SEPARATE OPINION OF JUDGE DILLARD

I concur in the Judgment of the Court. I am moved to write a separate opinion first to elaborate on a few possibly controversial aspects of the Judgment and second to put it in a broader perspective.

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The present controversy centres on the familiar problem of conflicting interests between a coastal State claiming special dependence on "coastal" fisheries and a "distant-water" State (so called), whose traditional rights and continuing needs clash with those of the coastal State [1]. But, while the *general* problem is a familiar one, the *particular* problem confronting the Court was more sharply focussed. It hinged on the meaning to be attributed to the Exchange of Notes of 11 March 1961, which the Court,

[1] In the waters around Iceland, embraced in an area known technically as ICES—Region Va, the yearly average catch from 1952-1972 was approximately 1 million tons. Iceland, the United Kingdom and the Federal Republic of Germany take regularly 96 to 97 per cent. of the total catch. The main fish species are at present cod, capelin, saithe, redfish and haddock. (Until 1966, herring was also important.) The five species represent 94 per cent. of all species and among the five, cod are the most important.

The life cycle, migratory habits and reproduction factors of all species are directly connected with the hydrography of the area including the effect of the warm and saline water of the Gulf Stream.

A graphic account of these matters accompanied by a comprehensive series of charts, diagrams and statistical data was presented to the Court by Dr. Arno Meyer, at its public sitting on 28 March 1974. It will appear in the *Pleadings* series of the Court dealing with the companion case of the Federal Republic of Germany.

Detailed statistical data bearing on the economic aspects of the fishery industry in relation to the three nations, appears in FAO Circular No. 314, entitled "The Economic and Social Effects of Fishing Industry—A Comparative Study" (Rome, 1973). Perhaps the most significant single fact disclosed in the survey is that fish exports represent for Iceland 83 per cent. of all exports. On the other hand, while Iceland has a significant surplus of local production over consumption, the other two States depend for fish largely on non-local sources. The FAO Circular while also revealing employment figures dealing with the catch and landing of fish, does not purport to include data on the processing and distributing of fish or in the manufacture of boats, gear and associated industries. In assessing the scope of conflicting interests both biological and economic factors are, of course, significant. Matters of this kind are dealt with extensively in McDougal and Burke, *The Public Order of the Oceans* (1962) and D. M. Johnston, *The International Law of Fisheries* (1965).

at the jurisdictional phase of the present proceedings, had definitively pronounced to be a treaty in force between the Parties. The impact of that treaty on the nature and scope of the Court's jurisdiction and the rights of the Parties consequent upon the submissions of the Applicant were by no means self-revealing. It resulted that the Court could not agree on all aspects of the case.

As in other controversies, an appreciation of the factual and legal issues depends, to some extent, on the general approach which individual judges bring to bear on their analysis.

In the present case there was little doubt that the attempt by Iceland unilaterally to exercise *exclusive* jurisdiction in the disputed waters could not be opposed to the vessels of the United Kingdom. But the reasons in support of this conclusion did not reflect a uniform approach and this, in turn, affected varying interpretations to be given to the requirements of the treaty and the submissions of the Applicant.

At the outset, I should say that the Judgment of the Court reflects an approach which I consider soundly grounded. On the other hand, other approaches were, in my view, by no means lacking in persuasive force. I shall elaborate briefly on two of them. I shall then turn to the special problem involved in responding to the Applicant's third and fourth submissions [1].

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One such approach would rest on the proposition that Iceland has materially breached the Exchange of Notes of 1961 which the Court had previously pronounced to be a treaty in force. The terms and implication of that treaty admit of no doubt. Even if Iceland, in keeping with her repeatedly announced aspiration to extend her limits—an aspiration also embedded in the treaty—had been privileged unilaterally to *pronounce* an extension, she was not legally privileged to *apply* that extension to the vessels of the United Kingdom except under any one of three contingencies: *(a)* that the United Kingdom failed to challenge it or *(b)* that through negotiations the Parties reached an agreement or *(c)* that, if challenged, this Court would have pronounced on whether the extension was well founded under international law.

The analysis of the treaty, including the obligation to give six months' notice of any extension and the obligation to have recourse to the Court, have been analysed in detail in the Judgment of the Court at the jurisdictional stage and need not be repeated here [2]. Suffice it to say that the requirement that "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", was no mere severable clause of minor significance

[1] All of the Applicant's submissions are set out in para. 11 of the Judgment.
[2] Judgment of 2 February 1973, *I.C.J. Reports 1973*, pp. 8-16.

but an essential element of the entire agreement, the importance of which to the United Kingdom was underlined in the negotiations. And its importance was enhanced by providing an amicable method of resolving a potential dispute.

It hardly needs extensive elaboration to demonstrate that when Iceland agreed to a specified *method* whereby an extension of fisheries jurisdiction by Iceland could be effected vis-à-vis the United Kingdom, her repudiation of that method constituted a material breach of the treaty. It is almost axiomatic that when an agreement or other instrument itself provides for the way in which a given thing is to be done, it must be done in that way or not at all (*I.C.J. Reports 1972*, p. 68).

This approach, based on a clear violation of the treaty, would render *irrelevant* at the "merit" stage of the dispute any purported theory Iceland might advance to justify her extension. This is true whether the alleged justification is keyed to a change in customary law, or to the "reasonableness" of the extended limits by reference to the continental shelf doctrine or any other reason. So long as the treaty is one in force she is not legally privileged to repudiate it, or to ignore the *method* whereby the dispute was to be resolved.

The consequence of this approach would be to allow the Court to adjudge and declare that *under international law* Iceland is not privileged to take the law into her own hands and, so far as the present proceedings are concerned, she cannot therefore oppose her extension to the United Kingdom.

It might be objected that this approach is based on too narrow a view of the meaning of the merits as contemplated in the Exchange of Notes of 1961 and that it does not sufficiently dispose of the controversy. In any event, while a permissible approach, it was not adopted.

Another approach which the majority of the Court failed to adopt but which can be rationally defended is of an entirely different order (needless to suggest those who espouse this approach are not to be charged with my way of putting the matter). I shall key it to the first submission of the United Kingdom.

That submission asked the Court to adjudge and declare:

> ". . . that the claim by Iceland to be entitled to a zone of exclusive fisheries jurisdiction extending 50 nautical miles from baselines around the coast of Iceland is without foundation in international law and is invalid".

It will be observed that the sweeping character of this submission differed from the second and third submissions (which, in effect, the Court responded to favourably) in that it appeared to require the Court to say that the proclaimed extension was *ipso jure* not well founded under international law *erga omnes*, whereas the second and third submissions strictly confined the issue to the opposability of the extension to the United Kingdom.

Naturally a pronouncement on the first submission would have automatically embraced the second and third. Furthermore its terminology corresponded to the main thrust of the language employed in the negotiations preceding the adoption of the Exchange of Notes of 1961.

The reluctance to pronounce on this submission may be attributable to three separate but related considerations. (I cannot speak for my colleagues, I am only expressing my own assessment.)

First, there was the notion that the state of customary international law in 1972 with respect to unilateral extensions of fishery jurisdiction was so charged with uncertainty, viewed simply as a kind of "head count" analysis of State practice, as to make tenuous any definitive pronouncement on this issue.

Second, there was the deeper notion, keyed to the very nature of the evolutionary character of customary international law which would deny that it can or should be captured in the classical formula of repetitive usage coupled with *opinio juris*, instead of recognizing that it is the product of a continuing process of claim and counter-claim in the context of specific disputes. This concept would render intellectually suspect any definitive pronouncement on the "12-mile rule" *erga omnes*, which, because of its too generalized nature, tended to ignore the many variables that give content to customary international law and condition its application.

Third, there was the inarticulated notion that because of the Third Conference on the Law of the Sea it would be *imprudent* for the Court to attempt to pronounce on the issue of a "fixed" limit for the extension of fisheries jurisdiction when the issue was in a state of such acknowledged political and legal flux.

In stating these notions I do not mean to imply that the Court was inclined to duck the issue of the validity of Iceland's extension under international law on the ground that it was too difficult to assess. It only sought a way of avoiding the pronouncement on the issue in the expansive way required by the United Kingdom's first submission. In essence it did so by emphasizing the *exclusive* character of the claimed extension in defiance of the established rights of the United Kingdom. This, it held to be contrary to the over-riding norm of international law enshrined in the qualifying paragraph of Article 2 of the 1958 Convention on the Law of the Sea, a norm (or standard) applicable *erga omnes* [1]. This approach, reflected in the first and second subparagraphs of the *dispositif*, made it

[1] Article 2 specifies that freedom of the high seas comprises *freedom of fishing*, along with freedom of navigation, to lay submarine cables and pipelines and freedom to fly over the high seas. The qualifying paragraph states:

> "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States *with reasonable regard* to the interests of other States in their exercise of the freedom of the high seas." (Emphasis added.)

The "norm" expressed by this Article is couched in the language of a "standard"

unnecessary for the Court to pronounce definitively on the so-called 12-mile rule or the United Kingdom's first submission.

Having said this, I am impelled to make the following observations.

The contention that by the middle or late 1960s customary international law had crystallized to a point which set an outer limit of 12 miles for exclusive fishery zones, while not conclusive, is persuasive. "Head counts" dealing with "State" practice, vary to some extent owing to different criteria as to what is exclusive (see FAO Circular No. 127, Rome, August 1971). Clearly the issue is realistically framed not in terms of a set limit of 12 miles but is keyed rather to the number of States whose territorial sea and/or exclusive fisheries jurisdiction taken jointly or separately do not *exceed* 12 miles. An authoritative analysis of 147 independent countries shows, as of August 1972, 96 States with 12 miles or less, 19 with limits ranging from 15 to 200 miles, 4 ambiguous and 28 landlocked. A United States State Department tabulation of 123 jurisdictions showed 88 per cent. as having 12 miles or less and 12 per cent. in excess of 12 miles. Other kinds of enumerations are plentiful. To determine the *significance* of these and other tabulations, account would need to be taken of geographical spread, degrees of maritime interest and many other factors beyond the reach of this opinion. References in the United Kingdom Memorial on the merits illuminate some of these factors (paras. 245-257) [1].

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and not that of a "rule" (in the narrow sense). This means that a court, or any other decision-maker, has more flexibility in applying it than if it required an exercise in what is called "jural syntax". The use of "standards" permits some accommodation of the need for a "general norm" permitting a tolerable degree of predictability with the need to adjust to the peculiarities of a special situation, a point to be alluded to later in this opinion.

On the meaning of "standards" see Pound, "Hierarchy of Sources and Forms in Different Systems of Law", 7 *Tulane Law Review*, 475 (1933) and on the use of standards in "individualizing" the application of law see Pound, *An Introduction to the Philosophy of Law* (1953), p. 64.

[1] The warning should be sounded that tabulations of jurisdictional extensions may be misleading unless an analysis is made of the degree of control the coastal State purports to exercise. In FAO Circular No. 127 (Rome, 1971) the criterion of "exclusive" jurisdiction used in its enumeration, includes any State which reserves to its nationals the right to fish "regardless of whether the legislation or an agreement to which it is a party permits fishing by non-nationals subject to certain conditions" (p. 1257). While this might be an acceptable criterion it may not coincide with that in other enumerations which would not include agreed upon conservation measures as constituting an "exclusive" claim.

For some uncertainties in this area, see: Stevenson, "Who is to Control the Oceans: US Policy and the 1973 Law of the Sea Conference", Vol. VI, *The International Lawyer*

The argument that classically conceived customary international law supports an outer limit of 12 miles is fortified by considering the fact, of which the Court could take judicial notice, that in practice States accord deference to the 12-mile limit as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity. In contrast many assertions of jurisdiction beyond 12 miles have generated protests from affected States. Nor can a legitimate inference be drawn from lack of protests by non-interested States that they necessarily acquiesce in such unilateral extensions of exclusive jurisdiction [1].

The authority of the International Court of Justice is sometimes invoked in support of a quasi-universalist, as opposed to a consensus theory of customary international law. Thus in the *Anglo-Norwegian Fisheries* case the Court, in discussing the 10-mile rule for bays, stated (*I.C.J. Reports 1951*, 116 at p. 131):

> "... the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."

However, it is worth noting, as the Court pointed out, that Norway had always opposed any attempt to apply the rule to the Norwegian coast. In striking contrast, Iceland, while reserving the aspiration to work for an extension, yet freely acknowledged that she would abide by an outer limit of 12 miles in the Exchange of Notes of 1961. The elucidation of an aspiration or pronounced intention, is not incompatible with the concession that, until it is achieved, she is bound by the 12-mile rule.

In fairness to the contentions of Iceland, however, it should be stated that the analysis above does not do full justice to the arguments which, on various official occasions, she has advanced. She starts from a different premise which implicitly denies the premise on which the concept of an "established" law depends. Because of the wide divergencies in State practice, she contends, in effect, that there is no law or at best a lacuna in the law viewed as a body of restraints on State conduct, and therefore

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465-477 (1972). For a recent evaluation of varying South American claims, see Garcia Amador in 68 *American Journal of International Law*, 33-50 (1974).

[1] Logically, it does not follow that because "protest" shows lack of "acquiescence" that lack of protest shows acquiescence. The matter is discussed in D'Amato, *The Concept of Custom in International Law* (1971), at pp. 85, 98-102, 195.

the law does not prevent the extension by each State of its exclusive fisheries jurisdiction. She is not claiming an exception to an *established* rule but a different kind of rule, namely a permissive rule which, in the absence of a specific rule to the contrary, permits the coastal State in a special situation to extend unilaterally its jurisdiction to an extent that it deems reasonable. She further claims that her extension is "reasonable" because it coincides generally with the limits of her continental shelf.

It is immediately apparent that the argument above invites an enquiry not only into the question of the burden of proof but at a deeper theoretical level into the much discussed question of State autonomy and freedom of State action and presumptions flowing from such concepts. In turn this goes back to the controversial *Lotus* case [1] and to the manner in which the International Court of Justice handled the submissions in the *Anglo-Norwegian Fisheries* case [2]. It would extend this opinion to inordinate lengths if these matters were broached in depth. Suffice it to suggest at present that, while the burden of proof problem may have some relevance in determining factual and jurisdictional issues, it has little bearing on the present case. Likewise with the notion of freedom of State action. Borrowing from Lauterpacht [3], I would put the matter as follows: if the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification. This the Court must determine in light of the applicable law and it does not advance the enquiry to attempt to indulge in a presumption or to lean on a burden of proof. It can be argued, for instance, that Iceland was the "actor" who sought to change the established law and the burden of proving legal justification rests on her. Conversely it can be argued that the Applicant was in the role of plaintiff and should therefore have the burden of establishing the illegality of Iceland's actions. In either event the Court must determine the rights of the Parties. Freedom of State action and burdens of proof suggest analogies to the criminal and civil procedures of some States. Applied to the present case the analogy is misplaced.

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[1] *P.C.I.J., Series A, No. 10* (1927) at p. 18. Cf. Hudson, *The Permanent Court of International Justice* (1943), pp. 611, 612; D'Amato, *op. cit., supra*, pp. 178-189.

[2] *I.C.J. Reports 1951*, p. 116. Cf. Waldock, "The Anglo-Norwegian Fisheries Case", 28 *British Year Book of International Law* (1951), p. 114 and Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", 30 *British Year Book of International Law* (1953), pp. 8-26.

[3] Lauterpacht, *The Development of International Law by the International Court* (1958), p. 361. See also, Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", 34 *British Year Book of International Law* (1958), pp. 149-150.

Although, in my view, the 12-mile rule may be grounded on a sounder theoretical base than an alternative rule grounded on a concept of "no law" or a "gaping lacuna" in the law [1], it yet seems to me that the way in which customary international law evolves, as noted previously, made it *unnecessary* for the Court to pronounce on the first submission of the United Kingdom, namely that Iceland's unilateral extension was without foundation in international law *ipso jure* and *erga omnes*. It sufficed for the disposal of the case that under international law Iceland's extension could not be opposed to the Applicant.

In the course of the oral proceedings a Member of the Court put to counsel the following question:

> "Is it the contention of the Applicant that its first three submissions, that is to say, submissions *(a)*, *(b)* and *(c)*, are so connected that it is necessary for the Court to adjudicate on the first in order to adjudicate on the second and third?" (CR 74/1, p. 33.)

In replying, counsel, after analysing the purport of all three submissions, declared:

> "It follows when these three submissions are analysed in this way that *(a)*, *(b)* and *(c)* are not so connected that the second and third cannot stand without the first, and in the view of Her Majesty's Government *it is therefore open to the Court to adjudicate on the second and the third of those submissions without adjudicating upon*

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[1] The difficulty with a "no law" concept is that it is apt to imply that States are free to fix any limit they think reasonable, a notion likely to generate confusion and breed conflict. Clearly the fact that there are discordances in the practice of States leading to a large measure of uncertainty casts doubt on the utility or wisdom of a specific rule, but the alternative is not to leap into the abyss of a legal vacuum. The better alternative is to recognize exceptions to the prevalent norm or to re-classify the norms themselves to take account of special circumstances as was done in the *Anglo-Norwegian Fisheries* case. At the theoretical level the difficulties with a "no law" or "vacuum" concept are profound. The references cited in the footnotes to the preceding paragraph contain discussions of some of these difficulties.

Nor is this all. The fact that the States in 1958 or 1960 did not reach a *formal* agreement on a specified limit does not signify that they accepted as an alternative the extreme postulate of State autonomy which would accord each State the freedom to set such limits as it chose. Indeed the conferences were based on the opposite assumption, an assumption dictated by a consciousness of the existence of a community interest hostile to the notion of uninhibited freedom. It is worth recalling that the 1958 Conference soundly rejected the only proposal coming to a vote on the question of allowing a coastal State discretion to set any limit it wished for the territorial sea. While obviously problems of the territorial sea are not co-extensive with those concerning fisheries, yet the problem of unilateral extensions may be common to each. In the First Committee the proposal was rejected by a vote of 44/29/9 and in the plenary session by 47/21/17. More significant is the fact that no further proposals of the kind were made. McDougal and Burke, *The Public Order of the Oceans* (1962), pp. 497-498.

> *the first*, it being of course understood and accepted that submissions *(b)* and *(c)* are based on general international law and are of course not confined merely to the effect of the Exchange of Notes." (CR 74/3, pp. 23, 24; emphasis added.)

The observations of counsel are, of course, in no sense controlling on the Court. Nevertheless it is not without significance to observe that the Applicant considered that its first submission was not essential to the disposition of the case, a position which the Court, in the exercise of its independent discretion, also assumed.

At a broader policy level it can also be argued that it might have been undesirable to specify any set limit for the extension of fisheries jurisdictions *erga omnes*. It is apparent from even a casual survey of the massive literature on the subject that there are so many disparities in the types of fishes and their migratory ranges, to say nothing of wide variations in the extent of coast lines and continental shelves, that the wisdom of freezing a limit applicable generally may be questioned. Fish and especially free swimming fish such as those involved in the present case are, of course, no respecters of national jurisdictions. The problem may well call for the application of flexible standards instead of fixed rules.

Charles De Visscher, in his book entitled *Theory and Reality in Public International Law* (Corbett Translation, 1957) addressed himself to the broad problem involved in the specification of general norms in his consideration of the *Anglo-Norwegian Fisheries* case. In the course of his discussion he quoted with approval (n. 38, p. 154) the following passage from Brierly, extracted from the latter's 1936 lectures before the Hague Academy of International Law:

> "Uniformity is good only when it is convenient, that is to say when it simplifies the task in hand; it is bad when it results from an artificial assimilation of dissimilar cases . . . The nature of international society does not merely make it difficult to develop rules of international law of general application, it sometimes makes them undesirable." (58 *Recueil des cours*, pp. 17-18.)

This gratuitous digression in the present opinion is not intended to suggest that in the present case the Court is *directly* concerned with the complex jurisprudential problem of knowing how best to reconcile the need for general norms in the interest of some degree of predictability versus the need to avoid them in the interest of the particularistic and individualistic nature of the subject-matter to which the norms are applicable. The digression is only intended to point to one of the broader aspects of fisheries jurisdiction impinging on the present case.

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From all that has been said above I find that the Court was justified in taking an intermediate position between the narrow approach based on breach of the treaty, to which allusion was made earlier, and the more expansive approach based on the United Kingdom's first submission. In short, the first two subparagraphs of the *dispositif* are preferable to permissible alternatives. It remains to discuss the more controversial position reflected in subparagraphs 3 and 4 of the *dispositif*.

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The jurisdiction of the Court to entertain the merits of the dispute was, as previously noted, definitively established by its Judgment of 2 February 1973. But the endowment of jurisdiction in the sense of the *general power* to deal with the merits is one thing; the nature and scope of that power is quite another.

It is precisely with reference to the third and fourth subparagraphs of the *dispositif* that questions of the latter kind have been raised concerning the extent of the Court's assumption of jurisdiction.

The third subparagraph states that the two Parties are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas around Iceland to seaward of the fishery limits agreed to in the Exchange of Notes of 1961. The fourth subparagraph indicates the guidelines for doing so. Briefly summarized it specifies that in the distribution of the fishery resources, account be taken of the preferential share to which Iceland is entitled to the extent that she qualifies as a State in a condition of special dependence on coastal fisheries; that account also be taken of the established rights of the United Kingdom; that the rights of both States should be given effect to the extent compatible with the conservation and development of the fishing resources in the area; that regard also be paid to the interests of other States in the conservation and equitable exploitation of the resources and that the two States keep under review the measures required for the conservation, development and equitable exploitation of the resources in light of scientific and other available information.

The United Kingdom in its Memorial on the merits (paras. 300-307) earnestly pressed upon the Court the desirability of applying equitable principles in fairness to both Parties, an attitude also reflected in the submissions contained in its Application and Memorial on the merits and repeated emphatically in the oral hearings. A similar attitude was displayed by the Applicant in the companion case concerning the Federal Republic of Germany. The justification was rooted in the acknowledged need to balance the traditional rights of the Applicant against the preferential rights of Iceland in the interests of a rational approach to the

exploitation and conservation of the fisheries in the waters under dispute.

It is true, of course, that the Court, as master of its own jurisdiction, is not controlled by the position taken by the Applicant but is compelled to inquire into the scope of its own jurisdiction in light of its source. Nevertheless it is not irrelevant that the Party whose interests are most vitally affected should urge upon the Court a solution of this kind, grounded legally on the principle enunciated in Article 2 of the Convention on the High Seas of 1958 which, while not binding on Iceland as a matter of conventional law, is yet binding as a declared and acknowledged norm of international law. Why then should the Court not respond favourably to the proposed equitable solution of the controversy? [1]

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As I understand it, the argument questioning the Court's power to deal with the above issues rests on the following chain of reasoning. Both the existence and scope of the Court's jurisdiction is confined to the Exchange of Notes of 1961. The reference in the Exchange of Notes to a "dispute" must be strictly confined to the kind of dispute contemplated by the parties in negotiating and framing the Exchange of Notes. This, and this alone, constitutes the *subject-matter* to which the Court's jurisdiction attaches. At no relevant time was there a dispute concerning preferential rights or conservation. Quite the contrary, it concerned only the extension itself and whether it could be held well founded under international law. The Court is not privileged to change the nature of the dispute without doing violence to its endowment of limited power in the Exchange of Notes. This interpretation is asserted to be fortified by the *travaux préparatoires* and to be consonant with the frequently stated proposition that the Court should, as a matter of policy, exercise the greatest restraint in assuming or extending its own jurisdictional powers. So runs the argument. In my view the argument, while plausible, is not sufficiently persuasive. It is true, of course, that the exclusive source of the Court's jurisdiction is the Exchange of Notes; it is also fair to say that the major subject discussed in the negotiations preceding the Exchange dealt with the extension as such and not with preferential rights or conservation. But references to the latter were not altogether lacking.

[1] In the words of Judge Hudson: "What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals" (*Diversion of Water from the Meuse, 1937, P.C.I.J., Series A/B, No. 70*, p. 76). I would add that those principles are particularly relevant when the issues focus on the common use of limited resources and the applicable norms of international law is couched in the form of a "standard".

Indeed at the very first discussion on 1 October 1960 Sir Patrick Reilly in his opening remarks conceded that there may be areas both inside and outside the 6-12-mile zone "which on the scientific principle of conservation should be reserved from trawling". Mr. Andersen of Iceland countered with the assertion that "conservation measures applicable to all alike were not sufficient to safeguard Iceland's coastal fisheries" (Records of the Anglo-Icelandic Discussions, 1 October 1960 to 4 December 1960, at pp. 1 and 5). Furthermore it should be recognized that a certain ambiguity attends the meaning of the term "exclusive", a point to be alluded to later and revealed in some of the diplomatic exchanges subsequent to the adoption of the Exchange of Notes, as, for instance, in the Government of Iceland's Note of 11 August 1972 in which preferential rights are expressly mentioned (United Kingdom Memorial on the merits, Annex 10, p. 125). But the more important point, in my view, is the larger context in which the dispute itself is located.

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It will be recalled that the Exchange of Notes speaks of the Althing Resolution of 5 May 1959 (quoted in para. 24 of the Judgment). The significant point is that this resolution explicitly referred to the "policy adopted by the Law of 1948 concerning the Scientific Conservation of the Continental Shelf Fisheries . . .".

The title of the 1948 Law is a "Law concerning the Scientific Conservation of the Continental Shelf Fisheries" and Article 1 authorized the Ministry of Fisheries to ". . . issue regulations establishing explicitly bounded *conservation zones* within the limits of the continental shelf of Iceland . . ." (emphasis added). It went on to declare that "all fisheries shall be subject to Icelandic rules and control . . .".

Reverting to the Exchange of Notes of 1961 it is necessary to emphasize that it does not refer to any particular type of extension but only that the Government would work for the implementation of the 5 May resolution "*regarding the extension of fisheries jurisdiction*". Furthermore the terms used to describe the "dispute" are by no means restricted to the *fact* of extension but to "*a dispute in relation to such extension*" and in the event of such dispute, "*the matter*" shall, at the request of either party be

referred to the Court (emphasis added). The terms are quite general and, on the face of it, hardly suggest the need for a restrictive interpretation.

In light of the importance of the 5 May resolution and its basis in the Law of 1948 it seems to me clear that a too narrow interpretation of the 1961 Exchange of Notes is neither compelled by its terms nor warranted by the context in which the whole dispute is located.

Perhaps a simple hypothetical example will help to illuminate the issue. Suppose Iceland had not purported to extend its exclusive jurisdiction in a fashion that was intended or likely to extinguish the rights of the United Kingdom but, under the guise of preferential rights and conservation, she laid down conditions that the United Kingdom found intolerable. Could it be plausibly argued that this type of extension, although expressly keyed to preferential rights and conservation needs, fell completely outside the ambit of the Exchange of Notes? Would it not still fall to the Court to decide the issue under international law? And could it be plausibly argued that in doing so the Court had somehow converted one type of "dispute" into another "type"?

If it is contended that this illustration misses the point since such an extension would, in fact, be "exclusive" I can only reply that this observation misses the point of the illustration.

I agree entirely with the conclusion stated in the Judgment that Iceland's claim was, in fact, an exclusive one. Indeed this conclusion is essential to the rationale of the Judgment. Furthermore it can be readily conceded that an assertion of jurisdiction which permits a State to fish in the disputed area only by the tolerant forbearance of the coastal State may be characterized as the assertion of an exclusive claim. At the same time, it should be noted that a certain ambiguity attends the notion of "exclusive" jurisdiction as revealed in the uncertainties which attach to many claims of States reaching beyond the 12-mile limit. These uncertainties were also reflected to some extent in the official diplomatic exchanges between the United Kingdom and Iceland and actual practice in the present case. It is not surprising therefore that, in the course of the oral proceedings, in response to a question put by a Member of the Court, counsel for the Applicant required (in the mimeographed version of the hearing of 29 March 1974) nine pages to analyse the many meanings of "exclusive" in State practice in which three types were emphasized (pp. 24-33). The hypothetical illustration is designed to show that an *asserted* claim based on conservation needs would *not* fall outside the reach of the Exchange of Notes.

Viewed from the point of view of the United Kingdom it would be quite irrelevant whether, under the stated hypothesis, it was or was not objectively an exclusive claim. The point is that a *claim* of extended jurisdiction *asserted* on conservation grounds would not be excluded under the Exchange of Notes.

The weakness, as I see it, in the argument which would deny the Court jurisdictional power to respond to this issue is rooted in a too simplistic concept of the nature of the dispute. Clearly a court could not convert a dispute between two farmers over the ownership of a cow into one over the ownership of a tractor. But the dispute covered in the Exchange of Notes is not of this clearly delineated character. To speak of the extension of "fisheries jurisdiction" is to speak of the projection of national power into an area that is not national and that could impinge on the rights of the Applicant. And it must be recalled that one of the main purposes of the Exchange of Notes was to provide an amicable method of resolving a dispute.

No doubt the Court could have disposed of the dispute by limiting its *dispositif* to the first two subparagraphs. It could also have disposed of the dispute by responding to the United Kingdom's first submission as indicated earlier in this opinion. It was not compelled to refer to preferential rights and conservation needs. This, I take to be a question of judicial discretion and even prudence. But all this does not entail the consequence that it is *precluded* from dealing with the dispute on the broader grounds so earnestly sought by the Applicant. To read the Exchange of Notes of 1961 otherwise, that is to say, in a too restrictive fashion, may have sufficed to decide the immediate issue between the Parties but, in my view, it would not have sufficiently sufficed to *resolve* the dispute by recognizing the interests of *both* Parties and supplying guides for their future conduct, especially when the dispute is itself heavily impregnated with elements of what is sometimes called distributive justice.

I hasten to add that I am not suggesting that the Court, itself, should attempt to resolve issues involving those elements. But, to repeat, it is not beyond the range of its function to indicate the nature of the legal rights involved and to provide appropriate guidelines in order to facilitate the better resolution of the dispute as was done in the *Continental Shelf* cases. This, of course, is what the third and fourth subparagraphs of the *dispositif* purport to do.

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Although the observations above may suffice to dispose of the *jurisdictional* issue, another and, in my view, more troublesome problem is involved. It is arguable that while the Court was privileged to pronounce upon the existence and relevance of the legal norms embraced in the concept of preferential and established rights in light of conservation needs, it should have stopped short of imposing on the parties a *duty* to negotiate. In other words, it should have merely indicated the *basis* for negotiations without including a *duty* to engage in them. Indeed it is arguable that, apart from lack of adequate authority, it is disingenuous to impose this duty on the Parties, especially in light of the interim agreement of November 1973, an agreement which would appear to render tenuous the invocation of Article 33 of the Charter, the terms of which are confined to any dispute, "the continuance of which is likely to endanger the maintenance of international peace and security . . .".

Of course, to put the matter in perspective, it should be observed that a *duty* to negotiate does not imply that the parties *must* immediately or later engage in negotiations. Obviously one of the parties would need to initiate them when it considered that circumstances so required. The duty to respond would then lie with the other party. In the present case, owing to the impact of the interim agreement of November 1973 it is readily conceivable that the status quo would not be disturbed until the expiry of that agreement.

The Judgment, in paragraphs 73-77, addresses itself to the problem of its *authority* to specify the duty to negotiate. It states that "It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights . . ." (para. 74). It appears to draw upon the need for collaboration flowing from the very nature of preferential rights; it alludes to the requirement of "collaboration" prescribed in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries; and it stresses a dictum in the *North Sea Continental Shelf* cases which stated that the obligation to negotiate assumed in the Special Agreements of the Parties (in that case):

> ". . . merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes" (*I.C.J. Reports 1969*, p. 47, para. 86).

The Judgment in the present case did not, however, specifically ground its holding on Article 33 of the Charter but suggested that its holding, based on the very nature of the rights in question, would correspond to the Principles and provisions of the Charter.

Reference to the "very nature of the respective rights of the Parties" (para. 75) while justified, may yet appear to be too cryptic a description of an assumed power and therefore to need some elaboration.

In any event, I submit that the conclusion reached can be fortified by reference to the widespread practice of States both in the matter of conservation of fishery resources and, analogically, in other areas in which the conflicting rights of States impinge on the use of a common resource.

In its Memorial on the merits the Applicant, in paragraphs 266-281, has called attention not only to the North-East Atlantic Fisheries Convention of 1959 to which 14 States including both the Applicant and Iceland are parties but to the International Convention for the North-West Atlantic Fisheries of 1949; the Atlantic Tuna Convention of 1966; the USA/USSR King Crab Fisheries Agreement of 1969; the USA/Cuba Shrimp Convention of 1949; the Brazil/USA Shrimp Conservation Agreement of 1972; the Convention on the Conservation of the Living Resources of the South-East Atlantic of 1969; the Canada/Norway Agreement on Sealing and the Conservation of Seal Stocks in the North-West Atlantic of 1971 and the Iceland/Norway/USSR Agreement on the Regulation of the Fishing of the Atlanto-Scandinavian Herring of 1972. After enumerating numerous other agreements and conventions in the Baltic, the Black Sea, the Pacific and the Antarctic, the conclusion is reached that in six oceans and seas, 30 or more States have participated in international agreements regulating high seas fisheries when the need for conservation, regulation and control is present [1].

It is not here suggested that each of these agreements resulted from the application of a *prior* duty to negotiate. Yet clearly each was the consequence of an imperatively felt need to engage in negotiations in order to accommodate the conflicting rights of the parties. It is worth recalling also that the preamble to the North-East Atlantic Fisheries Convention of 1959 puts all the parties on record as:

[1] According to a compilation in Lay, Churchill, Nordquist, *New Directions in the Law of the Sea*, Vol. II, pp. 771-798, there were, as of 1 August 1972, no fewer than 210 bilateral and multilateral agreements dealing with various aspects of the law of the sea. After a characteristically thorough survey, McDougal and Burke conclude that "Practically all international agreements since the beginning of . . . conservation effort in 1911 . . . witness the general understanding that the participation of all States substantially concerned with a fishery is necessary for effective action". McDougal and Burke, *The Public Order of the Oceans* (1962) at p. 965.

> "Desiring to ensure the conservation of the fish stocks and the rational exploitation of the fisheries of the North-East Atlantic Ocean and adjacent waters."

And the terms of the Convention on Fishing and Conservation of the Living Resources of the High Seas places the duty of acting to conserve resources on *all* States. As stated in Article 1 (2):

> "All States have the *duty* to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas." (Emphasis added.)

This is further fortified by Article 4 (1):

> "If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, these States *shall*, at the request of any of them, *enter into negotiations* with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected." (Emphasis added.)

Although Iceland was not a party to this Convention it is yet possible to surmise that, in light of the practice of States and the widespread and insistent recognition of the need for conservation measures that the principle it announces may qualify as a norm of customary international law, bearing in mind the observation made by Judge Tanaka in another context, that:

> "The role played by the existence of a world-wide international organization like the United Nations, its agency the International Law Commission, and their activities generally do not fail to accelerate the rapid formation of a customary law [1]." (*I.C.J. Reports 1969*, p. 177.)

Further support can be derived from the qualifying paragraph of Article 2 of the High Seas Convention, to which frequent allusion is made in the text of the Judgment. The obligation to pay due regard to the interests of other States contained in Article 2 is, of course, a norm of law which lies upon all States. It can be triggered by any State whose interests are allegedly infringed by another State involving thereby an obligation to come to some kind of peaceful arrangement. It is worth noting, also, that the International Law Commission in commenting on

[1] Compare also the observation of Judge Sørensen in *I.C.J. Reports 1969*, pp. 242-247. See generally, Baxter, "Treaties and Custom", Hague Academy of International Law, *Recueil des cours*, 1970, I, pp. 31-104.

the preliminary draft which ultimately emerged as Article 2 of the High Seas Convention indicated that its rules concern particularly: "The rights of States relative to the *conservation of the living resources of the high seas*" (*Yearbook of the International Law Commission*, Vol. II, 1956, p. 278; emphasis added.)

It would be tedious and unnecessary to extend this discussion by referring to analogous problems in areas other than fisheries. Yet, I cannot forbear calling attention to Judge Jessup's observations in his separate opinion in the *North Sea Continental Shelf* cases in which he alluded to the principle, fortified by State practice, of the need for international co-operation in the exploitation of a "natural" resource common to more than one State. To the examples he cites and to those in Onorata's "Apportionment of an International Petroleum Deposit", 17 *International and Comparative Law Quarterly* (1969), to which he referred, many others could be added. (*I.C.J. Reports 1969*, pp. 82-83.)

Projected against this broad background, the power of the Court to adjudicate on this issue and to specify a duty to negotiate in good faith, seem to me to be well founded in law.

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The reference earlier in this opinion to elements of "distributive justice" impels me, even at the risk of appearing "textbookish" to add an explanatory comment.

The present case involves, both in its practical aspect and its long-range implication the problem of the wise or meritorious allocation of limited resources or what are presumed to be limited resources. This presents an almost typical instance of what, in classical theories of justice, may be described as distributive as opposed to corrective (sometimes called remedial) justice.

Obviously this is no place to undertake an abstract discussion of the requirements of what may be a just solution to a specific controversy. The general subject commands an immense literature and it would be at once pretentious and possibly irrelevant to broach it. I am merely suggesting that, when contrasted with corrective justice, it may provide a helpful analytical tool in considering the nature of a dispute, the role of a court and the character of the norms at its disposal [1].

[1] There are many ways of analysing the concept of distributive justice and some were discussed in various opinions in the *North Sea Continental Shelf* cases. I would agree that in the context of that case the use of the concept by the Federal Republic of Germany was questionable.

Allowing for gross over-simplification the distinction may be put this way: questions of *establishing* a *system* or *régime* of equitable allocation of resources engage elements of distributive justice; on the other hand *disturbances* to the system fall under the province of corrective justice [1].

It is not unusual to assume that the former lies exclusively in the lap of the legislative branch and the latter in that of the Court. But this easy way out of the problem ignores the turbulent way in which disputes are generated, the manner in which they are put in the lap of the Court, and the need to resolve them.

In the present case it may be urged, as Iceland has, that the wise allocation of resources should be left to the norms of law which may emerge from the Conference on the Law of the Sea. Whatever virtue adheres to this position is, however, neutralized by the sheer fact that the Court must decide a case in which, basically, elements of distributive justice intrude.

Its capacity to do so is not precluded by any *theory* of the judicial process which inhibits it from analysing all the elements involved in any dispute, marshalling all the supporting data, even of a highly sophisticated scientific character, and "laying down the law" in terms of the *establishment* of a régime of allocation. But considerations of a practical, political and psychological nature dictate that this function is best done at the outset by the parties themselves or better still by other bodies specially qualified to assess the conflicting interests, the relevant scientific factors, the values involved, and the continuing need for revising the *régime* in light of changing conditions. The Court's role is best limited to providing legal guide-lines which may *facilitate* the establishment of the system and in the event of a subsequent dispute, to help redress disturbances to it. Meanwhile the Court has consistently indulged the assumption that the Parties will, in fact, negotiate in good faith.

This, of course, is the approach taken by the Court in subparagraphs 3 and 4 of its *dispositif*. Viewed in this light, it supplements the findings in the first two subparagraphs, while also responding to the requirements of distributive justice.

(Signed) Hardy C. DILLARD.

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[1] The distinction (although not in the form I have put it) is usually attributed to Aristotle who discusses it in connection with "particular" justice in his *Politics* (III, 9 and V, 1) and his *Nicomachean Ethics* (V, 3, 1-17). See also Aristotle, *Ethics* (Everyman edition, 1950), pp. 112 *et seq.* Additional references and a brief explanation of the distinction may be found in Academy of International Law, 91 *Recueil des cours*, 1957-I, pp. 549-550.