DISSENTING OPINION OF JUDGE PADILLA NERVO

I am unable to concur in the Order of the Court and therefore I voted against its adoption.

In my view, the Court should not have indicated measures of protection. Notwithstanding contrary opinion, the special features of this case do not justify such measures against a State which denies the jurisdiction of the Court, which is not a party to these proceedings and whose rights as a sovereign State are thereby interfered with.

The claim of the Republic of Iceland to extend its fisheries jurisdiction to a zone of 50 nautical miles around Iceland, has not been proved to be contrary to international law.

The question regarding the jurisdiction of the Court has not been fully explored. It relies mainly as a source of its jurisdiction on the Exchange of Notes of 11 March 1961, an agreement which the Republic of Iceland contends has fully achieved its purpose and object, and the provisions of which it considers no longer to be applicable and, consequently, terminated.

The Minister for Foreign Affairs of Iceland sent to the Registrar on 29 May 1972 a letter regarding the filing on 14 April 1972 of an Application by the Government of the United Kingdom, instituting proceedings against Iceland.

With that letter were sent several documents dealing with the background and termination of the Agreement of 11 March 1961, and "with the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland".

The letter refers to the dispute with the United Kingdom who opposed the 12-mile fishery limit established by the Icelandic Government in 1958, and to the 1961 Exchange of Notes.

Iceland states that "the 1961 Exchange of Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit".

In paragraph 4 of the United Kingdom Application instituting proceedings, it is said:

> "The validity of this action was not accepted by the United Kingdom and fishing vessels from the United Kingdom continued to fish inside the 12-mile limit. There then ensued a number of incidents involving, on the one hand, Icelandic coastguard vessels and, on the

other hand, British fishing vessels and fisheries protection vessels of the Royal Navy."

It appears from the above-quoted statements, that such circumstances were not the most appropriate to negotiate and conclude the 1961 Agreement.

The Foreign Minister of Iceland further indicates:

"The Agreement by which that dispute was settled, and consequently the possibility of such recourse to the Court (to which the Government of Iceland was consistently opposed as far as concerns disputes over the extent of its exclusive fisheries jurisdiction, as indeed the United Kingdom recognizes) was not of a permanent nature. 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 . . .

. . . After the termination of the agreement recorded in the Exchange of Notes of 1961, there was on 14 April 1972 no basis under the Statute for the Court to exercise jurisdiction in the case to which the United Kingdom 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 United Kingdom of Great Britain and Northern Ireland on 14 April 1972."

In the *Anglo-Iranian Oil Co.* case, Judges Winiarski and Badawi Pasha gave the following reasons for their dissenting opinions which—in my view—are applicable and valid in the present case:

"The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits." (*I.C.J. Reports 1951*, p. 96).

"In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered

a scarcely tolerable interference in the affairs of a sovereign State." (*Ibid.*, p. 97.)

"We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated." (*Ibid.*, p. 97.)

In my opinion such doubts do exist in the present case.

The Exchange of Notes on which the Application founds the jurisdiction of the Court, dated 11 March 1961, makes reference to the Resolution of the Parliament of Iceland of 5 May 1959, which declared that a recognition of the rights of Iceland to fisheries limits *extending to the whole continental shelf* "should be sought".

In the Note of 11 March 1961 it is stated that: "The Icelandic Government will continue to work for the *implementation* of the Althing Resolution of 5 May 1959, regarding the *extension* of fisheries jurisdiction around Iceland . . ."

The claim of Iceland that its continental shelf must be considered to be a part of the country itself, has support in the Convention on this subject, done at Geneva on 29 April 1958.

This Court, in its Judgment of 20 February 1969, stated:

". . . the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, . . . namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its

own affair, but no one else may do so without its express consent." (*I.C.J. Reports 1969*, p. 22, para. 19.)

The Government of Iceland in its information and documents sent to the Court, has given well-founded reasons and explanations of its sovereign right to extend its fisheries jurisdiction to the entire continental shelf area.

The coastal fisheries in Iceland have always been the foundation of the country's economy.

The coastal fisheries are the *conditio sine qua non* for the Icelandic economy; without them the country would not have been habitable.

Iceland rests on a platform or continental shelf whose outlines follow those of the country itself. In these shallow underwater terraces, ideal conditions are found for spawning areas and nursery grounds upon whose preservation and utilization the livelihood of the nation depends. It is increasingly being recognized that coastal fisheries are based on the special conditions prevailing in the coastal areas which provide the necessary environment for the fishstocks. This environment is an integral part of the natural resources of the coastal State.

The continental shelf is really the platform of the country and must be considered to be a part of the country itself.

The vital interests of the Icelandic people are therefore at stake. They must be protected.

The priority position of the coastal State has then always been recognized through the system of fishery limits. In the past these limits have to a great extent not been established with any regard to the interests of the coastal State. They owe their origin rather to the preponderant influence of distant water fishery nations, who wished to fish as close as possible to the shores of other nations, frequently destroying one area and then proceeding to another.

In a system of progressive development of international law the question of fishery limits has to be reconsidered in terms of the protection and utilization of coastal resources regardless of other considerations which apply to the extent of the territorial sea. The international community has increasingly recognized that the coastal fishery resources are to be considered as a part of the natural resources of the coastal State. The special situation of countries who are overwhelmingly dependent on coastal fisheries, was generally recognized at both Geneva Conferences in 1958 and 1960. Since then this view has found frequent expression both in the legislation of various countries and in important political statements. The course of events is decidedly progressing in this direction.

Reiterating the considerations which lead the Government of Iceland to issue new regulations relating to exclusive fisheries jurisdiction in the

continental shelf area, it stated the following:

> "In the *aide-mémoire* of 31 August, 1971, it was intimated that 'in order to strengthen the measures of protection essential to safeguard the vital interests of the Icelandic people in the seas surrounding its coasts, the Government of Iceland 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'. It was further stated that in the opinion of the Icelandic Government, the object and purpose of the provisions in the 1961 Exchange of Notes for recourse to judicial settlement in certain eventualities have been fully achieved. The Government of Iceland, therefore, considers the provisions of the Notes exchanged no longer to be applicable and consequently terminated." (Government of Iceland's *aide-mémoire* of 24 February 1972, Annex H to United Kingdom Application.)

> ". . . In the period of ten years which has elapsed, the United Kingdom Government enjoyed the benefit of the Icelandic Government's policy to the effect that further extension of the limits of exclusive fisheries jurisdiction would be placed in abeyance *for a reasonable and equitable period.* Continuation of that policy by the Icelandic Government, in the light of intervening scientific and economic evolution (including the ever greater threat of increased diversion of highly developed fishing effort to the Icelandic area) has become excessively onerous and unacceptable, and is harmful to the maintenance of the resources of the sea on which the livelihood of the Icelandic people depends." (Government of Iceland's *aide-mémoire* of 31 August 1971, Annex C to United Kingdom Application.)

In the Request by the Government of the United Kingdom for the indication of interim measures of protection the grounds of the request are stated at length.

It is stated therein that Iceland's intention of extending the limits of its fisheries jurisdiction, if carried into effect for any substantial period, would result in immediate and irremediable damage to the United Kingdom fishing and associated *industries*, and that such damage could not be made good by the payment of monetary compensation.

Another argument is, that it is not possible for the fishing effort to be diverted from the Iceland area to other fishing grounds, at *economic levels*. Distant-water trawlers displaced from Iceland could not *profitably* fish on near-water or middle-water grounds. Other factors would also seriously impair fishing operations and their *financial returns*.

It is claimed that any additional effort by United Kingdom and other

vessels diverted from the Iceland area would (among other things) *depress the profits* of the traditional near-water and middle-water sectors of the United Kingdom fleet and in turn *the current returns* of the United Kingdom inshore fleet.

The request for interim measures states:

> "In general, therefore, modern distant-water trawlers such as are used by the United Kingdom fishing fleet in the Iceland area, equipped with expensive and sophisticated technical gear and having inflexibly high operating costs, could not, if excluded from the Iceland area, hope to gain, let alone sustain, fish yields which would keep them in business."

Not only Iceland but many coastal States in all regions of the world, know by experience the harmful effects of the ever greater threat of highly developed fishing effort near their shores, by foreign fishing fleets equipped—like the modern trawlers of the United Kingdom—with *sophisticated technical gear.*

The arguments developed in the request for measures of protection and in the oral hearing of 1 August 1972 appear, in my view, to have as their real object the protection of the interests, financial or economic, of private fishing enterprises rather than the "rights" of the United Kingdom.

Furthermore, the existence of those rights cannot be taken for granted. This matter belongs to the merits of the case, to be decided when the Court deals with them.

The assertion that the indication of interim measures of protection *in no way prejudges* the rights which the Court may subsequently adjudge to belong either to the Applicant or to the Respondent, is an assertion contradicted by the obvious implication that questionable rights are presumed to exist by the mere fact of indicating measures intended to protect them.

The measures indicated in the Order have the character of a preliminary decision on the merits. The implementation of those measures will amount to execution of such a preliminary decision. This fact cannot be denied simply by asserting that such measures in no way prejudge the substance of the case.

The claim of immediate and irreparable damage is based on the *assumption* that the dispute on the merits or even the jurisdictional issue, will not be settled by the Court for many years.

That is a wrong assumption and therefore the plea of a disruption of the whole fishing industry will not have any force or weight if the Court, as should be expected, does consider the matter of jurisdiction before the end of this year.

The Applicant has invoked Article 53 of the Statute and calls upon the Court to decide in favour of its claim.

According to paragraph 2 of that Article, the Court must, *first of all*, satisfy itself that it has jurisdiction.

Relevant to the issue of jurisdiction is the provision in Article 61, paragraph 1, of the Rules: "A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made."

The objective requirement *ratione temporis* for the exercise of this jurisdiction is that the request is filed during the proceedings in the case.

> "If it is clear on the face of the document instituting proceedings that the jurisdiction of the Court to hear the case on its merits requires some step on the part of the respondent State for its perfection, then, . . . there will be no 'proceedings', and consequently no inherent jurisdiction to indicate provisional measures, until that step has been taken." (Rosenne, *The Law and Practice of the International Court*, Chap. XII, Incidental Jurisdiction, p. 424.)

The Government of Iceland, on 28 July 1972, acknowledged receipt of a telegram from the Registrar of the Court concerning the United Kingdom's request for interim measures filed 19 July 1972. The message from the Government of Iceland, states in part:

> ". . . there is no basis for the request to which your telegram refers. In any event *the Application of 14 April 1972 refers to the legal position of two States and not to the economic position of certain private enterprises or other interests in one of those States.* Without prejudice to any of its previous arguments the Government of Iceland objects specifically to the indication by the Court of provisional measures under Article 41 of the Statute and Article 61 of the Rules of the Court in the case to which the United Kingdom refers, where no basis for jurisdiction is established." (Emphasis added.)

In the Exchange of Notes of 11 March 1961, the agreement *already envisaged* the prospect that the Republic of Iceland would extend the fisheries jurisdiction beyond the 12-mile limit.

If it is contrary to international law to envisage such extension, the United Kingdom and the Federal Republic of Germany would not have accepted the inclusion of such statement in the formal exchange of notes.

There is in such exchange of notes an implicit recognition of the right of Iceland to extend its fisheries jurisdiction.

The United Kingdom, in view of its recognition of the exceptional dependence of the Icelandic nation upon coastal fisheries for their liveli-

hood and economic development, *accepted* the proposals put forward by the Government of Iceland, among them, the proposal contained in the penultimate paragraph, which states that "the Government of Iceland would continue to work for the *implementation* of the Althing Resolution of 5 May 1959 regarding the extension of fisheries jurisdiction around Iceland", which declares that a recognition of its rights to the whole continental shelf should be sought, as provided in the Law concerning the Scientific Conservation of the Continental Shelf Fisheries of 1948.

The United Kingdom did not object to the existence of such rights, it accepted the proposal which contained as counterpart or consideration the obligation of Iceland to give six months' notice of any such extension.

If a dispute did arise in respect of such extension, it would not affect the previous implicit recognition of Iceland's right to extend its fisheries jurisdiction.

The most essential asset of coastal States is to be found in the living resources of the sea covering their continental shelf and in the fishing zone contiguous to their territorial sea.

The progressive development of international law entails the recognition of the concept of the *patrimonial* sea, which extends from the territorial waters to a distance fixed by the coastal State concerned, in exercise of its sovereign rights, for the purpose of protecting the resources on which its economic development and the livelihood of its people depends.

This concept is not a new one. It has found expression in declarations by many governments proclaiming as their international maritime policy, their sovereignty and exclusive fisheries jurisdiction over the sea contiguous to their shores.

There are nine States which have adopted a distance of 200 nautical miles from their shores as their exclusive fisheries jurisdiction. Some of them have enacted and enforced regulations to that effect since 20 years ago, when the "Santiago Declaration" was signed by the Governments of Chile, Ecuador and Peru in August 1952.

My last observation is the following. The claim of irremediable damages to the Applicant has not, in my opinion, been proved. They are only allegations that the fishing enterprises would suffer financial losses and also allegations that the eating habits of people in the countries concerned will be disturbed. Such an argument cannot, in my opinion, be opposed to the sovereign rights of Iceland over its exclusive jurisdiction and the protection of the living resources of the sea covering its continental shelf. The Order does not strike, in my view, a fair balance between the two sides as required by the relevant article of the Statute. The restrictions indicated in the Order are obviously against Iceland, interfering with its indisputable rights to legislate over its own territory as it considers essential (cf. para. 1, sub-para. *(d)*, of the operative clause of the Court's

Order). In the measures indicated in that Order the only substantial restriction to the Applicant consists in limiting the amount of its annual catch to 170,000 metric tons instead of its claim to 185,000 metric tons, 15,000 metric tons less than the Applicant had asked for in its request for measures of protection. All the other measures of protection requested in the Application the Court has accepted. On this aspect also I am not able to agree with the indication of measures in the Order of the Court.

(Signed) Luis PADILLA NERVO.