SEPARATE OPINION OF JUDGE SIR HUMPHREY WALDOCK

1. I am in general agreement with both the operative part and the reasoning of the Judgment of the Court. As, however, there are some aspects of the case which I consider should have received more prominence in the Judgment, I feel it incumbent on me to deal with them in this separate opinion.

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2. The Judgment refers to the Exchange of Notes of 11 March 1961 and draws certain conclusions from it regarding the United Kingdom's recognition of Iceland's exceptional dependence on coastal fisheries and regarding Iceland's recognition of the United Kingdom's traditional fisheries in the waters around Iceland. It does not, however, give the 1961 Exchange of Notes the importance which, in my opinion, that agreement necessarily has as a treaty establishing a particular legal régime governing the relations between the parties with respect to fishing in those waters. The 1961 Exchange of Notes, which was negotiated and concluded immediately after the Second United Nations Conference on the Law of the Sea had failed to resolve the problem of fishery limits, had as its express object the settlement of an existing fishery dispute between Iceland and the United Kingdom. This it did upon terms which lay down specific rules to cover the case of a subsequent claim by Iceland to extend her fishery jurisdiction beyond the 12-mile limit assented to by the United Kingdom in that agreement. The result, in my view, is that the starting point for determining the rights and obligations of the Parties in the present case has to be the 1961 Exchange of Notes which, by its Judgment of 2 February 1973, the Court has held to be valid, in force and applicable to the extension of Iceland's fishery jurisdiction now in question before the Court.

3. The 1961 Exchange of Notes has to be read in the light of the fishery dispute which it was designed to settle. Under varying Icelandic fishery limits, United Kingdom fishing vessels had fished in the waters around Iceland for some centuries, before the conclusion of the Anglo-Danish Fishery Convention of 24 June 1901. By that Convention Denmark, which was then internationally responsible for the foreign relations of Iceland, in effect agreed to apply to the waters around Iceland the pro-

visions of the North Sea Fisheries Convention of 1882 regarding fishery limits and the regulation of fisheries. In particular, Article 2 of the 1901 Convention provided:

> "The subjects of His Majesty the King of Denmark shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of the said islands, as well as of the dependent islets, rocks and banks.
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> As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles."

The Convention, which was subject to termination by either party on giving two years' notice, remained in force until 3 October 1951, governing the fishery relations between the United Kingdom and Iceland until that date. Meanwhile, Iceland's separate international personality was being increasingly recognized and she was separately represented at The Hague Codification Conference of 1930 convened to codify, *inter alia*, the law of territorial waters. At that Conference her delegate argued in favour of a 4-mile limit for Iceland as having a historical basis and being "a fair limit, provided it were possible to have some rules for protecting the fisheries in certain areas outside the territorial waters". The Conference having failed to reach any agreement on the limit of the territorial sea, British fishing vessels continued to fish in the waters around Iceland up to the 3-mile limit under the 1901 Convention, even if at a very reduced rate during the 1939-1945 War and immediately thereafter.

4. The end of the Second World War, however, proved to be a turning point in the history of Icelandic fisheries. On 17 June 1944 the Althing proclaimed the establishment of the Republic of Iceland and Iceland became fully independent. The following year saw the issue by President Truman, on 28 September 1945, of two Proclamations claiming for the United States, respectively, jurisdiction over the natural resources of the subsoil and sea-bed of the continental shelf contiguous to the United States and the right, either alone or together with other interested States, to establish fishery conservation zones in areas of the high seas contiguous to its coasts. The new doctrines advanced in these Proclamations, and especially the invocation of the continental shelf as a legal concept, provided the stimulus for a variety of new maritime claims in different countries, including Iceland, where the public were already restive about the fishing of foreign vessels up to three miles from their shores.

5. So it was that in 1948 the Althing passed a law entitled "Law Concerning the Scientific Conservation of the Continental Shelf Fisher-

ies", which included the following provisions:

> "*Article 1.* The Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland; wherein all fisheries shall be subject to Icelandic rules and control; Provided that the conservation measures now in effect shall in no way be reduced. The Ministry shall further issue the necessary regulations for the protection of the fishing grounds within the said zones . . .
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> *Article 2.* 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 provisions, if they may have owed some of their inspiration to the two United States Proclamations, were not based on the same principle as either of those Proclamations. The continental shelf Proclamation issued by President Truman asserted a claim to jurisdiction and control over the natural resources only of the subsoil and sea-bed of the continental shelf, expressly declaring that it in no way affected the character as high seas of the waters above it. Iceland's Law of 1948, on the other hand, asserted a claim to be entitled to establish fishery conservation zones in the waters of the high seas above her continental shelf and to exclusive jurisdiction and control therein. Indeed, it was not until 1969 and by a quite separate law that Iceland proclaimed her sovereign rights in respect of the natural resources of the continental shelf itself (*United Nations Legislative Series*, ST/LEG/SER.B/15, p. 364). Again, President Truman's fishery Proclamation, unlike Iceland's Law of 1948, was not related to the continental shelf and made explicit provision for the participation of other States in the conservation measures.

6. Moreover, the *Exposé des Motifs* accompanying the Law of 1948 made it plain that, although expressed as essentially a conservation measure, the Law was intended to be an enabling Act authorizing the Fisheries Ministry to extend Iceland's fisheries jurisdiction over areas of the continental shelf as and when the Ministry judged it appropriate (*United Nations Legislative Series*, ST/LEG/SER.B/6, pp. 514-515). In the following year, on 3 October 1949, the Government of Iceland gave notice of her denunciation of the Anglo-Danish Convention of 1901, with the result that the Convention, in accordance with its terms, ceased to be in force two years later, i.e., on 3 October 1951. During that interval, in the course of the *Anglo-Norwegian Fisheries* case, the United Kingdom had recognized Norway's historic claim to a 4-mile territorial sea and the Court itself had endorsed the validity of the system of straight baselines applied by Norway along the bays and islets off the Norwegian coast (*I.C.J. Reports 1951*, pp. 126 and 132-139). Aware, no doubt, of these

developments, Iceland early in 1952 informed the United Kingdom of her intention to issue new fishery regulations in pursuance of the Law of 1948; and on 19 March of that year promulgated regulations which provided for a fishery zone extending four miles to seaward of straight baselines drawn along the outermost points of the coasts, islands and rocks and across the openings of bays, and prohibited all foreign fishing activities within that zone.

7. Iceland's 1952 Fisheries Regulations encountered protests from the United Kingdom with respect to the 4-mile claim and certain of the straight baselines, the compatibility of which with the principles laid down in the *Anglo-Norwegian Fisheries* case it called into question. The fishing industry in the United Kingdom also reacted against the new Regulations by trying to prevent Icelandic vessels from landing their catches in the United Kingdom. After various abortive attempts to solve the dispute, a *modus vivendi* was reached in 1956, under the auspices of the Organization for European Economic Co-operation. Under it there was to be no further extension of Iceland's fishery limits pending the General Assembly's discussion of the International Law Commission's report on the law of the sea, a discussion which resulted in the convening at Geneva in 1958 of the first United Nations Conference on the Law of the Sea.

8. The Conference, although it succeeded in adopting four major Conventions on the Law of the Sea, failed to reach agreement either on the limit of the territorial sea or on the extent of a State's exclusive fishery rights. On these questions it had to content itself with recommending the convening of a second Law of the Sea Conference specifically for the purpose of trying to settle them. Even so, the Geneva Conference of 1958 was not without its implications with regard to Iceland's fishery limits. Thus, by Articles 1 and 2 of the High Seas Convention, the Conference agreed that the high seas comprise "all parts of the sea that are not included in the territorial sea or in the internal waters of a State", and that the freedom of the high seas comprises "*inter alia*, both for coastal and non-coastal States . . . Freedom of fishing". By Articles 1 and 2 of the Continental Shelf Convention it further agreed that the rights attaching to a coastal State in virtue of its adjacent continental shelf relate solely to the natural resources of the sea-bed and subsoil, including only such living resources as belong to sedentary species; and that these rights of the coastal State "do not affect the legal status of the superjacent waters as high seas". Clearly, Iceland's claim in her Law of 1948 to be entitled to establish her fishery jurisdiction over the waters of all her continental shelf did not find any justification in these provisions of the High Seas and Continental Shelf Conventions adopted by the 1958 Geneva Conference.

9. Similarly, the Convention on Fishing and Conservation of the Living Resources of the High Seas took a different approach to the conservation of fishery resources outside the territorial sea from that of the Law of 1948. Reflecting the approach of President Truman's fishery Proclamation rather than of the Icelandic Law, the Geneva Conference recognized that "a 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", but did not allow any exclusive rights of jurisdiction to coastal States outside their territorial sea. Instead, it placed a general obligation on non-coastal States to enter into negotiations with the coastal State, at the latter's request, "with a view to prescribing *by agreement* the measures necessary for the conservation of the living resources of the high seas in that area" (emphasis added). True, if such negotiations were requested by a coastal State and had not led to an agreement within six months, the Convention empowered the coastal State to adopt unilateral measures of conservation; but it did so only under strictly circumscribed conditions and pending the settlement of any disagreement as to their validity by a special commission. Thus, in this Convention the 1958 Conference left fishery conservation in waters outside the territorial sea essentially a matter to be agreed between the coastal State and any other States concerned and, in the event of disagreement, to be decided by an independent commission. In consequence, Iceland's Law of 1948 could equally not find its justification in the Convention on Fishing and Conservation of the Living Resources of the High Seas.

10. In the Territorial Sea and Contiguous Zone Convention, the 1958 Conference settled the rules governing the baselines for delimiting the territorial sea, and incorporated in them, subject to minor variations, the straight baseline system sanctioned by the Court in the *Anglo-Norwegian Fisheries* case. It also recognized that a coastal State has full sovereignty and so, by implication, exclusive fishery rights within its territorial sea. But it failed to reach agreement on the extent of the territorial sea, though in prescribing that the contiguous zone may not extend beyond 12 miles from the baseline, it implied that *a fortiori* the territorial sea may not extend beyond that limit. It follows that this Convention, like the others adopted at the 1958 Conference, did not provide Iceland with a legal basis for the continental shelf fisheries claim enunciated in her Law of 1948.

11. Two other developments at the 1958 Conference require to be noticed, since they contributed to shaping the course of the present dispute. The first is the emergence at the Conference of the concept of the preferential position of a coastal State whose people are specially dependent upon coastal fisheries. As paragraph 56 of the Judgment recalls,

although an Icelandic proposal embodying this concept failed to obtain the necessary majority, the Conference adopted a resolution concerning "the situation of countries or territories whose people are overwhelmingly dependent on coastal fisheries for their livelihood or economic development". This resolution, entitled "Special Situations relating to Coastal Fisheries", recognized that "such situations call for exceptional measures befitting particular needs", and made the recommendations which are set out in that paragraph of the Judgment. In such "special situations" the resolution in effect advocated that, if catch-limitation becomes necessary for the purpose of conservation, non-coastal States should collaborate with the coastal State to establish agreed conservation measures which recognize such preferential requirements of the latter as result from its dependence on the fishery in question. Thus, even in the case of a State specially dependent on coastal fisheries, like Iceland, the resolution did not envisage the unilateral assumption of exclusive rights by the coastal State. On the other hand, it clearly did envisage that they should have a certain preference in the exploitation of the fisheries in adjacent areas of the high seas.

12. The other development of the 1958 Conference requiring to be noticed is the ventilation first by Canada, and then by the United States, of the concept of a contiguous zone of exclusive fisheries as a possible means of compromising the differences between those who advocated a 3-mile territorial sea and those who considered that a coastal State should be at liberty to choose any breadth for the territorial sea up to 12 miles. At this Conference the version of the compromise to attract most support was that of the United States which provided for a 6-mile territorial sea and a further 6-mile contiguous zone of exclusive fisheries, subject to the proviso that States, the nationals of which had fished in the fishery zone regularly for the past five years should have the right to continue to do so. But the United States' proposal did not obtain the necessary two-thirds majority in the voting and, as already indicated, no agreement was reached at the Conference on the questions of the breadth of the territorial sea or of the extent of a State's exclusive fishery rights.

13. Soon after the conclusion of the Conference, as the Judgment relates, Iceland announced her intention to reserve exclusively for Icelandic fishermen the right of fishing within 12 miles from her baselines and further to expand her exclusive fishing zone by modifying those baselines; and to this intention she gave effect by the issue on 30 June 1958 of new "Regulations concerning the Fisheries Limits off Iceland". Article 1 of these Regulations proclaimed a 12-mile fishery limit around Iceland drawn from new baselines and Article 2 prohibited all fishing activities by foreign vessels within the new fishery limit. The Regulations, as they expressly stated, were issued under the power conferred on the Ministry of Fisheries by the Althing in the Law of 1948 "Concerning the Scientific

Conservation of the Continental Shelf Fisheries". Their immediate inspiration, however, seems to have been the trend at the 1958 Conference towards allowing a 12-mile contiguous zone of exclusive fisheries as a compromise to resolve the differences regarding the breadth of the territorial sea.

14. The validity of the new Regulations was immediately challenged by the United Kingdom and various attempts were made to settle the resulting dispute by negotiation which, however, failed to produce any solution before the second United Nations Conference on the Law of the Sea began in March 1960. During the course of these negotiations, on 5 May 1959, the Althing passed a resolution which requires mention as it later became an element in the 1961 Exchange of Notes. This resolution, *inter alia*, stated:

> ". . . the Althing declares that it considers that Iceland has an indisputable right to fishery limits of 12 miles; *that recognition should be obtained of its rights to the entire continental shelf area in conformity with the policy adopted by the Law of 1948, concerning the scientific conservation of the continental shelf fisheries*, and that fishery limits of less than 12 miles from baselines around the country are out of the question". (Emphasis added.)

The Althing thus made it clear that the 1958 Regulations asserting a claim to a 12-mile fishery limit in no way implied any modification by Iceland of her objective of extending her exclusive fishery zone over "the entire continental shelf area".

15. The period between the 1958 and 1960 Conferences also saw the conclusion of a fishery conservation convention by 14 States interested in the fisheries of the North-East Atlantic. This was the North-East Atlantic Fisheries Convention of 24 January 1959, which embraced the Icelandic area and to which Iceland and the United Kingdom are parties [1]. The Convention set up for the North-East Atlantic Area a régime for the conservation and exploitation of fisheries, operated by a Fishery Commission and by Regional Committees and similar to the régime created a decade earlier for the North-West Atlantic by the North-West Atlantic Fishery Convention of 8 February 1949. The 1959 Convention is expressed to apply to all the waters situated within the North-East Atlantic area, but under Article 2 nothing in the Convention is to be "deemed to affect the rights, claims or views of any contracting State in regard to the extent of jurisdiction over fisheries".

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[1] As also is the Federal Republic of Germany, Applicant in the other *Fisheries Jurisdiction* case now before the Court.

16. The Second Conference on the Law of the Sea, held in Geneva in March and April 1960, failed to reach agreement on what had become the twin questions of the breadth of the territorial sea and the extent of exclusive fisheries. At the Conference, attention again centred on the possibility of solving these questions on the basis of a 6-mile territorial sea plus a further 6-mile contiguous zone of exclusive fisheries subject to a short phase-out period for States having existing fisheries within the 6-mile contiguous fishery zone. Moreover, it was a joint United States-Canadian proposal in that form, providing for a 10-year phase-out period and also for preferential fishing rights for a coastal State in a situation of special dependence on adjacent fisheries, which was the text that paragraph 52 of the Judgment refers to as having failed of adoption by only one vote.

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17. Meanwhile, the dispute between the United Kingdom and Iceland concerning both the 12-mile limit and the new baselines promulgated in the 1958 Regulations still subsisted; and they undertook a series of negotiations from 1 October 1960 until the end of that year with a view to its settlement. These negotiations, as was only to be expected, were conducted by the Parties in the context not only of the previous history of the dispute but of the comprehensive review of the law of the sea which had just taken place at the first and second Geneva Conferences on the Law of the Sea.

18. Thus, at the opening meeting on 1 October 1960 the Icelandic delegate recalled the views expressed by Iceland at those Conferences. He stressed that Iceland is in a unique position in that her people are dependent entirely upon the coastal fisheries; that it was essential for her to safeguard her coastal fisheries; that she did not consider conservation measures alone to be sufficient and that it was therefore her policy to secure exclusive jurisdiction "in accordance with international law". He also referred to the fact that a 6 + 6 solution, with an adjustment period of 10 years, had nearly been reached at the second Conference. He further said that two proposals tabled by the Icelandic delegation had received considerable support: namely, that countries in special situations should receive preferential treatment even beyond 12 miles; and that a transitional period should not apply to special situation countries.

19. The United Kingdom, in its opening statement, also recalled the compromise proposal of the United States and Canada for a 12-mile

fishery limit, subject to a 10-year transitional period for States having existing fisheries between the 6 and 12-mile limits. It observed that a bilateral agreement had just been concluded between the United Kingdom and Norway based upon that compromise proposal and subject to a 10-year transitional period for United Kingdom fishing vessels. At the same time, the United Kingdom reaffirmed its recognition of Iceland's special situation as a country whose economy depends mainly upon its fisheries and conceded that the United States-Canada formula would, for this reason, need to be modified to take account of that factor. That modification, it suggested, should be the reduction of the transitional period of United Kingdom fishing from ten to five years.

20. The negotiations continued with proposals and counter-proposals from each side. The Icelandic delegates insistently pressed for the reservation to Icelandic fishermen of certain areas even outside the 12-mile limit as being essential, in their view, to solve the problem of densely fished areas. The United Kingdom delegation no less insistently contested that view and objected that in the light of the scientific evidence concerning the fisheries, the reservation of areas outside the 12-mile limit could not be justified on grounds of conservation; while offering to examine together with the Icelandic delegation any proposals for conservation measures in particular areas or for policing regulations to avoid difficulties in any areas of more dense fishing, they declined to accede to Iceland's demand for reserved areas outside the 12-mile limit.

21. The compromise by which the dispute was ultimately settled in the 1961 Exchange of Notes is set out in paragraph 26 of the Judgment. In substance, the Parties agreed to settle the dispute on the basis of: a 12-mile fishery zone around Iceland; baselines as promulgated in the 1958 Regulations subject to four modifications; a 3-year transitional period for United Kingdom fishing between the 6-mile and 12-mile limits; exclusion of United Kingdom fishing vessels from seven specified areas between the 6-mile and 12-mile limits; a clause providing for the contingency of any further initiative taken by Iceland to extend her fishery jurisdiction in implementation of the Althing Resolution of 5 May 1959. Thus, while accepting the reduction of the transitional period still further from five to three years as well as restrictions within the transitional zone even during that period, the United Kingdom did not accept any Icelandic rights of jurisdiction outside the 12-mile limit. On the contrary it made its whole acceptance of the package settlement conditional upon Iceland's acceptance of a provision regulating the position between the Parties in the event of any future initiative taken by Iceland under the Althing Resolution of 5 May 1959 to extend her jurisdiction. It further emphasized that its acceptance of the settlement was "*in view of the*

exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development".

22. Thus, whatever differences there may have been in the views of the two countries regarding the applicable rule of general international law, Iceland and the United Kingdom agreed in 1961 that the 12-mile limit, which was the only fishery limit that had come near to general acceptance at the 1960 Conference, should thereafter constitute the limit of Iceland's fishery jurisdiction as between themselves. They further agreed that this 12-mile limit should remain in force between them unless and until an extension of Iceland's fishery jurisdiction should become opposable to the United Kingdom in accordance with the final clause in the Exchange of Notes which provided:

> "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, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

This clause, as the Court stressed in its Judgment on the jurisdiction of the Court (*I.C.J. Reports 1973*, p. 3), is not a mere compromissory clause ancillary to the main provisions of the agreement. It was a basic condition of the settlement by which Iceland obtained the United Kingdom's recognition of Iceland's 12-mile limit, her enlarged baselines, the brief three-year transitional period and the exclusion of United Kingdom vessels from seven areas even during the transitional period.

23. In that Judgment the Court traced the origins of the compromissory clause in the negotiations leading up to the conclusion of the 1961 Exchange of Notes (para. 18):

> "The records of these negotiations which were drawn up by and have been brought to the Court's attention by the Appplicant, as well as certain documents exchanged between the two Governments, show that, as early as 5 October 1960, it had become apparent that the United Kingdom would accept in principle Iceland's right to exclusive fisheries jurisdiction within the 12-mile limit following the end of a transitional period. However, the Government of the United Kingdom sought an assurance that there would be no further extensions of Icelandic fisheries jurisdiction excluding British vessels, in implementation of the Althing resolution, *except in conformity with international law*. In the course of the discussions concerning this point both parties accepted the notion that disputes arising from such further extensions should be submitted to third-party decision." (Emphasis added.)

Having then traced the history of the drafting of the clause, the Court concluded (paras. 21-23):

> "The history of the negotiations not only shows the intentions of the parties but also explains the significance of the six months' notice required to be given by the Government of Iceland to the United Kingdom Government, for on 2 December 1960 *the United Kingdom representatives stated that the assurance they were seeking should provide*, inter alia, *that*, '*pending the Court's decision, any measure taken to give effect to such a rule will not apply to British vessels*'. The Foreign Minister of Iceland is recorded as having replied on the same date that the most difficult feature of the problem of the assurance was how to deal with the point that 'if there was a dispute, *no measure to apply an extension on fishery limits would be taken pending reference to the International Court*'.
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> The idea of a six months' notice to be given by Iceland was first discussed on 3 December 1960 and was embodied in the formula advanced by the Icelandic delegation on that same date, which is transcribed in paragraph 19 above. This requirement of notice was agreed to by the parties. It may be assumed that they considered that such a period would allow sufficient time to settle the question through negotiations or, if no settlement were reached, *to submit the whole issue to the Court, including, in accordance with the statutory powers possessed by the Court, the applicability of the measures of exclusion to British vessels* pendente lite . . .
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> This history reinforces the view that the Court has jurisdiction in this case, and adds emphasis to the point that *the real intention of the parties was to give the United Kingdom Government an effective assurance which constituted a* sine qua non *and not merely a severable condition of the whole agreement*: namely, the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit." (Emphasis added.)

This view of the compromissory clause, which I share, is amply justified by the context of the clause in the settlement embodied in the 1961 Exchange of Notes and by the record of the negotiations.

24. It follows, in my opinion, that under the very terms of the 1961 Exchange of Notes a subsequent extension by Iceland of her fishery jurisdiction beyond the 12-mile limit agreed to in that treaty is not opposable to the United Kingdom if that extension does not comply with the conditions laid down in the compromissory clause.

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25. The principal facts relating to Iceland's subsequent extension of her fishery jurisdiction to 50 miles are summarized in paragraphs 27-34 of the Judgment. When Iceland made a public announcement of her intention to extend her fishery limit to 50 miles from her baselines, she at the same time announced that she considered the 1961 Exchange of Notes as "terminated". On the United Kingdom's objecting that it considered Iceland's intended extension of her fishery limit to have no basis in international law and reminding her of the compromissory clause in the 1961 Exchange of Notes, Iceland repeated her claim that the compromissory clause was no longer in force. Similarly, when in an aide-mémoire of 24 February 1972 Iceland gave to the United Kingdom formal notice of her intention to proceed to the extension of her fishery limit not later than 1 September of that year, she reasserted her thesis that the provisions of the Exchange of Notes were "no longer applicable" and "consequently terminated". Again, when on 14 April 1972 the United Kingdom filed an Application bringing the present case before the Court, Iceland informed the Court, in a letter of 29 May 1972, that the Agreement of 11 March 1961 was not of a permanent nature, that its object and purpose had been fully achieved, and that it was no longer applicable and had terminated; that there was on 14 April 1972 no basis under the Statute for the Court to exercise jurisdiction; and that she was not willing to confer jurisdiction on the Court and would not appoint an agent. Furthermore, although the Court had not yet pronounced on its jurisdiction, Iceland proceeded, on 14 July 1972, to issue new Regulations extending her fishery limit to 50 miles as from 1 September of that year.

26. When the issue of the new Regulations led the United Kingdom to file a request for the indication of interim measures of protection, Iceland in a telegram to the Court of 29 July 1972 reiterated her view that there was no basis for the exercise of the Court's jurisdiction in the case, asserted that there was consequently no basis either for the request for an indication of interim measures and took no part in the proceedings. On 17 August 1972 the Court made its Order for interim measures in which, *inter alia*, it indicated that, pending its final decision in the proceedings, Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone. Notwithstanding this Order of the Court, however, Iceland proceeded to enforce her new Regulations against United Kingdom vessels as soon as they came into effect on 1 September 1972. In a Note of 28 August 1972 to the United Kingdom, Iceland explained that she did not consider the Order to be binding upon her "since the Court has no jurisdiction in the matter".

27. So long as Iceland's claim, that the 1961 Exchange of Notes was

no longer applicable between her and the United Kingdom, remained undecided, the question whether the enforcement of her new Regulations against the United Kingdom violated that agreement could perhaps be considered as being in doubt. In its Judgment of 2 February 1973, however, the Court rejected *seriatim* all Iceland's objections to the application of the 1961 Exchange of Notes to the present dispute and upheld its jurisdiction to pronounce upon the merits. That Judgment, as Iceland could not fail to be aware, was binding upon her under Article 36, paragraph 6, of the Statute of the Court and *res judicata* for the purposes of the present case. Yet, even after the handing down of that Judgment, Iceland persisted in her efforts to enforce the new 50-mile limit against United Kingdom vessels and, as is evidenced by her telegram to the Court of 14 January 1974, in denying the Court's competence to adjudicate upon the dispute. Whatever may have been the considerations that led Iceland to repudiate her obligations under the compromissory clause of the 1961 Exchange of Notes, the clear implication of the Court's Judgment of 2 February 1973 is that she lacked any legal justification for thus attempting to revoke the assurance which she had given to the United Kingdom in that Agreement.

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28. The comprehensive character of Iceland's repudiation of the assurance which she had given in the 1961 Exchange of Notes needs little emphasis in the light of the facts recited above. By denying the Court's competence to decide the dispute in relation to the extension of her fishery jurisdiction, by denying the Court's power to indicate interim measures and by disregarding the Court's Order indicating that she should refrain from taking measures to enforce the extension against United Kingdom vessels *pendente lite*, Iceland in effect tore up the assurance which she had given in 1961 and sought unilaterally to impose the new extension upon the United Kingdom. It follows that Iceland's extension of her fishery jurisdiction promulgated in 1972 does not comply with the conditions laid down in the compromissory clause of the 1961 Exchange of Notes. It further follows, in my opinion, that the extension is not opposable to the United Kingdom in the present proceedings.

29. It is true that the object of the compromissory clause was to enable either Party, and more especially the United Kingdom, to have the question of the validity of any further extension of Iceland's fishery jurisdiction determined by the Court; and that, as the records of the negotiations show, the clause was directed to the possibility of some future development in maritime international law. It is also true that the United Kingdom has invoked the clause and asked for a determination of the invalidity of the new extension under maritime international law;

and that the Court has upheld its jurisdiction to pronounce upon the merits. In my opinion, however, Iceland's repudiation of the compromissory clause, and of the assurance which she thereby gave in the 1961 Exchange of Notes, constitutes an initial and conclusive ground of the invalidity of the extension as against the United Kingdom. To decide otherwise would be to give Iceland the benefit of her own wrong by leaving the question of invalidity open before the Court. At the same time, by giving effect to this initial ground of invalidity, which derives from general principles of international law, the Court would be fulfilling the object of the compromissory clause, no less than by pronouncing upon the validity of the extension under maritime international law.

30. Consequently, I do not think that it would be correct to regard Iceland's total refusal of the Court's jurisdiction as having the effect only of exposing her to a judgment in default of appearance under Article 53 of the Statute. To attribute to it so limited an effect would not, in my view, be consistent with the object of the compromissory clause or compatible with the Court's finding that the assurance given to the United Kingdom in the clause was intended to be not merely a "severable condition" but a "*sine qua non* of the whole agreement". The compromissory clause, it follows from that finding, is an integral part of the law applicable between Iceland and the United Kingdom with regard to an extension of Iceland's fishery jurisdiction, and, as such, is also part of the law to be applied by the Court in deciding upon the validity of such an extension.

31. Accordingly, in my opinion, Iceland's total repudiation of the assurance which she gave in the 1961 Exchange of Notes constitutes an additional, and quite fundamental, ground for finding that Iceland's extension of the fishery jurisdiction in 1972 is not opposable to the United Kingdom in the present proceedings. That in itself would, I think, suffice to justify the Court in upholding the second and third submissions of the United Kingdom. Unlike the first submission which asks the Court to declare the extension to be without foundation in international law and invalid *erga omnes*, these two submissions specifically challenge Iceland's right to assert an exclusive fisheries jurisdiction, *as against the United Kingdom, beyond the limits agreed to in the Exchange of Notes of 1961*. At the public sitting of 29 March 1974, in reply to a question from a Member of the Court, counsel for the United Kingdom explained that the first three submissions of the United Kingdom are not so connected that the second and third cannot stand without the first, and that it is therefore open to the Court to adjudicate on the second and third without adjudicating upon the first. Nor does counsel seem to have intended to modify that statement when he added: "it being, of course, understood and accepted that submissions *(b)* and *(c)* are based on general international law and are, of course, not confined merely to the effect of the Exchange of Notes". General international law, no doubt, forms an element in the second and third submissions since it is the United Kingdom's thesis that the 12-mile

limit agreed to in 1961 is at the same time the generally accepted limit of exclusive fishery jurisdiction. But what differentiates these submissions from the first submission is the express reliance which they place on the agreement between the Parties in the 1961 Exchange of Notes regarding a 12-mile fishery limit around Iceland.

32. My view therefore is that, in addition to the reasons given in the Judgment, Iceland's repudiation of her obligations under the 1961 Exchange of Notes would in itself suffice to justify subparagraphs 1 and 2 of the operative part of the Judgment which in effect upheld the second and third of the United Kingdom's final submissions.

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33. As to the first submission, it follows that I agree with the Court that for the purposes of the present Judgment it is not, strictly speaking, necessary to pronounce upon the question raised by that submission, namely, whether the extension of Iceland's fishery limit to 50 miles is without foundation in international law and is invalid. Framed in that way, the submission appears to ask the Court to hold that the extension was *ipso jure* illegal and therefore invalid *erga omnes*; and this view of the submission is confirmed by the statement of counsel at the public sitting on 25 March 1974 when, *inter alia*, he said: "This answers the question whether an extension of an exclusive fisheries zone beyond 12 miles would be illegal, it would." Although I consider that Iceland's extension of her fishery limit beyond the 12-mile limit agreed to in 1961 would not be *opposable* to the United Kingdom under general international law as well as under the Exchanges of Notes, I should have more hesitation in upholding the proposition advanced in the first submission. The reason is that it does not seem to me to formulate the issue in the manner in which it presents itself in modern maritime international law.

34. After the failure of The Hague Codification Conference of 1930 to establish the 3-mile limit as a universal rule and obligatory limit for the breadth of the territorial sea, the question arose as to what, if any, is the rule of international law concerning the breadth of the territorial sea. The prevailing opinion was that, after the failure of the Conference, the 3-mile limit remained a limit which could be said to be generally accepted and, therefore, *ipso jure*, valid and enforceable against any other State; but that a claim in excess of that limit could no longer be said to be *ipso jure* contrary to international law and invalid *erga omnes*; and that the validity of such a claim as against another State would depend on whether it was accepted or acquiesced in by that State (cf. G. Gidel, *Droit international public de la mer*, 1934, Vol. 3, pp. 134-135).

35. Since 1930 a considerable number of new claims to maritime jurisdiction have been advanced by coastal States, whether to a larger territorial sea or to other forms of maritime jurisdiction. In the absence of clearly established general rules, the legal issue has continued to present itself in terms of the opposability of the claim to each other State rather than of the absolute legality or illegality of the claim *erga omnes*; in other words, in terms of the acceptance or acquiescence of other States. At the two Geneva Conferences on the Law of the Sea of 1958 and 1960 the 12-mile limit figured prominently in the debates both with respect to the breadth of the territorial sea and the extent of the exclusive fishery zone, though adopted at those Conferences in regard to neither. In fisheries, as paragraph 52 of the Judgment relates, the law evolved through State practice and a coastal State's right to an exclusive fishery zone up to 12 miles from its baselines appears to have become generally accepted. Larger claims have certainly been advanced by individual States and the third United Nations Law of the Sea Conference is already in session. But these larger claims, while accepted by some States, are rejected by others and beyond the 12-mile limit general acceptance does not exist, nor, as paragraph 53 of the Judgment observes, can the Court anticipate the law before the legislator has laid it down. Therefore, an extension of fisheries jurisdiction beyond 12 miles is not, in my opinion, opposable to another State unless shown to have been accepted or acquiesced in by that State.

36. In the present instance, Iceland's unilateral extension of her exclusive fishery limits from 12 to 50 miles as from 1 September 1972 was at once objected to by the United Kingdom. Consequently, if it were necessary to rest the Judgment on this point, I would consider the Court justified in holding that Iceland's extension of her fishery jurisdiction beyond the 12-mile limit agreed to in the 1961 Exchange of Notes is also not opposable to the United Kingdom under general international law.

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37. The Judgment, however, lays the emphasis on Iceland's obligation to respect the United Kingdom's existing fishing rights, the United Kingdom's obligation, in turn, to respect Iceland's preferential rights as a coastal State specially dependent on the fisheries in adjacent waters, the resulting obligation of both countries to undertake negotiations in good faith for the equitable solution of their differences regarding their respective fishing rights and their duty to examine together such measures as may be required for the conservation and development and equitable exploitation of the fishery resources in the disputed waters. On this aspect

of the case I need only add a few observations regarding the competence of the Court under the compromissory clause to adjudicate upon these issues, a question which is examined in paragraphs 43-48 of the Judgment. I fully subscribe to the reasoning developed in those paragraphs which I believe to be borne out by the records of both the negotiations leading to the conclusion of the 1961 Exchange of Notes and of the dispute concerning Iceland's extension of her fishery jurisdiction to 50 miles.

38. Even the brief account of the 1960 negotiations given in paragraphs 18-22 of this opinion shows that preferential rights, conservation and the traditional fishing rights of the United Kingdom were very much a subject of the differences between the Parties in those negotiations. The opening statements of either side on 1 October 1960 set the framework for the negotiations, and it is clear that from the outset Iceland invoked her exceptional dependence on her coastal fisheries, referring specifically to her proposal at the 1960 Conference that countries in special situations should receive *preferential treatment even beyond 12 miles*. The United Kingdom, on the other hand, while acceding to Iceland's claim to be a "special situation" country, took a quite different view of the preferential treatment to which Iceland was entitled in virtue of her special situation; for it took the position that this might entitle Iceland merely to a reduction of the phase-out period for British vessels. In subsequent meetings the Icelandic delegation fought hard for areas to be entirely reserved to Icelandic fishermen outside the 12-mile limit; so much so that those areas were referred to at the meeting of 5 October 1960 as a more or less continuous belt of water around the Icelandic coast. Indeed, the Icelandic delegation seems to have suggested that this might actually amount to a further belt of 12 miles from which all United Kingdom fishing should be excluded. The response of the United Kingdom delegation was that this could not conceivably be justified either on grounds of conservation or on practical grounds of density of fishing.

39. In short, running through the negotiations were arguments concerning preferential treatment, reserved areas outside the 12-mile limit, conservation and dense fishing. It was in this context and in face of the constant pressure of the Icelandic delegation for reserved areas outside the 12-mile limit, as well as in the context of Iceland's declared policy of seeking to extend her fishery jurisdiction over the whole continental shelf, that the United Kingdom delegation raised the question of a guarantee against a further extension of Iceland's fishery jurisdiction except in conformity with international law. Indeed, when the question of a gua-

rantee was first raised at the meeting of 5 October 1960, it was in the context of a discussion as to what would be the position after the transitional period in regard to the reserved areas outside the 12-mile limit which had been demanded by Iceland.

40. It is true that the guarantee soon assumed a broader aspect in the discussions and was then expressed to provide an assurance against the exclusion of United Kingdom vessels from any area outside the 12-mile limit except in conformity with a generally accepted rule of international law. In other formulations it was referred to as an assurance against any extension of Iceland's "fishery limits", but in its final version it was expressed in the entirely general form "extension of *fisheries jurisdiction* around Iceland" and linked to the Althing Resolution of 5 May 1959 concerning Iceland's policy of seeking recognition of her "rights" to the whole continental shelf. That Resolution was itself linked to Iceland's 1948 "Law concerning the Scientific Conservation of the Continental Shelf Fisheries" which, although expressed simply as a conservation measure, was an "enabling" Act authorizing the fisheries minister to extend Iceland's fisheries jurisdiction over areas of the continental shelf as and when he judged it appropriate (see paras. 5 and 6 of this opinion).

41. Although Iceland's primary objective has, no doubt, been to extend her exclusive fishery rights over more and more areas of the continental shelf, it does not seem to me justifiable to regard either the Law of 1948 or the Althing Resolution of 1959 as relating only to extensions of Iceland's exclusive fishery *limits* as the means for expanding her claims to the fishery resources of the continental shelf. Quite apart from the express reference to "conservation" as the *motif* for the Law of 1948, it is clear not only from the proceedings of the 1958 and 1960 Conferences but also from the records of the 1960 negotiations that Iceland was ready to make use of any concept, and especially those of "preferential rights" and "conservation zones" as a means of furthering her fisheries objectives. Consequently, in my opinion, it would be altogether too narrow an interpretation of the compromissory clause to interpret the reference in it to the Althing Resolution of 1959 as confining the Court's competence to a dispute in relation to an extension of Iceland's exclusive fishery limits and nothing else. The compromissory clause itself does not refer to an extension of fishery *limits* but to an extension of fishery *jurisdiction*, a term apt to cover any form of an attempt by Iceland to extend her authority over fisheries outside the 12-mile limit.

42. In addition, as I have indicated, such a narrow interpretation does not seem consistent with the *travaux préparatoires* of the compromissory clause. Equally, it does not seem to me consistent with the Court's conclusion, in its Judgment of 2 February 1973, that:

> ". . . the real intention of the parties was to give the United Kingdom Government an *effective* assurance . . .: namely, the right to challenge before the Court the validity of *any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf* . . ." (*I.C.J. Reports 1973*, p. 13, para. 23; emphasis added).

If, instead of extending her exclusive fishery limit pure and simple, Iceland had introduced measures greatly to restrict, or render unprofitable, foreign fishing but in the guise of a "preferential" or "conservation" régime, it would make nonsense of the "effective assurance"—the "*sine qua non* of the whole agreement" in the Exchange of Notes—to interpret it as not covering such measures. Nor should it be overlooked that the "extension of fisheries jurisdiction" effected by Iceland's 1972 Regulations was in fact expressed in those Regulations to be an application of the Law of 1948 concerning "*Scientific Conservation* of the Continental Shelf Fisheries". Consequently, it seems to me evident that the Court's competence must be understood as covering questions of preferential rights and conservation, and more especially when raised in direct connection with a dispute in relation to an extension of Iceland's zone of exclusive fisheries.

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43. There remains, however, the question whether the present "dispute" does involve the questions of preferential rights and conservation. I share the view of the Court that, although occasioned by Iceland's unilateral extension of her fishery jurisdiction, the present dispute at the same time clearly includes differences regarding those matters. This seems to me sufficiently established by the account of the dispute given in paragraphs 17-29 of the United Kingdom's Memorial on the merits which show that the differences between the Parties were not limited to the question of the validity of the extension of the exclusive fishery zone, as such, but involved Iceland's claims to exclusive fishery limits *by reason of her right to preferential treatment* and her claims to be entitled to take *unilateral* conservation measures.

44. Thus, in the very first explanation of the extension offered by the Icelandic Government, in an aide-mémoire of 31 August 1971 (Annex 3 of the Memorial on the merits), it justified the measure by reference to

its need to maintain the resources of the sea and to "measures of protection essential to safeguard the vital interests of the Icelandic people in the seas surrounding its coasts". Moreover it reiterated this justification in an aide-mémoire of 24 February 1972, enclosing a Memorandum entitled *Fisheries Jurisdiction in Iceland* and containing material designed to support that justification. The United Kingdom objected that an extension of the exclusive fishery limit was not a necessary means of achieving conservation and offered to examine with Iceland agreed catch-limitation schemes in areas outside the 12-mile zone. Iceland disputed the efficacy of multilateral conservation measures, now arguing that the problem was not one of conservation but of division of stocks. The United Kingdom objected that it had fishing rights in the waters around Iceland which were firmly based on traditional use, specific agreement and customary law. It repeated its catch-limitation proposal, referring in this connection to the North-East Atlantic Fisheries Commission and reminding Iceland that under the Special Situations Resolution of 26 April 1958 any such catch-limitation arrangement would have to recognize any preferential rights of the coastal State resulting from its dependence on the fisheries concerned. As to the question of preferential rights, it is true that Iceland showed some tendency to invoke a trend in favour of according priority rights to coastal States in general and not merely in special situations. But, that the dispute involved Iceland's claim to preferential rights is further evidenced by her Note of 11 August 1972 to the United Kingdom (Annex 10 of the Memorial on the merits); for the Icelandic Government there recalled:

> "In the discussions between representatives of the Icelandic and British Governments in July 1972 on the question of fisheries limits the Icelandic side made quite clear its willingness to continue the discussions.
>
> The Icelandic representatives laid main emphasis on receiving from the British side positive replies to two fundamental points:
>
> 1. Recognition of preferential rights for Icelandic vessels as to fishing outside the 12-mile limit.
> 2. That Icelandic authorities should have full rights and be in a position to enforce the regulations established with regard to fishing inside the 50-mile limit."

In that Note, it is true, Iceland was thinking in terms only of an interim agreement regarding United Kingdom fishing, but it shows that "pre-

ferential rights" were very much part of Iceland's armoury of legal argument in the dispute.

45. A "dispute", as has frequently been said both by the Permanent Court of International Justice and by this Court [1], is: "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." In the present instance it seems to me clear that the "disagreement on a point of law" and the "conflict of legal views or of interests", though occasioned by Iceland's extension of her fishery limit, included disagreements and conflicts as to whether Iceland's right to preferential treatment entitled her to exclusive fishery rights, whether exclusive rights may be claimed in the name of conservation, whether conservation measures may be taken unilaterally and whether Iceland's claims should prevail over the United Kingdom's traditional rights in the waters in dispute. Accordingly, I think the Court fully justified in concluding that these issues form an integral part of a dispute *in relation to an extension of fisheries jurisdiction around Iceland* within the meaning of the compromissory clause.

46. As to the question of the Court's competence in the event of the failure of the parties to resolve the dispute by negotiation or other means of their own choice, I agree with the Court that this question is hypothetical and does not call for its consideration in the present proceedings. Under Article 60 of the Statute the Judgment is "final and without appeal". It thus constitutes a final disposal of the case brought before the Court by the Application of 14 April 1972, subject only to the right reserved to any party by that Article to request the Court to construe the Judgment in the event of a dispute as to its meaning or scope. Consequently, should some other dispute between the parties as to their respective fishery rights in the waters around Iceland be brought before the Court unilaterally by either of them it would be for the Court, in the light of the particular circumstances of that dispute, then to determine its jurisdiction to entertain the case and the validity of any objections that might then be raised to the exercise of its jurisdiction.

(Signed) H. WALDOCK.

[1] E.g., *Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A, No. 2*, at p. 11; *Right of Passage over Indian Territory* case, *I.C.J. Reports 1960* at p. 34.