SEPARATE OPINION OF JUDGE DE CASTRO

[Translation]

I have voted with the majority, but do not consider that I can wholly subscribe to the reasoning in the Judgment. I therefore venture, in exercise of the right conferred on me by the Statute, to set out in detail the reasons for my vote.

I. The Texts to Be Interpreted

1. The 1961 Agreement

The Exchange of Notes of 11 March 1961 underlies the whole case; the compromissory clause contained therein constitutes the source of the Court's jurisdiction (Judgment of 2 February 1973). It is necessary to interpret its content in order to ascertain the intentions of the parties, which is the first factor to be taken into account by the Court.

The Exchange of Notes took place at a time when the law of the sea was undergoing a crisis in its development, and it is in this context that it should be considered and then interpreted [1].

On 5 April 1948 the Althing adopted the "Law Concerning the Scientific Conservation of the Continental Shelf Fisheries", and by a decree of 30 June 1958, Iceland's fisheries limits were extended to a distance of 12 miles. The United Kingdom challenged the validity of this action and there ensued serious incidents and lengthy negotiations. It was during this period that the Resolution of the Althing of 5 May 1959 was passed and the United Nations Conference on the Law of the Sea was held in 1960. Finally, following talks in London and Reykjavik, the dispute was settled by the Exchange of Notes of 11 March 1961. The United Kingdom Government accepted Iceland's unilateral declaration of 1958 stating that it "will no longer object to a 12-mile fishery zone around Iceland".

This acceptance by the United Kingdom was explained in a letter from Her Britannic Majesty's Ambassador to the Foreign Minister of Iceland as being "in view of the exceptional dependence of the Icelandic nation upon coastal fishery for their livelihood and economic development". Iceland's

[1] On the relationship between the Icelandic claims and the development of the law of the sea, see section III.

special interest in the fisheries of its coastal waters was thus recognized [1].

The United Kingdom accepted a 12-mile zone, but only because of Iceland's special interest in the adjacent seas. Iceland for its part regarded the 12-mile limit as provisional and did not accept it as the maximum and permanent limit.

The United Kingdom conceded that the following reservation should be inserted in the Agreement:

> "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 Icelandic Government thus reserved the power to extend its fisheries jurisdiction at will, subject to certain conditions or more precisely to certain restrictions, namely those set out in the agreement; that six months' notice be given of any decision to that effect and that any dispute which might arise over any such extension be referred to the Court at the request of either party. Additionally there was an implied restriction that the purpose of any extension would be to implement the Althing resolution of 5 May 1959.

In its resolution of 5 May 1959, the Althing had declared 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".

Thus the Law of 1948 enables the true scope of Iceland's reservation in its 1961 Notes to be ascertained. Its purpose was identical to its title: its direct object was the establishment of "conservation zones" within the limits of the Icelandic continental shelf; but, in accordance with progressive thinking which was already widespread at the time, the Law went on to lay down that in the said zones "all fisheries shall be subject to Icelandic rules and control" (Art. 1).

The statement of reasons for the Law mentioned Iceland's special interests and declared that:

> "It is well-known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety."

It also referred to the new trends in the law of the sea, especially the

[1] This special interest of Iceland was recognized by the Court in the Order of 17 August 1972 (*I.C.J. Reports 1972*, pp. 16 and 17) and in its Judgment of 2 February 1973 (*I.C.J. Reports 1973*, p. 20).

growing recognition by countries which engage in fishing mainly in the vicinity of their own coasts, of the right of coastal States to ensure the protection of fishing grounds in accordance with the findings of scientific research. The "commentary on Article 1" explained that it provided for:

> ". . . the delimitation of the waters within which the measures of protection and prohibition of fishing should be applied, i.e., the waters which are deemed not to extend beyond the continental shelf; and, on the other hand, the measures of protection and prohibition of fishing which should be applied in these waters".

On the question of the sovereignty of States over fishing grounds in the vicinity of their coasts, the statement of reasons was not categorical, merely stating that:

> "It would appear, however, to be more natural to follow the example of those States which have determined the limit of their fisheries jurisdiction in accordance with the contour of the continental shelf along their coasts. The continental shelf of Iceland is very clearly distinguishable, and it is therefore natural to take it as a basis. This is the reason why this resolution has been adopted in the present draft law."

Under Article 2 of the Law:

> "The regulations promulgated under Article 1 of the present law shall be enforced only to the extent compatible with agreements with other countries to which Iceland is or may become a party."

These texts may be seen as reflecting, to a moderate extent, the so-called progressive movement, initiated by President Truman's Proclamations, and expressed in the trends towards a renewal of the law of the sea relating to fisheries which have resulted from the legislation and the doctrines of Latin American countries.

It seems to me that according to the text of the Law of 1948 and of the explanations given in the statement of reasons for the Law, the Icelandic reservation of 1961 should be interpreted as a solemn declaration of its intention to extend its fisheries zone in the future and to do so unilaterally, by reason of the special interests and especially the preferential rights of Iceland within the limits of its continental shelf, such a reserved right of extension to be enforced in so far as was compatible with such agreements as Iceland might conclude with other countries.

It should be noted that in 1948 the Icelandic Government proceeded with caution; it did indeed claim to subject the zone superjacent to the continental shelf to its rules and controls, but it did so because it saw such areas as "conservation zones". Therefore, the reservation made in the Exchange of Notes of 1961 in respect of the intentions expressed in the

Althing Resolution of 1959—which in turn referred to the Law of 1948—is to be interpreted not as a reservation of a right to claim exclusive fishing rights within the limits of the Icelandic continental shelf, but as a reservation of the right to claim preferential rights by reason of Iceland's special interests.

2. The 1972 Althing Resolution

The Althing Resolution of 1972 asserted that the continental shelf of Iceland and the superjacent waters were within the jurisdiction of Iceland and provided that the fishery limits would be extended to 50 miles from baselines around the country (para. 1). The extension effected by this Resolution is the cause of the dispute now before the Court. The Resolution, however, merits detailed consideration.

Paragraph 2 states:

> "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."

The Court has adjudged and declared that the Notes of 1961 are still in force so far as concerns the compromissory clause (Judgment of 2 February 1973). In that respect, the Althing Resolution was considered to be of no effect. For reasons similar to those set out in the said Judgment (paras. 36 *et seq.*), and in the light of the principles enshrined in Article 42 of the Vienna Convention on the Law of Treaties, it is quite clear that Iceland does not have the right to declare unilaterally that the agreement made in 1961 no longer constitutes an obligation for it.

The Court could confine itself to saying that the Althing Resolution, proclaiming the lapse of the 1961 Notes, was void and ineffective. But the other paragraphs of that Resolution should be considered independently (*duae sunt ... stipulationes, una utilis, alia inutilis, neque vitiatur utilis per hanc inutilem*, D.45.1.1, para. 5), and in relation to the 1961 Notes in question.

Paragraph 1 is no more than the implementation of what had been announced in 1961, i.e., the extension of Iceland's jurisdiction over the whole continental shelf area. It now describes the Law of 1948 as the "fundamental policy of the Icelandic people" [1]. The aim of the Resolution and that of the 1948 Law were in fact the same, i.e., "to strengthen the measures of protection essential to safeguard the vital interests of the Icelandic people in the sea surrounding its coasts" and to prevent all that

[1] It should be noted that Article 7 of the Icelandic Regulations of 14 July 1972 states that: "these regulations are promulgated in accordance with Law No. 44 of 5 April 1948, concerning the scientific conservation of the continental shelf fisheries."

was "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).

If the decree of 30 June 1958 is borne in mind, the 1972 Resolution can be considered as the adoption of a position in view of future negotiations, the aim being to adapt Iceland's jurisdiction to the new trends in the law of the sea and to take advantage of a fresh crisis in the development of that law. The demand for a zone of exclusive jurisdiction (cf. above aide-mémoire) was formulated in most moderate terms. The 1972 Resolution pointed out that:

> ". . . efforts to reach a solution of the problems connected with the extension [will] be continued through discussions with the Governments of the United Kingdom and the Federal Republic of Germany [1]" (para. 3).

In those discussions, the Icelandic representatives emphasized the importance of a positive reaction from the British side to a point regarded as fundamental: "recognition of preferential rights for Icelandic vessels as to fishing outside the 12-mile limit." (Government of Iceland's Note of 11 August 1972.)

3. The 1973 Agreement between the United Kingdom and Iceland

The Court has been informed of the Exchange of Notes constituting an interim agreement on fisheries between the Government of the United Kingdom and the Government of the Republic of Iceland, dated 13 November 1973.

This agreement deprives of effect as between the Parties the Orders of the Court made on 17 August 1972 and 12 July 1973, indicating interim measures. It establishes a temporary régime valid for a period of two years. The agreement is temporary "pending a settlement of the substantive dispute". It is also stated that "its termination will not affect the legal position of either Government with respect to the substantive dispute" (para. 7).

The Court may wonder whether the effect of the 1973 agreement is only to replace the interim measures laid down in the Orders of the Court by the Exchange of Notes. It seems to me that this agreement has a wider and more general scope which should be examined.

On that same date, 13 November 1973, the United Kingdom Prime Minister said in the House of Commons, in reply to Mr. Harold Wilson:

> "Our position at the World Court remains exactly as it is, and the agreement is without prejudice to the case of either country in this matter. This is an interim agreement covering two years from the

[1] This statement, which appears in the middle of the Resolution, seems to me to be highly significant; problems which the 1961 Exchange of Notes made it possible to bring before the Court are referred to negotiation.

> moment of signature this afternoon, in the expectation that the Conference on the Law of the Sea will be able to reach firm conclusions. We all know the difficulties facing a conference on the law of the sea, but both Governments hope that it will have been possible by the expiration of this agreement to reach agreement on the law of the sea and that that will then govern the situation."

The Court cannot ignore the terms of this agreement and the interpretation, given in the House of Commons, of its aims and intentions. It is thus placed in an embarrassing position.

As a result of this agreement, the Court's judgment on the merits of the case will have no immediate effect. It has been subjected by the Parties to a waiting period of two years and to two conditions, the first concerning a settlement of the dispute by a new agreement and the second relating to an agreement at the Conference on the Law of the Sea. All this is irregular and hardly in keeping with what seems to be the function of the Court.

This agreement also shows that the Parties do not believe that the Court will be able to settle their dispute. They have found a solution to certain issues referred to the Court, albeit for a period of two years only. This agreement is an interim one, but it was concluded "pending a settlement of the substantive dispute". Now the settlement which the Parties say they are waiting for is not that which may result from a judgment of the Court. This is obvious, in view of the attitude of Iceland, which continues to deny that the Court has jurisdiction. The hope of the Parties that they will be able to reach a definite settlement is based on negotiations now in progress, whether or not they are carried on with the Conference on the Law of the Sea in view.

Does the announcement of these negotiations justify suspending the proceedings? It is true that peaceful settlement of disputes should be brought about above all by means of negotiation. The Court is open to States to settle issues of a legal nature which they may refer to it, but a dispute is ripe for reference to the Court, when negotiations between the parties reach deadlock and when the success of the negotiations has definitively been ruled out as a result of a *non volumus* or a *non possumus* of the parties. I do not know of any precedent which might help to answer this question; in my opinion, once proceedings have been initiated, there is no way of suspending them, and they should continue unless the case is settled out of court or discontinued.

The agreement constitutes a valuable argument in favour of cautious solutions. It shows that the readiness expressed by Iceland in the 1972 Resolution to seek a solution of the problems connected with the extension through discussions was not an empty formula. It also shows that a judgment of the Court, delivered before the Parties reach a settlement through negotiations on the substance of the dispute, and drawn up without taking into consideration the indicative value of

the agreement, could be an insurmountable obstacle to a negotiated settlement of the dispute—and that would be contrary to the essential purpose of the Court which is to contribute to the peaceful settlement of disputes.

II. The Burden of Proof

A preliminary question which arises is that of the burden of proof.

The United Kingdom Memorial on the merits asserted that "the burden of proving that international law now recognizes the right of a coastal State to make such an exclusive claim as Iceland is now making rests upon Iceland". In support of this assertion, it stated that the Exchange of Notes of 1961 represented the law as it then existed, and that the conclusion to be drawn therefrom was that "an assertion of exclusive jurisdiction over fisheries beyond 12 miles is not permissible by unilateral act". It added that Iceland must furnish convincing proof before such long-established rights could be set aside (para. 229) [1].

The Memorial on the merits of the Federal Republic of Germany argued that:

> "It is Iceland, not the Federal Republic of Germany, which is challenging the established law, and it is for this reason that the Government of the Federal Republic maintains that the burden of proof that international law now recognizes the right of a coastal State to extend its jurisdiction beyond the 12-mile limit, rests upon Iceland." (Part IV, para. 60; see also para. 66.)

In my opinion, this line of argument rests on incorrect premises.

It is begging the question to say that the law as it existed, the "established law", prohibited States from extending their fisheries jurisdiction beyond 12 miles. All that one can say is that around 1961 there was a trend in favour of the 12-mile rule. But the question still remains for consideration whether or not this rule fulfilled the conditions necessary for it to be regarded as a rule of customary law.

It is not permissible to refer to rights as being definitively and firmly vested rights in 1961; the Exchange of Notes of 1961 contained an express reservation whereby the Government of Iceland proclaimed its intention to work for the extension of its fisheries jurisdiction beyond 12 miles, such reservation being accepted by the other party. The said rights were therefore conditional vested rights.

The question raised by the Applicant regarding the burden of proof seems to me to be an unreal question, calling for a different reply depending on who puts it. The Applicant believes that Iceland has claimed

[1] In this sense, cf. Katz, "Issues Arising in the Icelandic Fisheries Case", *International and Comparative Law Quarterly*, XXII-I (January 1973), p. 95.

the right to extend its fisheries jurisdiction beyond 12 miles and should provide evidence of the law under which it is entitled to extend its jurisdiction beyond 12 miles and up to 50 miles. From Iceland's point of view, it is the United Kingdom which has claimed the right to over-rule Iceland's resolution, as being contrary to international law; it is therefore for the United Kingdom to provide evidence of the law limiting Iceland's sovereignty.

The question is the same, but is put from different standpoints. The proof to be sought is that of the substantive law to be applied in this case, a law which is the same for both parties although considered from two different points of view [1].

The question should also be asked whether customary international law has to be proved. This question has arisen in the municipal law of States where customs are considered as giving rise to a *quaestio facti*, but the customs referred to are those peculiar to regions, places or groups of persons (businessmen, farmers, etc.). The question arises in international law in a wholly different way.

A distinction should be observed between two categories of customs. Traditionally jurists and canonists have distinguished in ordinary law between notorious customs well known to all and particular customs; the latter, being exceptions, had to be proved. This is also the case in English law, under which there are two kinds of customs: "general customs" which apply throughout the Kingdom and "particular customs" applicable to the inhabitants of certain regions. The particular customs had to be proved, while the general customs did not,—they were the "common law" [2].

International customary law does not need to be proved; it is of a general nature and is based on a general conviction of its validity *(opinio iuris)*. The Court must apply it ex officio; it is its duty to know it as *quaestio iuris: iura novit curia* [3]. Only regional customs or practices, as well as special customs, have to be proved [4].

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[1] I think that this is confirmed by the inconclusive discussions in the United Kingdom *v.* Norway *Fisheries* case and by the considered views on the matter of Lauterpacht, *The Development of International Law by the International Court* (London, 1958, pp. 363, 365).

[2] Blackstone, *Commentaries on the Laws of England*, Introduction, para. 3, 4th ed., Oxford, 1770, pp. 67, 75.

[3] In the *Lotus* case the Court raised the question whether Turkey had acted in a manner contrary to the principles of international law (*P.C.I.J., Series A, No. 10* (1928), p. 32); in the *Fisheries* case between the United Kingdom and Norway, the Court considered the question whether Norway's actions were contrary to international law (*I.C.J. Reports 1951*, p. 132). The question of the law to be applied was therefore not considered in the terms of the view of the Applicant in these cases, and there is no reason to adopt a different course in the case now before the Court.

[4] *I.C.J. Reports 1950*, p. 276.

III. The Development of the Law of the Sea

1. The Court has said that the delimitation of sea areas depends upon international law (*I.C.J. Reports 1951*, p. 132). What are the rules of international law to be applied to the delimitation made by Iceland?

The existence of such rules has been denied by the Icelandic Prime Minister in a speech, in which he said:

> "I cannot see that our proposed extension of fisheries jurisdiction is contrary to any accepted international law. It is a fact that there are no generally accepted rules in international law on the territorial limit." (*Iceland and the Law of the Sea*, 1972, p. 31, quoted in the Memorial on the merits of the Federal Republic of Germany, Part IV, p. 96, para. 58.)

The terms used are of a polemical nature; they come from one of the Parties to the dispute. But it has also been possible to make the following objective comment:

> ". . . in plain words, the really grave issue is not what breadth is presently accepted, but whether the issue is governed by international law at all [1]".

In my opinion, the changes, the increasingly rapid development of technical conditions for the exploitation of the resources of the sea have resulted in a visible lagging behind of the old rules; there is a crisis in the law of the sea, but that should not stand in the way of the search for a just legal solution of this case. I think it would be useful to examine this development before considering the law to be applied. I do not propose to repeat here the well-known history of the law of the sea, but only to restate what may be useful to arrive at what I consider the necessary clarification of some points in order to justify my opinion on the law to be applied.

2. The opposition between the theses of *mare liberum* and *mare clausum* is of a purely political nature; it reflects the need to counter, with arguments of every kind, the claims to hegemony of the maritime powers; it is the struggle for the domain or empire of the sea.

> "The question ... has been a subject for debate in our day by the most distinguished minds. In connexion with this question it has been easy to observe that many of the disputants hold their zeal for their own country before their eyes rather than the truth [2]."

On the other hand, the delimitation of sea areas is considered from a legal point of view when it concerns the question of *mare adjacens*. The

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[1] Brownlie, *Principles of International Law*, 2nd ed., Oxford, 1973, p. 196.

[2] Pufendorf, *De jure naturae et gentium*, translated from the Latin by C. H. and W. A. Oldfather, Carnegie Institute, 1934, IV, 5, 5.

glossator, and then the commentary of Baldo on D, 1, 8, 2, had already generalized among jurists the distinction between *proprietas, usus, jurisdictio aut protectio.*

The high seas, *res communis omnium*, is not something that lends itself to ownership; its use is common to everybody, and this applies also to fishing. The sea *unquam fuit a communione hominum separatum*, and unlike land and rivers, there is no reason to divide it up; fish stocks in the sea are inexhaustible and it would be iniquitous to divide up ownership in them or the right to fish for them *(iniqua nullo tempore praescribuntur)* [1].

The *mare adjacens* is subject to the *jurisdictio et protectio* of the ruler of the territory. Over that area the *potestas* of the master of the coast is recognized without difficulty [2]. Its foundation is the fact that the adjacent sea is necessary to the defence of the territory itself; the coastal zone has the same value as a moat [3] or a rampart [4].

Once *jurisdictio* over the adjacent sea has been recognized, there is no difficulty in extending it to fisheries, with the possibility of excluding foreign vessels from that area, or of demanding tribute for permission to fish there [5]. The width of the area of jurisdiction or *imperium* is justified by the defence needs of the territory. It was fixed according to the range of cannon [6], of the naked eye, of binoculars, or else in miles. The number of miles varied according to countries and writers, from the 60 miles attributed to Baldo down to three or four miles. The thinking of the 18th century has been summed up as follows:

> "It is not easy to determine just what extent of its marginal waters a nation may bring within its jurisdiction. Bodin (*De la République*, Liv. I, chap. X) claims that, following the common rule of all maritime nations [7], the sovereignty of the Prince extends as far as 30 leagues from the shore. But this precise determination could only be based upon a general consent of nations, which it would be

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[1] Grotius, *Mare liberum sive de iure, quod Batavis competit ad Indicana commercia, dissertatio*, Ed. de H. Cocceius, Lausannae, 1752, IV, p. 469.

[2] Grotius recognized that the *imperium in maris portionem* could exist by reason of the territory, *quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur. De iure Belli ac Pacis*, II, 3, 13, 2, ed. Amstelaedami, 1735, I, p. 238.

[3] *Unde dominium maris proximi non ultra concedimus, quam e terra illi imperari potest, et tamen eo usque; nulla si quidem sit ratio, cur mare, quod in alicujus imperio est et potestate, minus ejusdem esse dicamus, quam fossam in ejus territorio*, Bynkershoek, *De dominio maris dissertatio*, chap. II, *Opera omnia*, Ed. Coloniae Allobrogum, 1761, II, p. 103.

[4] Every country ". . . is deemed to be the master of the sea which washes its coast as far as it serves it as a rampart". Pufendorf, *loc. cit.*, IV, 5, para. 8. II, p. 276.

[5] On this question, see Cocceius in his commentary to Grotius' *De iure Belli ac Pacis*, ed. Lausannae, 1751, II, p. 143. On the "Sardine War", see Johnston, *The International Law of Fisheries*, 1965, p. 169.

[6] *Potestatem terrae finiri, ubi finitur armorum vis*, Bynkershoek, *loc. cit.*, p. 104.

[7] Barbeyrac comments that Bodin (I, ch. 80, ult.) agreed with Baldo that in the Law of Nations the jurisdiction of a prince extends to a distance of 60 miles from the shores of his territory, Notes to Pufendorf, *loc. cit.*, p. 276, Note 7.

> difficult to prove. Each State may regulate as it thinks best the use of those waters as far as the affairs of its citizens, either with one another or with the Sovereign, are concerned; but between nation and nation the most reasonable rule that can be laid down is that in general the sovereignty of a State over its marginal waters extends as far as is necessary for its safety and as far as it can be effectively maintained; because on the one hand a nation may appropriate only so much of common property, like the sea, as it has need for some lawful end . . . [1]"

3. This concept, which could be called the classical concept, and which predominated until the middle of this century, is no more than the development of ancient principles. Sovereignty over land is considered to extend to the sea dominated by that land; this marine belt is equivalent to a territorial sea. The *imperium* over the adjacent sea gives rights to and imposes obligations on a State; these are of great variety (neutrality, prize, contraband, customs, lighthouses, etc.) and they include in particular exclusive fishing rights.

In practice the difficulty to be overcome has been to reach an agreement fixing the maximum distance in miles beyond which States are no longer allowed to extend unilaterally their fisheries jurisdiction. Has any such rule, ranking as an international custom, crystallized?

From the 18th century up to the Second World War the question of the limits of fishing zones did not give rise to serious problems. It was possible to say that the law of the sea was a model of stability in the international community. The draft regulations concerning the territorial sea in time of peace, prepared by the Institute of International Law at its Stockholm session in 1928, well reflected the general opinion: "The territorial sea extends for three sea miles. An international custom may justify recognition of a greater or lesser breadth than three miles [2]."

4. The Declaration of Panama of 3 October 1939 has been regarded as the first symptom of a withdrawal from the so-called classic conception of the law of the sea. Twenty-nine nations, under the aegis of the United States, established a neutral zone beyond the territorial sea, extending in some places as far as 300 miles.

The origin of the crisis in the law of the sea with regard to fisheries is to be found in the proclamations by President Truman (28 September 1945). The old principle of the division of the sea into two zones, the territorial sea and the high seas or free seas, which had up till then been regarded as dogma, was called in question or abandoned. A new zone, that of the continental shelf, was now recognized. In that zone, the coastal

[1] Vattel, *The Law of Nations*, I, ch. 23, para. 289, trans. C. G. Fenwick, Carnegie Institute, Classics of International Law, p. 108.

[2] *Annuaire de l'Institut de Droit international*, 1928, p. 755.

State has rights of exploitation of the natural resources of the sea-bed and subsoil (the proclamations of President Truman only contemplated the mineral resources of the shelf). There was also to be another zone beyond the territorial sea, that of the superjacent epi-continental waters, considered as sources of biological wealth; this was a zone over which the right to establish reserved areas for the protection and conservation of fisheries was asserted [1].

The ideas enunciated by President Truman in his proclamations had consequences unforeseen by their author. Their success is not to be explained solely by the political weight of the United States; it was justified by the changes which had occurred in the techniques of exploitation of the sea-bed and fisheries. The theoretical basis of freedom of fishing in the high seas (the zone outside the territorial sea), argued by Grotius and followed by general opinion, had become unsound. The inexhaustibility of fisheries proved to be an illusion. The new methods of fishing made it necessary to take steps for the conservation of the living resources of the high seas.

Thus new concepts entered international practice, marking "a reversal of the traditional ideas on the liberty of the high seas" and principles were stated of "a new theory which was soon to throw international law into confusion, by provoking ever bolder initiatives [2]". The Truman Proclamations were subject to carefully drafted limits and reservations, taking account of the interests of the States engaged in fishing in the high seas, but they opened new prospects to learned speculation, and afforded States plausible grounds for enlarging their zones of fishery jurisdiction.

The special nature of the continental shelf once accepted, it should be observed that it is neither easy nor natural to separate the legal status of the various elements composing it, since they are closely linked together. It would seem artificial to make a distinction between mineral resources and living resources. De Buen proposed as early as 1916 (at the Madrid Conference) the incorporation of the continental platform in the territorial sea, as being the area most propitious to the development of edible species of fish, and the most favourable fishing ground.

Thus the difficulty of defining the boundaries and the structure of the continental platform—and the difficulty resulting from the existence of coasts practically without a continental shelf—was to lead to the substitution, for geological, bathymetrical and geographical criteria, of the simplified concept of an epi-continental zone established by each State beyond its territorial sea, and varying in the extent.

5. Another trend favouring the enlargement of the fishery zone flowed

[1] Spanish and South American precedents are quoted in Rojahn, *Die Ansprüche der lateinamerikanischen Staaten auf Fischereivorrechte jenseits der Zwölfmeilengrenze*, Hamburg, 1972, pp. 17-19; but they do not seem to have had any influence.

[2] Ferron, *Le droit international de la mer*, Paris 1960, Vol. II, p. 141.

from the fact that the idea of protection and conservation of fisheries grew into the idea of jurisdiction in that connection over an area extending beyond the territorial sea. Once the jurisdiction of the coastal State to safeguard the conservation of fish stocks was recognized, the special interests of the inhabitants of that country constituted a basis for the establishment of preferential or exclusive rights over that zone in favour of that State.

For one or other of these reasons, the fact is that following the Truman Proclamations, there was a sort of chain reaction consisting of a series of declarations in favour of extension of the fisheries jurisdiction of States.

On 29 October 1945, Mexico declared that it claimed the whole area of the continental platform adjacent to its coasts and all the natural resources, known or unknown, to be found therein. On 11 October 1946, Argentina declared that the epi-continental sea and the Argentinian continental shelf were subject to national sovereignty. On 1 May 1947, Nicaragua asserted sovereignty over the contiguous area of the high seas or the waters of the continental shelf, up to 200 miles from the coast [1]. It should be observed that it is in this historical perspective, and against the background of the trend flowing from the Truman Proclamations that the Icelandic Law of 1948 concerning the scientific conservation of the continental shelf fisheries should be placed and also interpreted.

The current legal revolution is in the course of being established thanks to the Santiago Declaration of 18 August 1952, and the principles adopted at the 3rd Meeting of the Inter-American Conference of Legal Advisers held in Mexico in 1956, as well as at other conferences and meetings of Latin American lawyers.

The claiming of exclusive jurisdiction over fisheries or of preferential rights over wider and wider zones—6 sea miles, 12 sea miles, and even 200 sea miles—and the claim by coastal States to settle unilaterally their fishery jurisdiction, have naturally led to alarm among the countries interested in high sea fishing.

6. In order to put an end to such dangerous uncertainties, the International Law Commission in 1949 included the law of the sea among the subjects to be studied with a view to codification. In the third draft prepared by the Commission for the United Nations Conference on the Law of the Sea, the 12-mile rule was laid down as a compromise formula. The Commission recognized that international practice was not uniform

[1] On the legislative acts and declarations made at the time by Panama, Peru, Costa Rica, Nicaragua, Honduras, El Salvador, Brazil, Ecuador and Venezuela, see Alvarez, *Los nuevos principios del derecho del mar*, Montevideo 1961, pp. 21 ff. and Ferron, *op. cit.*, pp. 157 ff. On the doctrine of Latin American authors prior to 1961 (Bustamante y Rivero, Ulloa, Garcia Montufar, Garcia Sayan) see Rojahn, *Die Ansprüche*, p. 144.

The attitude of the Latin American States has been described as "reactions to what these nations felt to be a failure of international mechanisms to respond to fisheries crises": Jacobson, "Bridging the Gap to International Fisheries Agreement: a guide for unilateral action", *The San Diego Law Review*, Vol. 9, No. 3, May 1972, p. 465.

with regard to the delimitation, and added: "The Commission considers that international law does not permit an extension of the territorial sea beyond 12 miles [1]."

The 1958 Conference showed the difficulty of reaching any consensus. The International Law Commission draft, which would have set a maximum limit to the extension of the territorial sea, was blocked. The 12-mile rule was acceptable neither to the countries who wished to keep the 3-mile rule nor to those who wished the possibility of a greater extension to be recognized.

Each of the opposing tendencies at the Conference could boast of certain resolutions in its favour. The conservative trend succeeded in having freedom of fishing included in the Convention on the High Seas as one of the four freedoms of the high seas; the high seas were there defined as meaning all parts of the sea that are not included in the territorial sea. The Convention on the Continental Shelf lays down that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas; in the definition of natural resources, over which the coastal State has sovereign rights, were included, in addition to mineral resources, living organisms belonging to sedentary species, and only those organisms.

The innovating trend could also boast of a certain measure of success. The Convention on Fishing and the Conservation of the Living Resources of the High Seas recognized that the coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea, which in certain circumstances entitles it to adopt unilateral measures of conservation. The Conference Resolution on Special Situations relating to Coastal Fisheries recommended taking account of the "preferential requirements of the coastal State resulting from its [economic] dependence upon the fishery" where it becomes necessary "to limit the total catch of the stock or stocks of fish in an area of the high seas adjacent to the territorial sea".

The Conference left unsolved the two most important questions, namely that of the maximum extension of the territorial sea, and that of the extension of the adjacent zone subject to the fisheries jurisdiction of the coastal State.

It was in the climate of uncertainty and conflict of trends experienced during the 1958 Conference that Iceland issued the decree of 30 June 1958 extending its fishing zone to 12 miles.

The Second Conference on the Law of the Sea (Geneva 1960) was called to settle the question of the breadth of the territorial sea and of the limits of fisheries zones; it was however a failure. But the 12-mile rule made marked progress.

It is true that the proposal to limit the breadth of the territorial sea to a maximum of 12 miles was rejected in committee (by 39 votes to 36,

[1] *Yearbook of the International Law Commission*, 1956, Vol. II, p. 265.

with 13 abstentions), but the compromise proposal made by the United States and Canada, contemplating a zone of territorial sea of 6 miles and a zone of exclusive fisheries jurisdiction of 6 miles, voted on at a plenary session, failed to be adopted by one vote, one additional vote being necessary for the text to receive a two-thirds majority (54 votes in favour, 28 against, and 5 abstentions) [1].

7. It should be observed that there are different understandings of the 12-mile rule both among States and among writers. By some it has been regarded as a brake on the pressure of new States anxious to extend still further their fisheries jurisdiction; for them it is the maximum permitted extension. By other States it has been understood as a first stage towards achieving recognition of the wider extension which they have in view; for them it is the minimum extension acceptable.

It was in this atmosphere of conflicting trends, which came into the open at the Conference of 1960, that the 1961 agreement must be examined. The trend of ideas opposed to the 3-mile rule had to be accepted; but the United Kingdom did not recognize the rule permitting the extension of fisheries jurisdiction up to the 12-mile limit as a general rule; it accepted it, but only as a negotiated rule, and in consideration of the special interests of Iceland. Iceland for its part did not recognize the 12-mile rule as the maximum limit of its fisheries jurisdiction zone; it sought an extension to 12 miles because that was what it was possible for it to obtain at the time, but it regarded it as a provisional extension and reserved the power of making a further extension, and applied itself to implementing the Althing Resolution of 5 May 1959.

8. The failure of the 1958 and 1960 Conferences prevented any rule as to the maximum limit for the fisheries zone from crystallizing. The development of the law of the sea in this field took place in conditions of anarchy, the dominant note being a progressive and accelerated extension of the claims of coastal States [1].

In the confusion which reigns in the matter, several tendencies can be distinguished which, in my opinion, can be summarized as follows.

In the first place, it should be observed that the possibility of extending the exclusive fisheries zone beyond the territorial sea is practically generally admitted. The resistance set up by some States to the 12-mile rule is continually decreasing [2]. Writers in Europe and the United States also recognize it as the maximum limit to the extension of the jurisdiction of

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[1] The compromise nature of the vote which occurred should be observed; it should be examined in relation with the proposal by Brazil, Cuba and Uruguay on recognition of preferential rights.

[2] This "creeping jurisdiction" was observable between 1967 and 1971: Kahden, *Die Inanspruchnahme von Meereszonen und Meeresbodenzonen durch Küstenstaaten*, 2nd ed. 1971, preface.

[3] Note however the protest by the United States against the declaration by Canada extending its coastal zone to 12 miles (May 1970). Japan stated that it did not recognize the 12-mile fishing zone, but in its agreement of 22 June 1965 with Korea is to be found reciprocal recognition of the 12-mile zone.

coastal States. This tendency in favour of the 12-mile rule has made it possible to say that the 12-mile limit appears to be "the magic number" for the great majority of States [1].

In the other direction, it is apparent that the trend originating in Latin America towards extending the zone of fisheries jurisdiction up to the 200-mile limit appears to be becoming more firmly established; in this connection one might quote the Declaration of Montevideo of 8 May 1970, and the declaration of Santo Domingo of 7 June 1972. This trend is spreading to other continents. In the report of the Asian-African Legal Consultative Committee on its 12th Session in Colombo (18-27 January 1971), it is said that most of the delegations were ready to accept a 12-mile limit for the territorial sea, but coupled with an affirmation of the rights of the coastal State to claim exclusive jurisdiction over an adjacent zone for economic purposes. See also the recommendations drafted at Yaoundé (20-30 June 1972) [2].

The seed sown by the Truman Proclamations is still bearing fruit, and it is from them that innovating ideas continue to spring concerning the law of the sea [3].

The recognition of a third maritime zone, inserted between the territorial sea and the high seas, is the basis of a new concept, that of the patrimonial sea or economic zone. According to the Declaration of Santo Domingo, the coastal State has sovereign rights over the renewable and non-renewable natural resources which are found in the waters, in the sea-bed and in the subsoil of an area adjacent to the territorial sea called

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[1] Bouchez, "Some Basic Problems of Coastal State Jurisdiction and the Future Conference on the Law of the Sea", *Annals of International Studies*, Vol. IV, 1973, p. 155.

[2] It has been announced in the press that the 77 developing countries meeting in Nairobi (Kenya) decided to defend the right to a 200 sea-mile limit for coastal States at the United Nations Conference in Caracas.

[3] The tendency to extend fisheries zones in the interest of coastal populations may also be observed in countries of the Western group.

The Senate and House of Representatives of Massachusetts, assembled in General Court, authorized the Director of the Division of Marine Fisheries, with the approval of the Governor, to extend jurisdiction up to 200 miles for the purposes of conservation and protection of maritime resources (Massachusetts, *An Act Relative to the Territorial Waters of the Commonwealth*). In 1972, Congress of the State of Maine requested the Secretary of State and the delegation to the United States Congress to extend jurisdiction over fisheries to the whole extent of the continental shelf (J. H. Samet and R. L. Fuerst, *The Latin-American Approach to the Law of the Sea*, University of North Carolina, Sea Grant Publication, March 1973, App. A and B, pp. 150-151). In the United States, there are conflicts between the states and the Federal Government. New England is in favour of an extension of jurisdiction to protect coastal fisheries. California favours limiting jurisdiction, taking account of cod fishing in the high seas. Military interests operate in favour of the 12-mile limit (Hjertonsson, *The New Law of the Sea*, "Influence of the Latin American States on Recent Developments of the Law of the Sea", Leiden-Stockholm, 1973, p. 96).

In Canada, the Governor is authorized to prescribe by Order in Council fishing zones in areas of the sea adjacent to the coast of Canada (Law of 16 June 1970 amending the Law on the Territorial Sea and Fishery Zones, new paras. 4 and 5A).

the patrimonial sea; the area of the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 sea-miles.

In the Truman Proclamation, and at the 1958 Conference, reference was made to the natural resources of the continental shelf over which it was recognized that the coastal State had an exclusive right, in order to define the scope thereof, with a view to respecting the freedom of fishing in the high seas. At the present time, the reference to rights over natural resources is taking a new turn. A point has been reached at which the right of States is reaffirmed to permanent sovereignty over all the natural resources of the sea-bed and subsoil within their national jurisdiction, and in the superjacent waters. This is also what was said in General Assembly resolution 3016 (XXVII), in a recommendation adopted by the Committee on Natural Resources of the Economic and Social Council (Session of February 1973) and in a resolution of the Economic and Social Council (April-May 1973) [1].

It seems to me that with its Resolution of 1972, Iceland followed the same tactics as those which had previously brought it success. It faced the defendant State with a *fait accompli*, and did so in the conviction that the development of the law of the sea is moving towards a justification of its decision. Iceland may cherish the hope that the trends in favour of extension of fisheries zones will obtain the support of the greater number of States at the Caracas conference [2].

IV. The Law to Be Applied

1. The complaint brought before the Court by the Applicant against Iceland is that of having committed a breach of international law by unilaterally extending its fisheries zone in 1972. The Exchange of Notes of 1961 contains the provision by which Iceland reserved the possibility of extending its fisheries zone in implementation of the Althing Resolution of 1959. But the Applicant contends that the Resolution of 1972 conflicts with the law established in 1961, and that Iceland cannot act in this way without proving that the 12-mile rule is no longer in force (United Kingdom Memorial, para. 229; Federal Republic Memorial, Part IV, para. 60). Reference is also made to the disregard by Iceland of "such long-established legal rights" of the Applicant (United Kingdom Memorial, para. 229).

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[1] The *travaux préparatoires* of the Caracas Conference should be taken into account, though *cum grano salis*, as of assistance in ascertaining the present tendencies amongst States; in addition they reveal the taking up of positions with a view to the discussions during the Conference.

[2] The Government of the United Kingdom has explained, in its reply to a question by a Member of the Court, that in para. 297 of its Memorial it intended to make the point "that the forthcoming Third United Nations Conference on the Law of the Sea may reveal whether a consensus can be reached which will bring about a development in the law so as to permit the kind of claim which Iceland is now making".

In order to express my view in such a way as to avoid the difficulties resulting from the lack of clarity of the Applicant's argument, it seems to me to be as well to deal with the various issues one by one.

The established rights relied on are said to be based on "the existing law and established legal rights" *(ibid)*. The Respondent's rights have a contractual basis, namely the exchange of Notes. The Respondent has acquired rights, but rights which are subject to a pre-condition unspecified in point of time *(dies incertus an et incertus quando)*. The right of the Applicant is an established right subject to a limitation, i.e., up to the date when Iceland exercises the power it has reserved of extending its fisheries jurisdiction. By exercising that power, Iceland does not infringe any established right of the Applicant to respect by Iceland of the 12-mile limit. The Applicant is entitled to appeal to the Court, but only on the grounds that Iceland has not honoured its commitment to submit to the Court the dispute concerning the extension.

Nor is it justified to refer to an established right under international law in force in 1961. The situation existing in 1961 is not what is before the Court. The act complained of by the Applicant is the 1972 Althing Resolution, that is to say a different situation, that of an extension which, although foreseen in 1961, was not effected until 1972. This is a new fact, the legality of which must be considered solely at the time when it occurs *(tempus regit factum)*. It is precisely that new fact with regard to which it was provided that in case of dispute between the parties the matter would be brought before the Court. The Applicant has no established right to the extension being perpetually limited to 12 miles, on the basis of international law in force in 1961 [1].

2. The key argument of the Applicant is that the 12-mile rule is the international law in force on the subject, because it has become a rule of customary law, and also because it has not been abrogated by a contrary custom. We must therefore consider whether the 12-mile rule amounts to a rule of customary international law.

According to the *communis opinio*, a customary international right comes into existence when a practice crystallizes which has the following distinguishing marks:

(a) General or universal acceptance. There should be no doubt as to the attitude of States. The rule in question must be generally known and accepted expressly or tacitly. What has led to the view that international custom is binding is that it expresses a *consensus tacitus generalis*, if not as a sort of tacit agreement, at least as the expression of a general conviction. For an international custom to come into existence, the fact that a rule may be adopted by several States in their municipal legislation, in treaties and conventions, or may be applied in arbitral decisions is not sufficient, if other States adopt a

[1] This appears to have been conceded by the Applicant when in its oral statement it expressed the view that the 12-mile rule was not yet in force in 1961.

different rule, and it will not be opposable to a State which still opposes its application (*I.C.J. Reports 1951*, p. 131). The existence of a majority trend, and even its acceptance in an international convention, does not mean that the convention has caused the rule to be crystallized or canonized as a rule of customary law (*I.C.J. Reports 1969*, p. 41).

(b) Uniform practice. For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform (*I.C.J. Reports 1951*, p. 25; *I.C.J. Reports 1951*, pp. 116 and 131; *I.C.J. Reports 1969*, p. 42).

(c) A considerable period of time. It is time which ripens a practice and transforms it into a custom. In the texts, such terms are used as *praescripta consuetudo*, *vetustas*, *per plurimos annos observata*, *diuturnis moribus introductum*, etc. The Court has recognized the possibility of some relaxation of the requirement of a considerable length of time, but only on condition that:

> "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." (*I.C.J. Reports 1969*, p. 43; see also p. 45.)

(d) Opinio Juris

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it . . . States . . . must therefore feel that they are conforming to what amounts to a legal obligation." (*I.C.J. Reports 1969*, p. 44.)

Taking account of these conditions, we must consider whether the 12-mile rule is in the nature of an international custom. In order to give an unambiguous reply to this question it is necessary when putting it to make a distinction between the two meanings which may be given to the expression "12-mile rule".

(i) The 12-mile rule means that States can no longer object to another State extending its fisheries jurisdiction zone to 12 miles.

(ii) The 12-mile rule means that States cannot extend their fishing zone beyond 12 miles.

Her Majesty's Government seems to me to have given a proper reply to a question put by Judge Sir Humphrey Waldock, when it was stated on its behalf that:

> "It could not safely be said that the new rule had emerged until Japan, a State whose interests were certainly specially affected in the meaning of that principle, decided that it could not effectively challenge in law the legislation of New Zealand and the United States. As from that moment, in our submission, it was reasonable to maintain that, notwithstanding continuing disagreement on the breadth of the territorial sea, there was then by that stage a new rule of law to the effect that a coastal State was entitled to an exclusive fishery limit of 12 miles." (CR 74/3, p. 40.)

This is quite correct, and it was possible to take the view that the resistance of the countries which continued to oppose extension of exclusive fisheries jurisdiction to 12 miles was overcome at that moment. For that reason, it is possible to say that the 12-mile rule, with that meaning, has become a customary rule.

But to concede the possibility that States might claim an exclusive fisheries zone of 12 miles does not lead as a logical or necessary consequence to the conclusion that "the figure of 12 miles was the correct limit in accordance with international law for the purpose of defining the zone in which the coastal State is entitled to exclusive fishery rights" (*ibid.*, p. 40). This statement is an answer to a different question, which should be examined separately.

The question is as follows: is there an existing rule of customary law which forbids States to extend their fisheries jurisdiction beyond 12 miles? Before replying in the affirmative to this, it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom.

In Part III of the present opinion, which was devoted to the development of the law of the sea with regard to fisheries, it was made clear that a continually increasing number of countries do not agree to limit their fisheries jurisdiction zone to 12 miles [1]. Before 1961, from the time of the Truman Proclamations onwards, there were manifestations contrary to that rule, in legislation, at Inter-American conferences, and in the discussions of the International Law Commission [2]. Since 1961, and in particular in 1972, it is difficult to regard the trend in favour of the 12-mile rule as supported by a majority. The 12-mile rule has at no time been accepted in a general or universal way as fixing a maximum limit [3].

It should also be noted that before and after 1961, during the period which may be regarded as that of the coming into existence of the rule, Iceland, which is certainly a State whose interests are specially affected, made known its opposition to the rule expressly and persistently [4].

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[1] The 12-mile rule may on the other hand be regarded as applicable to the limit of the territorial sea.

[2] Quotations in Rojahn, *Die Ansprüche*, p. 164.

[3] On the present majority trend, see Stevenson, "Who is to Control the Oceans: U.S. Policy in the 1973 Law of the Sea Conference", *The International Lawyer*, VI, No. 3, July 1972.

[4] Quotations in Rojahn, "Die Fischereigrenze Islands vom 1 September 1972 im

According to the most authoritative writers, and following the doctrine of the Court itself (*I.C.J. Reports 1950*, p. 65; *I.C.J. Reports 1951*, p. 131; *I.C.J. Reports 1969*, p. 42, para. 73) the express will of a State during such a period prevents the coming into existence of a custom. The majority principle does not apply, even if a majority exists. To apply it would be contrary to the principles of sovereignty and equality of States.

In the 1961 Exchange of Notes, Iceland denies by implication that the 12-mile rule is a rule of customary international law limiting the extent of the fishery zone. This is the meaning which should be attributed to the direct reference to the 1959 Resolution and the indirect reference to the 1948 Law. A reservation was made in favour of a zone extending to the boundary of the continental shelf. I do not consider that this reservation should be interpreted as being subject to there being a change in international law. There is only one limitation on the reservation made, namely that in case of dispute as to the extension, the question was to be brought before the Court. It may be supposed that the Icelandic Government might have intended, as a matter of political prudence, to await the most favourable moment from the point of view of international opinion in order to carry out the announced extension, but that is another matter.

3. Nor do I consider that the authority of the 1958 conventions can be invoked in favour of the 12-mile rule. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone mentions a limit of 12 miles for the contiguous zone, but in four specific fields (customs, and fiscal, immigration or sanitary regulations) and does not envisage fisheries. Nor is this an oversight: the question of fisheries was in everyone's mind. This is a case in which it may be well to apply the old adage *inclusio unius exclusio alterius*.

Article 2 of the Convention on the High Seas has also been cited as evidence that Iceland has violated, by its 1972 Resolution, the principle of freedom of fishing in the high seas enshrined in Article 2 of the Convention on the High Seas [1]. It is true that in zones forming part of the high seas "fishing ... could only be shared and not exclusive" (separate opinion of Sir Gerald Fitzmaurice, *I.C.J. Reports 1973*, p. 69, para. 5). But I am afraid that to do no more than apply this criterion would be to beg the question, because it would be to admit by implication that the extent of the high seas was mathematically fixed by international law. But this is far from being the case. The extent of the territorial sea has not been established. The practice of States shows that the territorial sea has been extended, for example, from 3 to 4 miles, or from 4 to 12 miles, on each occasion at the expense of the high seas. Can it not be extended

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Lichte maritimer Abgrenzungsprinzipien des Internationalen Gerichtshofes", *Archiv des Völkerrechts*, Vol. XVI, No. 1 (1973), pp. 39, 41, 43, 47; see also Nelson, "The Patrimonial Sea", *International and Comparative Law Quarterly*, October 1973, p. 673, Note 29.

[1] If the Icelandic Resolution of 1972 is open to criticism it is on the ground that it is contrary to the Exchange of Notes, and has not been duly justified.

beyond 12 miles when circumstances or special reasons justify it? It should also be observed that since the 1960 Conference on the Law of the Sea there has been a trend, which cannot be overlooked, toward recognition of a third zone, between the territorial sea and the high seas, over which States can claim a form of jurisdiction, without any pretension to sovereignty [1]. Can this not be extended beyond 12 miles? While it does not seem necessary to reply to these questions, it is difficult to see how the implementation of the 1959 Althing Resolution, which was envisaged in the 1961 Exchange of Notes, can in 1972 be contrary to international law vis-à-vis the United Kingdom, if it is not conceded that between 1961 and 1972 the 12-mile rule entered customary law. Has the 12-mile rule, having found the door closed, crept in by the window?

It seems to me also that it is not possible to base any useful argument whatever on the Convention on the Continental Shelf, or on the comments on it by the Court to the effect that the coastal State has "no jurisdiction over the superjacent waters" of the continental shelf (*I.C.J. Reports 1969*, p. 37, para. 59). The significance of these is that a State has no jurisdiction over the superjacent waters by virtue of its rights over the continental shelf, but this reservation concerns the régime of the superjacent waters in so far as they appertain to the high seas, and not the superjacent waters when they are regarded as territorial waters, contiguous zone, or fishing zone subject to the jurisdiction of a State.

There are no well-founded arguments in favour of the binding character of the 12-mile rule; those built upon *ad hoc* interpretations of articles in the 1958 conventions do not convince. The 1958 Conference failed in its attempt to fix a limit to fisheries jurisdiction. How can one deduce from the conventions what the parties to the Conference refused to say?

4. Another question should be examined, although it has not been raised by the Applicant. The extension effected by Iceland in 1972 was disputed by the United Kingdom and, in violation of the compromissory clause of the 1961 Exchange of Notes, Iceland has refused to appear before the Court. It should be considered whether the consequence of Iceland having acted in this way is that the extension which it has decreed is not opposable to the United Kingdom, and whether the Court should confine itself to stating as much in its Judgment.

I do not consider that this argument has a sound legal basis either in the Parties' agreement, or in the Statute of the Court, or in the law of treaties.

The 1961 Exchange of Notes recognized that Iceland had the power to extend its fisheries jurisdiction on the sole condition that this was done in implementation of the 1959 Althing Resolution. It was after the extension, and if there should be a dispute between the Parties, that the question could be brought before the Court. This was not a right conferred on the

[1] This is recognized in the proposal to limit territorial waters to 6 miles and the zone of exclusive fishing rights to a further 6 miles.

United Kingdom; the question could be brought before the Court at the request of either Party. Iceland could have done so, for example, if the extension it had decided to make was disregarded by the Applicant, if, instead of bringing the dispute before the Court, the Applicant had sent its fleet to protect its fishing vessels. The Notes contain no penal clause or clause providing any sanction if one of the Parties failed to appear.

The Statute of the Court (Art. 53.), in harmony with modern procedural law, does not treat a party in default as guilty, and is far from regarding failure to appear as a *ficta confessio*. The Court, using its own means, and taking account of the facts of which it is aware and of the applicable law, must ascertain whether the extension is valid or not and to what extent it may be valid.

Finally, the Applicant does not raise the non-fulfilment of Iceland's duty to submit the dispute to the Court as a ground for abrogation of the treaty, and for its being absolved from its obligations toward Iceland; on the contrary, the Applicant contends that the agreement is still in force.

5. I cannot see that there is any other customary rule fixing the extent of the fishery zone. The 200-mile rule cannot be regarded as an accepted one, and as thus conferring on States the right to extend their jurisdiction to that extent. Despite the progress which it has made in recent years, it is not marked either by the uniformity or the general acceptance which it would require in order to be regarded as a customary rule, even of regional extent [1].

Against the contentions of the Applicant, Judge Padilla Nervo has argued that:

> "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." (Dissenting opinion, *I.C.J. Reports 1973*, p. 41.)

The view of Judge Padilla Nervo must be rejected for several reasons. The patrimonial sea is a compromise concept, which is worthy of consideration but which does not meet the conditions required of a rule of law. The countries represented at Santo Domingo did not claim that their proposal concerning a zone of patrimonial sea should be applicable to all Latin American States, or that it was generally favoured by them, but they regarded it as a contribution to the working out of an eventual joint Latin American formula [2].

[1] García Amador observes that the differences relate to the very nature of the claims, *Latin-America and the Law of the Sea*, University of Rhode Island, Occasional Paper No. 14, 1972, p. 1. On the protests of States and of writers, see Rojahn, "Zur zukünftigen Rechtsordnung des Festlandsockels und der Fischerei auf dem Hohen Meer", *Jahrbuch für internationales Recht*, Vol. XV, 1971, p. 407.

[2] Castañeda, "The Concept of Patrimonial Sea in International Law", *Indian Journal of International Law*, Vol. 12, No. 4, October 1972, p. 538.

Nor should it be overlooked that the task of encouraging the progressive development of international law, for which the initiative belongs to the General Assembly (United Nations Charter, Art. 13), was entrusted to the International Law Commission (Statute of the Commission, Art. 15). The Court is not a legislative body (*I.C.J. Reports 1966*, p. 48); its function is to decide in accordance with international law such disputes as are submitted to it (Statute, Art. 38).

Finally it should be observed that the question of the sovereign rights of States as to the fixing of zones of jurisdiction has been badly expressed. The Court has made clear what is truly within the national competence of each State:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." (*I.C.J. Reports 1951*, p. 132.)

6. Our examination of these questions up to this point leads to the pessimistic conclusion that there is in international law no binding and uniform rule fixing the maximum extent of the jurisdiction of States with regard to fisheries. From this conclusion it has been deduced that there is a legal vacuum, but in my opinion this deduction is not based on conclusive reasons.

The Prime Minister of Iceland, adopting the same line as is to be found in declarations by Latin American States, and the writings of authors from those countries, has stated in a speech before the Icelandic Parliament:

> "Since there are no generally agreed rules on the width of the territorial limit in terms of international law, it must be in the power of every State to decide its territorial limit within a reasonable distance." (Cited from a pamphlet entitled *Iceland and the Law of the Sea*, issued by the Government of Iceland in 1972, pp. 31-32; quotation in Part IV, para. 58, of the Memorial of the Federal Republic of Germany.) [1]

From an opposite point of view, and by way of *reductio ad absurdum*, it has been said that:

> "...so soon as it is admitted that international law governs the question of the breadth of the territorial sea, it follows automatically that international law must also prescribe *a* standard maximum

[1] For quotations of Latin American writing in the same sense, see Rojahn, *Die Ansprüche*, p. 168. See also the statement by the Icelandic delegate in the General Assembly on 17 December 1973 (quoted in CR 74/1, pp. 61-62).

> breadth, universally valid and obligatory in principle . . . If this is not so, then international law would *not* govern the question of the extent of the territorial sea . . ." (Fitzmaurice in XXXI *BYIL*, 1954, p. 386.)

It would of course be better for legal security if a mathematical rule existed. But law also has "safety valve" rules, which provide flexibility in the legal rules, and permit of more just solutions for individual cases to be found at the expense of legal security (e.g., the concepts of good faith, *bonos mores*, *comitas gentium*, misuse of right, *droits de voisinage*). In another case which also concerned the delimitation of zones of jurisdiction with regard to fisheries, the Court showed how it was necessary to take into account considerations which: ". . . bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question" and for this purpose, there was:

> ". . . one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*I.C.J. Reports 1951*, p. 133) [1].

The flexibility of a rule is not a reason for denying its existence. Failing a rule for the mathematical delimitation of the zones, "there are still rules and principles of law to be applied" (*I.C.J. Reports 1969*, p. 46, para. 83).

The defeatist idea that the determination of fisheries jurisdiction zones is a question of municipal law, within the national competence of each State, must be rejected. It is contrary to the principle of the freedom of the high seas, the principle which underlies the statement by the Court quoted above, to the effect that the validity *erga omnes* of the delimitation of sea areas is a matter of international law (*I.C.J. Reports 1951*, p. 132).

To leave to the unfettered will of each State the uncontrolled power to lay down the limits of exclusive fishing zones is contrary to the spirit of international law. The principle of equal rights of peoples (United Nations Charter, Art. 1, para. 2) does not permit of the unilateral creation of monopolies over zones of the high seas, at the expense of other States.

[1] It has been said with regard to this judgment that it contains implicit recognition "of the futility of the quest for uniform rules to determine the extent of exclusive fishery rights for wholly different situations". The advice of the author of this comment is that to resolve the questions arising in this field, efforts should be made to ensure "that the settlement be as rational, equitable and expert as humanly possible". Douglas Johnston, *The International Law of Fisheries*, Yale University Press, 1965, p. 248. The conclusion of regional agreements is also to be recommended: see Vigne, *Le rôle des intérêts économiques dans l'évolution du droit de la mer*, Geneva, 1971, p. 119.

It is generally conceded, even by the Latin American States, that the high seas are free, and that freedom of fishing is one of the four freedoms of the seas [1].

The high seas are not *res nullius* to be appropriated by the first-comer, nor by the most powerful [2]. They belong to the community of peoples, or to mankind [3]. The high seas are regarded as *res omnium communis*, and the use of them belongs equally to all peoples. The appropriation of an exclusive fisheries zone in an area hitherto considered as part of the free seas is equivalent to deprivation of other peoples of their rights. The extension of its jurisdiction over the adjacent sea by a coastal State presupposes a reduction of the freedom of fishing of other States, and such respective increase and loss of power calls for legal justification. At all times, States have endeavoured to justify their claims in one way or another. According to Vattel (*op. cit.*, above), there must be "some lawful end" for the appropriation of something which is common property. Judge Alvarez contended that States might alter the extent of the territorial sea "provided that they furnish adequate grounds to justify the change" (individual opinion, *I.C.J. Reports 1951*, p. 150) [4].

7. I think that the principle of the freedom of the high seas is as valid as ever it was, but it does not operate in isolation, it must be applied in accordance with existing circumstances and the views currently held. In the time of Grotius, and up to the end of the Second World War, the principle could be expressed in absolute terms; today, reality is otherwise, and compels us to express it more moderately, and to harmonize it with other secondary principles.

The case before the Court requires a just solution to be found to the conflict which is emerging between the principle of the freedom of the high seas with regard to fisheries, and the trends in favour of extension of the zone of jurisdiction of coastal States. But for this purpose it should be borne in mind that the Court does not have to decide a general and

[1] This is the principle enshrined in Articles 1 and 2 of the 1958 Geneva Convention on the High Seas. This Convention lays down on this point general principles of international law established long before their formulation in the Convention (*I.C.J. Reports 1969*, p. 39, para. 65).

[2] This is, I think, the general opinion. On the question of the nature of the high seas, see Jenisch, *Das Recht zur Vornahme militärischer Übungen und Versuche auf Hoher See in Friedenszeiten*, Hamburg, 1970, pp. 43-52.

[3] General Assembly resolution 2749 (XXV) of 17 December 1970 refers in paragraph 1 to the common heritage of mankind. On the idea of fishing zones as "property devoted to a purpose" *(Zweckvermögen)* and relevant references, see Rojahn, *Die Ansprüche*, p. 171; on the concept of coastal nations as trustees for the international community, see President Nixon's statement of 23 May 1970, quoted by Rojahn in "Zur zukünftigen", p. 425.

[4] Quotations on the criterion of what is reasonable will be found in Brownlie, pp. 196 and 215. The Prime Minister of Iceland has referred to what is "reasonable" (Memorial of the Federal Republic of Germany, Part IV, para. 58). See also *I.C.J. Reports 1951*, p. 131 "moderate and reasonable"; *I.C.J. Reports 1969*, pp. 52 and 54, paras. 98 and 101 (D) (3): "reasonable degree of proportionality". But the criterion of what is reasonable should be determined objectively.

abstract question, but a dispute between two countries, for the settlement of which the positions and relationships of the Parties should primarily be considered.

The consideration of "the close dependence of the territorial sea upon the land domain" (*I.C.J. Reports 1951*, p. 133) also underlies the recognized extent of the new zone of fisheries jurisdiction. But the establishment of jurisdiction over the fishing zones must be justified by the special interest of the coastal State, and by the existence of reasons permitting of the recognition that that State has preferential or priority rights.

The 1958 Conference recognized the concepts of "special interest", "preferential requirements" and "just treatment" (Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6; Resolution on Special Situations Relating to Coastal Fisheries). The scope of these concepts is limited to fishery conservation, and the situation of countries whose coastal population depends on fishing. At the 1960 Conference, Brazil, Cuba and Uruguay proposed a text in which it was said that "the coastal State has the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone . . ."; this draft furthermore almost obtained unanimity, but as has already been stated, it failed to be adopted, along with the proposal by Canada and the United States.

Although these concepts have not been enshrined in a convention, and despite the restrictions subject to which they were advanced, in fact what is happening to them is what happened to the Truman Proclamations, they are the "starting point of the positive law on the subject" (*I.C.J. Reports 1969*, pp. 32-33). They are accepted as something natural. As examples of this development, one might mention the recommendation of the American Bar Association of August 1964 (para. 1 *(b)*, quoted by Johnston, *op. cit.*, p. 252, note 346), the draft of the Inter-American Committee of 1956, the Statement by President Nixon of 23 May 1970 (quotations in Rojahn, "Zur zukünftigen", p. 412), and the proposal of the United States according to Stevenson (*loc. cit.*, pp. 469-470). In United Nations General Assembly resolution 2750 C (XXV) of 17 December 1970, in which the subjects to be dealt with by the Conference on the Law of the Sea are laid down, is included the question of the preferential rights of coastal States. The Government of the United Kingdom "accepts that the concept of preferential fishing rights of coastal States and the spirit of the proposals embodied in the three-Power amendment are applicable, are relevant, to the solution of the present dispute" (CR 74/3, pp. 16-17) [1].

Along with the special interest and the preferential rights of the coastal State, account should be taken of the historic rights of the countries concerned with high sea fishing. The acquisition of rights over the sea by prescription is not admitted, but long usage should be respected, and

[1] See also CR 74/1, pp. 82-83.

that for the same reasons as for the interests of the coastal State. It is contrary to the concept of justice to disregard situations which have been established for years, the capital invested, the establishment of industries, the protein needs of populations, and above all the confidence inspired by a respect for the status quo concerning the use of the high seas as common property.

8. The difficulties in the way of harmonizing these interests are not insurmountable. This practical possibility of effecting a delimitation of the respective rights is well demonstrated, for example, in the negotiations with a view to fixing the different countries' fishing quotas in the North-West Atlantic, and the agreements concerning fisheries in the region of the Faroe Isles (CR 74/3, pp. 48-55).

The conduct of the parties results from recognition of their respective interests. Study of the Exchanges of Notes of 1961, and the documents supplementary thereto (the Resolutions of 1948 and 1959), shows that the right unilaterally to declare an extension of jurisdiction, as reserved by Iceland, is not an absolute right. It requires justification. Extension is contemplated if it becomes necessary for reasons relating both to the conservation of fisheries and the needs of the Icelandic people. That reservation was accepted by the Applicant. Iceland for its part tacitly recognized the historical rights of the Applicant in 1961 and in 1972. There is thus mutual recognition of preferential rights and historic rights, coinciding with the present trends in practice, and with what writers have argued to be desirable.

In the *North Sea Continental Shelf* cases, the Court was in a situation which was to some extent analagous to the present situation, inasmuch as there was no mathematical rule to be applied to the delimitation of adjacent zones of the continental shelf. It did not follow from a denial that the equidistance rule was a legal rule that another "single equivalent rule" had to be found. Failing a single rule enabling the areas to be delimited, the Court stated that nonetheless "there are still rules and principles of law to be applied" (*I.C.J. Reports 1969*, p. 46, para. 83).

When the General Assembly decided to convene the Conference on the Law of the Sea, it said that its purpose would be "the establishment of an equitable international régime" (resolution 2750 C (XXV) of 17 December 1970). The Court applies "equitable principles", which, "on a foundation of very general precepts of justice and good faith" lead to actual rules of law.

> "It is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field . . ." (*I.C.J. Reports 1969*, pp. 46-47, para. 85.)

There is no need to demonstrate and prove what is a matter of general

knowledge and general recognition, namely the changes which have occurred in fishing techniques, the risk of exhaustion of fish stocks resulting therefrom, and the increasing protein requirements of ever more numerous populations.

9. It cannot be concealed that it is difficult to see how the concepts of special rights, preferential rights and historic rights can be brought under the heading of one of the sources of international law. It is not easy to prove the existence of a general practice accepted as law, nor would these concepts appear to form part of the general principles of law recognized by civilized nations. But it does appear possible to overcome the difficulty resulting from the unfortunate drafting of Article 38 of the Statute with the assistance of the teachings of the most highly qualified writers. One cannot make a sharp division between customary law and the principles of law. At the origin of the modern doctrine, in the historical school to which legal science owes the foundations of the theory of custom, they can be seen to be closely united. Savigny teaches us that practice (usages) is not the foundation of customary law, but that it is the sign by which the existence of a custom may be known. The custom is produced by the community of conviction, not by the will of men, whose acts only manifest this community of ideas [1]. This observation is still of assistance. In order to be binding as a legal rule, the general conviction *(opinio communis)* does not have to fulfil all the conditions necessary for the emergence of a custom. This is what explains the value of *opinio juris*, and why it may confer on one single act the possibility of becoming "the starting point of the positive law" (*I.C.J. Reports 1969*, pp. 32-33).

V. Procedural Questions

The Court is also faced with difficult questions of procedure. Should the Court confine itself to upholding or rejecting the submissions of the Applicant, or should it endeavour to do justice by deciding the question of the extension?

The first difficulty lies in ascertaining the meaning of the compromissory clause. The Court examined its history and its significance in the Judgment of 2 February 1973 on jurisdiction. According to the documents known to the Court, Iceland did not wish to be bound definitively and permanently by the 12-mile limit; it wished to preserve full freedom to extend its fisheries jurisdiction and to implement the Althing Resolution of 1959 unilaterally. The United Kingdom showed itself ready to accept

[1] Savigny, *System des heutigen römischen Rechts* (1840), I, paras. 12 and 18. Puchta, *Pandekten*, para. 12, Fifth Edition (1850), p. 19; *Cursus der Institutionen*, I, para. 13, Ninth Edition (1881), pp. 18 and 19. The Court has referred to usages accepted as expressing principles of law: *P.C.I.J., Series A, No. 10* (1927), p. 18.

the reservation by Iceland of this power to implement the Althing Resolution, on condition that the extension was in accordance with an international agreement embodying a generally accepted rule of law in relation to fishery limits, or in conformity with a rule of international law, established by general consent, which would permit such an extension (United Kingdom Memorial on jurisdiction, para. 29).

The two Parties held tenaciously to their positions. The form proposed by the United Kingdom might appear to reserve a right of veto in respect of any future attempt to extend jurisdiction; the opposition of the United Kingdom would be sufficient to prevent the emergence of a new general customary law which would permit a further extension. On the other hand, it was very much in Iceland's interests to preserve its freedom to extend its fishery zone, and thus to be able to take advantage of the time which could be foreseen when the trend in favour of the extension of the fisheries jurisdiction of coastal States would have acquired sufficient momentum in general opinion—and it preferred arbitration to the jurisdiction of the Court.

The impossibility of reconciling such inconsistent points of view resulted in the adoption of the neutral formula of the compromissory clause to which the Parties agreed: "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."

The form of words adopted results from a compromise; neither of the Parties succeeded in carrying its point, but both the terms and the object of the clause appear to be clear: the Court has the mission of finding a solution to the dispute which, it was to be feared, would arise as to the extension of the fisheries zone.

Nevertheless, the interpretation of the clause may give rise to some doubts. Does it limit the task of the Court to saying whether the extension effected by Iceland is or is not in accordance with law? Is the role of the Court to resolve the dispute by saying how far and subject to what conditions the extension is in accordance with the law? On the second hypothesis, the Court would have to examine the nature of the extension which was contemplated by the Exchange of Notes of 1961 in relation to the Althing Resolution of 1959 and Law of 1958—that is to say to take account of the special situation of Iceland and its priority rights over the continental shelf.

In a separate opinion, Sir Gerald Fitzmaurice has said that: "The question of conservation has therefore no relevance to the jurisdictional issue now before the Court, which involves its competence to adjudicate upon the dispute occasioned by Iceland's claim unilaterally to assert exclusive jurisdiction for fishery purposes up to a distance of 50 nautical miles from and around her coasts." (*I.C.J. Reports 1973*, pp. 26-27.) This

observation, in my opinion, must be interpreted in relation to the Judgment on the Court's jurisdiction, and not in relation to the phase of the procedure concerning the merits. In that Judgment, the Court said that it would "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" (*ibid.*, p. 7, para. 11).

It will be as well to observe, all the same, that in that Judgment, the Court recalled that in its Order of 17 August 1972 it had recognized the exceptional dependence of Iceland on its fisheries, and stated that "from this point of view account must be taken of the need for the conservation of fish stocks in the Iceland area" (*I.C.J. Reports 1973*, p. 20, para. 41, quoting *I.C.J. Reports 1972*, pp. 16 and 17).

"The meaning of the expression extension of fisheries 'jurisdiction' in the compromissory clause must be sought in the context of this Althing Resolution [that of 1959] and in the complete text of the 1961 Exchange of Notes" (*I.C.J. Reports 1973*, p. 8, para. 14). It does not appear that the jurisdiction of the Court should be confined to answering yes or no to the claim made before it that the extension is contrary to existing international law. The "matter" having been brought before the Court, the Court must take cognizance of it as a whole and not in part. Once the Court had declared in its Judgment that it had jurisdiction, it should not leave the dispute open. It should seek a solution to the matter of the extension, in accordance with such guidelines as may be deduced from the Exchange of Notes of 1961 and the principles of law. That solution may well consist of saying how far the extension is in accordance with law, and how it should be corrected or rectified in order to be just and equitable.

The skilful way in which the Applicant has drafted its submissions has faced the Court with another problem of procedural law. Should it confine itself to replying to the claims expressed in the Application? A municipal tribunal would be in a difficulty in view of the rule which forbids it to give judgment *ultra petita*. But the function of the Court is wider, and is not limited on grounds of pure form. The Court is not bound by the narrow rules of the *litis contestatio*, especially when the Respondent fails to appear.

The jurisdiction of the Court results from the 1961 Exchange of Notes, and not only from the will of the Applicant. The compromissory clause enables the matter of the extension to be brought before the Court, so that it can accomplish its function as principal judicial organ of the United Nations. The function of the Court is to seek the *solution* of the dispute before it (Charter, Arts. 33 and 95), and thus to contribute to the pacific settlement of disputes between States. When one Party fails to appear, the other does not have the power of narrowing down the role of the Court.

VI. Equitable Solution

Is it open to the Court to find for itself an equitable solution? Is it preferable for it to lay down guidelines so that the Parties can reach an equitable agreement?

It is open to the Court, it seems to me, to take the initiative and examine *proprio motu* the factual elements in the case. By making orders for the conduct of the case, it can entrust qualified individuals or commissions with the task of carrying out enquiries or giving expert opinions, before or after the oral stage of the proceedings (Statute, Arts. 48 and 50). With this information to hand, the Court would be able to balance the interests involved and decide according to principles of equity [1]. This procedure was not followed by the Court in 1969, and would not seem to be a wise course today. Iceland, by failing to appear, persists in refusing to assist the Court, and the Parties are either engaged in negotiation or have expressed the intention of negotiating.

The example of the 1969 Judgment should be followed; there are several reasons for doing so. The Icelandic Law of 1948 makes an express reservation for agreements with other countries to which Iceland was or might become a party. In the Resolution adopted by the Althing on 15 February 1972 it was stated that efforts to reach a solution of the problems connected with the extension should be continued through discussions with the United Kingdom and Federal Republic. The agreement of 13 November 1973 between the United Kingdom and Iceland expresses the hope that the dispute will be terminated by an agreement before the expiration of two years (13 November 1975). The Government of the Federal Republic for its part has stated that the Court cannot assume the role of a legislator for the better management of the fishery resources of the oceans, and goes on:

> "But the Court may be disposed, and this would certainly be within its judicial functions in deciding the dispute between the Parties, to give the Parties some guidance as to the principles which the Parties should take into account in their negotiations for the most equitable management of the fishery resources in the waters of the high seas around Iceland . . ." (Memorial of the Federal Republic of Germany, Part IV, para. 149.)

In 1969 the Court stated that "in the matter of delimitation" there were certain "basic legal notions", and continued:

> "Those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of Justice and good faith, actual

[1] The Court thought it appropriate to submit for expert opinion certain figures and estimates of a technical nature (*Corfu Channel, I.C.J. Reports 1949*, p. 237), when Albania did not appear. However, the circumstances in that case were quite different.

rules of law are here involved which govern the delimitation of adjacent continental shelves." (*I.C.J. Reports 1969*, pp. 46-47, para. 85.)

For the purposes of the case now before the Court, no mathematical rule can be found which would enable the zone of exclusive fisheries jurisdiction to be delimited, but it should be observed that guidelines do exist for reaching an equitable delimitation. The special interest of Iceland in the adoption of measures for conservation of fish in the zone of the continental shelf, and in consideration being given in priority to the needs of its population and its industry, is recognized. On the other hand, so far as possible these rights must be reconciled with the historic interests or rights of the Applicant. The actual catch potential of each Party, without risk of exhaustion of the stock, must be considered. Provision should therefore be made for reserved zones, catch quotas, limitation on number of vessels, types of permitted vessels, size of mesh of nets, times of fishing, transition period, periodic revision of agreements, etc.

The Court could, following the method of the 1969 Judgment, decide that the Parties are under an obligation to continue negotiations in such a way that "in the particular case, and taking all the circumstances into account, equitable principles are applied" (*I.C.J. Reports 1969*, p. 47, para. 85). This obligation to negotiate is "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements" (*P.C.I.J., Series A/B, No. 42*, 1931, p. 116—a form of words adopted in *I.C.J. Reports 1969*, p. 48, para. 87).

> "As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the judicial settlement of international disputes 'is simply an alternative to the direct and friendly settlement of such disputes between the Parties' (*P.C.I.J., Series A, No. 22*, at p. 13)." (*I.C.J. Reports 1969*, p. 47, para. 87.)

VII. The Submissions

I would add that the following points could well have been brought out in the Judgment. The extension decided on by Iceland in 1972, to the extent that it was intended to implement the 1959 Althing Resolution, was not in itself invalid as against the United Kingdom. On the other hand, Iceland's statement that it regarded the 1961 agreement as no longer in force was invalid, for it was the validity of that agreement which entitled Iceland to implement the 1959 Resolution. Once the dispute had been brought before the Court, it was for the Court to decide on the validity of the extension; and it was bound to do so taking into account the 1961 agreement, which bound the Parties, and the law of the sea. It is for this end that the Court should lay down guidelines to define the conditions on which the extension may be regarded as legally justified.

(Signed) F. de Castro.