 1996.

66 Straddling Fish Stocks Agreement, (121), art. 40.

67 *Ibid.*, preamble. See also Agenda 21, Chapter 17, Programme Area C.

68 Straddling Fish Stocks Agreement, (121), art. 2 and 3.

The UNCLOS and the Straddling Stocks Agreement, therefore, though distinct legal instruments (it is not necessary to be a party to the UNCLOS in order to become a party to the Straddling Stocks Agreement[69]), are intimately connected[70]. What is more, the dispute settlement procedures of the UNCLOS apply *mutatis mutandis* to any dispute between States party to the Agreement[71].

The privileged forum for cooperation between coastal States and States fishing on the high seas for the conservation and management of straddling fish stocks and highly migratory fish stocks are regional or sub-regional fisheries management organizations, such as the NAFO[72]. States fishing on the high seas under the Agreement have the duty to cooperate "by becoming members of such organizations"[73], and

> "only those States which are members of such an organization...or which agree to apply the conservation and management measures established by such organization...shall have access to fishery resources to which those measures apply"[74].

Yet, as the *Turbot* dispute proved, being members of a regional fisheries management organization might not be enough by itself to ensure the respect of sustainable fishing practices. For this reason, article 18.1 of the Agreement recalls that:

> "A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with sub-regional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures."[75]

Furthermore, in order to tackle the plague of flags-of-convenience, article 18.2 of the Agreement requires that a State authorize the use of its flag for fishing on the high seas "only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this agreement"[76], while the subsequent paragraph explains in great detail what these responsibilities are[77]. Finally, the Agreement sets up a series of enforcement procedures that not only provide for action by the flag States[78], but also allow members or regional fishing organizations to stop, board, and inspect vessels on the high seas to ensure compliance with conservative regulations[79], and grant enforcement powers to port States[80].

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69 E.g. the while United States signed the Straddling Fish Stocks Agreement on December 4, 1995 and ratified it on August 21, 1996, to date they are still not party to the UNCLOS.

70 E.g. Straddling Fish Stocks Agreement, (121), preamble and art. 2. Art. 4 reads: "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]."

71 Straddling Fish Stocks Agreement, (121), art. 30.

72 *Ibid.*, art. 8.

73 *Ibid.*, art. 8.3.

74 *Ibid.*, art. 8.4.

75 *Ibid.*, art. 18.1.

76 *Ibid.*, art. 18.2.

77 *Ibid.*, art. 18.3.

78 *Ibid.*, art. 19.

79 *Ibid.*, art. 21.

80 *Ibid.*, art. 23.

Thus, less than nine months after the arrest of the *Estai,* the legal framework regulating fisheries conservation measures and their enforcement by coastal, flag and port States in the North Atlantic had been altered substantially. Leaving aside, for the moment, the issue of the actual impact of the new legal framework on the effective conservation of fisheries, it is undeniable that by boarding the Spanish trawler and triggering the dispute, much like Iceland did in the 1970s, Canada had pierced the mist surrounding the rights of coastal States over fisheries beyond the customary limits, and forced the international community to fill an ambiguous legal vacuum[81]. Yet, unlike in the case of the *Icelandic Fisheries*, in the case of the *Turbot* dispute the process has been much swifter. Although not extinguished, the environmental problem that precipitated the *Turbot* dispute had been addressed satisfactorily. By the end of 1995, turbot was no more a point of contention between Canada, the EU and its members[82]. Yet, while diplomats where toasting the end of a nasty row, lawyers were sharpening their knives. As a matter of fact, it remained to be determined whether what happened on March 9, 1995 some 245 miles off the Newfoundland coast was lawful or not, and whether those who suffered a prejudice were entitled to compensation[83].

3.5. The Proceedings before the ICJ

On March 28, 1995, Spain filed an application with the Registrar of the ICJ instituting proceedings against Canada[84]. The timing of the Spanish application is particularly important, for it happened exactly at the time when EU and Canadian diplomats were feverishly trying to negotiate a settlement of the dispute. It is not unlikely, therefore, that the immediate rationale for the involvement of the World Court was the wish to put pressure on the Canadian Government.

In its application, Spain claimed that the Amendment of the Coastal Fisheries Protection Act and the seizure of the *Estai* not only constituted a violation of the Northwest Atlantic Fisheries Convention[85], but also a violation of several international principles and norms. These included the freedom of navigation[86] and the

81 Actually, the UNCLOS (which, incidentally, Canada has not yet ratified, while Spain did so on January 15, 1997) is not wholly silent on the point. Articles 87.1 and 116 contain the principle of customary international law whereby States enjoy freedom of fishing on the high seas. However, such a freedom , under article 116.b, is subject to, *inter alia*, "the rights and obligations as well as the interests of coastal States provided for, *inter alia*, in article 63.2", which notes that States have the duty to "seek...to agree upon the measures necessary for the conservation of [straddling] stocks" in the areas of the high seas adjacent to EEZs.

82 Actually, as Kurlansky remarked, it can be said that, politically, the incident was a win for all sides. Kurlansky, *op.cit.*, at 217.

83 Beside the legal actions before the ICJ, the owner of the *Estai* (José Pereira e Hijos) and the master of the boat (Enrique Davila Gonzáles) started civil actions against the Canadian Government in the Canadian Federal Court, claiming general damages for trespass and endangerment on the high seas. The plaintiffs also accused the Canadian officials of "piracy, unlawful seizure, unlawful arrest of the *Estai*, unlawful arrest of the Captain, negligence, unlawful detention and interference with the plaintiff's servants and agents". Cox, *op.cit.*

84 Spanish Application, supra note 6.

85 *Ibid.*, para. 2.A. Namely of articles XI.7, XII, XVII, and XVIII.

86 *Ibid.*, para. 2.A.b.

freedom of fishing on the high seas[87], the right of States to exercise exclusive jurisdiction over their own ships on the high seas[88], the prohibition against subjecting parts of the high seas to State sovereignty[89], the prohibition against carrying out hot pursuit on the high seas[90], the prohibition against imprisonment and corporal punishment as penalties for violations of fishing laws and regulations[91], the duty to cooperate in the conservation of the living resources of the high seas[92], the prohibition against threatening or using armed force in international relations[93], the duty to settle international disputes by peaceful means[94], the prohibition against invoking provisions of domestic law as justification for the failure to observe international law[95].

As redress for these wrongful acts, Madrid asked the Court to:

> "A. declare that the legislation of Canada, in so far as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas outside the exclusive economic zone of Canada, is not opposable to the Kingdom of Spain;
>
> B. adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to the Kingdom of Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned; and
>
> C. consequently, declare also that the boarding on the high seas, on March 9, 1995, of the ship *Estai* flying the flag of Spain, and the measures of coercion and the exercise of jurisdiction over that ship and over its captain, constitute a concrete violation of the aforementioned principles and norms of international law."[96]

According to Spain, the basis of the Court's jurisdiction could be found in article 36.2 of the Statute since both States had filed a declaration of acceptance of the Court's jurisdiction[97]. However, the Canadian declaration, which had to form the basis of the Court's jurisdiction and which replaced the previous 1985 declaration, purported to exclude all

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."[98]

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87 *Ibid.*, para. 2.A.c.
88 *Ibid.*, para. 2.A.a.
89 *Ibid.*, para. 2.A.d.
90 *Ibid.*, para. 2.A.e.
91 *Ibid.*, para. 2.A.f.
92 *Ibid.*, para. 2.A.g.
93 *Ibid.*, para. 2.A.h.
94 *Ibid.*, para. 2.A.i.
95 *Ibid.*, para. 2.A.j.
96 *Ibid.*, para. 5.
97 Namely, in the case of Spain on October 29, 1990 and in that of Canada on May 10, 1994. *ICJ Yearbook*, (1994–1995), at 85 and 112–113.
98 Declaration of May 10, 1994, para. 2.d, *ICJ Yearbook*, (1994–1995), at 85.

The declaration of acceptance of the Court's jurisdiction was filed with the Registry two days before Canada passed the amendment to the Coastal Fisheries Protection Act. As Canada foresaw that the amendment of the Act might attract the wrath of other fishing nations, the reservation contained in the new declaration intended precisely to keep any dispute on the issue outside the reach of the ICJ[99]. It was, in other words, a legal tactical move. It goes without saying, therefore, that Canada contested the Court's jurisdiction on the basis of the reservation attached to its optional declaration. On April 21, 1995, the Ambassador of Canada to The Netherlands informed the Court that, in his Government's opinion the Court

> "manifestly lacks jurisdiction to deal with the Application filed by Spain..., by reason of paragraph 2(d) of the [Canadian declaration of May 10, 1994]"[100].

3.5.1. Preliminary Objections

On May 2, 1995, the president of the Court, after having ascertained the views of the parties, fixed the time limits for the written proceedings on the issue of jurisdiction of the Court. Spain's memorial was due within five months, on September 29, 1995 and, Canada's counter-memorial on February 29, 1996[101]. While both were filed within the prescribed time limits, on April 17, 1996, Spain asked the Court to be authorized to submit a Reply to the Canadian counter-memorial. The request, opposed by Canada, was eventually rejected by the Court, by fifteen votes to two (the regular bench, plus the two ad hoc judges[102]), because it held that it was sufficiently informed, at that stage, of the contentions of fact and law on which the parties relied with respect to the jurisdictional issue[103]. Unlike in the past (i.e. *Iceland Fisheries Jurisdiction* and *Nuclear Tests* cases, at least in the first phase), this time the Court seemed to be determined to settle swiftly a dispute which had lost much of its original consequence. From June 9 through 17, 1998, public hearings were held on the issue of preliminary objections[104].

Needless to say, Spain's main concern was to convince the Court that paragraph 2(d) of the 1994 Canadian's declaration did not bar it from exercising jurisdiction. To do so, it had to convince the Court that the purpose of its application was not to seize it of a dispute concerning fishing on the high seas or the management and conservation of biological resources in the NAFO Regulatory Area, but rather that it related to Canada's entitlement, in general, and in particular relation to Spain, to exercise jurisdiction on the high seas against ships flying the Spanish flag and their crews, and to enforce that right by resort to armed force. According to the Spanish Application

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99 Davies/Redgwell, *op.cit.*, at 213.

100 *Fisheries Jurisdiction* (Spain v. Canada), Order of May 2, 1995.

101 *Ibid.*, pp. 87–88.

102 Spain's ad hoc judge was Mr. Santiago Torres Bernárdez. Canada's ad hoc judge was Mr. Marc Lalonde.

103 Judge Vereshchetin and Judge *ad hoc* Torres Bernárdez dissenting. *Fisheries Jurisdiction* (Spain v. Canada), Order of May 8, 1996, ICJ Reports 1996, pp. 58–61.

104 Four agents and counsel of Spain addressed the Court during the oral phase; Mr. Ignacio Sánchez Rodríguez; Mr. Remiro Brotóns, Mr. Highet, and Mr. P.M. Dupuy. On Canada's behalf spoke: Ambassador Kirsch, Mr. Hankey, Mr. Willis and Mr. Weil.

> "...[t]he exclusion of the jurisdiction of the Court in relation to disputes which may arise from management and conservation measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area and the enforcement of such measures does not even partially affect the present dispute. Indeed, the Application of the Kingdom of Spain does not refer exactly to the disputes concerning those measures, but rather to their origin, to the Canadian legislation which constitutes their frame of reference. The Application of Spain directly attacks the title asserted to justify the Canadian measures and their actions to enforce them, a piece of legislation which, going a great deal further than the mere management and conservation of fishery resources, is in itself an internationally wrongful act of Canada, as it is contrary to the fundamental principles and norms of international law; a piece of legislation which for that reason does not fall exclusively within the jurisdiction of Canada either, according to its own Declaration (para. 2(c) thereof). ... The question is not the conservation and management of fishery resources, but rather the entitlement to exercise a jurisdiction over areas of the high seas and the opposability of such measures to Spain."[105]

Conversely, according to Canada the dispute did concern the adoption of measures for the conservation and management of fisheries stocks with respect to vessels fishing in the NAFO Regulatory Area and their enforcement. Hence, because of the reservation contained in its 1994 Declaration, the Court could not exercise jurisdiction.

3.5.2. The Court's Judgment on Its Jurisdiction

On December 4, 1998, almost four years since the seizure of the *Estai*, and more than three years since the conclusion of the Agreed Minute and the Straddling Stock Agreement, the Court ruled by a large majority (twelve to five) that it had no jurisdiction on the dispute[106]. To reach such a decision, however, it had first to determine what the real subject of the dispute was[107]. The majority found that

> "...the essence of the dispute [was] whether [the acts of Canada on the high seas in relation to the pursuit, the arrest and the detention of the *Estai* on the basis of certain enactments and regulations adopted by Canada] violated Spain's rights under international law and require reparation"[108].

Once the dispute was thus characterized, close examination of the words used in the Canadian reservation and their interpretation "in a natural and reasonable way, having due regard to the intention of [Canada] at the time when it accepted the compulsory jurisdiction of the Court"[109], led the Court to the conclusion that the

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105 Spanish Application, point 4.

106 *Fisheries Jurisdiction* (Spain v. Canada), Preliminary Objections, Judgment. Judges Weeramantry, Bedjaoui, Ranjeva, Vereshchetin and Torres Bernárdez voted against. Judges Schwebel, Oda, Koroma and Kooijmans appended separate opinions.

107 While the Court conceded that it is for the Applicant, in its Application, to present to the Court the dispute with which it whishes to seise it, and to set out the claims, relying on its case-law, it held that it is nonetheless for the Court itself to determine on an objective basis what the dispute dividing the parties is. To do so, it will not confine itself on the Application and final submissions, but also on diplomatic exchanges, public statements and other evidence. *Fisheries Jurisdiction* (Spain v. Canada), Preliminary Objections, Judgment, para. 29–35.

108 *Idem*, para. 35.

109 *Idem*, para. 49.

dispute did arise out of and concern conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area and the enforcement of those measures[110]. The issue of the lawfulness of Canadian's acts, on which Spain based much of its arguments, according to the Court belonged to the merits phase and had no relevance for the interpretation of Canada's declaration and the consequent decision on the jurisdiction.

3.6. The Aftermath

One year after the Agreed Minute, there were about 20 European vessels, most of them from Spain, fishing for turbot and redfish in the international waters known as "the nose and tail of the Grand Banks", as compared to the 50 trawlers that worked in the area prior to the seizure of the *Estai*[111]. Many of the European fishermen, mostly from the region of Galicia (Spain), were forced to remain at bay because fishing turbot in the area was simply no longer viable (which, incidentally, makes one wonder whether fishing in the area was viable only when carried out in violation of NAFO regulations and therefore in a destructive way).

It is too early to assess whether the enforcement measures introduced in the aftermath of the *Turbot* dispute will be sufficient to offer the marine living resources (turbot, cod and redfish) of the Grand Banks area hope for recovery. It is a fact that currently catches are restricted and monitored, and the catch of young fish well below the spawning age has become more difficult as compared to the past. Yet, until the Straddling Stocks Agreement enters into force, and long-distance fishing States, as well as those so generously offering their flags to trawlers all around the world, become parties to the Agreement, depletion of high seas fisheries will remain a major environmental problem[112].

The issue of Canada's unilateral attempt to protect high seas fisheries by all standards had been satisfactorily settled in 1995 first by the EU/Canada Agreement, and subsequently by the Straddling Stocks Agreement. But, there is still much potential for conflict in the waters off the Canadian coasts. First, it is not yet certain whether Spanish fishermen and, eventually, Spain itself will continue to respect an agreement struck by the EU, especially in the face of constantly shrinking fish stocks and correspondingly high levels of lay-offs in the fishing industry. The ideas of the EU in this area do not necessarily coincide with those prevailing in Madrid or La Coruña. Second, and most importantly, the issue of what rights coastal States enjoy beyond the customary 200-mile limit for the protection of marine living resources is still uncertain. This explains why, while EU and Canada delegates shook hands in Brussels on April 15, 1995, the Spanish Government decided not to withdraw its application with the ICJ.

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110 *Idem*, para. 87.

111 Cox, *op.cit.*.

112 For a disheartening picture of the situation of fisheries and fishing industries in the North Atlantic, particularly in relation to the Canada–Spain dispute, see Kurlansky, op.cit., pp. 207–233.

Indeed, the stake of the proceedings before the World Court were much higher than the mere determination of whether, by seizing the *Estai,* Canada committed an internationally wrongful act. Nowadays, no less than 18,900 Spanish fishing boats operate off the coasts of all continents, Antarctica included but Australia excluded[113]. Of the total Spanish catch of 568,000 tons a year, nearly 410,000 tons, that is to say about 72 percent, are taken in international waters[114]. The sheer size of the Spanish fishing fleet justified, upon Spain's joining the EC in 1986, a 10-year ban on Spanish trawlers from the waters of other community members. Following the end of the moratorium on January 1, 1996, the access of Spanish (as well as Portuguese) fishing vessels is still restricted to a maximum of forty vessels at any one time in an area known as the "Irish Box", and within that area, the Irish Sea and the Bristol Channels are still closed to them[115]. Thus, what Spain was seeking from the World Court was so not much a ruling on the narrow incident of the boarding and confiscation of the *Estai*, but a judgment indicating that on the high seas, beyond the 200–mile limit, States have the right to harvest living resources at will, and that flag States retain exclusive jurisdiction over acts committed by vessels flying their flag, unless the contrary been agreed on in a freely negotiated treaty. This explains why, three years since the Agreed Minute and the Straddling Stocks Agreement, the dispute was still pending before the ICJ.

3.7. Assessment of the Turbot Dispute

The ICJ played no role whatsoever in the settlement of the narrow dispute caused by the seizure of the *Estai* based on the revised Coastal Fisheries Protection Act. Because of the Canadian reservation, the Court was prevented from playing a consequential role in the resolution of present and future disputes on the apportionment of rapidly diminishing natural resources. Had it been able to adjudge on the merits, it might have had the unique occasion not only to remind States of their duty to cooperate to preserve marine living resources on the high seas, but also to give a new dimension to the principle *sic utere tuo,* by declaring that States cannot jeopardize the natural resources of the global commons. In other words, within the limits imposed by the subject-matter of the dispute, the Court could have had the possibility of exploring the boundaries and content of the so-called precautionary principle and thereby contribute to the clarification and development of customary international law.

As far as marine biological resources are concerned (a domain where scientific uncertainty dominates, making implementation of the precautionary principle even more disputed and disputable), this chance could also have been the last one. As a matter of fact, since the entry into force of the UNCLOS and the ensuing establishment of the International Tribunal for the Law of the Sea, States can resort to a specialized, and therefore particularly competent, forum for settling fishing disputes. As envisaged by the UNCLOS and, even more, by the Straddling Stocks

113 Teece, *op.cit.*, at 94.
114 *Ibid.*
115 Davies, *op.cit.*, at 930, note 20. Kurlansky, *op.cit.*, at 210–211.

Agreement, the ITLOS should become the natural outlet for all disputes concerning the conservation and management of marine living (as well as non living) resources. Whether this will happen depends ultimately on the will of States, and States admittedly have not shown a particular propensity toward selecting the Tribunal as the competent forum[116]. But, as the *Southern Bluefin Tuna* dispute shows, the ITLOS can play a momentous role in the settlement of environmental disputes. It remains to be seen whether rivalry between the World Court and ITLOS in this key domain will eventually be beneficial for international environmental law.

116 *Supra*, Ch.II.4.2.1. Treves, T., "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice", *op.cit.*, pp. 809–822.

4. THE *SOUTHERN BLUEFIN TUNA* DISPUTE (AUSTRALIA AND NEW ZEALAND V. JAPAN)

4.1. Introduction

The *Southern Bluefin Tuna* is the most recent instance of an environmental dispute submitted to international adjudication[1]. It originated in the mid-1990s with a disagreement between Japan on the one hand and Australia and New Zealand on the other, over the management of the southern bluefin tuna stock. Since 1994, fishing for southern bluefin tuna by the three States has taken place within the framework of the 1993 Convention for the Conservation of Southern Bluefin Tuna[2]. The Commission for the Conservation of Southern Bluefin Tuna, made up of representatives of the three States, is charged with the task of establishing annual TAC quotas[3]. However, starting in 1995 the parties have increasingly disagreed over the TAC and its partition of national quotas. In particular, while Japan insisted that catch could be increased without endangering the stock, Australia and New Zealand were of the opposite mind. Scientific uncertainty as to the southern bluefin tuna biology and the state of the stock fueled disagreement. The dispute eventually exploded in 1998 when Japan, frustrated by its regime partners' opposition, announced that it intended to start a unilateral "experimental fishing program".

Pending the constitution of an Arbitral Tribunal under Annex VII of the UNCLOS to decide on the merits of the dispute, Australia and New Zealand asked the ITLOS to prescribe provisional measures, ordering Japan immediately to cease the program. The Order was issued on August 27, 1999, and, at the time of this writing, proceedings before the ad hoc Arbitral Tribunal have not yet started[4]. An award is not expected before the Summer of 2000. Although the dispute is still *sub judice*, thus preventing an exhaustive analysis of the case and assessment, it could not have easily been left out of this study because, in many respects, it is singular and highlights several important features of contemporary international environmental disputes.

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1 Because of the recentness of the *Southern Bluefin Tuna* dispute, literature is still scarce. Among the few reviews, see: Kwiatkowska, B., "The Southern Bluefin Tuna Cases", *International Journal of Marine & Coastal Law*, Vol. 15, 2000, pp. 1–36; *idem*, "Southern Bluefin Tuna Case", *AJIL*, Vol. 94, 2000, pp. 150–155.

2 1993 Convention for the Conservation of Southern Bluefin Tuna, (109).

3 *Ibid.*, art. 8.3.a.

4 *Southern Bluefin Tuna* cases, (New Zealand v. Japan; Australia v. Japan), (Provisional Measures), Order of August 27, 1999. Text reproduced in *ILM*, Vol. 38, 1999, pp.1624–1655.

The most striking peculiarity of the *Southern Bluefin Tuna* case is that it is one of the very few instances in which a dispute has been submitted to arbitration on the basis of a compromissory clause contained in a multilateral environmental treaty, and thus against the will of one of the parties[5]. Moreover, unlike the other three disputes expounded in this sub-chapter on marine biological resources (*Bering Sea Fur Seals*, *Icelandic Fisheries* and *Turbot* disputes[6]), the *Southern Bluefin Tuna* dispute does not concern the extension of a State's jurisdiction on the high seas. The first three disputes started when one State attempted to exercise sovereignty in waters that were generally considered beyond its jurisdiction and one or more other States decided to challenge this. Conversely, the *Southern Bluefin Tuna* dispute (and, by and large, the *Turbot* dispute) arose out of the failure of an environmental regime.

4.2. The Issue

The southern bluefin tuna (*Thunnus maccoyii*) is a pelagic fish, which is found throughout the southern hemisphere, mainly in waters between 30° and 50° South[7]. It is a fast, long-distance swimmer and highly migratory. The breeding area is in the Indian Ocean, south of the island of Java, in the Indonesian EEZ. This is the only known breeding area, and this is the reason why the southern bluefin tuna is studied and managed as one single stock[8]. The juveniles then migrate thousands of miles, first south along the west coast of Australia and subsequently along two migratory paths: west across the Indian Ocean towards South Africa and on into the Atlantic Ocean, or east along the south coast of Australia and into the waters of Tasmania, New South Wales and New Zealand. During austral winter they leave the Australian and New Zealand's exclusive economic zones for deeper oceanic waters where they are harvested by long-line fisheries.

Southern bluefin tuna is a large species, measuring up to two meters in length and reaching a weight of 200 kilograms[9]. In the marine food chain it plays an important role both as predator and prey. The young are a food source for sharks, seabirds, orcas and other tuna. Yet, it is also an extremely valuable catch for humans. Nowadays, an average adult fish can command between US $30,000 and $50,000 at market[10]. Japan is the largest market for southern bluefin tuna (90% of the total catch is consumed there[11]), where it is considered a great delicacy, usually ending up in sashimi dishes.

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5 *Infra*, Ch.IV.3.1, note 19.
6 *Supra*, Ch.III.1, III.2, III.3.
7 Commission for the Conservation of Southern Bluefin Tuna, *Fact Sheet*, "What are Southern Bluefin Tuna?", http://www.home.aone.net.au/ccsbt/facts.html#what (Site last visited January 20, 2000); *Southern Bluefin Tuna* cases, Verbatim Record (August 18, 1999), ITLOS/PV.99/20, intervention of Mr. Campbell (Hereafter: Campbell Intervention); Ayling, T., *Collins Guide to the Sea Fishes of New Zealand*, Auckland, Collins, 1982, at 292. See Map 4 and 4 bis.
8 Commission for the Conservation of Southern Bluefin Tuna, *Fact Sheet*, *op.cit.*
9 *Ibid.*
10 *ITLOS Press Release*, No. 27, August 26, 1999, at 2.
11 *Ibid.*

Unluckily, southern bluefin tuna is also slow-growing and late maturing. It takes several years before it reaches spawning age (at the age of eight according to Japanese scientists and at 12 according to Australian and New Zealanders)[12]. Whenever, if ever, it manages to escape predators, it can live up to about 40 years. Although there are great uncertainties about its biology (including mean age of maturity, the length of time it spends on spawning grounds and whether it spawns each year), it is clear that its features make it particularly slow to recover from depletion. Indeed, the chances that a single tuna can survive feeding for five to eight years in key commercial fishing areas has increasingly become unlikely.

Southern bluefin tuna have been heavily fished since the early 1950s, with catch reaching about 80,000 tons in the early 1960s[13]. Currently, southern bluefin tuna is fished either by longline or by purse seine netting[14]. In most fisheries longline is employed. High-tech and robotized fishing ships lay out an enormous amount of fishing line 24 hours a day in 100 kilometers lengths, each carrying up to 3,000 baited hooks. Once fish are caught, they are hauled in (together with large quantities of by-catch, such as sea-birds, sharks and other fish species), processed and stored. Most of the fishing is done by Japanese vessels, either on the high seas or under license in the EEZ of Australia and New Zealand. Conversely, fish farming is a significant component of the Australian fishery. The industry is mainly based in Port Lincoln, South Australia, where it began in 1990. Young tuna under six months (well before breeding age) are caught on route to their Southern Ocean feeding ground in purse seine nets and towed to port, where they are held in large circular holding nets and fattened up for sale at premium prices in the Japanese market[15].

Almost half a century of heavy fishing has inevitably led to a dramatic drop of the number of mature fish. By the mid of the 1980s it became clear that the stock was at a level requiring rebuilding and conservation measures to avert extinction (about 25 to 35 percent of the 1960 level[16]). As a consequence, the then three major fishing States, Australia, Japan and New Zealand, started coordinating their fishing activities, agreeing on annual total catch quotas. In 1985 a total quota of 38,650 tons was set, less than 50 percent of the catch of the glorious 1960s[17]. In 1989 it was reduced by about 70 percent, to 11,750 tons, with an allocation of 6,065 tons to Japan, 5,265 to Australia and 420 to New Zealand[18]. Japan alone had to reduced its catch by 74 percent[19].

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12 *Ibid.*, at 2.
13 Campbell Intervention, *supra,* note 7.
14 Http://www.greenpeace.org/~comms/97/ocean/report/bluefin.html (Site last visited, January 22, 2000).
15 *Ibid.*
16 Kwiatkowska, *op.cit.*, at 6. Australia's Statement of Claim, at 4, para. 6.
17 Campbell Intervention, *supra,* note 7.
18 *Ibid.*
19 *Southern Bluefin Tuna* cases, Verbatim Record (August 19, 1999), ITLOS/PV.99/22, intervention of Mr. Togo, (Hereafter: Togo Intervention).

This voluntary management arrangement between the three States was formalized in 1993 with the Convention for the Conservation of Southern Bluefin Tuna (1993 Convention)[20]. The 1993 Convention entered into force on May 20, 1994, shortly before the entry into force of the UNCLOS[21]. The 1993 Convention established the Commission for the Conservation of Southern Bluefin Tuna (the Commission), with the aim of ensuring "...the appropriate management, the conservation and the optimum utilization of southern bluefin tuna"[22]. As in the case of many other fishing regimes, the goal is pursued through the gathering of scientific data (by the Scientific Committee, which advises the Commission on the status of the fish stock and the best measures to ensure its sustainable management[23]), and the establishment of a sustainable TAC quota, which is then partitioned among participating states.

Yet, instead of being a forum for the coordinated management of a rapidly shrinking valuable natural resource, the 1993 Convention has turned into the scene of acrimonious dispute, fueled by scientific uncertainty as to the biology and state of the southern bluefin tuna. Certain that the stock is on its way to recovery, since the entry into force of the 1993 Convention, Japan has been pitted against Australia and New Zealand in a struggle to increase the TAC, frozen at 1989 levels. Japanese scientists were confident that quotas could be safely increased without impairing the target of the restoration of the stock to 1980 levels by 2020[24].

In 1995, Tokyo sought an increase of 6,000 tons, or about 50 percent of the TAC, and proposed the carrying out, within the framework of the 1993 Convention, of a joint pilot plan for an experimental fishing program (EFP), testing the recovery of the stock at various places and stages of growth[25]. However, Australian and New Zealander scientists could not be so confident in the capacity of the stock to bear any extra fishing, especially considering that since the early 1990s, Indonesia (in whose EEZ the spawning grounds lie), South Korea and Taiwan, which are not party to the 1993 Convention's regime, had greatly increased in their catch of southern bluefin tuna[26]. As decisions are taken by unanimous vote of the parties present at the Commission's meeting, Japan had no chance of outvoting its opposition[27].

4.3. The Dispute

It could reasonably be argued that it was the emergence of "free-riders" that eventually derailed the 1993 Convention regime. Indeed, in Japan's view, the only way to

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20 *Supra*, note 2.

21 The UNCLOS entered into force on November 16, 1994, 12 months after the deposit of the 16th instrument of ratification or accession.

22 1993 Convention, art. 3.

23 *Ibid.*, art. 9.

24 Kwiatkowska, *op.cit.*, at 6–7. Australia's Statement of Claim, at 7, para. 11.

25 Campbell Intervention, *supra*, note 7.

26 In 1998, those three States taken together fished about 5,000 tons; an amount equivalent to 40 percent of the TAC applied under the 1993 Convention and about the share allocated to Australia and Japan, while, at the same time, the parental stock was estimated to have declined to 7 to 15 percent of the 1960 level. Togo Intervention, *supra*, note 19.

27 1993 Convention, art. 7.

lure nonparties into the regime was to scientifically establish the appropriate level of total allowable catch for long-term conservation and optimum utilization, and then offer a share to each country in exchange for their commitment[28]. It is not the place here to discuss the merits of the Japanese approach, yet one could incidentally note that Tokyo's reasoning, while politically wise, did not leave any margin for error. It was based on the assumption that scientists were right about the state of the stock, even before adequate testing had been carried out. Be that as it may, in February 1998, at the Fourth Meeting of the Commission Japan announced that:

> "in light of a lack of collaboration in its view by Australia and New Zealand to constructively consider and approve the EFP since 1995, and because Japan believed exhaustive efforts had been exercised to achieve consensus within the Commission, Japan was preparing to implement an EFP unilaterally commencing in June 1998"[29].

Tokyo planned to test the recovery of the stock by catching an additional 2,010 tons (about 10,000 adult specimens) above its national quota annually for three years. At the same time, however, it pledged that if the pilot EFP were shown to have an adverse effect on the stock, Japan would reduce its national allocation in subsequent years to pay back the catch taken under the pilot plan[30]. Finally, Japan stated that it would introduce necessary measures to ensure the transparency of the research, such as observers, enforcement vessels, separation of the research from commercial operations, and submission of reports to the 1993 Convention Scientific Committee[31].

Australia and New Zealand substantially challenged Japan's EFP proposal in terms of its statistical validity, underlying logic and scientific merit, as well as its legality under the Convention[32]. In particular, they expressed strong concern that the proposal did not specify the means by which adverse effects would be assessed, nor the decision rules for any consequent management response. Although they did not oppose per se the idea of an experimental fishing program as a means of enhancing the understanding of the stock and reducing uncertainty as to its state, they were vehemently opposed to any program carried out unilaterally and outside the framework of the 1993 Convention[33]. Moreover, not only did they doubt the scientific value of the Japanese program and feared that it might expose the stock to a significant threat, but they also suspected that the program might ultimately only be a commercial operation in disguise[34].

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28 Togo Intervention, *supra,* note 19.

29 Report of the Resumed Fourth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna, Canberra, Australia, February 19–21, 1998, Agenda Item 3. Http://www.home.aone.net.au/ccsbt/4–3contents.html (Site last visited, January 22, 2000).

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 The market value of the 2,010 tons Japan intended to fish under the EFP is about 6 billion JPY, or about USD 50 million. Value calculated on the basis of 3,024 yen/Kg. See "Ex-vessel prices at 42 landing ports in Japan during December 1998".
Http://swr.ucsd.edu/fmd/sunee/fishlexv/jxvdec98.htm (Site last visited January 22, 2000). However, during the hearings before the ITLOS, Japan pointed out that "...100 percent of EFP [takes] place during months or geographical locations that are not currently fished on a commercial basis. In addition, the 1998 EFP operated at a substantial loss, and similar loss is anticipated for 1999. This loss is tolerated only because it is a scientific, not a commercial operation". Togo Intervention, *op.cit.*

Between March and June 1998, trilateral negotiations failed to resolve the disagreement over the Japanese initiative, which, of course, had also been rejected by the Commission[35]. To dissuade Japan from starting the program, Australia adopted counter-measures, refusing to sign a bilateral fishing agreement to permit Japanese vessels to fish for other species in the Australian EEZ or even to visit Australian ports[36]. Despite this, on June 1, 1998, Japan elaborated a revised proposal for a pilot program prior to its three-year program. The pilot EFP took place between July 10 and August 31, 1998, catching 1,464 tons on top of the national quota for that year[37].

By two notes of August 31, 1998, Australia and New Zealand formally notified Japan of the existence of a dispute, challenging its legality under the 1993 Convention, the UNCLOS (to which all three States by that time had become party[38]), and customary international law[39]. The gauntlet had been thrown down, and it was up to the parties to decide the battleground. At first, and logically so, the dispute was tackled within the 1993 Convention regime. Negotiations were held and the matter was discussed at the fifth meeting of the Commission (February, 22–26, and May, 10–13, 1999)[40]. An ad hoc working group on the possibility of carrying out a joint experimental fishing program was also established. However, these means failed to address the dispute, and on June 1, 1999, Japan unilaterally initiated the full-fledged EFP. Third-party involvement to settle the dispute was considered. Although Japan was ready to subject the dispute to mediation, and eventually by common agreement to arbitration, as provided in Article 16 of the 1993 Convention[41], it was not willing to meet the condition that it cease its program before further steps were taken[42].

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35 *Supra*, note 27.

36 Japanese Response, para. 17.

37 Australia's statement of claim, at 8, para. 13.

38 Australia ratified UNCLOS on October 5, 1994; Japan on June 20, 1996; New Zealand on July 19, 1996. Http://www.un.org/Depts/los/los94st.htm (Site last visited, January 22, 2000).

39 Kwiatkowska, *op.cit.*, at 7. Australia's Statement of Claim, at 10, para. 18.

40 Report of the Fifth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna, Tokyo, February, 22–26, 1999, http://www.home.aone.net.au/ccsbt/5–1Mainfull.html#5–1 REPT (Site last visited January 22, 2000); Report of the Fifth Annual Meeting, Second Part, May 10–13, 1999, Tokyo, http://www.home.aone.net.au/ccsbt/5–2Main.html#5–2Report (Site last visited January 22, 2000).

41 "1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, *with the consent in each case of all parties to the dispute*, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above. [Emphasis added].

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention…".

42 Australia's statement of claim, at 13–14, para. 30, 32–34.

Japan was exposed to litigation in two international fora. The notes formalizing the existence of a dispute stated that Japan's behavior was inconsistent not only with the 1993 Convention, but also with the UNCLOS and general international law, alluding therefore that Australia and New Zealand as last resort considered resorting to the adjudicative mechanisms contained in the UNCLOS or the International Court of Justice. All three States had in the past filed rather open-ended optional declarations of acceptance of the ICJ jurisdiction.

> "...Australia...recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice....The Government of Australia further declares that this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement."[43]

> "...Japan recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes...with regard to situations or facts...which are not settled by other means of peaceful settlement. This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement."[44]

> "...New Zealand accept[s] as compulsory, *ipso facto*, and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice...over all disputes other than...disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement; disputes arising out of, or concerning, the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[45]

Litigation before the ICJ was, therefore, an option, but not an appealing one. At no time has the World Court distinguished itself for its swiftness, even less so in environmental cases, and at the end of 1999 the Court was facing its most crowded docket ever[46]. A judgment on the merits could have taken years, perhaps too late for the southern bluefin tuna. As Japanese fishing vessels had put to sea on July 1, 1999 to start the EFP aiming to catch no less than 2,010 tons per year for the next three years, preventing Japan from carrying it out, rather than litigate on its merits, became paramount. Still, although Australia and New Zealand could request provisional measures from the World Court, the uncertainty surrounding the

43 Declaration of March 17, 1975, *ICJ Yearbook*, 1994–1995, at 80.
44 Declaration of September 15, 1958, *ibid.*, at 95.
45 Declaration of September 22, 1977, para 2, 2.2 and 2.3, *ibid.*, at 104.
46 "Report of the International Court of Justice", August 1, 1998 – July 31, 1999, United Nations, New York, 1999. UN Doc. A/54/4.

binding nature of such measures[47], compounded by the bleak record[48] and past dismaying first-hand experience of the two States[49], advised against its selection.

The alternative was resorting to the dispute settlement procedure of the UNCLOS. Several considerations militated in favor of this choice. First, adjudication could be triggered unilaterally. Article 286 of the UNCLOS provides that

> "...any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to [diplomatic means], be submitted *at the request of any party* to the dispute to the court or tribunal having jurisdiction under this section."

None of the limitations and exceptions contained in Part XV, Section 3 (art. 297–299), could be invoked by Japan[50].

According to Article 287, upon signing, ratifying or acceding to UNCLOS, or at any time thereafter, a State can choose as means for the settlement of disputes the ICJ, the ITLOS and/or two different kinds of ad hoc tribunals, described in Annex VII and VIII of UNCLOS. However, when no such choice is made, or has not been made by all parties, or the parties have not chosen the same forum, it is the arbitral procedure provided in Annex VII to be applied[51]. Yet, what made resort to the UNCLOS particularly attractive for Australia and New Zealand were the provisions contained in Article 290, whereby...

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47 Article 41.1 of the ICJ Statute reads: "The Court shall have the power to indicate...provisional measures which ought to be taken...." The ambiguous wording of the ICJ Statute does not allow for any definitive conclusion. Indeed, the Court has a "power". But that power is only "to indicate" provisional measures, not to order or to prescribe, such as in the case of article 25 of the Statute of the ITLOS. Yet, the Statute describes those measures as measures that "ought to be taken," which suggest that they are binding.

The question of whether provisional measures of the World Court have binding force has been the subject of debate at least since the Statute of the Permanent Court of International Justice was drafted. The issue has attracted legions of scholars and both sides have enlisted in their ranks, to paraphrase article 38 of the ICJ Statute, several highly qualified publicists of various nations. To roughly summarize the debate, one could say that those who deny that provisional measures are binding tend to rely on the wording of the Statute and its drafting history. Conversely, those who hold provisional measures to be binding resort to a functional or teleological approach.

The Court has never pronounced itself on the issue of the legal consequences of noncompliance with the provisional measures it indicates. The closest the Court has cone to stating that provisional measures it indicates are indeed binding has been in connection with the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. In that case, two requests for provisional measures were filed by Bosnia. The Court indicated them a first time and when prompted with a second request it noted that "[th]e present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's order of 8 April 1993...but an immediate and effective implementation of those measures." Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, at 325.

48 Since its inception, the Court has received 17 requests for indication of provisional measures and it indicated them in 10 cases. Nonetheless, none of the States to whom provisional measures were to be applied have ever complied with them.

49 *Infra*, Ch.III.9.

50 *Infra*, Ch.III.4.4.2.

51 UNCLOS, art. 287.5.

> "If a dispute has been duly submitted to a court or tribunal..., th[at] court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[52]

Moreover,

> "Pending the constitution of an arbitral tribunal to which a dispute is being submitted..., any court or tribunal agreed upon by the parties or, failing such agreement, the International Tribunal for the Law of the Sea..., may prescribe...provisional measures"[53]

Unlike in the case of the ICJ, the language of the UNCLOS leaves no doubt as to the binding nature of provisional measures. The parties are mandated to comply promptly with any provisional measures prescribed[54], and this was a considerable advantage. Finally, unlike the World Court, at the time of the dispute the docket of the ITLOS was empty and the Tribunal could be convened to hear the request of provisional measures at the shortest notice.

These might be some of the tactical considerations that made UNCLOS the chosen battleground, much to Tokyo's surprise[55]. Accordingly, on July 15, 1999, both Australia and New Zealand sent notifications to Japan, requesting an arbitral tribunal to be constituted under Annex VII of UNCLOS to adjudge and declare that Japan has breached its obligations under Article 64 and Articles 116–119 of UNCLOS by: failing to adopt the necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the southern bluefin tuna stock at levels which can produce the maximum sustainable yield; carrying out a unilateral experimental fishing program from 1998 to 1999 which has or will result in Japan exceeding its previously agreed quota; allowing its nationals to catch additional tuna in the course of the program in a way which discriminates against Australian and New Zealand fishermen; failing to act in good faith by cooperating with each of the applicants with a view to ensuring the conservation of the stock;

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52 *Ibid.*, art. 290.1.

53 *Ibid.*, art. 290.5.

54 *Ibid.*, art. 290.6: "The parties to the dispute shall comply promptly with any provisional measures prescribed under this article". See also art. 25 of the Statute of the ITLOS, and art. 95.1 of the Rules of the Tribunal. The Statute of the ITLOS is contained in Annex VI of the UNCLOS. The Rules of the Tribunal can be found at: Http://www.un.org/Depts/los/ITLOS/Rules-Tribunal.htm (Site last visited January 22, 2000). ITLOS/8.

55 The prospect of reference to Part XV of UNCLOS was referred to only shortly before the proceedings were instituted. When contesting the Arbitral Tribunal's jurisdiction, Japan claimed that dispute resolution means had not been exhausted under the UNCLOS, because negotiation shad been held under the 1993 Convention. However, as Judge ad hoc Shearer pointed out in his Separate Opinion, it would be "...highly artificial to separate into two different baskets a dispute under the Convention and a dispute under the CCSBT. The two instruments are inherently interlinked. There had been lengthy negotiations between the parties within the framework of the latter instrument. These negotiations had not resulted in a conclusion, nor in a choice of appropriate third party dispute resolution procedures. It was no more likely that these negotiations would have been successful had they been conducted expressly with reference to the United Nations Convention on the Law of the Sea. Yet, negotiations under UNCLOS were no more likely to succeed than those already held under the 1993 regime." Shearer, Separate Opinion, *ILM*, Vol. 38, 1999, pp. 1647–1652, at 1649.

and, finally, failing to carry out its obligations under the Convention "in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle"[56].

As a consequence, the Arbitral Tribunal was asked to adjudge and declare that Japan must refrain from authorizing or conducting any further experimental fishing program without the agreement of Australia and New Zealand; negotiate and cooperate in good faith with Australia and New Zealand, including through the Commission, with a view to agreeing to future conservation measures and a TAC necessary for maintaining and restoring the tuna stock to the maximum sustainable yield levels; ensure that its nationals and persons subjected to its jurisdiction do not take any tuna which would lead Japan to exceed its national allocation of the TAC until such time as an agreement is reached on an alternative level of catch; and restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch for the current year by the amount of tuna taken by Japan in the course of its unilateral program in 1998–1999[57]. The applicants also requested the payment by Japan of litigation costs[58].

4.4. The Proceedings before the International Tribunal for the Law of the Sea.

On July 30, 1999, exactly two weeks after the notes requesting the establishment of the Arbitral Tribunal were sent to Tokyo[59], Australia and New Zealand filed with the Registry of the ITLOS a request for the prescription of provisional measures. In particular, they requested the Tribunal to order that Japan immediately cease its unilateral program and restrict catch in any given fishing year to its national allocation as last agreed in the Commission (subject to the reduction of such catch by the amount of tuna taken by Japan in the course of its fishing program in 1998–1999)[60]. Moreover, they sought an order that all parties act consistently with the precautionary principle in fishing for southern bluefin tuna pending a final settlement of the dispute; ensure that no action of any kind is taken which might aggravate, extend or render more difficult a solution to the dispute submitted to the Annex VII Arbitral Tribunal; as well as ensure that no action is taken which might prejudice their respective rights in regard to the carrying out of any decision on the merits[61]. These requests were based on the claim that Japan's unilateral program and lack of cooperation in the conservation and management of tuna had the potential to cause serious prejudice to their rights under the

56 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 28.1.
57 *Ibid.*, para. 28.2.
58 *Ibid.*, para. 28.3.
59 Article 290.5 of UNCLOS reads: "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, *failing such agreement within two weeks from the date of the request for provisional measures*, the International Tribunal for the Law of the Sea....". [Emphasis added].
60 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 31–32.
61 *Ibid.*

UNCLOS, a prejudice that would lack an adequate remedy in any subsequent decision of the Arbitral Tribunal.

On August 9, 1999, Japan filed its Statement in Response contesting the jurisdiction of the Arbitral Tribunal and, as a consequence, of the ITLOS[62]. In particular, Tokyo claimed that the dispute did not concern the interpretation and application of UNCLOS, as claimed by Australia and New Zealand, but rather the 1993 Convention[63]. Secondly, that contrary to the requirements of Article 286 of UNCLOS, prior to the activation of the arbitration mechanism a settlement had not been genuinely sought; consultations and negotiations were conducted in bad faith and were not terminated[64]. For these reasons, Tokyo asked the Tribunal to deny Australia and New Zealand interim relief. However, should ITLOS find that the Arbitral tribunal has *prima facie* jurisdiction, then Japan counter-requested to be granted provisional relief in the form of an order to Australia and New Zealand to restart, urgently and in good faith, negotiations with Japan for a period of six months to reach an agreement on a protocol for an experimental fishing program, the determination of a new TAC and national allocations for the year 2000[65]. Should negotiations fail after the expiration of the six month period, Japan asked the Tribunal to prescribe the dispute to be settled by a panel of independent scientists[66].

Hearings started on August 18, 1999[67]. By all standards, the Tribunal proceeded extremely swiftly. Less than two weeks had passed since the request of provisional measures had been filed. The 1999 Japanese EFP was rapidly coming to its end. During the three days of hearings, the agents and counsels of the parties in the main reiterated the arguments made in the Notes and Response[68]. Australia and New Zealand put a great effort in building a case for the urgency of the measures, particularly in light of the uncertainty surrounding the factual situation of the southern bluefin tuna stock and the precautionary principle. To this end they introduced an expert witness, Dr. John Beddington, Professor of Applied Population Biology at Imperial College, London. The expert was subject to a sort of *voir dire* procedure; he was questioned by the attorneys of the other party to determine his qualification[69]. It is interesting to note that examination on the *voir dire* of parties' experts is extremely unusual in international judicial fora. The only other known instance of preliminary examination of an expert witness to determine competence and independence dates back to the *South West Africa* cases, litigated in the 1960s before the ICJ[70]. Much as in that case, in the *Southern Bluefin Tuna* case the

62 Japan's Response and Counter-Request for Provisional Measures, pp. 13–19, para. 28–41.

63 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 33.

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 Before hearings started, on August 16, 1999, the Tribunal, after consultation with the parties, and taking into consideration that Australia and New Zealand requests coincided, joined proceedings in the two cases.

68 Australia was represented by William Campbell, Daryl Williams, Professor James Crawford and Henry Burmester; New Zealand by Timothy Caughley and Bill Mansfield; Japan by Kazuhiko Togo, Robert Grieg and Professor Nisuke Ando.

69 *Merriam-Webster's Dictionary of Law*, Springfield, Mass., 1996, at 526.

70 ICJ Pleadings, *South West Africa*, Vol. X, at 340. The incident is reported by: Rosenne, S., *The Law and Practice of the International Court (1920–1996)*, The Hague, Nijhoff, 1997, Vol. III, at 1358.

President of the Tribunal, under whose control the examination takes place[71], was strict in limiting the examination to the witness's expertise, and not to allow it to extend to the witness's views on the matter[72]. After the *voir dire*, the expert was examined and cross-examined.

4.4.1. The Provisional Measures Order.

On August 27, 1999, one week after the end of hearings and four days before the end of the Japanese experimental fishing program, the Tribunal delivered its order[73]. By a large majority, the 22 judges of the Tribunal (Professor Ivan Shearer was sworn in as judge ad hoc for Australia and New Zealand, Japan having already one national, Judge Soji Yamamoto, sitting on the Tribunal's bench) prescribed six provisional measures and took two decisions concerning their implementation[74]. By 20 votes to two they ordered all parties to ensure no action is taken which might aggravate or extend the dispute pending the constitution of the arbitral tribunal, and might prejudice the carrying out of any decision on the merits[75]. By the same majority it was prescribed that all the parties shall refrain from conducting an experimental fishing program, unless by consensus and unless the experimental catch is counted against national annual allocations[76]. By 18 votes to four, the Tribunal ordered that none of the parties exceed the annual national allocations of the TAC fixed since 1989 at 11,750 tons (6,065 tons to Japan, 5,265 to Australia and 420 to New Zealand)[77]. Yet, in calculating the annual catches for 1999 and 2000, and without prejudice to what the Arbitral tribunal might decide, account

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71 ITLOS Rules, rule 80.

72 ICJ Pleadings, *South West Africa*, Vol. X, at 340; *Southern Bluefin Tuna* cases, Verbatim Record (August 18, 1999), ITLOS/PV.99/20.

73 *Supra*, note 4.

74 The Tribunal was composed as follows: President Mensah (Ghana); Vice-President Wolfrum (Germany); Judges Zhao (China); Caminos (Argentina), Marotta Rangel (Brasil), Yankov (Bulgaria), Yamamoto (Japan), Kolodkin (Russia), Park (South Korea), Bamela Engo (Cameroon), Nelson (Grenada), Chandrasekhara Rao (India), Akl (Lebanon), Anderson (United Kingdom), Vukas (Croatia), Warioba (Tanzania), Laing (Belize), Treves (Italy), Marsit (Tunisia), Eiriksson (Iceland), Ndiaye (Senegal), Shearer (ad hoc for Australia and New Zealand).

75 *Southern Bluefin Tuna* cases, Order of August 27, 1999, orders 1.a and 1.b. Judges Vukas and Eiriksson dissenting. Judge Eiriksson was not able to concur with the order not to take aggravating and non-prejudicial measures, because, in his opinion, it is supererogatory and ritualistic. Eiriksson, Dissenting Opinion, *ILM*, Vol. 38, 1999, at 1655. It is "...general policy guiding States in international relations" and the parties do not need to be reminded of it. On the same issue see also Vukas, Dissenting Opinion, *ILM*, Vol. 38, 1999, pp. 1652–55, at 1654–55, para. 6. One could argue that the duty to ensure no action is taken which might aggravate or extend the dispute pending the constitution of the arbitral tribunal, and might prejudice the carrying out of any decision on the merits implies also the lifting of the ban of Japanese vessels from the Australian EEZ and ports. Nowhere in the Tribunal's order is there explicit mention of the ban. According to Judges Yamamoto and Park in the operative part of the order where the parties were required to refrain from conducting an EFP, the Tribunal should have also required Australia to terminate the measures taken against Japan in 1998, because "in the absence of the cause that gave rise to the need for the measures, the measures themselves would have no raison d'être". Yamamoto and Park, Separate Opinion, *ILM*, Vol. 38, 1999, at 1646. On the same point see also Judge's Eiriksson Dissenting Opinion. Eiriksson, *ibid.*, at 1655, para.3.

76 *Ibid.*, order 1.d. Judges Yamamoto and Vukas dissenting.

77 *Ibid.*, order 1.c. Judges Zhao, Yamamoto, Vukas and Warioba dissenting.

should be taken of the catch during 1999 as part of an experimental fishing program[78]. Finally, by 21 votes to one, the Tribunal recommended that negotiations be resumed without delay with a view to reaching an agreement on the conservation and management of the southern bluefin tuna[79], and, this time by 20 votes to two, that further efforts be made to extend the regime to other States not party to the 1993 Convention regime[80].

For what concerns the implementation of the orders, the Tribunal decided (21 votes to one) that each party should submit a report no later than October 6, 1999, on the steps taken or proposed in order to ensure prompt compliance with the measures prescribed, and that the measures prescribed be notified by the Registry to all parties to the UNCLOS engaged in fishing southern bluefin tuna[81].

4.4.2. The Provisional Measures Order: A Few Remarks.

How did the Tribunal come to these conclusions? First, it had to address Japan's objection to the existence of a *prima facie* jurisdiction of the Arbitral Tribunal[82]. The Tribunal easily brushed aside the frail objection that the dispute was scientific rather than legal, thus making it unjusticiable, by observing, *inter alia*, that the dispute also concerned points of law and by citing the ICJ definition of a dispute contained in the *Mavrommatis* and *South West Africa* cases[83]. With equal ease, it disposed of the claim that alternative amicable dispute settlement procedures had not been exhausted before resorting to arbitration by observing that negotiations and consultations had indeed taken place both under the 1993 Convention and UNCLOS, but to no avail[84]. The notification by Australia and New Zealand that they did not intend to continue negotiations was enough to move on to adjudication because no State is obliged to pursue negotiations or other dispute settlement procedures when it concludes that the possibilities of settlement have been exhausted[85].

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78 *Ibid.*. In particular, Judge Warioba objected that, since the Tribunal admitted that it cannot conclusively assess the scientific evidence presented by the parties, it had no basis of prescribing an order that sets a TAC. That issue should have been left to the arbitral tribunal to determine. Warioba, Separate Opinion, *ILM*, Vol. 38, 1999, at 1638.

79 *Ibid.*, order 1.e. Judge Vukas dissenting.

80 *Ibid.*, order 1.f. Judges Vukas and Warioba dissenting. Judge Warioba objected that the order of the Tribunal should have been confined to issues that are the subject matter of dispute placed before it. The relationship of the parties to the dispute does not include nonparties to the 1993 Convention. Warioba, Separate Opinion, *ILM*, Vol. 38, 1999, at 1638.

81 *Ibid.*, orders 2 and 3. Judge Vukas dissenting.

82 It is noteworthy that on this point all judges agreed. Although Vukas voted against all measures, he recognized the existence of the Arbitral Tribunal's *prima facie* jurisdiction. See Vukas, Dissenting Opinion, para. 2. Even the Japanese Judge Yamamoto concurred. Judge ad hoc Shearer went even further stating that "...the demonstration of the jurisdiction of the Annex VII arbitral tribunal in the present case goes beyond the level of being merely *prima facie*; that jurisdiction is to be regarded as clearly established". Shearer, Separate Opinion, *ILM*, Vol. 38, 1999, at 1647.

83 *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment, *PCIJ*, Ser. A, No. 2 (1924), at 11; *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, *ICJ Reports 1962*, pp. 319–662, at 328. *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 42–44. See also *supra*, Ch.I.2.1.

84 *Ibid.*, para. 56–57.

85 *Ibid.*, para. 60.

A larger hurdle was the fact that, although the dispute as such originated within the 1993 regime, it was brought before the ITLOS (and *in primis* before the Arbitral Tribunal) as a dispute on the UNCLOS. The Tribunal was able to construe the case as a dispute on the implementation of UNCLOS by observing that under article 64 of UNCLOS, read together with articles 116 and 199, States have a duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and optimum utilization of highly migratory species (and the southern bluefin tuna is listed as such in Annex I of UNCLOS)[86]. According to the Tribunal the conduct of the parties within the 1993 Convention regime, as well as their relations with nonparties, is relevant to the evaluation of States' compliance with the UNCLOS[87]. Lack of cooperation under the 1993 regime would lead to a violation of UNCLOS[88]. The fact that the 1993 Convention applies to the parties does not exclude their right to invoke the provisions of UNCLOS[89]. This conclusion is wholly sound and consistent with the letter and spirit of the UNCLOS. However, in the Tribunal's view, the linkage between the UNCLOS and the sectorial regimes is not limited to the normative content but also extends to procedural aspects. Contrary to what claimed by Japan, the fact that the 1993 Convention applies to the parties does not preclude recourse to the dispute settlement procedures of UNCLOS[90]. Only in the event that Australia, New Zealand and Japan could agree to submit the dispute to arbitration under article 16 of the 1993 Convention, could the UNCLOS dispute settlement procedure have been overridden[91]. Because they could not come to such agreement, the Tribunal concluded that Australia and New Zealand were not precluded from unilaterally having recourse to the Annex VII Arbitral Tribunal[92].

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86 *Ibid.*, para. 48–49.

87 *Ibid.*, para. 50.

88 As Judge ad hoc Shearer remarked, the rationale of the 1993 Convention was to give effect to the prospective obligations of the parties under the UNCLOS with respect to southern bluefin tuna as a highly migratory species. Article 64 of UNCLOS provides that "...The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone...." Southern bluefin tuna is listed as a highly migratory species in Annex I to the Convention. The Commission is an "appropriate organization" for the purposes of article 64, and also for the purposes of articles 118 and 119, which relate to high seas fisheries in general. Australia, Japan, and New Zealand ratified the United Nations Convention on the Law of the Sea shortly after the conclusion of the CCSBT (on 4 October 1994, 20 June 1996, and 19 July 1996, respectively). Shearer, Separate Opinion, *ILM*, Vol. 38, 1999, at 1648. Judge Shearer also quoted Churchill and Lowe who wrote that the 1993 Convention is "...the first agreement signed since the adoption of the Law of the Sea Convention to give effect to the principles of article 64." See Churchill, R.R. / Lowe, A.V., *The Law of the Sea*, Manchester, Manchester University Press, 1999, 3rd ed., 313–314.

89 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 51.

90 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 55.

91 Article 282 of the UNCLOS reads: "...if the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a *binding decision*, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree..."

92 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 54.

The interpretation given by the ITLOS of the relationship between the dispute settlement mechanisms of the UNCLOS and that of the 1993 Convention is potentially far-reaching. At the beginning of the twenty-first century there are dozens of regional fishing agreements, encompassing almost all known fisheries. At the same time, membership to the UNCLOS is rapidly becoming global, totaling at the end of 1999 no less than 132 States. It is thus very likely that some or all States participating in a sectorial regime might also happen to be parties to UNCLOS. If the *Southern Bluefin Tuna* reasoning is applied *mutatis mutandi* also to these regimes, it means that, with the entry into force of UNCLOS, disputes arising out of the implementation of regional or sectorial agreements might be subject to a dispute settlement mechanism which, more often than not, might be substantially different and more coercive than the one originally provided for in the lesser agreements.

Did the negotiators of the UNCLOS envision the creation of such an overarching and integrated system of compulsory dispute settlement? Not quite so. Article 297.3 of UNCLOS provides that:

> "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 [i.e. compulsory procedures entailing binding decisions], except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

The textbook case diplomats had in mind was the *Icelandic Fisheries Jurisdiction* dispute[93]. In other words, while the UNCLOS placed all States on an even footing on the high seas, making them all equally subject to compulsory adjudication, within the EEZ coastal States were given, among many other rights, the privilege of not being obliged to accept adjudicative settlement with respect to biological resources. Coastal States at the UNCLOS negotiations were not willing to subject their newly found EEZ rights to international accountability, and the exclusion from binding compulsory jurisdiction was deliberate and necessary in the interest of consensus[94].

Yet, if coastal States had been shielded from compulsory submission to procedures entailing binding decisions, all other States had not. The paradox is evident. In the *Southern Bluefin Tuna* dispute, Australia and New Zealand are coastal states and Japan is long-distance fishing. Article 297.3 protects the former and leaves bare the latter. Were Japan to attempt to counter-claim that it is not or not only its EFP, but rather the fishing practices of Australia and New Zealand that endanger the stock, and/or that it is their lack of cooperation that must be sanctioned and not

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93 Supra, Ch.III.2.

94 Boyle, A., "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", *International Journal of Marine & Coastal Law*, Vol. 14, 1999, pp. 1–25, at 11.

its own, the Arbitral Tribunal could not have jurisdiction because of the article 297.3 exception[95].

The second hurdle the ITLOS had to overcome to issue orders was the claim that the prerequisites for the prescription of provisional measures (urgency, preservation of the rights of the parties or prevention of serious harm to the environment) did not subsist. Much of the hearings revolved precisely around the question of whether the Japanese EFP could endanger the stock of southern bluefin tuna. The Tribunal found that there was no disagreement between the parties that the stock is severely depleted and is at its historically lowest level[96], but that at the same time there were significant scientific uncertainties regarding the measures to be taken and the effectiveness of those taken thus far[97]. In those circumstances, the Tribunal felt, although it could not conclusively assess the scientific evidence presented, that the parties should act "...with prudence and caution..." and take measures "...as a matter of urgency"[98].

Before the end of the hearings, the parties had been asked to provide information on the schedule and duration of their annual fishing for southern bluefin tuna in the framework of the 1993 Convention. In particular, the Tribunal wanted to know more about the time of the year when the fishing commences and the length of the fishing season, whether that time is the same for all parties or whether it varies among individual parties. In its considerations, it observed that catches of nonparties to the 1993 Convention were on the rise[99]; that commercial fishing was expected to continue through the rest of 1999 and beyond[100]; that, following a first pilot program that took place in 1998, Japan's experimental fishing program as designed consisted of three annual programs in 1999, 2000 and 2001[101]; and that Japan, although committed to end the 1999 program on August 31, had made no commitment regarding any experimental fishing programs after 1999[102]. Still, the experimental fishing program, the object of the dispute, was scheduled to end within a few days of the issuing of the order (on August 31, 1999, as Japan had done the previous year), and these considerations by themselves could not justify the measures, for there was nothing the ITLOS could prescribe that the Arbitral Tribunal, once constituted, could not do, without prejudice to the rights to be protected[103]. Moreover, how could the stock be endangered when Australia and

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95 This situation implies, in the words of Boyle, manifest "...lack of equivalence in the due process rights of high seas and coastal states" by subjecting to compulsory jurisdiction the high seas fishing states in a situation where the actions of the coastal states themselves may be affecting the very same stock. As any adjudicative body called upon to settle the dispute could not disentangle the aspects of the case relating to the high seas from those pertaining the EEZ, Boyle suggests that the court or tribunal may refuse to hear claims brought by coastal States unless they are willing to agree to jurisdiction over any counter-claim made by the respondent long-distance fishing State with regard to the stock in dispute. *Idem*, at 12–13.

96 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 71.

97 *Ibid.*, para. 79.

98 *Ibid.*, para. 80.

99 *Ibid.*, para. 76. See also the Joint Declaration by Judges Wolfrum, Caminos, Marotta Rangel, Yankov, Anderson, Eiriksson, *ILM*, Vol. 38, 1999, at 1637–38.

100 *Ibid.*, para. 75.

101 *Ibid.*, para. 82.

102 *Ibid.*, para. 84.

103 By and large this is the reason why Judge Vukas voted against all orders.

New Zealand did not intend to restrict their own fishing during the coming months, but simply to stick to their own national quotas?

The explanation of how the ITLOS came to the conclusion that provisional measures were urgently required is contained in the Separate Opinion of Judge Treves. In his opinion, while recognizing that there is no danger of collapse of the stock in the months before the Arbitral Tribunal decides the case, he aptly pointed out that the urgency concerns the halting of a "...trend towards such collapse..."[104]. Each step in such deterioration could be seen as prejudicial because of its cumulative effect towards the collapse[105]. By assessing the urgency of the prescription of provisional measures in light of prudence and caution, the Tribunal essentially resorted to the precautionary principle. Nonetheless, quite regrettably, the ITLOS stopped short of calling the principle by its name. Although the precautionary principle has been at the front and center of international environmental law since the mid-1980s, its exact meaning and status in international law are still unresolved[106]. The extreme time pressure under which the Tribunal worked could be one explanation of why the judges preferred avoiding debating whether the precautionary principle has finally become customary international law, particularly when the World Court in the *Gabcíkovo-Nagymaros* case[107], with months at its disposal, could do no better. Yet, a more plausible explanation is that after all, in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the case, it was not necessary to hold the view that this approach is dictated by a rule of customary international law. As Judge Treves acutely remarked:

> "The precautionary approach can be seen as a logical consequence of the need to ensure that, when the arbitral tribunal decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to [b]e inherent in the very notion of provisional measures"[108].

Of course, while urgency is part of the character of provisional measures, for provisional measures to be urgent the situation must be such that, should they not be prescribed, to use the words of article 290.1 of UNCLOS, the respective rights of the parties could not be preserved, or serious harm to the marine environment be prevented. Urgency is not an absolute concept, but must be appraised in light of the magnitude of the damage that needs to be averted, and different instruments can fix different thresholds. In the case of the UNCLOS, the prevention of "serious harm" (or, which is the same, "significant, substantial or major harm") seems to be the appropriate standard. Had the case been brought under the 1995 Straddling Stocks

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104 Treves, Separate Opinion, *ILM*, Vol. 38, 1999, at 1645, para. 8.

105 *Ibid.*

106 Sands, *Principles of International Environmental Law*, op.cit., 208–213. On the precautionary principle, see, in general: O' Riordan, T./ Cameron, J., *Interpreting the Precautionary Principle*, London, Earthscan, 1994, pp. 262–283; Hohmann, H., *Precautionary Legal Duties and Principles of Modern International Environmental Law*, London, Graham and Trotman, 1994; Freestone, D. / Hey, E., *The Precautionary Principle and International Law: The Challenge of Implementation*, Boston, Kluwer, 1995.

107 *Infra*, Ch.III.7.

108 Treves, Separate Opinion, *ILM*, Vol. 38, 1999, at 1645, para. 9.

Agreement, the standard would have been even lower, since article 31.2 speaks merely of prevention of "...damage to the stocks in question..."[109].

To conclude this hasty assessment of the order issued by the ITLOS, one cannot leave out that, although the origin of the dispute was the Japanese EFP, and Australia and New Zealand asked the Tribunal to order that Japan immediately cease the unilateral program, the operative part of the order did not mention the EFP. Arguably, the Tribunal refrained from ordering Japan to immediately discontinue the EFP because it was in any event to end within a few days of the order. Yet, this explanation would be far too hard-boiled and miss the point. Indeed, not only did the Tribunal not order the immediate termination of the EFP, but rather, in a certain sense, endorsed it. The parties were ordered to refrain from conducting an experimental fishing program unless it was either conducted with the agreement of the other parties or the experimental catch was counted against the annual national allocation[110]. As Judge Laing observed in his Separate Opinion, the Tribunal did not order the immediate cessation of the EFP because it held that premature interruption would impair the program's scientific validity and diminish the value of data collected to date[111]. In other words, in the view of the Tribunal, if damage had been caused, at least something should have been learned from it.

4.5. The Arbitration and Its Aftermath: To Be Continued.

The same day Australia and New Zealand filed the request of provisional measures with the Registry of the ITLOS, they designated as arbitrator Sir Kenneth Keith, a judge on the Court of Appeal of New Zealand, counsel for New Zealand in the *Nuclear Tests* cases[112] and arbitrator in the *Rainbow Warrior* dispute[113]. On August 13, 1993, Japan chose Chusei Yamada, a member of the International Law Commission and Professor at the Waseda University School of Law, Tokyo. After the prescription of the provisional measures, the parties agreed on the appointment of three other arbitrators: Florentino Feliciano (Philippines), a member of the Appellate Body of the World Trade Organization; Per Tresselt (Norway), a diplomat and member of Norway's delegation to the Third UN Conference on the Law of the Sea; and Stephen Schwebel (USA), President of the International Court of Justice, who was also eventually appointed President of the Arbitral Tribunal[114].

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109 1995 Straddling Stocks Agreement (124). On the dispute settlement provisions of the 1995 Straddling stocks agreement, see, Treves, T., "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995", Boyle, A. / Freestone, D., *International Law and Sustainable Development*, Oxford, Oxford University Press, 1999, pp. 253–269, in particular 265–267.

110 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 90.1.d.

111 Laing, Separate Opinion, *ILM*, Vol. 38, 1999, at 1640, para 10.

112 *Supra*, Ch.III.9.

113 *Supra*, Ch.III.9.5.

114 It is noteworthy that none of the five arbitrators was actually chosen from the lists of arbitrators drawn up by States parties under Annex VII, article 2, of UNCLOS, nor that of conciliators under Annex V, article 2. However, had the appointment of one or more of the arbitrators or of the Tribunal's President needed to be made, according to article 3.e of Annex VII, by default by the ITLOS President, he would have been obliged to make use of those lists. It is also remarkable that although under Annex VII arbitrators need not be lawyers, but need only be "experienced in maritime affairs", four out of five individuals chosen are renown international legal publicists.

At the time of this writing, proceedings before the ad hoc Arbitral Tribunal have not yet started. An award is not expected before the Summer of 2000. For the time being, the orders delivered by the ITLOS should be enough to prevent a further deterioration of the southern bluefin tuna stock[115]. All parties have reported on the steps taken or proposed to take in order to ensure prompt compliance with the measures prescribed. At the beginning of October 1999, the Japanese Fisheries Agency declared that in the first nine months of 1999 (i.e. after the end of the EFP), Japan caught 6,621 tons of southern bluefin tuna[116]. In particular, the catch consisted of 4,423 tons caught commercially and 2,198 tons under the EFP[117]. Overall, despite the EFP, in 1999 Japan exceeded its quota by 9 percent, or 556 tons, rather than the 2,010 tons announced. Still, the Fisheries Agency further declared that "continued commercial fishing for the rest of the year means Japan's excess catch is certain to grow, but the margin will be deduced from its quota next year"[118].

Whether strict compliance with the orders and, for that matter any decision the Arbitral Tribunal might make in the future, is enough to address the environmental problems that precipitated the dispute is far from certain. Although Japan claims that the present TAC, frozen at the 1989 levels, is far from too low and that an increase would not compromise the target of the reestablishing of the 1980 stock levels by 2020, even strict observance of the 11,750 tons TAC might not be enough. Alarmingly enough, after having examined all the evidence presented to the Tribunal, Judges Wolfrum, Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson felt compelled to jointly declare that "...in the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term"[119].

4.6. Assessment of the *Southern Bluefin Tuna* Dispute

Although the *Southern Bluefin Tuna* dispute is still *sub judice*, and the influence of the litigation on the conservation of the stock will be assessable only several years from now, there are some aspects of the case which can be stressed forthwith. Some concern the general impact of the case on disputes over world fisheries and others concern the future of southern bluefin tuna fishing and the 1993 Convention regime.

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115 The Arbitral Tribunal has the power to modify, revoke or affirm provisional measures. As Judges Treves and Laing pointed out, unless otherwise decided by the Arbitral Tribunal, the measures are valid up to the moment in which the judgment on the merits is rendered. Treves, Separate Opinion, *ILM*, Vol. 38, 1999, at 1644, para. 4, Laing, Separate Opinion, *ILM*, Vol. 38, 1999, at 1639, para. 6.

116 "Japan's Bluefin Tuna Catch Already Tops 1999 Quota", *Japan Weekly Monitor*, October 11, 1999, available in Lexis.

117 *Ibid.*

118 *Ibid.*

119 Joint Declaration of Vice-President Wolfrum, Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson, *ILM*, Vol. 38, 1999, at 1637–38.

The first and foremost effect of the *Southern Bluefin Tuna* case has been to underline that the obligations contained in the UNCLOS relating to cooperation and conservation of high seas living resources, although couched in general terms, have real meaning and can be given effective content in particular cases. What is more, the order rendered by ITLOS signaled that regional and special fisheries agreements do not override the obligations under the UNCLOS but complement them. States must act consistently with those broad obligations at all times, including the work of regional fisheries organizations, or risk being called to account before international judicial bodies, even in those cases in which they opted for a less trenchant dispute settlement procedure. Admittedly, coastal States are covered by the exceptions provided for in article 297.3 of UNCLOS. However, the *Southern Bluefin Tuna* dispute reminds States fishing on the high seas and in foreign exclusive economic zones, which are often singled out as the ultimate cause of the decline in fisheries all over the planet, that they are exposed to compulsory adjudication.

The *Southern Bluefin Tuna* dispute might become the turning point in the long struggle between coastal and long-distance fishing States. The attention ITLOS paid to the environmental problem as a whole, as contrasted to the narrow issue of the legitimacy of the Japanese experimental fishing program in light of the UNCLOS, is to be praised. In many regards, the judges acted as custodians of the environment, preserving not so much the legal rights of the parties to the dispute, but rather the common interest of the parties and humanity as a whole in the preservation of the species[120]. This might sound even more alarming for long-distance fishing States, considering that the *Southern Bluefin Tuna* order confirmed the long practice of the World Court of giving the applicant the benefit of the doubt in deciding whether the Court has jurisdiction to indicate provisional measures[121]. Still, the Tribunal was bold but not brash. It was cautious not to trespass on the duties and functions of the Arbitral Tribunal. The jurisdictional formula and the cautious terminology employed in the order reveal the care the judges of the Tribunal put in maintaining a sharp distinction between the functions of the ITLOS in the concrete case brought before it and those of the Arbitral Tribunal[122].

An even greater role will undoubtedly be played by the Annex VII Arbitral Tribunal once it decides the dispute on the merits. The way the dispute is settled could serve as a signpost for the plight of international fisheries as a whole. In particular, it is interesting to see how the Arbitral Tribunal will assess scientific uncertainty and whether it will finally break the spell that prevents adjudicative bodies from taking a position on the precautionary principle, let alone examining its content. The composition of the Arbitral Tribunal, including several fine international legal scholars, justifies great expectations.

As for the consequences of the case on the cooperative regime for the fishing of southern bluefin tuna, it is clear that the 1993 Convention as we know it has

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120 Ad hoc Judge Shearer was prompted to observe that "The Tribunal, in its prescription of measures in this case has behaved less as a court of law and more as an agency of diplomacy". Shearer, Separate Opinion, *ILM*, Vol. 38, 1999, at 1649.

121 Kwiatkowska, *op.cit.*, at 32–33.

122 Kwiatkowska, *op.cit.*, at 32.

come to a bitter end. Cooperation between Australia, New Zealand and Japan cannot be reestablished by court order. The reasons for the collapse of the 1993 Convention regime are that it did not incorporate all States fishing for southern bluefin tuna and that, under its multilateral façade, was in essence a bilateral arrangement where the party with the greatest interests at stake was also invariably outvoted. The launching of the Japanese unilateral experimental fishing program was the immediate cause of the dispute, not its underlying reason, and this also explains why its eventual findings do not really matter. Even if the program was to reveal that there is plenty of tuna for all, because it was carried out unilaterally, it is very unlikely that Australia and New Zealand will accept it as a basis for raising the TAC. Japan can either bury the 1993 Convention by withdrawing from it[123], or double the efforts, jointly with Australia and New Zealand, to bring all other fishing States into the regime[124].

Either way, southern bluefin tuna cannot be effectively conserved and managed without the cooperation of Tokyo, for Japan is both the main fisher and consumer[125]. Hopefully, having coercively brought Japan before an international adjudicative body will not backlash. Almost a century has passed since the last time the Japanese Government appeared before an arbitral tribunal. In the *Japanese House Tax* case, Japan proposed and consented to have a tangled dispute over tax exemptions with Great Britain, Germany, and France arbitrated[126]. The dispute was submitted to the then-newly born Permanent Court of Arbitration but, to the great surprise of Japan, the three-arbitrators panel decided in favor of the European Powers. Japanese statesmen, government officials and scholars were deeply convinced of the justice of the Japanese case in the dispute. The possibility of a negative verdict was largely beyond question.

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123 "Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw". 1993 Convention, art. 20.

124 "After the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it. This Convention shall become effective for any such other State on the date of deposit of that State's instrument of accession". *Id.*, art. 18.

125 As Judge Laing remarked "It is ironic that these disagreements about science and natural resources should result in judicial proceedings when the Respondent consumes the overwhelming majority of the harvest of southern bluefin tuna and is therefore the ultimate financial resource…". Laing, Separate Opinion, *ILM*, Vol. 38, 1999, at 1643, para. 22.

126 *The Japanese House Tax Arbitration*, Award of May 22, 1905, *RIAA*, *op.cit.*, Vol. 11, pp. 51–58. For the English text see, *AJIL*, Vol. 2, 1908, at 915–921.

The reasons why Japan offered to submit the house tax dispute to arbitration are disparate. It probably felt that it could not prevail against three Great Powers at the negotiating table; more likely, however, might be that during the first decades of the Meji Era, after Japan had opened itself to the world, it had embraced with enthusiasm the idea of arbitration as dispute settlement means. During the last three decades of the nineteenth century, the Japanese government considered submitting to arbitration no less than three disputes (The *Maria Luz* case (Japan–Peru), The *Peiho* case (Japan – United States) and the *Japanese Immigrants* case (Japan – Hawaii). Of the three, The *Maria Luz* case led to an award by the Russian Emperor (Moore, J. B., *International Adjudications, Ancient and Modern; History and Documents*, New York, Oxford University Press, 1929–, Vol. 5, pp. 5035–5036.), while the *Peiho* and the *Japanese Immigrants* cases were settled by lump-sum compensation. See Ishimoto, Y., "International Arbitration in the Meji Era", *Japanese Annual of International Law*, Vol. 7, 1963, pp. 30–37, at 31–35.

The *Japanese House Tax* case had an immeasurable impact on the subsequent course of Japan in the practice of international law[127]. First it rekindled the suspicion that the West was not really interested in treating Japan on an equal footing and that international justice was Western-biased. Secondly, and more importantly, it convinced Japan that international law was not so much a body of principles based on natural justice which the East could share in common with the West, but rather a bunch of technical rules to be manipulated and which could either burn you or work to your advantage if you are sufficiently skillful[128]. In other words, it opened a long and lasting crisis of confidence in the entire system of international adjudication. Except the *S.S. Wimbledon*[129] and the *Interpretation of the Statute of the Memel Territory*[130] cases, in which Japan was technically an applicant in its capacity as one of the Allied Powers, Japan did not participate in international litigation until after World War II[131].

Of course, the *Japanese House Tax* dispute took place at a time when Japan was taking the first steps on the world scene, suddenly exposing itself to the outside world and to the canons of behavior for conducting relations with them. Nothing comparable to the shock produced by that award can be expected nowadays from Japan[132]. However, much like then, this time Japan seems to be genuinely convinced of the justice of its case and the need and appropriateness of an experimental fishing program. Japan has even a larger interest in the long-term conservation of southern bluefin tuna than Australia and New Zealand. Yet, legally speaking it has been dragged into litigation rightly so, but still unexpectedly and against its will. These meta-legal considerations will very likely have a bearing on the award of the Arbitral Tribunal.

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127 On the impact of the *Japanese House Tax* dispute over Japanese foreign policy, see, inter alia: Yokota, K., "International Adjudication and Japan", *ibid.*, Vol. 17, 1973, pp. 1–20; Ishimoto, *op.cit.*. The arbitration failed to settle the dispute, but neither side proposed arbitration again. The dispute continued until 1937, when agreements for the abolition of perpetual leaseholds were reached by Japan with all States concerned. Ishimoto, op.cit., at 36–37.

128 Owada, H., "Japan, International Law and the International Community", Lecture given at the University of London, November 24, 1980 (on file with the author).

129 *S.S. "Wimbledon"*, Judgments, *PCIJ*, Ser. A, No. 1 (1923)

130 *Interpretation of the Statute of the Memel Territory*, Preliminary Objection, *PCIJ*, Ser. A/B, No. 47 (1932), p. 243; *Interpretation of the Statute of the Memel Territory*, Judgment, *PCIJ*, Ser. A/B, No. 49 (1932), p. 294.

131 *Netherlands Steamship Op Ten Noort, Decisions of the Netherlands-Japanese Property Commission*, Decisions I and II, January 16, 1961, *RIAA*, *op.cit.*, Vol. 14, pp. 508–523.; *ILR*, Vol. 30, 1966, pp. 515–532.

132 As Yokota noticed, the Japanese attitude toward international adjudication has completely changed since World War II. Since then the policy of Japan has been that, unless disputes are resolved through negotiations, then they should be submitted to adjudication. "Japan is not only in theory in favor of international adjudication as demonstrated by its having accepted the optional clause without reservations, but also as demonstrated in practice by its having actually taken the initiative to submit disputes to the International Court of Justice…". Yokota, op.cit., at 20.

B. International Watercourses

5. THE *LAKE LANOUX* DISPUTE (SPAIN V. FRANCE)

5.1. Introduction

The *Lake Lanoux* dispute took place between Spain and France from 1917 through 1957[1]. It was caused by the intention of the French Government to exploit the hydroelectric potential of the waters of Lake Lanoux, situated in French territory, by diverting its effluent from its natural course. The water contained in Lake Lanoux flowed naturally via the Carol River into Spanish territory and eventually into the Mediterranean Sea. France planned to divert its course by channeling it towards a hydroelectric power plant situated on the Ariège River, and from here, without entering Spanish territory, into the Atlantic Ocean. For more than 40 years, France and Spain tried, at different times and resorting to a number of diplomatic means, to settle the controversy. However, the dispute was finally disposed of by arbitration[2].

The *Lake Lanoux* arbitration is usually pointed at as the evidence par excellence of the constructive role judicial means may play in the settlement of disputes on the apportionment of natural resources. Not only did it eliminate a venomous dispute between neighboring States in a successful way, but it also set a number of principles of international law which, thanks to their deep grounding in State practice and severity of construction, subsequently had a great impact on the evolution of international law in general, and of international environmental law in particular.

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1 On the *Lake Lanoux* dispute, see in general, Duléry, F., "L'affaire du Lac Lanoux", *R.G.D.I.P.*, Vol. 57, 1958, pp. 469–516; Gervais, A., "La sentence arbitrale du 16 novembre 1957 réglant le litige franco–espagnol relatif à l'utilisation des eaux du Lac Lanoux", *A.F.D.I.*, Vol. 3, 1957, pp. 178–180; Gervais, A., "L'affaire du Lac Lanoux: Etude critique de la sentence du Tribunal arbitral", *A.F.D.I.*, Vol. 6, 1960, pp. 372–434; Laylin, J.G./Bianchi, R.L., "The Role of Adjudication in International River Disputes: The Lake Lanoux Case", *A.J.I.L.*, Vol. 53, 1959, pp. 30–49; MacChesney, B., "Judicial Decisions: The Lac Lanoux Case", *A.J.I.L.*, Vol. 53, 1959, pp. 156–171; Mestre, A., "Quelques remarques sur l'affaire du Lac Lanoux", Faculté de droit et des sciences économiques de Toulouse, *Mélanges offerts à Jacques Maury*, Paris, Dalloz, 1960, pp. 261–271; Rauschning, D., "Lac Lanoux Arbitration", *Encyclopedia of Public International Law*, *op.cit.*, Vol. 2, pp. 166–168; Decleva, M., "Sentenza arbitrale del 16–IX–1957 nell'affare dell'utilizzazione delle acque del Lago Lanoux", *Diritto Internazionale*, Vol. XIII, 1959, pp. 166–173.

2 For the text of the *Lake Lanoux* arbitration see *RIAA*, *op.cit.*, (Affaire du Lac Lanoux), Vol. 12, pp. 281–317; the text in English of most of the award can be found in *International Law Reports (ILR)*, Vol. 24, 1957, pp. 101–142.

5.2. The Issue

Lake Lanoux lies in the Eastern Pyrenées, a few kilometers from France's border with Spain and Andorra, at an altitude of more than 2,100 meters. Its waters have their source in the Carlit massif, wholly within French territory. Its effluent, the Font-Vive stream, contributes about one-fourth of the waters of the Carol River. The Carol flows for about 25 kilometers in French territory, parallel to the Spanish border and then enters Spain, where it joins the Segre River. The Segre joins the Ebro, and the Ebro finally empties into the Mediterranean Sea[3].

Two parameters determine the capacity of a body of water to produce electric power through a dynamo: its volume and the height from which it falls. In the case of Lake Lanoux, both elements are particularly favorable. Indeed, not only is it one of the largest Pyrenean lakes, covering about 86 hectares of surface and storing approximately 17 million cubic meters of water[4], but its storage capacity could be conveniently increased to 70 million cubic meters by building a dam across its narrow outlet[5]. In addition, Lake Lanoux is located almost on the Pyrenean watershed. While on the Mediterranean side of the watershed its waters naturally descend a relatively gentle slope, on the Atlantic side only a quite narrow and easily perforable ridge prevents its waters from falling into the Ariège River, flowing some 800 meters lower[6]. It should not be surprising, therefore, that since the invention of the dynamo various schemes have been conceived for the utilization of the waters of Lake Lanoux[7].

5.3. The Existing Legal Regime

In order to understand the complexity of the Lake Lanoux dispute, it is necessary to step back to the nineteenth century. After centuries of diplomatic and border clashes caused by the lack of a clearly defined frontier, it was only in 1853 that Spain and France appointed a mixed commission to determine their common border and to settle a number of related issues[8]. Negotiations held in Bayonne were complex and fitful and lasted for almost 12 years. In order to simplify its task the Mixed Commission broke down the French–Spanish border into three segments, and negotiations on them were held successively, starting from the Atlantic coast and ending on the Mediterranean shore. The first Agreement was concluded on December 2, 1856, fixing the border from the mouth of the Bidassoa river, on the Atlantic coast, to the junction point of the Basses–Pyrénées department, Aragon and Navarra[9]. The second, signed on April 14, 1862, dealt with the border running

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3 Before reaching the Franco–Spanish border a canal takes off from the Carol to irrigate an area straddling the border. Yet, while on French territory, the canal is private property of the Spanish town of Puigcerdà, located just across the border. *RIAA*, *op.cit.*, at 287–288.

4 These figures refer to the Lake Lanoux dimensions at the time of the dispute before its damming.

5 For the details, see *ILR*, Vol. 24, 1957, pp. 101–142, note 2.

6 *Ibid.*

7 See Map 5.

8 Duléry, *op.cit.*, at 483–484.

9 Text in *CTS*, Vol. 116, pp. 85–94.

from that point to Andorra[10]. The third and last treaty, signed on May 26, 1866, dealt with the frontier from the Valley of Andorra to the Mediterranean Sea[11]. A separate agreement signed on the same day, called the Additional Act (*Acte additionel*), related to certain transboundary issues which, because of their general character, did not find a place in any of the three treaties of Bayonne[12]. They included the preservation of boundary marks, cattle and pasture, properties divided by the frontier and, last but not least, the issue of control and enjoyment of waters of common use between the two countries.

Article 8 of the Additional Act laid down the following framework principle.

> "All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.
>
> Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

Articles 9, 10 and 11 contain the rules concerning the apportionment of water[13]. Articles 12, 13 and 14 deal with servitudes[14]. Finally, articles 15, 16, 17 and 18

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10 *Ibid.*, Vol. 125, pp. 455–464.

11 *Ibid.*, Vol. 132, pp. 359–374.

12 *Ibid.* Only two articles of the Third Treaty of Bayonne dealt with water-related issues and none played a significant role in the ensuing dispute. These are articles 20 and 27. Article 20 dealt with the Angoustrine Canal, which in any event is not linked to the Lake Lanoux hydrographic basin. Article 27 dealt with the Puigcerdà Canal, but then again the Spanish Government never raised any concern during the dispute about the effect of the French schemes on its waters. *Supra*, note 3.

13 Article 9: "For watercourses which flow from one Country to the other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigation, or works and of enjoyment for domestic use currently existing in the other State, by virtue of concession, title or prescription, with the reservation that only that volume of water necessary to satisfy actual needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid'. Quoted from *ILR*, *op.cit.*, at 617.

Article 11: "When in one of the two states it is proposed to construct works or to grant new concessions which might change the course of the volume of a watercourse of which the lower or opposite part is being used by the riparian owners of the other country, prior notice will be given to the highest administrative authority of the Department or of the Province to which such riparian owners are subject by the corresponding authority in the jurisdiction where such schemes are proposed, so that, if they might threaten the rights of the riparian owners of the adjoining Sovereignty, a claim may be lodged in due time with the competent authorities, and thus the interests that may be involved on both sides will be safeguarded". *Ibid.*, at 617–618.

14 Article 12: "The downstream lands are obliged to receive from the higher lands of the neighboring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the *downstream* lands". (Emphasis added). *Ibid.*, at 618. The French text of the same article reported in *RIAA*, *op.cit.*, at 289, reads: "la servitude des *fonds superieurs*" (Emphasis added). However, the text of the Act Additionnel contained in *CTS*, Vol. 132, pp. 359–374, uses "fonds inferieurs". This seems to be the most correct and logical text.

concern the relationship between the authorities of the two States, and between the authorities and the users within the respective jurisdictions, with the aim of ensuring the optimal use of the transboundary waters[15].

5.4. The Dispute

For a long time the use of transboundary waters in the Pyrenean region had been the object of disputes, both at village and State level. Already towards the middle of the nineteenth century a project for the diversion of the waters of the Carol River to create the "Grand Canal de Cerdagne", aimed at irrigating the plains of the Roussillon and of French Cerdagne, was abandoned because of opposition by both local French farmers and the Spanish Government[16]. However, towards the end of the nineteenth century, because of the discovery of electricity and the dynamo, Lake Lanoux became of interest not only to agriculture but also industry. New technical developments multiplied the possible uses of its waters and, as a consequence, the potential sources of conflict, and put pressure on the existing legal regime, designed mainly to regulate agricultural usage, and unfit to deal with a bright new world lit by electric power.

In 1917, the first project for the diversion of the waters of Lake Lanoux towards the hydroelectric generators in the Ariège Valley was blocked by the protests of the Spanish Government[17]. Madrid demanded the maintenance of the status quo and agreement that the scheme would not be carried out without the consent of the Spanish Government[18]. This first check, however, did not prevent the French Government from examining new schemes for the diversion of the waters of Lake Lanoux. Increasingly worried by the French plans, in 1920 the Spanish Government requested the appointment of an international mixed commission to examine the issue on behalf of the two Governments in order to reach eventually an agreement on the works to be undertaken that would safeguard both French and Spanish interests[19].

The following years saw a series of exchanges of views regarding the constitution of such an international mixed commission and the task to be entrusted to it. France wished to restrict the commission's mandate to taking note of representations made by Spanish users and ascertaining whether they were well-founded, while Spain though that the commission should have the power to deal with all questions concerning the scheme that the respective delegations might deem necessary to

15 Article 15: "When, apart from disputes within the exclusive jurisdiction of the ordinary courts, there shall arise between riparian owners of different nationality difficulties or subjects of complaint regarding the use of water, the persons concerned shall each apply to their respective authorities, so that [the later] shall agree between themselves to resolve the dispute, if it is within their jurisdiction, and in case of lack of jurisdiction or failure to agree, as also in the case where the persons concerned will not accept the decision given, then recourse shall be had to the higher administrative authority of the Department and the province".

16 Duléry, *op.cit.*, at 472–473.

17 *RIAA*, *op.cit.*, at 291.

18 *Ibid.*

19 *Ibid.*

examine[20]. Years passed without the two countries agreeing on any substantial point, and the outbreak of the Spanish Civil War followed by World War II pushed the issue off their respective agendas.

Thirty-two years after the beginning of the dispute, on the occasion of a meeting of the International Commission of the Pyrenées[21] in Madrid on February 3, 1949, negotiations recommenced. The French delegation raised anew the question of the utilization of the waters of Lake Lanoux and proposed the setting up of a mixed commission of engineers with instructions to study the question and report to the two Governments[22]. The Commission of Engineers met at Gerona on August 29 and 30 of the same year but, since the French Government had not yet made a choice among the different schemes lying before it, the Commissioners did not have much to discuss[23].

In 1950, Electricité de France, the Government-held corporation which managed the production of electrical power, submitted a request to the Ministry of Industry for a concession to exploit the waters of Lake Lanoux by diverting their flow from the Ariège and, at the same time, ensuring full restoration of flow to the Carol River. A five-kilometer tunnel was to connect the upper course of the Ariège to a point of the Carol well before it reached the Spanish border, roughly above the outlet to the Puigcerdà Canal[24]. The French Government, however, did not adopt the project of Electricité de France lock, stock and barrel. Indeed, while in principle it could accept that waters drawn off should be returned, it regarded itself bound to return only a quantity of water corresponding to the actual need of the Spanish farmers and to compensate possible hindrances to current usages[25]. In other words, the French plan thus conceived set a limit to the quantity of water that could be used in the neighboring agricultural region, mortgaging its development. The French view, delivered by the Prefect of the Pyrénées Orientales to the Governor of the Province of Gerona, bypassing and de facto depriving the Commission of Engineers of any diplomatic role, was rejected by the Spanish Government[26].

Faced with a rejection of the "partial restitution plan", towards the end of 1953 the French Government adopted the scheme of Electricité de France, this time pledging the full restitution of waters[27]. Yet once again French plans met with opposition from the Spanish Government. To Spain the issue was no longer a question of fact – the actual or potential damage caused by a diminution in the water flow of the Carol – but one of principle. Indeed, the alteration of the natural conditions of the hydrographic basin of Lake Lanoux made restitution of waters dependent upon the will of the French Government. Either an accident at the dam or a deterioration of the diplomatic relations between France and Spain could jeopardize the agricultural industry of the whole region. The faucet would have been in the French hands.

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20 *Ibid.*

21 The International Commission of the Pyrenées was created by an Exchange of notes, dated May 30 and July 19, 1875, between the French and Spanish Governments, cited in *RIAA, op.cit.*, at 291–292.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

A further and pointless meeting of the Commission of Engineers was convened in Perpignan on August 5, 1955, after which the International Commission of the Pyrenées, in November of that same year, being unable to find an agreement, decided to lay aside the ineffectual Commission of Engineers and to convene a new Special Mixed Commission with a mandate to design a project for the use of Lake Lanoux for subsequent consideration by the two Governments[28].

By this time, France had grown quite wary of Spanish delays and maneuvers. In order to come out of the diplomatic quagmire and give a new impetus to negotiations, at a meeting of the new Special Mixed Commission on December 12, 1955, the French delegation raised its offer[29]. France pledged to free Spanish farmers from seasonal drops in the water flow by granting an annual minimum of 20 million cubic meters of water and by managing water delivery so as to offset natural fluctuations; to put in place an articulated system of flow monitoring which could be surveyed at any time by a Spanish engineer enjoying consular privileges and immunities; and by building an emergency system to guarantee the flow of water in case of accidents at the Ariège-Carol by-pass. At a second meeting of the Special Mixed Commission, held in Paris in March 1956, the Spanish delegation answered the French initiative by putting forward an alternative project[30]. This scheme met the Spanish objection by keeping the waters of Lake Lanoux beyond human power to be drained from the basin of the Carol. However, while it still enabled France to produce hydroelectric power, the amount would have been less (by 10 percent) than under the French proposal[31].

At this point the diplomatic efforts were deadlocked. On one hand, France considered that Spanish territory was unaffected by the plan, and that in any event Spanish farmers would have benefited from the new hydrographic regime. Moreover, all the burdens and costs of the work would have been absorbed by France on its territory. Finally, it considered that international law, both customary and conventional, was on its side. France had consistently offered all it could for the maintenance of the diversion project. On the other hand, Spain no longer considered the dispute as a matter of fact but rather as a matter of principle. It could not tolerate the water supply of the region being under Damocles' sword of accidents or of French political whim. Any plan which would have implied a modification of the natural conditions of the hydrographic basin had to be rejected. Moreover, Spain held that the Treaty of Bayonne and the Additional Act made any modification of the transboundary water regime conditional upon the consent of both parties.

The Spanish fear that France could unilaterally implement the scheme was real, since preparatory work for the construction of the dam and the build up of material had started. Diplomatic fencing had proved useless, and the 1929 French–Spanish Treaty of Arbitration[32] was a last resort for Spain. In particular, under the 1929 Treaty, there were two possibilities to settle disputes "in which the

28 *Ibid.*, at 293.
29 *Ibid.* See also Mémoire, Annex 11.
30 *RIAA*, *op.cit.*, at 293.
31 *Ibid.*, at 298.
32 Treaty of Arbitration between Spain and France, Paris, July 10, 1929, *LNTS*, Vol. 148, pp. 369–383.

parties differ as to their respective rights..."[33]. The first possibility was international adjudication, either by the PCIJ or by an ad hoc arbitral tribunal to be constituted pursuant to the Treaty's provisions. The other possibility was conciliation through the French–Spanish Conciliation Commission established under article 5–17 of the same Treaty. Conciliation was also the subsidiary procedure to be followed in case the two States could not resolve the dispute "by the normal methods of diplomacy" and by international adjudication[34]. Finally, ...

> "[i]f it has been found impossible to conciliate the Parties, the dispute shall, by means of a special agreement, be submitted for decision to an arbitral tribunal having power to decide *ex aequo et bono*."[35]

Of all these options Spain chose to request an arbitral tribunal to decide whether French actions were consistent with the Third Treaty of Bayonne and the Additional Act. France, equally convinced of having international law on its side, immediately accepted and pledged to suspend work until the rendition of the award. The *compromis* was signed on November 29, 1956[36].

5.5. The Arbitration

Article 2 of the *compromis* provided for the establishment of a tribunal composed of five arbitrators, two of whom were appointed by France (Plinio Bolla, the former President of the Swiss Federal Tribunal; Paul Reuter, Professor at the Law Faculty of the University of Paris); two by Spain (Fernand de Visscher, Professor at the University of Louvain and former judge of the ICJ; Antonio de Luna, Professor at the University of Madrid), and one umpire jointly appointed. However, since the parties could not agree on the name of the umpire within six weeks from the signature of the *compromis*, under the same article the King of Sweden appointed Sture Petrén, Minister Plenipotentiary of Sweden, member of the Permanent Court of Arbitration, and future judge of the ICJ (1967 to 1976). The Tribunal was officially constituted in Geneva on January 25, 1957. Admittedly, this was an arbitral tribunal particularly knowledgeable in public international law, an element which strengthened the authority of the award.

Compared to the questions asked in all other cases presented in this study, the question the two parties agreed to bring before the Arbitral Tribunal was quite straightforward, i.e.:

> "Is the French Government correct in maintaining that in carrying out, without an agreement previously arrived at between the two Governments, works for the utilization of the waters of Lake Lanoux on the conditions laid down in the French project and proposals mentioned in the preamble of this compromis, it is not committing a breach of the Treaty of Bayonne of May 26, 1866, and of the Additional Act of the same date?"[37].

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33 *Ibid.*, art. 2
34 *Ibid.*, art. 18.
35 *Ibid.*, art. 19, first para.
36 For the text of the *compromis*, see *RIAA*, *op.cit.*, at 285–286.
37 Author's translation. See art. 1 of the *Compromis*. *RIAA*, *op.cit.*, at 286, and *ILR*, *op.cit.*, at 624.

After a first written phase, during which memorials and counter-memorials were exchanged, between April and July 1957, the Tribunal held hearings from October 17 through October 23. The arguments of Spain and France can be conveniently summarized as follows[38]: Spain held that the French scheme affected the whole hydrographic basin in such a way that the restoration of waters would actually depend on the will of one only State. This would transform waters which were naturally shared into waters for the predominant use of one State, since the guarantees for the restoration of water were not in themselves sufficient to prevent the regime of community, sanctioned by the Third Treaty of Bayonne and the Additional Act, from being destroyed. In any event, the French scheme required mutual consent prior to its execution, as agreed to in articles 11, 12, 15 and 16 of the Additional Act[39].

Conversely, France claimed that the Third Treaty of Bayonne did not prohibit any change in the natural conditions of transboundary waters. The Additional Act not only did not jeopardize the sovereignty of each of the two States, but also expressly confirmed the right to undertake works of public utility. Neither the Third Treaty of Bayonne nor the Additional Act prescribed that prior consent by the other State was necessary to undertake such works. Furthermore, the scheme of Electricité de France would safeguard the rights and interests of Spain by not causing the slightest change either in the course or in the flow of waters in Spanish territory. The execution of the French scheme appeared to cause no damage to Spanish interests, as Spain had not given any precise indication of such potential damage.

5.6. The Award

The Tribunal rendered its award by majority vote less than 11 months after its inception, on November 16, 1957. Four arbitrators out of five squarely rejected the claims of Madrid. Only one of the two Spanish-appointed members of the Tribunal, Antonio de Luna, a Spanish national, dissented. The other arbitrator appointed by Spain, Fernand De Visscher, national of an upstream State (Belgium), in a similar international dispute (*Diversion of the River Meuse* case)[40], voted with the majority.

In order to untangle the dispute, the Tribunal felt compelled to divide the question asked by the parties into two fundamental issues. First, the arbitrators decided they had been called on to decide whether the works for utilizing the waters of Lake Lanoux in the conditions laid down in the Electricité de France scheme and the subsequent offers of the French Government constituted, not only under the third Treaty of Bayonne and the Additional Act, but also in light of customary international law, an infringement of the rights of Spain. To this first "half-question", the

38 For the Spanish arguments, see *RIAA*, *op.cit.*, at 295–96, *ILR*, *op.cit.*, at 625–626. For the French thesis *RIAA*, at 296–97, *ILR*, at 627. See further the Spanish reply *RIAA*, at 297–99, *ILR*, at 627–629; and the French reply *RIAA*, at 299–300, *ILR*, at 630–631.

39 *Supra*, note 12.

40 *Infra*, Ch. III.5.

Tribunal answered negatively. By carrying out the diversion as stated in the scheme elaborated by the Electricité de France, that is to say by guaranteeing the complete restitution of the waters diverted from the Carol, and adding the extra guarantees and concessions made by the French Government during the negotiations, France did not violate Spanish interests or rights. Moreover, the arbitrators rejected the Spanish contention that France, by acquiring the capacity to cut off the water flow in Spanish territories, violated if not the letter at least the spirit of the Treaty of Bayonne. Indeed, Spain could not prove that the works were aimed at creating a means of injuring Spain, nor that France was acting in bad faith.

Second, having found that France could legitimately carry out the scheme, the Tribunal moved on to determine whether, under the Treaty of Bayonne and the Additional Act, France could do so unilaterally, without obtaining the consent of Spain. The Tribunal did not find clear and convincing evidence that either customary international law or the regime established by the Treaty of Bayonne restricted French sovereignty to the extent of subjecting the execution of works on transboundary watercourses to Spanish consent. All the Additional Act provided for was a duty to inform and consult in good faith, as well as to take into account the interests of the downstream State. France's right to make the ultimate decision remained unfettered.

5.7. The Aftermath

The award of the Tribunal endorsed the diversion of the waters of Lake Lanoux towards the Ariège. However, this blessing was conditional upon the project being consistent with the scheme of Electricité de France and the guarantees offered by the French Government during the last phase of the negotiations[41]. Eight months after the award, on July 12, 1958, Spain and France concluded an agreement concerning the development of Lake Lanoux which closely reflected the scheme of Electricité de France and contained all the offers made during the 1950–1956 negotiations[42]. The 1958 Agreement provided for the full restitution of the diverted waters through a gallery linking the Ariège to the Carol with a capacity of five cubic meters per second. The amount restituted annually was not to be less than 20 million cubic meters, and France had to make technical arrangements to prevent the accidental severance of the flow[43]. A joint commission, made up of three

41 "In carrying out, without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux *in the conditions mentioned in the Scheme for the Utilization of the Waters of Lake Lanoux notified to the Governor of the Province of Gerona on January 21, 1954, and brought to the notice of the representatives of Spain on the Commission for the Pyrenées at its session held from November 3 to 14, 1955, and according to the proposals submitted by the French delegation to the Special Mixed Commission on December 13, 1955*, the French Government was not committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date." Emphasis added. Quoted from *ILR*, *op.cit.*, at 651. For the original French text, see *RIAA*, *op.cit.*, at 317.

42 Agreement Relating to Lake Lanoux (with an arrangement concerning the lake's development), Madrid on July 12, 1958, *UNTS*, Vol. 796, pp. 235–237. The agreement was amended by an Exchange of letters on January 27, 1970. *Ibid.*, pp. 240–243. The Exchange of letters of January 27, 1970, is no longer in force.

43 Article 1. *Ibid.*

Spanish and three French commissioners, was to supervise the implementation of the measures and the Agreement[44]. A Spanish official, serving at the Spanish Consulate in Toulouse and enjoying consular privileges and immunities, was granted access any time to all of the installations[45]. In case of violations of the Agreement, France was to make compensation, and disputes eventually arising out of its implementation would be settled according to the 1929 Arbitration Convention, the same agreement which had given rise to the arbitration[46]. Finally, a series of technical arrangements ensured Spain a steady flow of water during the dry summer season[47].

In other words, by settling a rather narrow point of law, the Tribunal removed from the negotiations the stumbling block of Spanish legal claims. Spain accepted what France had offered before the arbitration. It always had the opportunity to do so, but once it was entrenched in the defense of the principle that upper riparians do not have the right unilaterally to carry out work which might affect the natural flow of waterways, it could not yield without paying a heavy political price. By authoritatively declaring the extent of French obligations and Spanish rights, the Arbitral Tribunal facilitated the metamorphosis of French unilateral commitments into a freely negotiated agreement. France carried out its scheme without the need to make more concessions than what had actually been offered before the arbitration, and Spain accomplished the goal of having the works carried out only after a freely negotiated agreement.

The regime established by the 1958 agreement has worked smoothly for 40 years. The French–Spanish Joint Commission established by article 2 of the 1958 Agreement has met regularly every year to verify adherence to agreement and to settle questions of its implementation[48]. The risk of the severance of the Carol River flow, either accidentally or intentionally, has not become a reality. Moreover, the downstream agriculture has benefited from a year-long steady flow. However, while throughout the dispute the question of quantity of water reaching Spain overshadowed any other consideration, in recent years quality has unexpectedly —given the proximity of the bypass to the spring— become an issue. Because of the gallery linking the Ariège to the Carol, upstream from the gallery diverting the water of the Lanoux Pond (since its damming, the official name of Lake Lanoux has become *Étang de Lanoux* or in English Lanoux Pond), the water reaching Spain no longer originates from the Carlit massif but from springs located in Andorra. The switching of springs has created an unexpected problem.

Because of the boom of the ski industry in Europe since the late 1960s and the incessant search for uncontaminated slopes, a ski resort was developed at Pas de la Casa, on the French–Andorra Pyrenean watershed. Pas de la Casa has become one of the largest ski stations in the Pyrenees, but its development has taken place

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44 Article 2. *Ibid.*

45 Article 5. *Ibid.*

46 *Supra*, note 32.

47 Annex to the Agreement. *Supra*, note 42.

48 Letter dated November 21, 1997 of Mr. J.C. Ferrand, Ingénieur général des ponts et chaussées, Ministère de l'Economie, des Finances et de l'Industrie, on file with the author. Mr. Ferrand is the chair of the French delegation to the joint commission established by Article 2 of the 1958 Agreement.

without taking into account its impact on the source of the Ariège. Because of the lack of adequate water treatment plants at Pas de la Casa, sewage water percolated in the Ariège[49]. Had the gallery linking the Ariège to the Carol not been built, the issue would have remained a bilateral one, affecting Andorra (polluter) and France (polluted). However, because of the damming of Lake Lanoux and the necessary restitution plan, pollution originating in Andorra, which by its nature would have never reached Spain, happened to be exported from one country to the other via France. This raises intriguing legal scenarios, as it is possible to wonder whether France might be held liable *vis-à-vis* Spain for pollution which it did not cause but which it contributes funnelling, or whether Spain is estopped from invoking French liability, which in any event would be joint with Andorra, because by accepting the diversion scheme it implicitly accepted the risk of importing pollution.

Nonetheless, the issue of the pollution of the Carol, caused by Pas de la Casa with the connivance of Electricité de France, never reached the level of an international dispute, even though rumors suggest that Spain threatened to bring a claim against France before an international tribunal[50]. In 1995, the issue was settled directly between the managers of the hydroelectric power plant at Hospitalet-Mérens and the Government of Andorra by dispatching a technician to Pas de la Casa to monitor the upkeep of the water treatment facilities[51]. If operational water pollution has been addressed, however, accidental pollution might still reach Spain[52]. To this end, in 1997 the Joint Commission established by the 1958 Agreement decided that in the event of pollutants accidentally spilling into the Ariège, Electricité de France would discontinue the restitution of water[53]. A dispute between France and Spain precipitated by transboundary water pollution of the Carol is thus still possible.

5.8. Assessment of the Lake Lanoux Dispute

The *Lake Lanoux* arbitration has been widely praised as an example of the capacity of judicial means to dispose of a dispute in a rapid, efficient and satisfactory way. A number of factors contributed to its success, some of them technical and some of a more political nature.

Political considerations played a fundamental if not decisive role in the case of the *Lake Lanoux* arbitration both in the origins of the dispute and in its disposal. Indeed, it would be impossible to understand why the dispute arose at all and why it was satisfactory resolved without considering the state of relations between the Franco regime and western democracies in the aftermath of World War II[54].

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49 "Pollution du Carol: c'est fini!", *L'Independant*, March 24, 1996.

50 Telephone conversation held on October 27, 1997, with Mr. Basseras, Agence de l'eau (Bassin Adour–Garonne).

51 "Pollution du Carol: c'est fini!", *op.cit.*.; letter dated November 21, 1997 by Mr. J.C. Ferrand, *op.cit.*.

52 On April 3, 1997, a truck bringing gasoline overturned at Pas de la Casa spilling its 3,200-liter load into the Ariège. "L' Ariège légèrement polluée", *La Dépêche du Midi*, April 3, 1997.

53 *Ibid.*

54 For an account of Spanish international relations in the post-war period, see Carr, R., *Spain: 1808–1975*, Oxford, Clarendon Press, 1982, 2nd ed., pp. XXX–865.

The late 1940s and early 1950s, the period during which the *Lake Lanoux* dispute entered its second and more virulent phase after the interruption of negotiations due to the World War II, were crisis years for the regime of Francisco Franco. By 1945 fascist Spain was surrounded by victorious democracies hostile to it. Paranoid fears of international plots went hand in hand with economic autarky as Franco inevitably paid the penalty for having come to power with the support of the Axis and for having collaborated with it during the war. In March 1946 the French Government closed the frontier; in December 1946 the Western democracies recalled their ambassadors from Madrid. Finally, Spain was excluded from the nascent United Nations and put into international quarantine. Quite consistently with this general atmosphere of political siege, Madrid tended to regard French projects for the development of Lake Lanoux as cunning schemes to make Spain thirsty.

However, when during the Korean War (1950–1953) the rigors of the Cold War reached their peak, Spain suddenly became a precious ally and anticommunist spiritual reservoir. In December 1955, Spain was admitted to the United Nations, therefore becoming a respectable member of the international community. Quite unsurprisingly, this is exactly the period during which the French offers and guarantees reached their apex[55]. Toward the end of the fifties, the change of political wind in the international arena accompanied a parallel shift in the Spanish domestic political balance. In February 1957, an important ministerial change took place that marginalized within the Spanish Government the die-hard and old fashioned Falangists in favor of a new generation of technocrats, generally university-trained and distinguished from the "amateurs" which occupied their positions "by right of conquest" on the battle-fields of the 1936–1939 civil war[56]. The *Lake Lanoux* arbitration took place with this more pragmatic leadership in power in Madrid, and the dispute rapidly evolved into a freely negotiated agreement on the very same terms that the previous cabinet would not accept.

As to the technical factors that made the *Lake Lanoux* arbitration a paradigm of international adjudication of disputes, first of all the process was uncommonly rapid. The award was rendered on November 16, 1957, only 11 months after the Tribunal's constitution, a record for many arbitral tribunals, and even more so for the adjudication of environmental disputes. The reasons for such swiftness are numerous. First, unlike what occurred in the *Trail Smelter* and *Bering Sea Fur Seals* arbitrations, the Arbitral Tribunal was asked a single question. Undoubtedly this facilitated the work of the arbitrators, and reduced the length and cost of the proceedings.

Second, unlike in other cases, the Tribunal was not asked by the *compromis* to craft a legal regime to address the issue, the so-called *arbitrage legislatif*, but merely to determine the content of the law and to assess French plans in this context (*arbitrage de droit*)[57]. While this formulation of the *compromis* helped reduce dramatically the length of the arbitration, nonetheless the parties still allowed the Tribunal to analyze the merits of the French scheme and to assess its

55 *Supra*, Ch.III.5.4.
56 Carr, *op.cit.*, at 724.
57 Gervais, "L'affaire ...", *op.cit.*, at 433.

compatibility with applicable law. Even though Spain neglected to prove the existence of actual damage and never raised issues of transboundary pollution, the Arbitral Tribunal ruled in favor of France only once it had been convinced that the French plan would avoid any damage to Spain. In other words, in the case of the *Lake Lanoux* dispute the designing of the technical solutions and the new regime were devolved to one of the parties. Subsequently, the two parties jointly brought the plan before a tribunal to get a verdict on its legality and capacity to avert environmental damage. By doing so themselves, rather than asking the Tribunal to work out a scheme on its own, the parties dramatically reduced the length of the proceedings (as compared, for instance, to the *Trail Smelter* dispute[58]).

Third, this is a case of "preventive" use of international judicial bodies. The case was submitted to the Tribunal before work had been undertaken. By avoiding damage in the first place, the parties averted litigation on issues of damage assessment and compensation that usually require lengthy analysis and evidence gathering, elements which tend to inflate the length and cost of procedures.

The *Lake Lanoux* arbitration has become a *locus classicus* of international environmental law. Some elements of the award broke new ground, heralding for instance the provisions set in the 1997 Convention on the Non-navigational Uses of International Watercourses[59]. Others helped clarifying the content of well-established principles, such as the principle of good faith in international relations[60]. Yet one cannot but observe that there is a striking contrast between the narrow question posed and the wide array of problems eventually dealt with by the Tribunal[61]. While the question asked in the *compromis* was limited to determining whether French plans were inconsistent with the Third Treaty of Bayonne and the Additional Act, in the award the Tribunal legally assessed French behavior not only in light of its international agreements, but also of customary international law[62]. Secondly, while the *compromis* merely asked whether France violated a particular norm (i.e. norm which requires obtaining the consent of the downstream State for work which might allegedly jeopardize its rights), the Arbitral Tribunal considered whether Paris had violated any other obligation to a downstream State[63]. Such an authoritative and extensive inquiry into the norms of customary international law regulating the use of international waterways, at the very limit of the spirit of the *compromis*, is one reason why the *Lake Lanoux* dispute has become so popular among legal scholars.

58 *Infra*, Ch.III.8.
59 Convention on the Law of the Non-Navigational Uses of International Watercourses, (126).
60 *RIAA*, *op.cit.*, at 306–307.
61 Gervais, "L'affaire …", *op.cit.*, at 376.
62 *RIAA*, *op.cit.*, at 304–305.
63 *Ibid.*, at 314–315.

Yet, despite the care and depth of the Tribunal's analysis, the arguments and counter-arguments of the parties as well as the award itself inevitably reflected the very limited state of development of international environmental law in 1957. Indeed, since the *Lake Lanoux* arbitration, international environmental law and practice have come a long way. Ecological considerations were completely outside the scope of the debate. While the parties constantly argued over the quantity of water in the Carol, neither raised the issue of its quality, that is to say of its chemical composition and physical characteristics (e.g. temperature). Nor did Spain raise the issue of what effect the modification by human intervention on the Carol might have had on the general equilibrium of the hydrographic basin. Had Spain claimed and proved that France's carrying out the scheme would have jeopardized Spanish territory and nationals, the award would have probably been different[64]. However, while Spain disregarded the facts to concentrate its pleadings on a matter of principle, France made its case by proving the absence of actual damage to Spanish interests. It is quite telling that while the French delegation included three engineers[65], the Spanish delegation did not comprise any.

64 "It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristics which would injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act. Neither in the dossier nor in the pleadings in this case is there any trace of such allegation". *RIAA*, *op.cit.*, at 303; *ILR*, *op.cit.*, at 635.

65 Mr. Duffaut, Inspecteur général des Ponts et Chaussés; Mr. Olivier Martin; Directeur de l'Equipement de l'Electricté de France; Mr. Moulinier, Directeur de la Région d'équipement hydraulique Garonne de l'Electricité de France.

6. THE *MEUSE* DISPUTE (THE NETHERLANDS V. BELGIUM)

6.1. Introduction

The dispute between The Netherlands and Belgium over the use of the waters of the Meuse River (Maas in Dutch) does not have a very definite beginning[1]. It reasonably could be said that as soon as Belgium became independent from The Netherlands, in 1831, the Meuse and its waters were a major stake in the political relations between the two countries. However, the question of the use of the Meuse waters evolved from a general point of contention into a true legal dispute only in the late 1920s, and in 1937 it eventually became the object of a judgment of the Permanent Court of International Justice[2]. As will be explained further on, the judgment rendered by the PCIJ did not permanently settle the issue of the diversion of the waters of the Meuse, and it is only recently, in 1994–1995, that Belgium and The Netherlands have managed to establish a legal regime satisfactory to all interested parties. For these reasons, although the Meuse affair went through different phases and suffered a number of interruptions, it could be regarded as one of the oldest and longest environmental disputes ever.

6.2. The Issue

The Meuse River originates in France, in the Plateau de Langres. Its hydrographic basin includes five countries (France, Germany, Luxembourg, Belgium and The

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1 On the legal problems concerning the use and diversion of the waters of the Meuse River in general, see: Dehousse, F., "L'affaire des eaux de la Meuse", *Revue de droit international*, Vol. XIX, 1937, pp. 177–263; Bouchez, L.J., "The Netherlands and the Law of International Rivers", Panhuys, H.F./Heere, W.P./Jitta, J.W./Ko Swan Sik/Stuyt, A.M. (ed.), *International Law in the Netherlands*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1978, 3 Vols., Vol. I, pp. 273–280; Verhoeven, J., "La Meuse et l'évolution du droit des fleuves internationaux", *Mélanges Fernand Dehousse*, Paris–Bruxelles, Nathan-Labor, 1979, Vol. 1, pp. 139–148.

2 On the case of the *Diversion of Water from the Meuse*, as adjudged by the PCIJ, see: *Diversion of Water from the Meuse* (Netherlands/Belgium), *PCIJ*, Ser. A/B, No. 70 (1937), pp. 4–89; *idem*, Ser. C, N. 81; Friede, W., "Urteil des Ständigen Internationalen Gerichtshofes vom 28 Juni 1937 in dem Streitfall über die Entnahme von Wasser aus der Maas", *Z.a.ö.R.V.*, Vol. 7, 1937, pp. 875–880; Witenberg, J.C., "Affaire des prises d'eau à la Meuse", *Journal de droit international*, Vol. 66, 1939, pp. 338–344; Herndl, K., "Meuse, Diversion of Water Case", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1981–, Vol. 2, pp. 187–189; Jokl, M., "Aperçu sur l'arrêt de la C.P.J.I. du 28 juin 1937", *R.G.D.I.P.*, Vol. 44, 1937, pp. 552–560; Fachiri, A.P., "*Diversion of Water from the Meuse*", *B.Y.I.L.*, Vol. 19, 1938, pp. 231–233; Verzijl, J.H.W., *The Jurisprudence of the World Court*, Leyden, Sijthoff, 1965, pp. 458–483; Hudson, M. O., *The World Court (1921–1938)*, Boston, World Peace Foundation, 1938, pp. 154–159; Marek, K. (ed.), *A Digest of the Decisions of the International Court*, Nijhoff, The Hague, 1974, pp. 872–889.

Netherlands). Its main course, about 900 kilometers, crosses one of the earliest and most highly industrialized areas of Europe. After abandoning French territory, the Meuse first crosses Belgium, then forms part of the Belgium–Netherlands border, enters The Netherlands, forms another tract of the border between the two countries and finally, flowing across Dutch territory, empties into the North Sea[3].

A large part of the natural course of the Meuse is unsuitable for navigation. Indeed, until it reaches the town of Venlo, in The Netherlands, the river is rapid and in general shallow. Moreover, since it is fed by rainfall and not by melting glaciers, its flow varies greatly during the year. Because of its unsuitability to navigation, for a long time the main function of the Meuse has been to serve as a water-reservoir for a number of artificial canals used for the transportation of goods. The first major canal built in the region that drew water from the Meuse for navigational purposes was the Zuid-Willemsvaart, initiated by King William I of The Netherlands in 1815 to connect Maastricht to Bois-le-Duc and completed in 1826. During the 1830–1839 Belgian uprising and the ensuing war, use of the canal was interrupted for military reasons. The Treaty of London of 1839 put an end to the Dutch–Belgian conflict by establishing a boundary between the two countries that cut the Zuid-Willemsvaart in two[4].

Once peace was established, Belgium and The Netherlands put arms aside and resumed the economic development of the region. In 1845 the two countries concluded a treaty to lengthen that canal from Maastricht, in The Netherlands, to Liège, in Belgium[5]. In the 1850s Belgium commenced the construction of a series of new waterways in the Campine region[6]. However, because of the porous nature of the soil and the extent of the new canals network, a large supply of water had to be drawn from the Meuse. To this end, Brussels had a new canal built to draw water from the tract of the Zuid-Willemsvaart running from Liège to Maastricht. But, as often happens in the case of brash alterations of the ecosystem, this new canal had unexpected repercussions on the other canals connected to the Meuse. The result was that the speed of the water of the Zuid-Willemsvaart was greatly increased, rendering it unsuitable for navigation[7].

In was only in 1863 that the two countries could agree on a way to deal with the problem of the excessive speed of the water-flow in the Zuid-Willemsvaart. This was basically achieved by increasing the level of the canal; concentrating the withdrawal of water from the Meuse in one single new intake situated at Maastricht, on Dutch territory, and by enlarging the program of work to be carried out in the common section of the river, so that more water could be withdrawn without jeopardizing navigation. These technical steps were contained in the Treaty concluded at The Hague, on May 12, 1863 (hereinafter the 1863 Treaty), which intended to "settle permanently and definitively the regime governing diversions of

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3 See Map 6 and 6 bis.

4 Treaty between Belgium and the Netherlands Relative to the Separation of the Respective Territories, London, April 19, 1839, *CTS*, Vol. 88, at 427–444.

5 Convention between Belgium and the Netherlands for the Construction of a Canal Lateral to the Meuse between Liege and Maastricht, The Hague, July 12, 1845, *CTS*, Vol. 98, at 359–361.

6 These are the Canal de la Campine; the Canal de Turnhout; the Canal de Hasselt and the Canal du Camp de Beverloo.

7 *Diversion of Water from the Meuse*, Judgment, at 11–12.

water from the Meuse for the feeding of navigation canals and irrigation channels"[8]. This aim was accomplished by laying down in detail the nature of the works to be constructed on either side, the quantity of water that might be utilized, and the like[9].

6.3. The Dispute

By the close of the nineteenth century it was becoming clear that larger and deeper canals were required in order to meet the economic needs of the two countries. In particular, the development of the coal-fields in the Dutch and Belgian Limburg called for a rapid improvement in the communications with the ports of the North Sea. Indeed, while the canals built under the 1863 Treaty regime allowed the passage of barges with a maximum weight of 450 tons, the rail and the canals of the Rhine could bear barges of a much larger tonnage[10]. The Dutch city of Rotterdam, situated at the mouth of the Rhine, and the Belgian city of Antwerp, on the outlet of the Scheldt River, were keenly competing for the control of the flow of the natural resources of the *hinterland*. Whoever would manage to improve the communications with the coal districts through the Meuse would gain a decisive economic advantage over the rival.

A first attempt to avert a dispute was the appointment of a Dutch–Belgian international joint commission to consider possible work to improve the navigation of the Meuse[11]. The Commission carried out its work between 1906 and 1912, but the two countries could not agree on the implementation of its report. The outbreak of World War I sealed the Commission's fate. Negotiations were resumed soon after the end of the conflict and in 1925 a new comprehensive treaty, which would have made it possible to build the waterways desired on either side, was signed[12]. Yet, in 1927 this further attempt to adjust the 1863 regime by finding a mutually

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8 Treaty between Belgium and the Netherlands for the Regulation of Drawings of Water from the Meuse, The Hague, May 12, 1863, *CTS*, Vol. 127, at 438–443.

9 The most important provisions of the 1863 Treaty can be summarized as follows: Article I provided for the construction below Maastricht, at the foot of the fortifications, of a new intake which would have constituted the feeding conduit for all canals situated below that town and for irrigation in the Campine region and in the Netherlands. Article II provided for the suppression of the lock at Hocht (No. 19) and its replacement by a new lock in the Zuid-Willemsvaart above the intake provided for in article I. Article III provided that the level of the canal between Maastricht and Bocholt to be raised so that the quantity of water prescribed by the succeeding articles IV and V could pass along the canal without raising the average current to a speed. Article IV fixed the quantity of water to be taken from the Meuse and under Article V the Netherlands was to have a fixed proportion out of the total quantity of water withdrawn from the river. Finally, article IX provided for the preparation and execution of a program of work in the bed of the Meuse to increase its depth, with Belgium to pay two-thirds and the Netherlands one-third of the costs.

The 1863 Treaty was concluded two years after a similar agreement had been rejected by the Dutch Second Chamber, seemingly because it did not resolve the problem of the excessive speed of the water of the Zuid-Willemsvaart.

10 Dehousse, *op.cit.*, at 247–248.

11 *Diversion of Water from the Meuse*, Judgment, at 14.

12 *Ibid.*, at 14–15.

acceptable solution, allowing for the expansion of commercial traffic on the waterways of both countries, miserably failed in the Dutch Parliament, causing the resignation of the Dutch Minister of Foreign Affairs[13].

In short, more than 20 years of negotiations lead nowhere. The lobbies of Rotterdam and Antwerp successfully vetoed any initiative that might benefit the other. The regime of the Meuse, as determined by the 1863 Treaty, could no longer withstand the pressure of commercial needs. Unable to reach an agreement, Belgium and The Netherlands resorted to unilateral actions. In the late 1920s, The Netherlands started building the Juliana Canal[14]. This was to allow larger barges to navigate from Maastricht to Maasbracht and from there to the Dutch section of the Zuid-Willemsvaart without needing to enter Belgian territory. Belgium, conversely, in 1930 began digging the Albert Canal to connect the Meuse to the Scheldt River and the port of Antwerp to Liège, another major industrial city[15]. While these undertakings, both fed by the waters of the Meuse and thereby in competition for a limited amount of water, had been the subject of intense diplomatic correspondence, there was no agreement as to the extent to which the Treaty of 1863 applied to them. Both countries took the view that the 1863 Treaty gave them a veto right on the work undertaken by its neighbor while, at the same time, it left them a free-hand to carry out work solely within their territory.

In 1934, the Juliana canal was completed, while the Albert Canal, a much larger (up to 200 meters wide and 130 km long) and technically more difficult undertaking, was still far from being concluded. Yet, the uneven progress on the two sides of the border gave The Netherlands a tactical advantage in the dispute, for if it managed to force Belgium to settle the dispute by having recourse to international adjudication before the Albert Canal was completed, the situation could be frozen while the case was pending. Meanwhile, the barges from Limburg would reach Rotterdam and not Antwerp, giving the former a decisive edge in the commercial competition. Brussels was well aware of the danger, and it would have never accepted to arbitrate the dispute, at least not before it could re-establish a balance on the terrain by completing the Albert Canal. But, in the 1920s both States had filed an optional declaration with the Registrar of the Permanent Court of International Justice[16].

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13 Dehousse, *op.cit.*, at 256.

14 *Ibid.*, at 15.

15 *Ibid.*

16 Unlike in the case of the ICJ, in the case of the PCIJ States enjoyed much less leeway in wording their optional declarations. In the PCIJ system the "optional declaration" had been standardized by an Annex to the Protocol of Signature of the Statute, of December 16, 1920. The standard optional clause read: "the undersigned, being duly authorized thereto, further declare, on behalf of their Governments, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with article 36, para. 2, of the Statute of the Court, under the following conditions:...". Belgium signed the Optional Clause on November 25, 1925, on condition of reciprocity and for a duration of 15 years. The Netherlands did so on August 6, 1921, on condition of reciprocity and for five years. The Dutch declaration was renewed on September 2, 1926, for 10 years as of August 6, 1926. Hence the Netherlands filed its application only five days before its declaration expired. This observation reinforces the conclusion that the case was submitted to the PCIJ for tactical considerations. *PCIJ*, Ser. E, N. 11, at 49, 259 and 265.

On August 1, 1936, the Dutch Government instituted proceedings against Belgium before the Permanent Court of International Justice[17]. A tactical consideration, therefore, by and large explains why the dispute over the diversion of the waters of the Meuse River came before the World Court. And this was not, as we will see, a fortunate decision.

6.4. The Proceedings before the Court

The Netherlands asked the Court in the main to adjudge and declare that the work already carried out by Belgium was in violation of the Treaty of 1863, that the proposed works would be contrary to it and, consequently, to order Belgium

> "... to discontinue all the works [undertaken to create the Albert Canal and] to restore to a condition consistent with the Treaty of 1863 all works constructed in breach of that Treaty"[18].

Moreover, it requested the Court to order Belgium to discontinue any feeding contrary to the 1863 Treaty and to refrain in the future from any such feeding[19].

The Belgian Government rejected the Dutch claim, asking the Court to declare the submission ill-founded, and, in an unprecedented move, filing a counterclaim inviting the Court to adjudge and declare that the Juliana Canal and the locks built to regulate it were in breach of the Treaty of 1863, "reserving the rights accruing to Belgium from the breaches so committed"[20]. The counterclaim was obviously rejected by The Netherlands, which considered itself entitled by the 1863 Treaty to do all it had done unilaterally.

In many respects, the case of the diversion of the Meuse River was atypical[21]. First of all, it was a perfectly symmetrical case. Both parties advanced parallel claims and advanced analogous arguments to discredit their counterpart's pretensions. Moreover, because the case had been brought to the Court by the Dutch application and Belgium had advanced a counterclaim, both were, at the same time, plaintiff and defendant[22]. Even the judgment of the Court, as we will see, was marked by such symmetry. Second, for the first time the Court was faced with a formal request to condemn one party to perform certain acts and refraining from doing other acts. This was a marked departure from previous practice and, at the

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17 For the Application of the Netherlands, see: *PCIJ*, Ser. C, N. 81, at 10–15.

18 *Diversion of Water from the Meuse*, Judgment, at 28.

19 *Ibid.*

20 *Diversion of Water from the Meuse*, Judgment, at 32.

21 On the peculiarity of the *Diversion of Water from the Meuse* case, see Verzijl, *op.cit.*, at 459.

22 Counterclaims were not mentioned in the Statute of the Permanent Court but were provided for in the Rules of Court, in particular the new Rules of March 11, 1936. Article 63 revised the rule on of counterclaims contained in article 40.2.(4) of the Rules of March 24, 1922. Counterclaims are quite rare in the practice of international tribunals. Usually there are two separate applications that are subsequently joined by the Court, as the PCIJ did in the case of the *Legal Status of the South-Eastern Territory of Greenland*, Orders of August 2 and 3, 1932, *PCIJ*, Ser. A/B, No. 48 (1932), at 268; *idem.*, Orders of May 11, 1933, Ser. A/B, No. 55 (1933), at 157.

time, still foreign to the Court[23]. Third, on May 13 to 15, 1937, for the first time in the history of the Court the bench went to the spot to visit installations, canals, locks and waterways to which the dispute related[24]. The proximity of the contended canals to the seat of the Court (The Hague) probably justified the measure. However, only one other time, and in a remarkably similar case, did the judges of the World Court carry out such a visit: the Gabcíkovo–Nagymaros case[25].

After the exchange of written pleadings, oral arguments by the agents of the parties were heard by the Court from May 4 through May 21, 1937[26]. The arguments of the parties may be conveniently summarized as follows: The Netherlands affirmed that the 1863 Treaty made the intake at Maastricht, in Dutch territory, the only lawful source of water for all canals situated downstream from Maastricht. The feeding of the Albert Canal with water taken from the Meuse elsewhere than Maastricht was, therefore, contrary to the spirit and letter of that Treaty[27]. In other words, the Dutch Government claimed that the 1863 Treaty created a single faucet for the feeding of waterways downstream from Maastricht and that only The Netherlands could control the flow of water in the region.

Belgium, obviously, rejected this contention and affirmed that feeding canals with water taken from elsewhere than at the Maastricht intake, and in any event wholly in Belgian territory, was consistent with the 1863 Treaty. The Netherlands had not acquired with the 1863 Treaty, nor did Belgium ever intended to concede, a monopoly on the control of all waters downstream from Maastricht. Moreover, Belgium counterclaimed that if, as The Netherlands asserted, the canals below Maastricht were to be fed with water taken only at the intake of Maastricht, then the same had to be applied not only to the canals of the left bank of the Meuse, like the Albert, but also to those on the right, like the Juliana[28]. By not feeding the Juliana Canal from the single Maastricht intake The Netherlands had violated the 1863 Treaty.

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23 As Judge Anzilotti explained in his Dissenting Opinion: "In my opinion the word *condemn* ("*condamner*") is not entirely appropriate in international proceedings; in any case, it is employed in a sense which is only remotely connected with that of *condemnation* in national law". *Diversion of Water from the Meuse*, Judgment, at 49.

24 Neither the Statute of the PCIJ, nor the Rules of the Court did provide for an on-site visit by the judges. Nevertheless, at the suggestion of Belgium, the Court decided in favor of such a visit, relying on article 48 of the Statute according to which "the Court shall make orders for the conduct of the case".

25 *Infra*, Ch. III.7.

26 The Dutch agent was Professor B.M. Telders, the Belgian agent, M. de Ruelle. Moreover, on behalf of the Belgian Government arguments were also presented by Mr. Marcq, as counsel, and Mr. Delmer, as technical adviser.

27 *Diversion of Water from the Meuse*, Judgment, at 17–20.

28 *Ibid.*, at 31–32.

6.5. The Judgment

The Court rendered its judgment on June 28, 1937, only 11 months after the submission. The judgment, rendered by a majority of 10 votes to three, entirely rejected both the Dutch claim and the Belgian counterclaim[29]. Specifically, the Court found that the letter of the 1863 Treaty did not provide for exclusive control of waters by The Netherlands[30]. In the absence of explicit provisions, such an exclusive control could not be presumed because it would have violated the principle of equality of sovereign States[31]. Moreover, regarding canals wholly in the territory of the parties, such as the Juliana and Albert canals, it held that the parties were at liberty to modify, enlarge or transform them and even to increase the volume of water from new sources, provided that the diversion of water at the Maastricht intake and the volume of water discharged therefrom was not affected[32]. Finally, it decided that the 1863 Treaty did not apply to the canals below Maastricht situated on the right bank of the Meuse[33].

In other words, while the parties had appeared before the Court because they could not find a mutually agreeable way to reconcile an anachronistic treaty with the needs of their expanding economies, the Court sent them back home by telling them first that against all evidence the 1863 Treaty was still alive, and second that all work undertaken by the parties, though of a unilateral nature, was perfectly consistent with a legal regime which had its sole *raison d'être* in the continuous cooperation of the parties. In other words, the Court took a very narrow approach to a complex issue by giving the principle *pacta sunt servanda* priority over all other considerations. The parties could build as many canals as they wanted, provided they were entirely within their respective territories, and provided they did not jeopardize the functioning of the Maastricht intake, which had been sanctified by the 1863 Treaty. This ruling applied even as they were entering into stiff competition for a limited amount of water that was not enough to feed all canals on both sides of the border.

Such an astonishing disregard for factual elements was not confined to the laws of hydraulics. Indeed, even though the history of the dispute made clear that

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29 Of the fifteen judges making up the Court according to the Statute, only thirteen were able to take part in the decision. The Colombian Judge Urrutia was absent on leave and the Norwegian judge, A. Hammarskjöld, died a few days after the judgment was given. The three dissenting judges were not the same persons for the two groups of claims. The Dutch submissions won the assent, at least in part, of Judges Altamira (Spain), Anzilotti (Italy) and Van Eysinga (The Netherlands); The Belgian submissions, at least in part, that of Judges Hurst (Great Britain), Anzilotti (Italy) and De Visscher (Belgium). Judge Hudson (USA), while agreeing with the operative part, raised objections to the statement of reasons of the Court.

30 *Diversion of Water from the Meuse*, Judgment, at 17–20.

31 "[I]t would be only possible to agree with the contention of the Netherlands Agent that the Treaty had created a position of inequality between the contracting parties if that were expressly indicated by the terms of the Treaty". *Ibid.*, at 20.

32 *Ibid.*, at 26.

33 "...the [single] feeder [at Maastricht] is situated on the left bank of the Meuse and..., in consequence, the canals which it has to feed are also on the left bank of the river...It is manifest that an intake situated on the left bank of the river cannot be regarded as intended to feed canals situated on the right bank. The [Juliana Canal] cannot therefore come under the regime of water supply instituted by the Treaty". *Ibid.*, at 31.

the underlying reason for the dispute was the commercial rivalry between Rotterdam and Antwerp and the struggle to control communications with the *hinterland*, the Court decided nonetheless to confine its action to an issue of the law of treaties. In the words of the Court itself:

> "From the history of the dispute given above, it will be seen that one of the difficulties in achieving a settlement of the differences between the two States has been the Belgian desire to obtain The Netherlands' consent to the construction of a new canal connecting Antwerp and the Rhine, a point upon which one may infer that The Netherlands Government [has felt itself] unable to accede to the wishes of the Belgian Government because of the commercial rivalry between Antwerp and Rotterdam. *With this aspect of the question the Court is in no way concerned.* Its task is limited to a decision on the legal points submitted to it as to whether...certain work constructed by the Belgian Government...infringe[s on] the Treaty of 1863 and, [regarding] the Belgian counterclaim, as to whether...certain work constructed by The Netherlands Government...constitute[s] an infringement of the Treaty of 1863." (emphasis added)[34].

As we will see, some 60 years later, in the *Gabcíkovo–Nagymaros* case, the World Court took a similarly narrow approach[35], perhaps with equally dismaying results.

6.6. The Aftermath

The judgment altered very little in the relationship between the two States because the Court rejected the submissions of both parties without really eliminating the underlying reasons for the dispute. The Albert Canal was completed in 1939 and soon after World War II broke out, putting a stop to the attempts to negotiate a settlement and sweeping away the Permanent Court of International Justice itself. Negotiations on a comprehensive agreement to deal with the issue of the common waters resumed after the end of the conflict but to no avail. Belgium and The Netherlands could not agree but on narrow and partial solutions without really addressing the fundamental issue: the amount of water from the Meuse to be used by each of them.

On February 24, 1961, the two States concluded an agreement to establish a direct connection between the Juliana and Albert canals of four kilometers in length at the height of Briegden[36]. An exchange of notes dated on the same day[37] modified some of the provisions of the 1863 Treaty to allow The Netherlands to carry out certain work to implement the Juliana–Albert connection[38]. Yet, the

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34 *Ibid.*, at 16.

35 *Infra*, Ch. III.7.

36 Treaty for the Improvement of the Connection between the Juliana Canal and the Albert Canal, Brussels, February 24, 1961, *UNTS*, Vol. 474, pp. 186–194.

37 Exchange of Notes Constituting an Agreement Concerning the Treaty of May 12, 1863 to Regulate the Regime for the Diversion of Water from the River Meuse and the Convention of January 11, 1873, amending that Treaty, Brussels on February 24, 1961, *UNTS*, Vol. 474, pp. 162–166.

38 Namely, to demolish lock No. 19 on the Zuid-Willemsvaart and to replace a feeder culvert on the same canal with a new one north of the projected canal connection. Para. 1 and 2 of the letter of the Ambassador of the Netherlands.

problem of the substantive provisions of the 1863 Treaty remained unadressed. To this end the parties undertook, by the same Exchange of Notes, to hold consultations in order to adapt the 1863 Treaty to the new situations within three years[39]. Once again, however, nothing was concluded.

In 1963 a treaty was concluded between Belgium and The Netherlands on the canal linking the Scheldt to the Rhine[40]. Under this agreement, Belgium was required to compensate The Netherlands, within a period of five years, for the freshwater which flows through this canal from The Netherlands to the harbor of Antwerp. Belgium was to return the same amount and quality of water flowing through the canal, and the compensation was to be effected somewhere along the common border. However, the only river from which Belgium would have been able to provide extra fresh water was the Meuse, and in the absence of an agreement to regulate the regime of its waters, the restitution had to be made under the regime established by the long-since voided Treaty of 1863.

With the 1963 Treaty, therefore, the Scheldt and the Meuse linked their destinies, which obviously did not help resolve the issue of the diversion of the Meuse but added a further dimension to the problem. Moreover, with industrialization, urban development and population growth, increased adverse effects on water quality have become an issue[41]. Finally, the gradual federalization of Belgium, which started during the 1970s, reduced the negotiating powers of Brussels and increased the competencies of the regions (Wallonia, Flanders and Brussels-Capital), particularly in water management issues, thereby multiplying the number of players. As a result, in 1975, a further attempt to conclude a comprehensive agreement on the quantitative and qualitative aspects of the waters of both the Scheldt and Meuse failed, mainly because of the refusal of Wallonia to pay the cost of measures (i.e. the construction of reservoirs in the Ardennes to ensure water supply for the Meuse) that would have benefited only Flanders, the region bordering The Netherlands[42].

The spell that doomed decades of negotiations to failure was overcome only recently. The conclusion of the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes[43], and the 1993 Belgian Constitutional reform which gave regions the capacity to conclude treaties in the areas of their competence[44], provided the impetus for the conclusion of treaties concerning the quality and quantity of water on the Meuse and Scheldt. The qualitative aspects were addressed by the Agreement on the Protection of the

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39 *Ibid.*, para. 3.

40 Treaty between Belgium and the Netherlands on the Linking of the Scheldt to the Rhine, Antwerp, May 13, 1963, *UNTS*, Vol. 540, at 56–81.

41 On the issue of the quality of the waters of the Meuse and its preservation see, in general, Van Dunné, J.M. (ed.), *Non-point Source River Pollution: The Case of the River Meuse*, London, Kluwer, 1996, pp. XXIX–245. See also Bouchez, *op.cit.*, at 280.

42 Bouman, N., "A New Regime for the Meuse", *RECIEL*, Vol. 5, 1996, pp. 161–168, at 162.

43 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (101).

44 For an assessment of the impact of the Belgian constitutional reform of May 5, 1993, on its international relations, see the special issue of the *Revue belge de droit international*, Vol. 27, 1994, pp. 5–381. On the power of Belgian regions to conclude international agreements, see Gautier, Ph., "La conclusion des traités", *ibid.*, pp. 30–57.

Rivers Meuse and Scheldt, signed at Charleville Meziers on April 26, 1994, by France, Belgium, The Netherlands and the Regional Governments of Wallonia, Flanders and Brussels-Capital[45]. The quantitative issue, which was the object of the original dispute, was addressed by a bilateral agreement on the discharge of the Meuse, concluded between The Netherlands and Flanders in Antwerp on January 17, 1995[46].

The Agreement on the discharge of the Meuse addresses four issues[47]: first, the long-standing issue of the water diversion of the Meuse through the Zuid-Willemsvaart at Maastricht; second, the reduction of water loss of the Meuse in case of low flows; third, cooperation in the research and development of the section of the Meuse which constitutes the boundary between Belgium and The Netherlands; and fourth, compensation for freshwater losses of the Kreekrak sluices.

Each party (The Netherlands and Flanders) agrees to channel to the other party specific quantities of water of the Meuse through canals in its territory[48]. Furthermore, the parties undertake to restrict the water loss of the main stream as much as possible according to a water-saving scheme contained in an annex to the Agreement[49]. In case of low flows, the Agreement calls on Flanders and The Netherlands equally to divide the amount of waters and to share responsibility for the discharge in the tracts of the Meuse constituting the border[50]. The Agreement suspends certain provisions of the 1863 Treaty[51], and replaces other provisions in the 1963 Treaty concerning the link between the Scheldt and the Rhine[52]. Finally, article 5 establishes a Flemish–Dutch Working Group on the Regulation of Discharges of the Meuse, which is entrusted with the implementation of regulations for water diversions and for the reduction of water loss of the Meuse[53].

According to the agreement, disputes regarding the latter's interpretation or implementation have to be dealt with first by negotiations between the parties. If negotiations do not result in a settlement, at the request of either party the dispute is

45 Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments)–France–The Netherlands: Agreement on the Protection of the Rivers Meuse and Scheldt, done at Charleville Meziers, France, April 26, 1994, *ILM*, Vol. 34, 1995, pp. 851–858. On the Agreement on the Protection of the Meuse and Scheldt Rivers, see in general Gosseries, A., "The 1994 Agreement Concerning the Protection of the Scheldt and Meuse Rivers", *European Environmental Law Review*, January 1995, pp. 9–14; Bouman, *op.cit.*.

46 Verdrag tussen het Koninkrijk der Nederlanden en het Vlaams Gewest inzake de afvoer van het water van de Maas, Antwerpen, January 17, 1995, *Tractatenblad van het Koninkrijk der Nederlanden*, 1995, n. 50.

47 *Ibid.*, preamble.

48 *Ibid.*, art. 2.

49 *Ibid.*, Annex A. The water saving scheme in Annex A defines the allowed quantities of water use by each of the parties at certain levels of discharges of the Meuse.

50 *Ibid.*, art. 3.

51 *Ibid.*, art. 7.

52 *Ibid.*, art. 8.

53 Each party appoints a maximum of three members to the Working Group, including one to head their delegation. The Working Group meets when it deems necessary or at the request of one of the heads of the delegations and it takes decisions by unanimous vote. The agreement, however, does not specify whether these decisions are binding for the parties. If an emergency occurs concerning the water supply to and from the Meuse on the territory of one of the parties, the Working Group is empowered to deliberate immediately on the measures to redress the situation. *Ibid.*, Annex A, point 3.

to be submitted to a three-arbitrator tribunal for final and binding settlement[54]. The choice of arbitration rather than international adjudication by the ICJ is justified, not so much by the unfortunate judgment rendered by the PCIJ, but rather because one of the contracting parties (Flanders) is not a party to the Statute of the Court, nor could it be since it is not a sovereign State.

6.7. Assessment of the Meuse Dispute

Commenting on the judgment rendered by the PCIJ on the *Diversion of the Meuse River* case, Jan Verzijl wrote:

> "It seems to me that anyone who, after having acquainted himself with the details of this suit, examines once more the merits of modern international justice and seriously asks himself whether there is actually cause for the repeatedly expressed doubt of the value of...adjudication of international disputes...may take heart again from the judgment under review...Two neighbors constantly bickering to the detriment of both have been taught a good and mild lesson"[55].

These words were written in 1937, immediately after the Court rendered its judgment; therefore the eminent Dutch legal scholar might be excused for his excess of enthusiasm[56]. Indeed, it took 58 more years for the parties finally to adjust the 1863 Treaty to the twentieth century. Not only did the Court's judgment not resolve the dispute, but it did not even help the parties clear the road to further negotiations by setting aside contentions on narrow points of law, as happened in the case of the *Lake Lanoux* dispute. In this respect, the *Diversion of Water from the Meuse* judgment can be regarded as a net waste of time and resources that does not qualify as a propitious precedent for the subsequent adjudication of disputes concerning natural resources. It took 36 years before another environmental dispute could be brought before the World Court (*Icelandic Fisheries Jurisdiction*)[57].

However, it is legitimate to wonder whether only the Court is to be blamed for such an unsatisfactory result. As a matter of fact, the parties brought a dispute to The Hague that the Court was not in a position to settle. Although both parties were fully aware that the Treaty of 1863 no longer met the requirements of modern industrialized economies, they could not agree between themselves on how to replace an outdated agreement with a new regime that would be mutually satisfactory. Metaphorically speaking, the parties acted as those who ask a veterinarian to resuscitate their beloved dog, long dead and stiffened by rigor mortis. The veterinarian,

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54 The characteristics and powers of the Arbitral Tribunal are specified in Annex C. The umpire cannot be neither a national nor resident of the Netherlands or Belgium. In case the two parties could not agree on the appointment of the umpire, the designation will be made by the President of the ICJ. The tribunal will decide its own rules of procedure and can indicate provisional measures. Costs will be equally shared by the parties.

55 Verzijl, *op.cit.*, at 482 and 483.

56 The chapter of Verzijl's book on the jurisprudence of the World Court concerning the Meuse dispute was originally published in 1937 as: "Het proces over het Maaswater", *Nederlandsch Juristenblad*, Vol. 12, 1937, pp. 769–785 and 801–812. Verzijl, *op.cit.*, at 458, first note.

57 *Supra*, Ch. III.3.

unwilling to loose clients, tells them that against all factual evidence the poor animal is still alive and kicking and nothing has happened. They are instructed to take the dear pet back home, just put a bowl of water in front of it and wait for the miracle to happen. Who is to blame? Those asking for miracles without supplying the power to do so, or those who shy away from resolving difficult problems?

The Court was well aware of this paradoxical situation. Indeed, in his dissenting opinion, Judge Altamira observed:

> "[T]he obligations under the [1863] Treaty are perhaps restrictive, having regard to circumstances that have since developed. [However], this is certainly not a question for the Court or for a judge to examine, but it arises quite naturally from a study of the legal elements contained in the Treaty and from the knowledge of present-day conditions. As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument"[58].

The *Diversion of Water from the Meuse* case was a dispute that should have never been submitted to the Court, for the latter did not have the power to settle it. Nonetheless, The Netherlands did enter the courtroom, not so much because it believed in a positive solution to the dispute, but rather for myopic tactical reasons[59]. Article 19 of the League of Nations Covenant offered a much more suitable tool to fix the problem[60], providing that:

> "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world"[61].

However, considering the comatose state in which the League of Nations was at the end of the 1930s, referral under article 19 of the Covenant would not have been likely to produce any better results.

Again, in his individual opinion Judge Hudson wrote:

> "By their actions over a period of years, the Parties to the Treaty of 1863 have indicated that they are not satisfied with the situation as it exists under the Treaty. So many changes have taken place —not merely in the regions served by the Meuse and its dependent canals and in the technology for the control of that service, but also as a result of the recent construction of new canals— that the essentially technical arrangements concluded 74 years ago seem to have been recognized to be no longer an adequate protection for the Parties' mutual interests. Repeated efforts have been made by the Parties to negotiate a treaty to replace that of 1863, and according to statements made to the Court, hopes of such a result have not been abandoned. The judgment in this case may better serve to facilitate their future negotiations if it preserves the equality between the Parties."[62].

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58 *Diversion of Water from the Meuse*, Judgment, at 43.

59 *Supra*, Ch.III.6.3.

60 Herndl, *op.cit.*, at 189.

61 Covenant of the League of Nations, attached to the Treaty of Peace between the British Empire, France, Italy, Japan and the United States (The Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, Versailles, June 28, 1919, *CTS*, Vol. 225, at 188.

62 *Diversion of Water from the Meuse*, Judgment, at 79–80.

The preservation of the equality between the parties as a way to facilitate settlement by direct negotiations was probably the goal of the majority of the Court's judges[63]. And preserving the equality between the parties was exactly what the Court did, insofar as neither of them was found guilty of having violated the 1863 Treaty. Yet, equality could have been maintained also by deciding that both parties had violated the Treaty. This would have sanctioned not only the behavior of two States which neglected international cooperation to pursue a narrow-focused self-interest, but it would have also stressed the anachronistic character of the 1863 Treaty, compelling them to amend it. The complete defeat of both as applicants ultimately amounted to the full rehabilitation of both as dutiful members of the international community[64]. Yet, by blessing the canalization work on both sides of the border, the Court sent the wrong signal. Belgium and The Netherlands could continue on carrying out unilateral canalization work on their territory because the circumstances under which they would have been found in violation of international law were so narrowly defined that the possibility of being legally sanctioned was remote. Under these circumstances, there were no real incentives to update the 1863 regime.

The judges took a surprisingly narrow approach to the dispute. As Judge Anzilotti, in his dissenting opinion, regretted:

> "In my opinion, in a suit the main object of which was to obtain the interpretation of a treaty with reference to certain concrete facts,...the Court...should not have confined itself to a mere rejection of the submissions of the Applicant; it should also have expressed its opinion on the submissions of the Respondent; and, in any case, it should have declared what it considered to be the correct interpretation of the Treaty."[65]

The narrow construction of the Court's mandate, moreover, completely overshadowed recourse to other possible sources of law. Despite the fact that the Statute of the World Court allowed it go beyond the narrow treaty regime by applying customary international law and general principles of law, the majority confined itself to the interpretation of the anachronistic 1863 Treaty. Admittedly, at the time the *Diversion of Water from the Meuse* dispute took place, there were not many relevant rules of customary international law that could help the Court. The *Trail Smelter* rule had not yet come into being, and the international law relating to international waterways was still in its infancy. Nonetheless, the dispute involved important *bona fide* issues and duties between neighbors that customary international standards prevailing at that time could have addressed. Again, considerations of consultation and prior notification, a central issue in the later *Lake Lanoux* arbitration, remained completely outside the scope of this case. The time was ripe to address these issues, but the Court did not seize the opportunity. It would take another 12 years before reverting to the principle of *sic utere tuo ut alienum non laedas* with the *Corfu Channel* dispute[66], and only with the 1957 *Lake Lanoux* arbitration was the principle affirmed that States must notify and consult each other about activities likely to have detrimental transboundary effects (something that nowadays is considered a basic element of international relations).

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63 Verzijl, *op.cit.*, at 483.
64 *Ibid.*, at 482.
65 *Diversion of Water from the Meuse*, Judgment, at 45.
66 *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment, ICJ Reports 1949, pp. 4–127, at 22.

7. THE *GABCÍKOVO–NAGYMAROS* DISPUTE (HUNGARY/SLOVAKIA)

7.1. Introduction

The *Gabcíkovo–Nagymaros* dispute arose out of a joint Slovakian–Hungarian project (the so-called Gabcíkovo–Nagymaros Project) to construct a series of hydraulic works on the part of the Danube River which forms the common border of the two States[1]. While the origin of the dispute can be fixed at the beginning of the 1980s, when Hungary started questioning the implementation of the project, its roots are more remote and can be traced back to the 1950s, when the project itself began taking shape.

The disagreement over the Gabcíkovo–Nagymaros Project is one of the most recent instances of an environmental dispute addressed by an international adjudicatory body. On September 25, 1997 the International Court of Justice rendered its judgment on this highly controversial case[2]. The Court found, *inter alia*, that Hungary and Slovakia were under an obligation to negotiate a solution of the dispute, but, as of this writing, such an agreement has not been concluded. On September 3, 1998, Slovakia asked the Court an additional judgment, accusing Hungary for the failure of negotiations. The case is currently pending before the Court, and a ruling on the sequel of the case is not expected before the end of the year 2001.

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1 On the *Gabcíkovo–Nagymaros* dispute see, in general, Fitzmaurice, J., *Damming the Danube: Gabcíkovo and post-Communist Politics in Europe*, Boulder, Co., Westview Press, 1996, pp. XII–137; Williams, P. R., "International Environmental Dispute Resolution: The Dispute between Slovakia and Hungary Concerning Construction on the Gabcíkovo–Nagymaros Dams", *Columbia Journal of Environmental Law*, Vol. 19, 1994, pp. 1–57; Berrisch, G.M., "The Danube Dam Dispute under International Law", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 231–281; Cepelka, C., "The Dispute over the Gabcíkovo–Nagymaros Systems of Locks is Drawing to a Close", *Polish Yearbook of International Law*, Vol. 20, 1993, pp. 63–73; Robert, E., "L'affaire relative au projet Gabcíkovo–Nagymaros: Un nouveau conflit en matiere d'environnement devant la Cour internationale de Justice?", *Studia Diplomatica*, Vol. 47, 1994, N.5, pp. 17–52; Nagy, B., "Divert or Preserve the Danube? Answers 'in Concrete'; A Hungarian Perspective on the Gabcíkovo–Nagymaros Dam Dispute", *RECIEL*, Vol. 5, 1996, pp. 138–144; Eckstein, G., "Application of International Water Law to Transboundary Groundwater Resources and the Slovak–Hungarian Dispute over Gabcíkovo–Nagymaros", *Suffolk Transnational Law Review*, Vol. 19, 1995, pp. 67–116; Hoenderkamp, E., "The Danube: Damned or Dammed? The Dispute between Hungary and Slovakia Concerning the Gabcíkovo–Nagymaros Project", *Leyden Journal of International Law*, Vol. 8, 1995, pp. 287–310; Bekker, P.H.F., "Gabcíkovo–Nagymaros Project", *A.J.I.L.*, Vol. 92, pp. 273–278; Liska, M. B., "Development of the Slovak–Hungarian Section of the Danube", in Blake, G./Hildesley, W./Pratt, M./Ridley, R./Schofield,C. (eds.), *The Peaceful Management of Transboundary Resources*, London, Graham & Trotman, 1995, pp. 175–185; Nagy, B., "The Danube Dispute: Conflicting Paradigms", *New Hungarian Quarterly*, Vol. 128, 1992, pp. 56–65; "Hungary Dam", <http://gurukul.ucc.american.edu/ted/hungary.htm> (Site last visited on October 10, 1997). For comments on the judgment given by the International Court of Justice, see, *infra* note 76.

2 *Gabcíkovo–Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports, 1997, pp. 1–72.

While the recentness and evolving nature of the *Gabcíkovo–Nagymaros* dispute necessarily prevents a full examination of the impact of the Court's judgment on the underlying environmental problem, and thus limits the lessons to be learned from it, nonetheless it could not be easily excluded from this study. Not only does the judgment rendered by the International Court in many respect embody many features of past adjudications, but it also heralds some of the issues that adjudication of international environmental disputes will be required to cope with in the future.

7.2. The Issue

The importance of the Danube River to the history and economy of Central and Eastern Europe cannot be overestimated. The mere description of its flow suffices to illustrate it. The Danube originates in Germany, in the Black Forest; it flows through nine States and ten cities with more than 100,000 inhabitants, including four State capitals (Vienna, Bratislava, Budapest and Belgrade). After leaving the German territory, it flows through Austria, enters Slovakia and soon after forms the international border with Hungary. Then it cuts Hungary in two and serves as border between Croatia and Yugoslavia, subsequently between Yugoslavia and Romania and again between Bulgaria and Romania. Finally, after a run of 2,860 kilometers, it forms a delta, shared by Romania and Ukraine and empties into the Black Sea. No wonder, therefore, that during the centuries the Danube has been a preferential channel of communication between Western and Eastern Europe, and that its control gave the Habsburgs a key role in European politics for more than 700 years[3].

The Danube was internationalized, that is to say, opened to navigation by all riparian States, by the Danube Convention of 1856, adopted following the defeat of Russia in the Crimean War[4]. The European Danube Commission, which also included non-riparian great powers such as Great Britain, France, Prussia, Russia and Sardinia, was established both as a symbol of the river's international status and to ensure freedom of navigation[5]. Following World War I, the Versailles peace settlement led to the establishment of a new Danube Commission in 1921 comprising seven riparian States (Germany, Austria, Czechoslovakia, Hungary, Yugoslavia, Bulgaria and Romania), plus Great Britain, France and Italy as

3 On the legal regime of navigation on the Danube, see in general, Blociszewski, J., "Le regime international du Danube", *Hague Academy of International Law, Collected Courses*, Vol. 11, 1926–I, pp. 255–268; Marcantonatos, L.G., 'Les pouvoirs juridictionnels de la Commission Européene du Danube", *Revue de droit international*, Vol. 17, 1936, pp. 469–533; Kunz, J.L, The Danube Regime and the Belgrade Conference", *A.J.I.L.*, Vol. 43, 1949, pp. 104–113; Imbert, L., "Le régime juridique actuel du Danube", *R.G.D.I.P.*, Vol. 55, 1951, pp. 73–94; Bokor-Szegö, H., "La Convention de Belgrade et le régime du Danube", *A.F.D.I.*, Vol. 8, 1962, pp. 192–214; Vitányi, B., *The International Regime of River Navigation*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, XIII–441 pp.; Gorove, S., *Law and Politics of the Danube: An Interdisciplinary Study*, The Hague, Nijhoff, 1964, XIV–171 pp.

4 General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey and Russia, Paris, March 30, 1856, *CTS*, Vol. 114, pp. 410–420.

5 *Ibid.*, art. 15–18.

guarantors of the agreement[6]. The USSR was, however, excluded. The 1939–1945 war swept away all cooperative arrangements in Europe, and the Danube Convention of 1921 was no exception. In the aftermath of World War II, a new Danube regime was established by a convention concluded in Belgrade in 1948[7]. However, as the cold war was rapidly opening a drift between Eastern and Western Europe, the Danube was cut in two. Indeed, only communist States of the Eastern block acceded to the new regime while the Western States which had been part to the 1921 Convention remained outside.

In the early 1950s, the Soviet Union and the other riparian countries of the Eastern block, by now the only members of the new Danube Commission, became increasingly interested in improving navigability of the river to use it to have access to the heart of Europe. Indeed, while the Danube is largely navigable year-round, for three months a year during summer it used to become intermittently impassable in the approximately 200 kilometers between Bratislava, in Czechoslovakia, and Nagymaros, in Hungary, where the river gradient decreases markedly, creating a large alluvial plain of gravel and sand sediment[8].

Negotiations between Czechoslovakia and Hungary to improve navigation in the common section of the Danube started in 1951[9]. However, while the original intent of the project was to by-pass the shallow waters between Bratislava and Nagymaros, during the 1970s, because of the sharp increase of oil prices, the project was refocused on energy production. On September 16, 1977, Czechoslovakia and Hungary concluded a treaty "concerning the construction and operation of the Gabcíkovo–Nagymaros System of Locks"[10] (hereinafter the "1977 Treaty") with the aim to attain

> "the broad utilization of the natural resources of the Bratislava–Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties"[11].

The Project promised four main benefits: the production of electric power at low cost[12]; control of floods[13]; enhanced navigability[14]; and preservation of the

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6 Convention Instituting the Definitive Statute of the Danube, Paris, July 23, 1921, *LNTS*, Vol. 26, pp. 174–199.

7 Convention Concerning the Regime of Navigation on the Danube, Belgrade, August 18, 1948, *UNTS*, Vol. 33, pp. 181–225.

8 See Map 7.

9 Fitzmaurice, *op.cit.*, at 75–76.

10 Czechoslovakia–Hungary: Treaty Concerning the Construction and Operation of the Gabcíkovo–Nagymaros System of Locks, Budapest, September 16, 1977, *ILM*, Vol. 32, 1993, pp. 1247–1258.

11 *Ibid.*, preamble.

12 The Gabcíkovo plant would have an installed capacity of 720 megawatts. For the Nagymaros Dam the figure was 158 megawatts. Fitzmaurice, *op.cit.*, at 80.

13 In 1954, 33,000 hectares of the Hungarian Danube plain were flooded, while in 1965 the flooding of 100,000 hectares caused in Slovakia the evacuation of some 65,000 people. Fitzmaurice, *op.cit.*, at 77.

14 The two countries would create a navigational inland waterway which met the Danube Commission's recommendations of a channel 180 meters wide by 3.5 meters deep. Fitzmaurice, *op.cit.*, at 77.

ecosystem of the inland delta[15]. How all these goals could be reconciled was not clear. While the Treaty did not explicitly establish priority for one objective over the other, even a superficial reading of it showed the primacy of the hydroelectric element over the others. To attain these goals the agreement provided for the construction, *inter alia*, of three dams: One located at Dunakiliti, where the Danube forms the common border, to divert 95 percent of the waters into an artificial canal lined with asphalt and plastic, 300–650 meters wide, 9–18 meters high and 25 kilometers long, located in Slovak territory and running parallel to the old Danube riverbed; one in the middle of the new canal, at the height of Gabcíkovo, to regulate the water level and to generate hydroelectric power; and another dam 100 kilometers downstream of the canal, at Nagymaros, to generate additional hydroelectric power. Moreover, in order to maximize efficient energy production, the dam at Gabcíkovo was to release water twice a day at electric energy peak consumption hours. The Nagymaros Dam, therefore, was also intended to stop the shock wave created at Gabcíkovo by the cyclic release of water. These works were to be carried out jointly by the two States, expenses and benefits being shared, and they constituted, according to the 1977 Treaty, "a single and indivisible operational system of works"[16].

7.3. The Dispute

Work started in 1978, but after a few years, in the beginning of the 1980s, Hungary, caught up in a deepening economic crisis, realized that it had neither the technological nor financial wherewithal to continue construction. Moreover, increasing skepticism by Hungarian hydrologists and biologists led Hungary to suspend construction of its share of the Project and to initiate a study of the impact of the works on the Danube ecosystem. Two areas in particular were threatened by the work[17]. First, the diversion of the Danube would have deprived the river inland delta, between the Maly Danube and the Mosoni Danube, of almost 95 percent of the water flow, seriously compromising the ecosystem of the region by upsetting the system of surface and subsurface waters and impairing biodiversity, agricultural and forestry production and fisheries. Second, the reduction of speed of the water caused by the Nagymaros Dam would have allowed the sedimentation of dangerous chemical elements that normally would have been flushed away. These chemicals, by polluting the aquifer, threatened the bank-filtered wells located between Nagymaros and Budapest, which supply two-thirds of the drinking water needs for the two million inhabitants living in the Hungarian capital.

From 1981 through 1989, as the rigors of the cold war were attenuating and democratic grass-roots movements were slowly beginning to take shape in the region, public opinion against the implementation of the Project rose and the

15 By slowing down the current, the Project could prevent erosion. Moreover, directing water to the riverside forests and sidearms of the Danube would prevent desiccation of those areas. "Hungary Dam", <http://gurukul.ucc.american.edu/ted/hungary.htm> (Site last visited on October 10, 1997).

16 Treaty of 1977, art. 1.1. See Map 7 Bis.

17 Nagy, *op.cit.*, at 140–141.

hesitations of the Government in Budapest caused the project first to be slowed down[18], then accelerated[19] and finally suspended altogether. On October 27, 1989 the Hungarian Government decided to abandon the work at Nagymaros and to maintain the status quo at Dunakiliti[20]. At this point while work on the Czechoslovak side was almost complete[21], on the Hungarian side it was far from terminated[22].

Although in 1990 the Communist Party lost control of the Government in both countries and was replaced by the opposition, negotiations between the new democratic Governments of the two States did not allow to remove the impasse. As a consequence, Czechoslovakia, which until that moment had spent a large sum of money on the project, started investigating alternative solutions that could make implementation independent of Hungarian action. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube on Czechoslovak territory some 10 kilometers upstream of Dunakiliti, at Cunovo, immediately before the Hungarian border, where both river banks belong to Czechoslovakia. All work, therefore, would have been carried out on Czechoslovak territory without the need for any intervention into or by Hungary, at Dunakiliti or Nagymaros. While Variant C potentially satisfied the needs of Czechoslovakia for the production of electric power[23], nonetheless, it did not address in any way the Hungarian concerns over possible damage to the ecosystem of the old Danube riverbed which would have received a mere five percent of the original flow[24].

Following a pattern typical of several other disputes, the failure of negotiations opened the phase of unilateral actions. While Czechoslovakia started work on Variant C in November 1991, on May 19, 1992, Hungary notified Czechoslovakia of the termination of the 1977 Treaty[25]. In the meantime, the Commission of the European Communities had offered to mediate, using the leverage of the strong desire of both States to become full members of the EC as rapidly as possible. By late summer 1992, both sides were talking of referring the dispute to the ICJ as a sign of goodwill and of the fact that they were able to settle their disputes in the "Western way";

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18 In June 1981 Hungary proposed Czechoslovakia to construct the project, while Budapest would compensate Prague for its half of the construction cost through a returned electricity payment. Czechoslovakia refused responsibility for the completion of the project, but it was willing to assume some of the construction responsibilities and to provide Hungary with a four-year delay with which to secure financing for the construction of its remaining share of the project. The parties formalized this agreement in the 1983 protocol to the Treaty of 1977. Williams, *op.cit.*, at 10.

19 At the request of Hungary, Budapest and Prague signed a second Protocol on February 6, 1989, which shortened the construction period of the project by 15 months. *Ibid.*, at 11.

20 *Gabcíkovo–Nagymaros Project*, Judgment, at 20, para. 22.

21 Dunakiliti Dam was 90 percent complete, the Gabcíkovo was 85 percent complete and the by-pass canal was between 60 percent (downstream of Gabcíkovo) and 95 percent complete (upstream of Gabcíkovo). *Ibid.*, para. 31. See figure 12.

22 In the Nagymaros sector, although dikes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction. *Ibid.*

23 The new reservoir at Cunovo was in any event smaller than that originally planned at Dunakiliti and Nagymaros could not contribute to the production of electric power. However, the turbines at Gabcíkovo in 1997 supplied supply 12 percent of Slovakia's electricity.

24 See Map 7 Ter.

25 Text of Hungarian Declaration Terminating the Treaty of 1977, *ILM*, Vol. 32, 1993, pp. 1259–1290.

while continuing on their unilateral paths, a possible agreement on a joint approach to the EC mediation began to emerge[26]. On October 28, 1992, the EC and the parties concluded an agreement in London to stop work on Variant C, negotiate a provisional water management scheme and refer the dispute to the ICJ[27].

On January 1, 1993, the devolution process of Czechoslovakia reached its final stage with the divorce of Slovakia and the Czech Republic. The latter, rushing towards full integration into the West, gladly got rid of a nasty international controversy and left Bratislava to sort out what was essentially a Slovakian problem. On April 7, 1993, Slovakia and Hungary concluded a special agreement to refer the dispute to the World Court and, after ratification of both parliaments, transmitted it to the Court on July 2, 1993[28].

7.4. The Proceedings before the Court

By article 2 of the Special Agreement, Slovakia and Hungary asked the Court to decide: first, whether Hungary was entitled to suspend and, in 1989, abandon its part of the works as provided by the 1977 Treaty[29]; second, whether Slovakia was entitled to proceed to Variant C and, as of October 1992, put it into operation[30]; and third, what were the legal effects of the notification of May 19, 1992, of the termination of the 1977 Treaty by Hungary[31]. Finally, the parties asked the Court "to determine the legal consequences, including the rights and obligations of the parties, arising from its judgment"[32]. In answering these questions the Court was to apply the 1977 Treaty "and rules and principles of general international law, as well as such other treaties as the Court may find applicable"[33].

The *Gabcíkovo–Nagymaros* case is an excellent example of a recent and worrisome tendency of the States appearing before the ICJ to overstate and over-litigate the case. From the date of the signature of the Special Agreement to the date in which the judgment was rendered, on September 25, 1997, almost four and half years passed, and this extreme delay could not be attributed to the Court.

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26 Fitzmaurice, *op.cit.*, at 111–113.

27 Czech and Slovak Federation–European Commission–Hungary: London Agreement on the Gabcíkovo–Nagymaros Project, London, October 28, 1992, *ILM*, Vol. 32, 1993, pp. 1291–1292. The issue of the temporary water management pending the final judgment of the Court could not be easily settled and required a further round of negotiations. Indeed, the filling of the Cunovo Dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. After lengthy negotiations brokered by the EC, on April 19, 1995, Slovakia agreed to raise the water level in the old bed of the Danube to 400 cubic meters per second, as compared to the 2000 cubic meters of the pre-Variant C times, loosing, according to Slovakian estimations, about $10 million. "Hungary Dam", <http://gurukul.ucc.american.edu/ted/hungary.htm> (Site last visited on October 10, 1997). Such an interim agreement, however, was to expire 14 days after the judgment of the Court. Special Agreement, *infra*, note 28, article 2.1.

28 Hungary–Slovak Republic: Special Agreement for Submission to the International Court of Justice of the Differences between them Concerning the Gabcíkovo–Nagymaros Project, Brussels, April 7, 1993, *ILM*, Vol. 32, 1993, pp. 1293–1297.

29 *Ibid.*, art. 2.1.a.

30 *Ibid.*, art. 2.1.b.

31 *Ibid.*, art. 2.1.c.

32 *Ibid.*, art. 2.2.

33 *Ibid.*, art. 2.1.

In article 3 of the Special Agreement the parties decided that not only a memorial and a counter-memorial were to be exchanged, but also replies. And obviously both parties exploited to the full the time-limits allowed for the filing of each: respectively 10 months for the memorial[34], seven for the counter-memorial[35] and six months for the reply[36]. A further delay was caused at the beginning of 1997 by the request of Slovakia to produce some new documents[37]. Hungary was allowed sufficient time to comment on those documents and Slovakia to comment on Hungarian observations. The oral phase was opened on March 3 and closed on April 15, 1997, during which the Court heard the arguments and replies of no less than 12 agents and counsels for Hungary[38] and eight for Slovakia[39]. The pleadings before the Court, written and oral, reached the all-time record of 26 volumes. One could wonder whether justice was better served by having such a plethora of lawyers arguing before the Court and even doubt the capacity of the judges to read, let alone to digest, such a quantity of information. The comparison with the *Diversion of Water from the Meuse* case, surely not a technically less intricate case, is appalling[40].

On top of that, since the parties estimated that the judges of the Court could not get a detailed opinion on the facts at issue from the overabundance of material submitted, as well as a videocassette shown during the oral proceedings, a visit to the "scene of the crime" was organized. Between April 1 through April 4, 1997, for the second time in the history of the World Court, the bench left the courtroom in The Hague to visit a number of locations along the Danube and take note of the technical explanations given by the parties' representatives[41].

The result of such a clash of legal wisdom and lawyering skills of proportions worthy of Hollywood can be conveniently summarized as follows: Hungary asked the Court to declare that the 1977 Treaty had been validly terminated, that it was entitled to suspend and abandon its part of the work and that Slovakia was not entitled to proceed in building Variant C[42]. Accordingly, Hungary requested the Court to declare that Slovakia had a duty to repair the damages and loss inflicted and to

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34 *Ibid.*, art. 3.2.a.

35 *Ibid.*, art. 3.2.b.

36 This time with a time-limit set by the Court. See article 3.2.c of the Special Agreement. For the Court's order, see: *Gabcíkovo–Nagymaros Project* (Hungary/Slovakia), Order of December 20, 1994, ICJ Reports 1994, pp. 151–152.

37 *Gabcíkovo–Nagymaros Project*, Judgment, at 9, para. 7.

38 Ambassador Szénási, Prof. Valki, Prof. Kiss, Prof. Vida, Prof. Carbiener, Prof. Crawford, Prof. Nagy, Dr. Kern, Prof. Wheater, Ms Gorove, Prof. P.M. Dupuy, Prof. Sands.

39 Ambassador Tomka, Dr. Mikulka, Mr. Wordsworth, Prof. McCaffrey, Prof. Mucha, Prof. Pellet, Ms. Refsgaard, Sir Arthur Watts.

40 In the *Diversion of the Meuse* case the Dutch delegation was composed of Professor Telders alone, and that of Belgium by two lawyers and one engineer (M. De Ruelle as agent). The pleadings of the case fill just one volume of a few hundred pages: *PCIJ*, Ser. C, N. 81.

41 The other time was during the case on the diversion of the Meuse. *Supra*, Ch.III.6. See Tomka, P., "The First Site Visit of the International Court of Justice in Fulfillment of its Judicial Function", *American Journal of International Law*, Vol. 92, 1998, pp. 133–140; Thouvenin, J.M., "La descente de la Cour sur les lieux dans l'affaire relative au projet Gabcíkovo–Nagymaros", *Annuaire français de droit international*, Vol. 48, 1997, p. 333.

42 *Gabcíkovo–Nagymaros Project*, Judgment, at 9–13, para. 13 and 14.

restore the status quo ante Variant C. Conversely, Slovakia asked the Court to declare that the 1977 Treaty was still in force, that Hungary was not entitled to suspend and discontinue work, and that Slovakia was entitled to build and operate variant C. In a parallel way, Bratislava requested the Court to declare that Hungary must fulfill its own obligations under the Treaty without further delay and that it was liable to pay full compensation for the loss and damages caused.

The lawyers of the two parties posed antithetical arguments. On the one hand, Hungary claimed that it was entitled to suspend the application of the 1977 Treaty because of the existence of a "state of ecological necessity"[43]. Slovakia both doubted the existence of the circumstances which could justify an "ecological necessity" and its validity as a cause for the suspension of a treaty under the law of treaties[44]. On the other hand, Slovakia invoked three different reasons according to which it was entitled to proceed with Variant C: first, the so-called principle of approximate application[45]; second, the duty to mitigate the damage resulting from Hungary's unlawful actions[46]; and third, the fact that its work was in the nature of a countermeasure[47]. Hungary rejected the existence of the "principle of approximate application" in international law[48]; second, it claimed that the principle of the "mitigation of damage" had only to do with the quantification of loss and could not serve as an excuse for unlawful conduct[49]; and third, that Variant C could not be considered a countermeasure because Hungary had not committed any international wrong[50].

On the question of the legal effect of the notification of termination by Budapest, the lawyers of Hungary presented five arguments in support of its lawfulness and, thus, effectiveness: state of necessity[51], impossibility of performance[52], fundamental change of circumstances[53], material breach by Czechoslovakia[54], and development of new norms of international environmental law[55]. Slovakia contested each and every one of these grounds. Finally, on the question of the legal consequences arising out of the judgment of the Court, Hungary claimed that it was entitled to 50 percent of the natural flow of the Danube at the point at which it crosses the boundary[56], indicated that a joint environmental impact assessment of the region and of the future of Variant C structures was to be carried out[57], and proposed a lump-sum settlement for the question of eventual financial accountability[58]. Slovakia stated that Hungary must

43 *Ibid.*, at 29, para. 40.
44 *Ibid.*, at 31, para. 44.
45 *Ibid.*, at 43, para. 67.
46 *Ibid.*, at 43, para. 68.
47 *Ibid.*, at 44, para. 69.
48 *Ibid.*, at 44, para. 71.
49 *Ibid.*
50 *Ibid.*
51 *Ibid.*, at 49, para. 93.
52 *Ibid.*, at 53, para. 97.
53 *Ibid.*, at 50–51, para. 95.
54 *Ibid.*, at 51–52, para. 96.
55 *Ibid.*, at 53, para. 97.
56 *Ibid.*, at 62–63, para. 125.
57 *Ibid.*, at 63, para. 125.
58 *Ibid.*, at 63, para. 126.

make reparation for the damage inflicted by its failure to comply with its obligations[59] and that such compensation should take the form of a *restitutio in integrum*, that is to say, of a return by Hungary, at a future time, to its obligations under the 1977 Treaty, plus a payment[60]. Finally, it called on Hungary to give the appropriate guarantees that it would abstain from preventing the application of the 1977 Treaty and the continuous operation of the system[61].

7.5. The Judgment

On September 25, 1997, some eight years after Hungary had stopped its work and five years since Slovakia started operating Variant C, the Court rendered its judgment[62]. The richness of the arguments and counter-arguments of the parties necessarily called for an articulated answer to the three original straightforward questions[63]. Regarding article 2.1 of the Special Agreement, the ICJ made four different findings: by 14 votes to one that Hungary was not entitled to suspend works[64]; by nine to six that Slovakia was entitled to build Variant C[65]; by 10 to five that Slovakia was not entitled to put variant C in operation[66]; and by 11 to four that the notification of termination by Hungary did not terminate the Treaty[67]. Regarding the legal consequences arising from its judgment, the Court decided by 12 votes to three that Slovakia was the successor to Czechoslovakia in the Treaty of 1977[68]; by 13 to two that Hungary and Slovakia were under an obligation to negotiate a solution that could ensure the attainment of the objectives of the 1977 Treaty in light of the "prevailing situation"[69]; by 13 to two that unless the Parties otherwise agreed, the future operational regime must be joint[70]; by 12 to three that each party had to compensate the other for the damages caused[71]; and by 13 to two that the settlement of accounts for the construction and operation of the work must be effected in accordance with the relevant provisions of the 1977 Treaty[72].

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59 *Ibid.*, at 64, para. 129.
60 *Ibid.*
61 *Ibid.*
62 President Schwebel (USA), Vice-President Weeramantry (Sri Lanka), Judges Oda (Japan), Bedjaoui (Algeria), Guillaume (France), Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Koroma (Sierra Leone), Vereshchetin (Russia), Parra-Aranguren (Venezuela), Kooijmans (Netherlands), Rezek (Brazil), Szubiszewski (judge *ad hoc* for Slovakia).
63 Judge Parra-Aranguren even complained about the fact that the Court decided not to vote separately on the issue of compensation due respectively by Hungary and Slovakia and by Slovakia to Hungary, lamenting the curtailment "of freedom of expression". See Judge Parra-Aranguren's Dissenting Opinion.
64 Judge Herczegh dissenting.
65 President Schwebel and Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer and Rezek dissenting.
66 Judges Oda, Koroma, Parra-Aranguren and Skubiszewski dissenting.
67 President Schwebel and Judges Herczegh, Fleischhauer and Rezek dissenting.
68 Judges Herczegh, Fleischhauer and Rezek dissenting.
69 Judges Herczegh and Fleischhauer dissenting.
70 Judges Herczegh and Fleischhauer and dissenting.
71 Judges Oda, Koroma, Vereshchetin dissenting.
72 Judges Herczegh and Fleischhauer and dissenting.

It is not the purpose of the present study to analyze how the Court came to these conclusions. Suffice to say that certain passages, particularly the decision to distinguish between the construction and the effective operation of Variant C[73], and that pertaining to the continuing existence of the 1977 Treaty[74], have been the most debated within the Court[75], and that in the future they will very likely cause international legal scholars to let rivers of ink flow[76]. What is important to underline here is that the Court, once again (as it did in the Diversion of the Meuse dispute[77]), basically

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73 *Gabcíkovo–Nagymaros Project*, Judgment, at 44–46, para. 72–79 and at 48, para. 88.

74 *Ibid.*, at 48–57, para. 89–110.

75 In particular see the declarations by Schwebel, Rezek; the separate opinion by Koroma; the dissenting opinion by Fleischhauer, Vereshchetin, Parra-Aranguren, Skubiszewski, Bedjaoui, Ranjeva and Herczegh.

76 These are just a few of the scholarly articles that have been published during last two years on the judgment: Bourne, C., "The Case Concerning the Gabcíkovo–Nagymaros Project: An important Milestone in International Water Law", *Yearbook of International Environmental Law*, Vol. 8, 1997, pp. 6–12; Boyle, A., "The Gabcíkovo–Nagymaros Case: New Law in Old Bottles", *ibid.*, pp. 13–20; Canelas de Castro, The Judgment in the Case Concerning the Gabcíkovo–Nagymaros Project: Positive Signs for the Evolution of International Water Law", *ibid.*, pp. 21–31; Klabbers, J., The Substance of Form: The Case Concerning the Gabcíkovo–Nagymaros, Environmental Law, and the Law of Treaties", *ibid.*, pp. 33–40; Stec, S. / Eckstein, G., "Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabcíkovo–Nagymaros Project", *ibid.*, pp. 41–50; Dixon, M., "The Danube Dams and International Law", *Cambridge Law Journal*, Vol. 57, 1998, pp. 164; Kiss, A.Ch., "Legal Procedures Applicable to Interstate Conflicts on Water Scarcity: the Gabcíkovo Case", in Blake, G./Chia, L./Grundy-Warr, C./Pratt, M./Schofield C., (eds.), *International Boundaries and Environment Security: Frameworks for Regional Cooperation*, London, Kluwer, 1997, pp. 80–99; Koe, A., "Damming the Danube: the International Court of Justice and the Gabcíkovo–Nagymaros Project (Hungary v. Slovakia)", *The Sydney Law Review*, Vol. 20, 1998, pp. 612–629; Kovacs, P., "Quelques considérations sur l'appréciation et l'interprétation de l'arrêt de la Cour internationale de Justice, rendu dans l'affaire Gabcíkovo–Nagymaros", *German Yearbook of International Law*, Vol. 41, 1998, pp. 252–266; Maljean-Dubois, S., "L'arrêt rendu par la Cour internationale de Justice le 25 septembre 1997 en l'affaire relative au projet Gabcíkovo–Nagymaros (Hongrie c./ Slovaquie)", *Annuaire français de droit international*, Vol. 48, 1997, p. 286; Okowa, P. N., "Case Concerning the Gabcíkovo–Nagymaros Project (Hungary/Slovakia)", *International and Comparative Law Quarterly*, Vol. 47, 1998, pp. 688–697; Reichert-Facilides, D., "Down the Danube: the Vienna Convention on the Law of Treaties and the Case Concerning the Gabcíkovo–Nagymaros Project (ICJ, The Hague, September 25, 1997)", *International and Comparative Law Quarterly*, Vol. 47, 1998, pp. 837–854; Sohnle, J., "Irruption du droit de l'environnement dans la jurisprudence de la CIJ: l'affaire Gabcíkovo–Nagymaros", *Revue générale de droit international public*, Vol. 102, 1998, pp. 85–121; Verhoosel, G., "Gabcíkovo–Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court", *European Environmental Law Review*, Vol. 6, 1997, pp. 247–253; Weckel, Ph., "Convergence du droit des traité et du droit de la responsabilité internationale à la lumière de l'Arrêt du 25 septembre 1995 de la Cour internationale de Justice relatif au projet Gabcíkovo–Nagymaros (Hongrie–Slovaquie)", *Revue générale de droit international public*, Vol. 102, 1998, p. 647; Wellens, K., "The Court's Judgment In The Case Concerning The Gabcíkovo–Nagymaros Project (Hungary/Slovakia): Some Preliminary Reflections", in Karel Wellens K., (ed.), *International Law: Theory And Practice: Essays In Honour Of Eric Suy*, The Hague, Nijhoff, 1998, pp. 765–801. See also, Fehérvary, A., *Environmental Law, State Responsibility And The Law Of Treaties In An International River Conflict: The Gabcíkovo–Nagymaros Project And The "Variant C" Solution*, mémoire, Genève, Institut Universitaire de Hautes Etudes Internationales, (HEIDS 321); Tamiotti, L., *L'état du droit international de l'environnement dans l'affaire du projet Gabcíkovo/Nagymaros (Hongrie/Slovaquie)*, mémoire, Genève, Institut Universitaire de Hautes Etudes Internationales, 1998. (HEIDS 676).

77 *Supra*, Ch. III.6.