

INTERNATIONAL COURT OF JUSTICE

1973
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General List
No. 56

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2 February 1973

FISHERIES JURISDICTION CASE

(FEDERAL REPUBLIC OF GERMANY *v.* ICELAND)

JURISDICTION OF THE COURT

Composition of the Court—Access to the Court of State not a party to the Statute—Security Council resolution of 15 October 1946—Relevance of date of deposit of declaration of acceptance of jurisdiction—Jurisdiction of the Court—Applicability of a compromissory clause providing for reference to the Court on the occurrence of a specified event—Failure of one party to appear—Examination of question of jurisdiction by the Court proprio motu—Statute, Article 53—Compromissory clause in Exchange of Notes—Statute, Article 36, paragraph 1—Determination of scope and purpose of agreement—Relevance of preparatory work—Initial validity of clause—Question of duress—Duration of clause—Implementation of clause subject to condition—Changed circumstances of fact and law as ground of termination of agreement—Conditions for application of doctrine of fundamental change of circumstances—Effect of changed circumstances in relation to compromissory clause.

JUDGMENT

Present: President Sir Muhammad ZAFRULLA KHAN; Vice-President AMMOUN; Judges Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETRÉN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; Registrar AQUARONE.

In the Fisheries Jurisdiction case,
between
the Federal Republic of Germany,
represented by
Dr. G. Jaenicke, Professor of International Law in the University of Frankfurt am Main,
as Agent and Counsel,
assisted by
Dr. D. von Schenck, Legal Adviser, Ministry of Foreign Affairs,
Dr. S. Vollmar, Ministry of Foreign Affairs,
Dr. R. Hilger, Ministry of Foreign Affairs,
Dr. D. Booss, Ministry of Food, Agriculture and Forests,
as Advisers,
and
the Republic of Iceland,

THE COURT,
composed as above,
delivers the following Judgment:

1. By a letter of 26 May 1972, received in the Registry of the Court on 5 June 1972, the State Secretary of the Foreign Office of the Federal Republic of Germany transmitted to the Registrar an Application instituting proceedings against the Republic of Iceland in respect of a dispute concerning the then proposed extension by the Government of Iceland of its fisheries jurisdiction. In order to found the jurisdiction of the Court, the Application relied on Article 36, paragraph 1, of the Statute of the Court, on an Exchange of Notes between the Government of the Federal Republic and the Government of Iceland dated 19 July 1961, and on a declaration, under the Security Council resolution of 15 October 1946, made by the Federal Republic of Germany on 29 October 1971 and deposited with the Registrar of the Court on 22 November 1971.
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of Iceland. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.
3. By a letter dated 27 June 1972 from the Minister for Foreign Affairs of Iceland, received in the Registry on 4 July 1972, the Court was informed (*inter alia*) that the Government of Iceland was not willing to confer jurisdiction on the Court, and would not appoint an Agent.
4. On 21 July 1972, the Agent of the Federal Republic of Germany filed in the Registry of the Court a request for the indication of interim measures of protection under Article 41 of the Statute and Article 61 of the Rules of Court adopted on 6 May 1946. By an Order dated 17 August 1972, the Court indicated certain interim measures of protection in the case.
5. By an Order dated 18 August 1972, the Court, considering that it was

necessary to resolve first of all the question of its jurisdiction in the case, decided that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute, and fixed time-limits for the filing of a Memorial by the Government of the Federal Republic of Germany and a Counter-Memorial by the Government of Iceland. The Memorial of the Government of the Federal Republic was filed within the time-limit prescribed, and was communicated to the Government of Iceland. No Counter-Memorial was filed by the Government of Iceland and, the written proceedings being thus closed, the case was ready for hearing on 9 December 1972, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iceland.

6. The Governments of the United Kingdom and Senegal requested that the pleadings and annexed documents in this case should be made available to them in accordance with Article 44, paragraph 2, of the Rules of Court. The Parties having indicated that they had no objection, it was decided to accede to these requests. Pursuant to Article 44, paragraph 3, of the Rules of Court the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

7. The Federal Republic of Germany, in reliance on Article 31, paragraph 3, of the Statute, notified the Court of its choice of a person to sit as judge *ad hoc* in this case. No objection was made by the Government of Iceland within the time-limit fixed for that Government to make its views known in accordance with Article 3 of the Rules of Court. However, the Court, taking into account the proceedings instituted against Iceland by the United Kingdom on 14 April 1972 in the case concerning *Fisheries Jurisdiction* and the composition of the Court in this case, which includes a judge of United Kingdom nationality, decided by eight votes to five that there was in the present phase, concerning the jurisdiction of the Court, a common interest in the sense of Article 31, paragraph 5, of the Statute which justified the refusal of the request of the Federal Republic of Germany for the appointment of a judge *ad hoc*.

8. On 8 January 1973, after due notice to the Parties, a public hearing was held in the course of which the Court heard the oral argument on the question of the Court's jurisdiction advanced by Professor Dr. G. Jaenicke on behalf of the Government of the Federal Republic of Germany. The Government of Iceland was not represented at the hearing.

9. In the course of the written proceedings, the following submissions were presented on behalf of the Government of the Federal Republic of Germany:

in the Application:

“The Federal Republic of Germany asks the Court to adjudge and declare:

(a) That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, to be effective from 1 September 1972, which has been decided upon by the Parliament (Althing) and the Government of Iceland and communicated by the Minister for Foreign Affairs of Iceland to the Federal Republic of Germany by aide-mémoire handed to its Ambassador in Reykjavik on 24 February 1972, would have no basis in

international law and could therefore not be opposed to the Federal Republic of Germany and to its fishing vessels.

- (b) That if Iceland, as a coastal State specially dependent on coastal fisheries, establishes a need for special fisheries conservation measures in the waters adjacent to its coast but beyond the exclusive fisheries zone provided for by the Exchange of Notes of 1961, such conservation measures, as far as they would affect fisheries of the Federal Republic of Germany, may not be taken, under international law, on the basis of a unilateral extension by Iceland of its fisheries jurisdiction, but only on the basis of an agreement between the Federal Republic of Germany and Iceland concluded either bilaterally or within a multilateral framework."

in the Memorial:

"The Federal Republic of Germany respectfully requests the Court to adjudge and declare:

That the Court has full jurisdiction to entertain the Application submitted by the Federal Republic of Germany to the Court on 5 June 1972 and to deal with the merits of this case."

At the public hearing on 8 January 1973, the following submission was presented by the Agent for the Federal Republic of Germany:

"On behalf of the Government of the Federal Republic of Germany I therefore respectfully request the Court to adjudge and declare:

That the Court has full jurisdiction to entertain the Application submitted by the Federal Republic of Germany on 5 June 1972 and to deal with the merits of the case."

10. No pleadings were filed by the Government of Iceland, which was also not represented in the oral proceedings, and no submissions were therefore presented on its behalf. The attitude of that Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 27 June 1972 from the Minister for Foreign Affairs of Iceland. After calling attention to certain documents that letter stated:

"Those documents deal with the background and termination of the agreement recorded in the Exchange of Notes of 19 July 1961, and with the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland."

The letter concluded by saying:

"After the termination of the agreement recorded in the Exchange of Notes of 1961, there was on 5 June 1972 no basis under the Statute for the Court to exercise jurisdiction in the case to which the Government of the Federal Republic refers.

The Government of Iceland, considering that the vital interests of the people of Iceland are involved, respectfully informs the Court that it is not willing to confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland, and specifically in the case sought

to be instituted by the Government of the Federal Republic of Germany on 5 June 1972.

Having regard to the foregoing, an Agent will not be appointed to represent the Government of Iceland."

In a telegram to the Court dated 4 December 1972, the Minister for Foreign Affairs of Iceland stated that the position of the Government of Iceland was unchanged.

* * *

11. A telegram addressed to the Court on 28 July 1972 by the Minister for Foreign Affairs of Iceland also mentioned that:

"the Federal Republic of Germany only accepted the jurisdiction of the Court by its declaration of 29 October 1971, transmitted to the Registrar on 22 November 1971, after it had been notified by the Government of Iceland, in its aide-mémoire of 31 August 1971, that the object and purpose of the provision for recourse to judicial settlement of certain matters had been fully achieved".

By mentioning this fact, the Minister for Foreign Affairs of Iceland seemed to suggest that the timing of the declaration of the Federal Republic of Germany of 29 October 1971, deposited with the Registrar on 22 November 1971, may have had some effect on the binding force of the agreement contained in the Exchange of Notes of 19 July 1961 or on the right of access to the Court of the Federal Republic of Germany. As to the first point, it is clear that the binding force of the agreement between the two Governments, which is to be examined in the present Judgment, bears no relation to the date on which the declaration required by the Security Council resolution of 15 October 1946 was deposited with the Registrar: the former is designed to establish the jurisdiction of the Court over a particular kind of dispute; the latter provides for access to the Court of States which are not parties to the Statute. As to the second point (i.e., the question of the Federal Republic's right of access to the Court), according to the Security Council resolution, a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, previously to its appearance before the Court. This was done. Article 36 of the Rules of Court provides as follows:

"When a State which is not a party to the Statute is admitted by the Security Council, in pursuance of Article 35 of the Statute, to appear before the Court, it shall satisfy the Court that it has complied with any conditions that may have been prescribed for its admission: the document which evidences this compliance shall be filed in the Registry at the same time as the notification of the appointment of the agent."

The appointment of the Agent of the Federal Republic in the present case was notified by the letter dated 26 May 1972, received in the Registry on 5 June 1972, whereas the declaration of the Federal Republic of Germany had been previously filed, on 22 November 1971.

* * * * *

12. The present case concerns a dispute between the Government of the Federal Republic of Germany and the Government of Iceland occasioned by the claim of the latter to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland. In the present phase it concerns the competence of the Court to hear and pronounce upon this dispute. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits.

13. It is to be regretted that the Government of Iceland has failed to appear in order to plead the objections to the Court's jurisdiction which it is understood to entertain. Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction to consider the Application of the Federal Republic of Germany. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction. It follows from the failure of Iceland to appear in this phase of the case that it has not observed the terms of Article 62, paragraph 2, of the Rules of Court, which requires *inter alia* that a State objecting to the jurisdiction should "set out the facts and the law on which the objection is based", its submissions on the matter, and any evidence which it may wish to adduce. Nevertheless the Court, in examining its own jurisdiction, will consider those objections which might, in its view, be raised against its jurisdiction.

* * *

14. To found the jurisdiction of the Court in the proceedings, the Applicant relies on Article 36, paragraph 1, of the Court's Statute, which provides that: "The jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force"; on paragraph 5 (the "compromissory clause") of the Exchange of Notes between the Government of the Federal Republic of Germany and the Government of Iceland of 19 July 1961 (the "1961 Exchange of Notes"), which provides:

"The Government of the Republic of Iceland shall continue to work for the implementation of the Althing Resolution of 5 May 1959, regarding the extension of the fishery jurisdiction of Iceland. However, it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such an extension, the matter shall, at the request of either party, be referred to the International Court of Justice";

and on the declaration, under the Security Council resolution of 15 Oc-

tober 1946, made by the Federal Republic of Germany on 29 October 1971 and deposited with the Registrar on 22 November 1971. In its resolution of 5 May 1959 the Althing (the Parliament of Iceland) had declared:

“... that it considers *that* Iceland has an indisputable right to fishery limits of 12 miles, *that* recognition should be obtained of Iceland’s right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948, concerning the Scientific Conservation of the Continental Shelf Fisheries and *that* fishery limits of less than 12 miles from base-lines around the country are out of the question”.

15. The meaning of the expression “extension of fishery jurisdiction” in paragraph 5 of the 1961 Exchange of Notes must be sought in the context of this Althing resolution and of the complete text of these Notes, in which the two contracting parties, referring to discussions which had recently taken place between them, stated that they were prepared to conclude the following arrangement: The Federal Republic of Germany, for its part, agreed (paragraph 1 of the Notes) that it “shall not object in future to a twelve-mile fishery zone around Iceland”, measured from certain designated baselines (paragraph 2) relating to the delimitation of that zone. It further agreed to a transitional period, ending on 10 March 1964, during which vessels registered in the Federal Republic might fish within the outer six miles of the 12-mile zone, subject to certain specified times and exclusions with respect to designated areas (paragraphs 3 and 4). It also recognized that the Icelandic Government “shall continue to work for the implementation of the Althing Resolution of 5 May, 1959” regarding its extension of fisheries jurisdiction. The Icelandic Government, for its part, agreed to give six months’ notice of such extension and also agreed that “in case of a dispute relating to such an extension, the matter shall, at the request of either party, be referred to the International Court of Justice” (paragraph 5).

16. In an aide-mémoire of 31 August 1971 the Government of Iceland gave notice to the Government of the Federal Republic of Germany that it “now finds it essential to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the areas of sea covering the continental shelf”, adding that: “It is contemplated that the new limits, the precise boundaries of which will be furnished at a later date, will enter into force not later than 1 September, 1972.” In answer to this notice, the Government of the Federal Republic advised the Government of Iceland on 27 September 1971 of its view “that the unilateral assumption of sovereign power by a coastal State over zones of the high seas is inadmissible under international law”. It also reserved all rights deriving from the 1961 Exchange of Notes, “especially the right to refer disputes to the International Court of Justice”.

17. There is no doubt in the present case as to the fulfilment by the Federal Republic of Germany of its part of the agreement embodied in the 1961 Exchange of Notes concerning the recognition of a 12-mile fishery zone around Iceland, and the phasing-out during a period of less than three years of fishing within that zone by vessels registered in the Federal Republic. There is no doubt either that a dispute has arisen between the Parties and that it has persisted despite the negotiations which took place in 1971 and 1972. This dispute clearly relates to the extension by Iceland of its fisheries jurisdiction beyond the 12-mile limit in the waters above its continental shelf, as contemplated in the Althing resolution of 5 May 1959.

18. Equally, there is no question but that Iceland gave the Federal Republic of Germany the required notice of extension. In consequence, the Federal Republic having disputed the validity, not of the notice but of the extension, the only question now before the Court is whether the resulting dispute falls within the compromissory clause of the 1961 Exchange of Notes as being one for determination by the Court. Since, on the face of it, the dispute thus brought to the Court upon the Application of the Federal Republic of Germany falls exactly within the terms of this clause, the Court would normally apply the principle it reaffirmed in its 1950 Advisory Opinion concerning the *Competence of the General Assembly for the Admission of a State to the United Nations*, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself. However, having regard to the peculiar circumstances of the present proceedings, as set forth in paragraph 13 above, and in order fully to ascertain the scope and purpose of the 1961 Exchange of Notes, the Court will undertake a brief review of the negotiations that led up to that exchange.

* * *

19. The account of these negotiations which has been given to the Court by the Applicant, as well as certain documents exchanged between the two Governments, show that, as early as June 1958, by a *Note verbale* dated 9 June and delivered to the Icelandic Foreign Minister on 16 June, the Federal Republic of Germany had protested against the announced intention of the Icelandic Government to extend its exclusive fisheries zone to 12 nautical miles with effect from 1 September 1958. In a *Note verbale* of 16 July 1958 it renewed its protest, stating:

“The Federal Government regrets this one-sided procedure extremely and is compelled to express its profound disappointment about the fact that the Icelandic Government has now taken the above-mentioned unilateral steps without having accepted the sug-

gestions of the Federal Government previously to seek an agreement on fishing off the Icelandic coast by friendly negotiations with the Federal Government or other interested nations."

The Note expressed the hope that the Government of Iceland would be prepared to enter into multilateral negotiations and specifically suggested that such negotiations should have as their aim to bring about an agreement that would take into account "the principles of international law" and "the historic interests of all nations concerned".

20. A *Note verbale* of 5 August 1959 from the Embassy of Iceland in Bonn to the Minister for Foreign Affairs of the Federal Republic of Germany drew attention to the Icelandic proposal at the 1958 Geneva Conference on the Law of the Sea to the effect that a possible disagreement over the extension of exclusive fishery rights should be settled by arbitration. The position taken by the Icelandic delegation at that conference was re-emphasized by repeating:

"It is necessary that the Coastal State can unilaterally include an adjacent area in its fishing zone, subject to arbitration in case of disagreement."

In its reply on 7 October 1959 the Government of the Federal Republic of Germany contradicted the view that a coastal State could unilaterally include an adjacent area in its fishing zone, subject to arbitration in case of disagreement. Direct negotiations between the parties appear to have been suspended until the conclusion of the then pending and extensive negotiations between the Government of the United Kingdom and the Government of Iceland, which culminated in an Anglo-Icelandic Exchange of Notes on 11 March 1961. Negotiations between the Governments of the Federal Republic and Iceland were, however, resumed immediately thereafter.

21. On 13 March 1961 the Minister for Foreign Affairs of Iceland transmitted to the Embassy of the Federal Republic of Germany copies of the Anglo-Icelandic Exchange of Notes and at the same time called attention to modifications of certain baselines. Thereupon the Government of the Federal Republic of Germany approached the Government of Iceland in order to resume negotiations. In an aide-mémoire of 12 April 1961 it noted with interest the Anglo-Icelandic Exchange of Notes and proposed discussions with a view to the conclusion of an agreement between Iceland and the Federal Republic. Subsequent negotiations centred on various economic matters raised by the Government of Iceland and on the terminal date for the "phasing-out" period, which the Icelandic Government wished to have identical with that comprised in the Anglo-Icelandic Exchange of Notes despite the later timing of the proposed exchange of Notes with the Federal Republic of Germany.

22. It is significant that during these negotiations the Icelandic delegation endeavoured to persuade the Government of the Federal Republic

that no provision for judicial settlement should be included. In an aide-mémoire of 20 June 1961, defining the position of the Government of Iceland at the outset of the negotiations in that year, that Government sought to exclude any provision for judicial settlement on the ground that it was unnecessary in view of the Exchange of Notes with the Government of the United Kingdom dated 11 March 1961. The aide-mémoire, after dealing with baselines and the duration of the adjustment period, explicitly stated:

“Reference to the International Court of Justice. It is only fair to say that it should not be necessary for the Federal Republic to insist on this point for the obvious reason that if Iceland were to extend the limits beyond 12 miles the U.K. Government certainly would refer that matter to the Court, on its own initiative.”

According to the Memorial of the Federal Republic, this attempt was however resisted: the German delegation insisted on the inclusion of the same provision as in the Anglo-Icelandic Exchange of Notes of 11 March 1961, which, in view of the possibility of recourse to the Court and the terms of Article 102 of the Charter of the United Nations, provided for registration of the Exchange of Notes with the Secretariat of the United Nations. By 6 July 1961, agreement had been reached on the terms of the Notes to be exchanged, including the compromissory clause and provision for registration, and they were exchanged on 19 July 1961; the agreement thus concluded was registered by the Government of Iceland with the Secretariat of the United Nations on 27 September 1961.

23. This history of the negotiations reinforces the view that the Court has jurisdiction in this case, and adds emphasis to the point that the real intention of the parties was to give the Government of the Federal Republic of Germany the same assurance as the United Kingdom, including the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit. In consequence, the exercise of jurisdiction by the Court to entertain the present Application would fall within the terms of the compromissory clause and correspond exactly to the intentions and expectations of both Parties when they discussed and consented to that clause. It thus appears from the text of the compromissory clause, read in the context of the 1961 Exchange of Notes and in the light of the history of the negotiations, that the Court has jurisdiction. It has however been contended that the agreement either was initially void or has since ceased to operate. The Court will now consider these contentions.

* * *

24. The letter of 27 June 1972 addressed to the Registrar by the Minister for Foreign Affairs of Iceland contains the following statement: “The

1961 Exchange of Notes took place under extremely difficult circumstances." In its Memorial, the Federal Republic of Germany interpreted this statement as questioning the initial validity of the agreement, inasmuch as it appeared "to intimate that the conclusion of the 1961 Agreement had taken place, on the part of the Government of Iceland, under some kind of pressure and not by its own free will". There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. It is equally clear that a court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support. The history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter.

* * *

25. In his letter of 27 June 1972 to the Registrar of the Court, the Minister for Foreign Affairs of Iceland observed that the 1961 agreement "was not of a permanent nature", and added that:

"In particular, an undertaking for judicial settlement cannot be considered to be of a permanent nature. There is nothing in that situation, or in any general rule of contemporary international law, to justify any other view."

This observation, directed against the Court's jurisdiction, appears to rest on the following chain of reasoning: (1) inasmuch as the compromis-sory clause contains no provision for termination, it could be deemed to be of a permanent nature; but (2) a compromissory clause cannot be of a permanent nature; therefore (3) it must be subject to termination by giving adequate notice. This reasoning appears to underlie the observation of the Government of Iceland in its aide-mémoire of 31 August 1971 to the effect that:

"In the opinion of the Icelandic Government . . . the object and purpose of the provision for recourse to judicial settlement of certain matters envisaged in the passage quoted above [i.e., the compromis-sory clause] have been fully achieved."

26. It appears to the Court that, although the compromissory clause in the 1961 Exchange of Notes contains no express provision regarding duration, the obligation it embraces involves an inherent time-factor conditioning its potential application. It cannot, therefore, be described accurately as being of a permanent nature or as one binding the parties in perpetuity. This becomes evident from a consideration of the object of

the clause when read in the context of the Exchange of Notes.

27. The 1961 Exchange of Notes did not set up a definite time-limit within which the Government of Iceland might make a claim in implementation of the Althing's resolution. It follows that there could be no specification of a time-limit for the corresponding right of the Federal Republic of Germany to challenge such an extension and, if no agreement were reached and the dispute persisted, to invoke the Court's jurisdiction. The right of the Federal Republic thus to act would last so long as Iceland might seek to implement the Althing's resolution. This was, of course, within the control of the Government of Iceland, which in 1971, ten years after the Exchange of Notes, made a claim to exclusive fishery rights over the entire continental shelf area surrounding its territory and thus automatically brought into play the right of the Federal Republic to have recourse to the Court.

28. That being so, the compromissory clause in the 1961 Exchange of Notes may be described as an agreement to submit to the Court, at the unilateral request of either party, a particular type of dispute which was envisaged and anticipated by the parties. The right to invoke the Court's jurisdiction was thus deferred until the occurrence of well-defined future events and was therefore subject to a suspensive condition. In other words, it was subject to a condition which could, at any time, materialize if Iceland made a claim to extend her fishery limits, and the right of recourse to the Court could be invoked only in that event.

29. The above observations suffice to dispose of a possible objection based on views expressed by certain authorities to the effect that treaties of judicial settlement or declarations of acceptance of the compulsory jurisdiction of the Court are among those treaty provisions which, by their very nature, may be subject to unilateral denunciation in the absence of express provisions regarding their duration or termination. Since those views cannot apply to a case such as the present one, the Court does not need to examine or pronounce upon the point of principle involved. It is sufficient to remark that such views have reference only to instruments in which the parties had assumed a general obligation to submit to judicial settlement all or certain categories of disputes which might arise between them in the unpredictable future. The 1961 Exchange of Notes does not embody an agreement of this type. It contains a definite compromissory clause establishing the jurisdiction of the Court to deal with a concrete kind of dispute which was foreseen and specifically anticipated by the parties. In consequence, when a dispute arises of precisely the sort contemplated, and is referred to the Court, the contention that the compromissory clause has lapsed, or is terminable, cannot be accepted.

* * *

30. In his statement to the Althing on 9 November 1971, the Prime Minister of Iceland alluded not only to an alleged change of circumstances with respect to fisheries and fishing techniques (which will be considered later in this Judgment), but also to changes regarding "legal opinion on fisheries jurisdiction". However, the relevance to the compromissory clause of this allusion is not apparent, since if there is a dispute as to such changes it would be embraced in the compromissory clause and might be considered as an issue going to the merits. On the other hand, it could be considered as relevant to the compromissory clause on an hypothesis familiar in the law of certain States under the guise of "failure of consideration". As such, it is linked with the assertion that, the object and purpose of the agreement having been fulfilled, it no longer has a binding effect for Iceland.

31. It should be observed at the outset that the compromissory clause has a bilateral character, each of the parties being entitled to invoke the Court's jurisdiction; it is clear that in certain circumstances it could be to Iceland's advantage to apply to the Court. The argument of Iceland appears, however, to be that, because of the general trend of development of international law on the subject of fishery limits during the last ten years, the right of exclusive fisheries jurisdiction to a distance of 12 miles from the baselines of the territorial sea has been increasingly recognized and claimed by States, including the applicant State itself. It would then appear to be contended that the compromissory clause was the price paid by Iceland for the recognition at that time of the 12-mile fishery limit by the other party. It is consequently asserted that if today the 12-mile fishery limit is generally recognized, there would be a failure of consideration relieving Iceland of its commitment because of the changed legal circumstances. It is on this basis that it is possible to interpret the Prime Minister's statement to the Althing on 9 November 1971, to the effect that it was unlikely that the agreement would have been made if the Government of Iceland had known how these matters would evolve.

32. While changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty, the Icelandic contention is not relevant to the present case. The motive which induced Iceland to enter into the 1961 Exchange of Notes may well have been the interest of obtaining an immediate recognition of an exclusive fisheries jurisdiction to a distance of 12 miles in the waters around its territory. It may also be that this interest has in the meantime disappeared, since a 12-mile fishery zone is now asserted by the other contracting party in respect of its own fisheries jurisdiction. But in the present case, the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties to be bound by the agreement embodied therein, had a much wider scope. That object and purpose was not merely to decide upon the Icelandic claim to fisheries jurisdiction

up to 12 miles, but also to provide a means whereby the parties might resolve the question of the validity of any further claims. This follows not only from the text of the agreement but also from the history of the negotiations, that is to say, from the whole set of circumstances which must be taken into account in determining what induced both parties to agree to the 1961 Exchange of Notes.

33. An analysis of the agreement, in the light of its object and purpose, reveals that it comprised two sets of obligations:

- (a) those obligations of a transitory character contained in paragraphs 3 and 4, by which the fishing vessels of the other contracting party were allowed to fish for a transitional period within areas of the outer 6 miles of the 12-mile fishery zone. Those provisions clearly have attained their objective and may be considered to have expired on 10 March 1964;
- (b) other obligations, contained in paragraphs 1, 2 and 5, which do not have a transitory character since for them, in contrast to paragraphs 3 and 4, the parties did not provide any limitation *ratione temporis*.

34. It is possible that today Iceland may find that some of the motives which induced it to enter into the 1961 Exchange of Notes have become less compelling or have disappeared altogether. But this is not a ground justifying the repudiation of those parts of the agreement the object and purpose of which have remained unchanged. Iceland has derived benefits from the executed provisions of the agreement, such as the recognition by the Federal Republic of Germany since 1961 of a 12-mile exclusive fisheries jurisdiction, the acceptance by the Federal Republic of the baselines established by Iceland and the relinquishment over a period of less than three years of the pre-existing traditional fishing by vessels registered in the Federal Republic. Clearly it then becomes incumbent on Iceland to comply with its side of the bargain, which is to accept the testing before the Court of the validity of its further claims to extended jurisdiction. Moreover, in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of *quid pro quo* for the provisions which the other party has already executed.

* * *

35. In his letter of 27 June 1972 to the Registrar, the Minister for Foreign Affairs of Iceland refers to "the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas

surrounding Iceland". Judicial notice should also be taken of other statements made on the subject in documents which Iceland has brought to the Court's attention. Thus, the resolution adopted by the Althing on 15 February 1972 contains the statement that "owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable".

36. In these statements the Government of Iceland is basing itself on the principle of termination of a treaty by reason of change of circumstances. International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.

37. One of the basic requirements embodied in that Article is that the change of circumstances must have been a fundamental one. In this respect the Government of Iceland has, with regard to developments in fishing techniques, referred in an official publication on *Fisheries Jurisdiction in Iceland*, enclosed with the Foreign Minister's letter to the Registrar of 27 June 1972, to the increased exploitation of the fishery resources in the seas surrounding Iceland and to the danger of still further exploitation because of an increase in the catching capacity of fishing fleets. The Icelandic statements recall the exceptional dependence of that country on its fishing for its existence and economic development. In his letter of 27 June 1972 the Minister stated:

"The Government of Iceland, considering that the vital interests of the people of Iceland are involved, respectfully informs the Court that it is not willing to confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland . . ."

In this same connection, the resolution adopted by the Althing on 15 February 1972 had contained a paragraph in these terms:

"That the Governments of the United Kingdom and the Federal Republic of Germany be again informed 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 that their provisions do not constitute an obligation for Iceland."

38. The invocation by Iceland of its "vital interests", which were not made the subject of an express reservation to the acceptance of the juris-

dictional obligation under the 1961 Exchange of Notes, must be interpreted, in the context of the assertion of changed circumstances, as an indication by Iceland of the reason why it regards as fundamental the changes which in its view have taken place in previously existing fishing techniques. This interpretation would correspond to the traditional view that the changes of circumstances which must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties.

39. The Applicant, for its part, has expressed before the Court the view that "the danger of overfishing has not yet materialized", and made it clear, in its oral argument, that it was not to be understood as accepting the correctness of the claim by the Government of Iceland that the technical development of fishing equipment and modern fishing techniques had made it more pressing than before to take conservation measures in order to prevent overfishing in the waters around Iceland.

40. The Court, at the present stage of the proceedings, does not need to pronounce on this question of fact, as to which there appears to be a divergence of views between the two Governments. If, as contended by Iceland, there have been any fundamental changes in fishing techniques in the waters around Iceland, those changes might be relevant for the decision on the merits of the dispute, and the Court might need to examine the contention at that stage, together with any other arguments that Iceland might advance in support of the validity of the extension of its fisheries jurisdiction beyond what was agreed to in the 1961 Exchange of Notes. But the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings. It follows that the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clause establishing the Court's jurisdiction.

41. It should be observed in this connection that the exceptional importance of coastal fisheries to the Icelandic economy is expressly recognized in the 1961 Exchange of Notes, and the Court, in its Order of 17 August 1972, stated that "it is also necessary to bear in mind the exceptional importance of coastal fisheries to the Icelandic economy as expressly recognized by the Federal Republic in its Note addressed to the Foreign Minister of Iceland dated 19 July 1961". The Court further stated that "from that point of view account must be taken of the need for the conservation of fish stocks in the Iceland area" (*I.C.J. Reports 1972*, p. 34). This point is not disputed.

42. Account must also be taken of the fact that the Applicant, in its contentions before the Court, expressed the opinion that if Iceland, as a coastal State specially dependent on coastal fisheries for its livelihood or economic development, asserts a need to procure the establishment of a

special fisheries conservation régime (including such a régime under which it enjoys preferential rights) in the waters adjacent to its coast but beyond the exclusive fisheries zone provided for by the 1961 Exchange of Notes, it can legitimately pursue that objective by collaboration and agreement with the other countries concerned, but not by unilateral assumption of exclusive rights within those waters. The exceptional dependence of Iceland on its fisheries and the principle of conservation of fish stocks having been recognized, the question remains as to whether Iceland is or is not competent unilaterally to assert an exclusive fisheries jurisdiction extending beyond the 12-mile limit. The issue before the Court in the present phase of the proceedings concerns solely its jurisdiction to determine the latter point.

* * *

43. Moreover, in order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken. In respect of the obligation with which the Court is here concerned, this condition is wholly unsatisfied; the change of circumstances alleged by Iceland cannot be said to have transformed radically the extent of the jurisdictional obligation which is imposed in the 1961 Exchange of Notes. The compromissory clause enabled either of the parties to submit to the Court any dispute between them relating to an extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the compromissory clause of the Exchange of Notes. Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961.

* * *

44. The Applicant, in the oral proceedings, advanced the contention that the assertion of changed circumstances does not, *ipso facto*, release the State invoking them from its treaty obligation unless it has been established, either by consent of the other party or by judicial or other settlement between the parties, that the changed circumstances are of a kind which justifies release from existing treaty obligations.

45. In the present case, the procedural complement to the doctrine of changed circumstances is provided for in the 1961 Exchange of Notes, which specifically calls upon the parties to have recourse to the Court in the event of a dispute relating to Iceland's extension of fisheries jurisdic-

tion. Furthermore, any question as to the jurisdiction of the Court, deriving from an alleged lapse through changed circumstances, is resolvable through the accepted judicial principle enshrined in Article 36, paragraph 6, of the Court's Statute, which provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". In this case such a dispute obviously exists, as can be seen from Iceland's communications to the Court, and to the other Party, even if Iceland has chosen not to appoint an Agent, file a Counter-Memorial or submit preliminary objections to the Court's jurisdiction; and Article 53 of the Statute both entitles the Court and, in the present proceedings, requires it to pronounce upon the question of its jurisdiction. This it has now done with binding force.

* * * *

46. For these reasons,

THE COURT,

by fourteen votes to one,

finds that it has jurisdiction to entertain the Application filed by the Government of the Federal Republic of Germany on 5 June 1972 and to deal with the merits of the dispute.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this second day of February, one thousand nine hundred and seventy-three, in three copies, of which one will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and to the Government of the Republic of Iceland, respectively.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Judgment of the Court. I consider it needful, however, to append the following brief declaration.

The sole question before the Court in this phase of these proceedings is whether, in view of the compromissory clause in the Exchange of Notes of 19 July 1961 between the Government of the Federal Republic of Germany and the Government of Iceland, read with Article 36(1) of its Statute, the Court is competent to pronounce upon the validity of the unilateral extension by Iceland of its exclusive fisheries jurisdiction from 12 to 50 nautical miles from the baselines agreed to by the parties in 1961. All considerations tending to support or to discount the validity of Iceland's action are, at this stage, utterly irrelevant. To call any such consideration into aid for the purpose of determining the scope of the Court's jurisdiction, would not only beg the question but would put the proverbial cart before the horse with a vengeance and is to be strongly deprecated.

Judge Sir Gerald FITZMAURICE appends a separate opinion to the Judgment of the Court.

Judge PADILLA NERVO appends a dissenting opinion to the Judgment of the Court.

(Initialled) Z.K.

(Initialled) S.A.