ORAL ARGUMENTS ON REQUEST FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION

MINUTES OF THE PUBLIC SITTINGS

held at The Peace Palace, The Hague, on 2 and 17 August 1972, President Sir Muhammad Zafrulla Khan presiding

FIRST PUBLIC SITTING (2 VIII 72, 10 a.m.)

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

Also present:

For the Government of the Federal Republic of Germany:

Professor Dr. Günther Jaenicke, as *Agent and Counsel*;
Mr. D. von Schenk, Legal Adviser, Ministry of Foreign Affairs *as Counsel*;
Mr. G. Moecklinghoff, Director of Fisheries, Ministry of Food, Agriculture and Forestry,
Dr. S. Vollmar, Ministry of Foreign Affairs, *as Advisers*.

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to consider a request for the indication of interim measures of protection, under Article 41 of the Statute and Article 61 of the Rules of Court, filed by the Federal Republic of Germany on 21 July 1972, in the *Fisheries Jurisdiction* case, between the Federal Republic and the Republic of Iceland.

The proceedings in this case were begun by an Application [1] by the Federal Republic, filed in the Registry of the Court on 5 June 1972. The Application founds the jurisdiction of the Court on Article 36, paragraph 1, of the Statute, and an Exchange of Notes between the Government of the Federal Republic and the Government of Iceland dated 19 July 1961. The Applicant asks the Court to declare that the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines would have no basis in international law and could not therefore be opposed to the Federal Republic and to its fishing vessels and that if Iceland establishes a need for special fisheries conservation measures in the waters adjacent to its coast but beyond the existing exclusive fisheries zone, such measures may not be taken under international law on the basis of a unilateral extension by Iceland of its fisheries jurisdiction but only on the basis of an agreement between the countries concerned.

The Government of Iceland was informed forthwith by telegram [2] of the filing of the Application, and a copy thereof was sent to it by air mail the same day. On 4 July 1972 a letter [3] was received in the Registry from the Minister for Foreign Affairs of Iceland, dated 27 June, in which it was stated *(inter alia)* that there was on 5 June 1972, the date on which the Federal Republic's Application was filed, no basis under the Statute of the Court to exercise jurisdiction in the case, and that an Agent would not be appointed to represent the Government of Iceland.

On 21 July 1972, the Federal Republic filed a request [4] under Article 41 of the Statute of the Court and Article 61 of the Rules of Court for the indication of interim measures of protection. I shall ask the Registrar to read from that request the details of the measures which the Federal Republic asks the Court to indicate.

[The Registrar reads the details of the measures [5].]

On 21 July, the day on which the request was filed, details of the measures requested were communicated to the Government of Iceland by telegram [6], and a complete copy of the request was sent to it the same day by express air mail. In the telegram and the letter enclosing the copy of the request, the Government of Iceland was informed that in accordance with Article 61, paragraph 8, of the Rules of Court, the Court was ready to receive the observations of Iceland on the request in writing, and that the Court would

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[1] See pp. 3-11, *supra*.
[2] See p. 377, *infra*.
[3] See p. 380, *infra*.
[4] See pp. 23-31, *supra*.
[5] See pp. 30-31. *supra*.
[6] See p. 386, *infra*.

hold hearings, opening on Wednesday, 2 August at 10 a.m., in order to give the parties the opportunity of presenting their observations on the request.

On 29 July 1972, a telegram [1] dated 28 July was received from the Minister for Foreign Affairs of Iceland, in which, after reiterating that there was no basis in the Statute for the Court to exercise jurisdiction, he stated that there was no basis for the request by the Federal Republic of Germany, and that, without prejudice to any of its previous arguments, the Government of Iceland objected specifically to the indication by the Court of provisional measures under Article 41 of the Statute and Article 61 of the Rules of Court where no basis for jurisdiction is established.

I note the presence in Court of the Agent and Counsel of the Federal Republic of Germany and declare the oral proceedings, on the request for the indication of interim measures of protection, open.

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[1] See p. 388, *infra*.

ARGUMENT OF MR. JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Mr. JAENICKE: Mr. President, Members of the Court: before I begin to state the grounds which have compelled the Government of the Federal Republic of Germany to ask the Court to indicate interim measures of protection under Article 41 of the Statute, I would like to express, on behalf of the Federal Republic of Germany, our deep appreciation for the prompt steps you have taken to assemble and to hear our request.

It is the second time, after a relatively short interval, that the Federal Republic of Germany has brought a case before this Court, and I myself very much appreciate the privilege to appear again before you in order to represent the Federal Republic of Germany in this case. The Federal Republic has recognized the jurisdiction of the Court in numerous international agreements; the Federal Republic has thereby acknowledged the role of the Court as the principal judicial organ of the international community and as the most competent institution to solve legal differences between States. It has been in conformity with this attitude that the Federal Republic of Germany agreed with the Republic of Iceland, by the Exchange of Notes on 19 July 1961, to settle eventual disputes about the limits of the fisheries jurisdiction of Iceland by referring them to the Court. The Federal Republic of Germany is, therefore, very much disappointed to hear that the Government of Iceland endeavours to withdraw from this engagement and has, up till now, not felt able to appear before the Court in order to defend its case. In view of the friendly relations prevailing between our two countries, the Federal Republic remains hopeful that the Government of Iceland will, at a later stage, join the proceedings and argue their case before you in order to solve the differences not by unilateral action or by establishing *faits accomplis*, but in an amicable way by resorting to judicial process in accordance with the obligations under the Charter of the United Nations.

Turning now to the grounds of our Request for Interim Measures of Protection, I do not intend to reiterate all the facts and arguments which have already been stated in our written request; I would rather like to concentrate, without prejudice to our previous arguments, on some basic points which, in my view, are especially relevant for the consideration of our request.

It may be for the convenience of the Court if, at the outset, I present a brief account of the situation which has compelled the Government of the Federal Republic of Germany to ask the Court for interim measures of protection. As you will recall, the Federal Republic has instituted proceedings against Iceland by Application, filed with the Court on 5 June 1972, and has asked the Court to adjudge and declare:

> "*(a)* that the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles . . . would have no basis in international law and could therefore not be opposed to the Federal Republic of Germany and to its fishing vessels;
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> *(b)* that if Iceland, as a coastal State specially dependent on coastal fisheries, establishes a need for special fisheries conservation measures in the waters adjacent to its coast but beyond the exclusive

fisheries zone provided for by the Exchange of Notes of 1961, such conservation measures, as far as they would affect fisheries of the Federal Republic of Germany, may not be taken, under international law, on the basis of a unilateral extension by Iceland of its fisheries jurisdiction, but only on the basis of an agreement between the Federal Republic of Germany and Iceland concluded either bilaterally or within a multilateral framework."

This Application relies on the agreement contained in the Exchange of Notes of 19 July 1961 between the Government of the Federal Republic and the Government of Iceland, whereby both Governments recognized the jurisdiction of the Court in case a dispute would arise between them about the extension by Iceland of its fisheries jurisdiction beyond the 12-mile limit.

After the Government of Iceland had made known its intention to extend its fisheries jurisdiction beyond that limit, repeated negotiations have taken place between the two governments, and we have already made reference to these negotiations in more detail in our Application of 5 June 1972. These negotiations, however, remained fruitless because the Government of Iceland was not prepared to recognize any fishing rights of the Federal Republic in the future in the extended zone, except during a limited phasing-out period.

The Government of the Federal Republic of Germany has always been and still is prepared to pay due attention to the special dependency of the Icelandic people on the fisheries in the waters around Iceland, and to the need to preserve existing fish stocks in order to sustain those fisheries. On the other hand, the Federal Republic of Germany can likewise expect that the Republic of Iceland recognizes the long-existing dependency of the German fisheries on the fishing grounds in the north-east Atlantic around Iceland and the long-term investment of skill, labour and capital by the German fisheries in that region. In such a situation, where legitimate interests of more than one party are at stake, the conflicting interests cannot be reconciled by unilateral appropriation of the fishing grounds by the coastal State, but rather by equitable allocation of the available resources between the States which have used these fishing grounds in the past.

As the Government of Iceland persisted in its unflexible position, the Government of the Federal Republic of Germany had no other choice than to refer the dispute to the Court.

After the decision to submit the dispute to the Court had been taken, the Government of the Federal Republic, nevertheless, continued negotiations with the Government of Iceland in the hope to reach an interim agreement until a final settlement, at least for the time of the pendency of the proceedings. Such negotiations have taken place between representatives of both Governments on 15 May at Reykjavik; on 2 June, and again on 7 July 1972, at Bonn.

In these negotiations the Government of the Federal Republic went a great length to meet the aspirations of the Government of Iceland, with respect to the allocation of the living resources before their coast: the Government of the Federal Republic was prepared to ensure that the fishing vessels of the Federal Republic would not take more fish from the fishing grounds in the neighbourhood of Iceland than they had taken in the average throughout the last ten years.

However, no agreement on an interim arrangement could be reached in these negotiations: the Government of Iceland claimed full jurisdiction and control over foreign fishing in the 50-mile zone, and was prepared to allow

fishing by German vessels only outside the 25-mile line in certain bounded areas, which were to be opened in rotation for some months in the year to German vessels. An interim arrangement on this basis was not acceptable for the Government of the Federal Republic, for the following reasons: it would have involved recognition of rights of jurisdiction and control over German ships on the high seas and would have reduced the German catch in the Iceland area, because of the limited area and time opened for fishing, to only a fraction of the normal catch in these waters.

The Government of the Federal Republic of Germany had hoped that the Government of Iceland would not, during the pendency of the proceedings before the Court, take any action against foreign fishing vessels in order to enforce Iceland's claim for an extended exclusive fisheries zone. However, the Regulations issued on 14 July 1972 leave no doubt that the Government of Iceland is now determined to do so as from 1 September 1972.

These Regulations prohibit all fishing by foreign fishing vessels in the extended zone, up to 50 nautical miles, from the new-established baselines; according to the Icelandic laws, which the Regulations have declared applicable to fishing activities in the extended zone, foreigners who engage in fishing activities in this zone may then be punished by fines up to 100,000 Icelandic crowns; foreign ships which enter Icelandic ports or territorial waters will be subject to inspection of their papers and enquiries in order to ascertain that the Icelandic laws concerning fisheries have not been violated or evaded, and may probably be exposed to seizure if they were found to have contravened the new Regulations.

The Icelandic Regulations of 14 July 1972 will have the following effect on the situation which existed at the commencement of the proceedings in this case:

First, the Republic of Iceland purports to extend its jurisdiction and control into the waters of the high seas up to 50 miles from its coast and, by excluding foreign vessels from fishing activities in this zone, to appropriate these parts of the high seas and its living resources for the exclusive use by its own nationals.

Secondly, the Republic of Iceland purports to force the fishing vessels of the Federal Republic of Germany to leave their traditional fishing grounds in the waters of the high seas around Iceland with the inescapable consequence of immediate and irreparable damage to the German fisheries, or to run the risk of being exposed to enforcement measures or other incidents which everyone wishes to avoid.

Whatever the fishing vessels of the Federal Republic might do under these circumstances, the following effect will be certain: the hitherto undisturbed and undisputed right of the Federal Republic of Germany and of her nationals to fish in the waters of the high seas around Iceland will be seriously impaired, if not already taken away by the action of the Government of Iceland, and the legal status of these waters will, in fact, be changed by way of a *fait accompli*.

In view of this situation, the Government of the Federal Republic of Germany sees no other alternative than to ask the Court for interim measures of protection for their fishing rights pending the final decision of the Court on the lawfulness or otherwise of the extension by Iceland of its exclusive fisheries zone.

Mr. President and Members of the Court, in order to show that there is sufficient ground for indicating interim measures of protection in this case, would you please allow me to refer to the practice of the Court in determining

when, and under what circumstances, interim measures had been considered appropriate for the protection of the rights of the parties.

I need not dwell here any longer on the details of the cases in which this Court, or the former Permanent Court of International Justice, has granted or rejected requests for interim measures of protection. All these cases are very well known to you. I shall confine myself to draw some conclusions from this practice as to the criteria which the Court has thought relevant in dealing with such requests.

Article 41 of the Statute of the Court states that the Court may indicate, if the circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. This formula leaves much room for interpretation as to what circumstances may require measures for the preservation of the rights of the parties to a dispute which has been submitted to the Court. In order to analyse the practice of the Court in dealing with this question, it may probably be useful first to turn to those cases in which the Court had rejected a request for interim measures and to ascertain the reasons which had led the Court to deny the existence of a situation which otherwise might have justified the indication of interim measures.

In the four cases where the former Permanent Court and the present Court had rejected such requests, the reasons may be summarized as follows:

First, in the *Factory at Chorzów* case, the German Government had instituted proceedings against Poland, claiming reparation for the unlawful taking of the property of a German company and, because the company had run into financial difficulties, had asked the Court to order, as a provisional measure of protection, the payment of a certain sum in advance, pending the decision of the Court on the exact amount of reparation which was then the only point still in dispute between the parties. The Court, by Order of 21 November 1927, rejected this request on the ground that ordering the payment of a certain sum in advance would amount to partial relief and would not constitute merely a preservation of the right in dispute.

Second, in the *South-Eastern Territory of Greenland* case, Denmark and Norway had instituted proceedings against each other because each of them claimed sovereignty over that part of Greenland. Norway asked the Court for interim measures of protection, alleging that Denmark might take coercive measures against Norwegian nationals in the disputed territory, and that regrettable incidents might ensue. The Court, by Order of 3 August 1932, rejected the Norwegian request on the ground that incidents as had been anticipated by the Norwegian Government were most unlikely to occur in sparsely inhabited territory, taking into account—and that is important—specific assurances of the Danish Government to this effect, and that, therefore, the circumstances, at least at that time, did not require any interim measures of protection.

Third, in the *Polish Agrarian Reform* case, Germany had instituted proceedings against Poland, alleging that the Polish authorities, in applying the Agrarian Reform Law, had committed discriminatory acts against persons of German origin in violation of the Minority Treaty of 28 June 1919, and had asked the Court to indicate as interim measures of protection that the Polish Agrarian Reform Law should not be applied, pending the proceedings before the Court, against persons belonging to the German minority. The Court, by Order of 29 July 1933, rejected the German request on the ground that the requested measure would result in a general suspension of the agrarian reform for the future, as far as it would apply to persons of German origin, while the dispute before the Court concerned only past cases of alleged

discriminatory treatment and that, therefore, the measure requested could not be regarded as solely designed to protect the rights which were the subject-matter of the dispute.

Fourth, in the *Interhandel* case Switzerland had instituted proceedings against the United States because of the alleged unlawful seizure and disposal of the property of the Interhandel Company which was claimed by Switzerland to be a Swiss company, and because of the disposal of that property by the United States authorities under their enemy property legislation. Switzerland requested interim measures of protection which should restrain the United States authorities from selling shares in an American company which were held by the Swiss company as its principal asset. The Court, by Order of 24 October 1957, declined to indicate the requested measure on the ground that the danger of the shares being sold was not so imminent as to justify interim protection, particularly, and that is again important, in view of the assurances of the United States Government to this effect.

The grounds on which the Court declined to issue an Order for interim protection in these four cases were, in short, the following: in the first and third cases, the alleged unlawful acts for which relief was sought had already taken place and the requested measures of protection went in reality beyond the mere protection of the rights in dispute; in the second and fourth cases the anticipated action of the other party directed against the rights of the Applicant did not appear to be sufficiently imminent as to justify interim protection of these rights pending the decision of the Court.

I need not stress the fact that the request for interim measures which we have submitted to this Court cannot be rejected on such grounds; the requested interim measures are solely designed to protect the fishing rights which have, up to now, been exercised by the Federal Republic of Germany unchallenged, and which are the subject-matter of the dispute between the Parties, and there can also be no doubt that the Regulations issued by the Government of Iceland on 14 July of this year present an imminent danger to the exercise of these fishing rights, as well as to their legal and factual basis.

Allow me now to turn to the three cases in which the Permanent Court of International Justice and this Court have indicated interim measures of protection. In these cases, the reasons for indicating such measures may be summarized as follows:

First: in the *Sino-Belgian Treaty* case, Belgium had instituted proceedings against China contesting the lawfulness of the unilateral denunciation by China of a treaty between both States. The Belgian Government requested interim measures of protection maintaining that the legal status of Belgian nationals in China might be impaired by actions of the Chinese authorities who were not prepared to recognize the provisions of the Treaty any more. The President of the Court, by Order of 8 January 1927, granted interim protection by ordering that the Belgian nationals in China should continue to enjoy certain treaty rights which might be prejudiced by measures enacted by the Chinese Government in contravention of the provisions of the denounced Treaty.

Second: in the *Electricity Company of Sofia and Bulgaria* case, the Belgian Government had instituted proceedings against Bulgaria contesting the lawfulness of a huge financial claim which had been maintained and enforced by the Bulgarian authorities, through the Bulgarian courts, against that Belgian company. The Belgian Government asked for interim protection against the execution of the judgment of the Bulgarian court against that company. The Court, by Order of 5 November 1939, granted interim protec-

tion on the ground that the measures of execution with which the company was threatened would seriously prejudice its position and the restoration of its rights if the Court would later decide in favour of the Belgian case.

Third: in the *Anglo-Iranian Oil Co.* case the United Kingdom had instituted proceedings against Iran, because it considered the application of the Iranian Oil Nationalization Act to the Anglo-Iranian Oil Company as being contrary to the concession agreement between the Iranian Government and that company. The Government of the United Kingdom asked for interim measures of protection on the ground that the Iranian Government was going to seize the Anglo-Iranian Oil Company's property and to transfer the management of the company's business in Iran to a State-owned national company in execution of the Oil Nationalization Act, and that such action would inflict considerable injury to the company's business in Iran pending the decision of the Court on the lawfulness of nationalization, caused by the loss of skilled personnel, foreign markets and goodwill. The Court, by Order of 5 July 1951, granted interim protection to the effect that the Iranian Government should not take any measure designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, and that these operations should continue under the direction of the company's management as it was constituted before the beginning of the proceedings. The Court further indicated that both Governments should constitute a joint Anglo-Iranian Supervisory Board which would, *inter alia*, satisfy the interest of the Iranian Government in keeping the operations of the company under control until final judgment of the Court.

If we compare the situations in these three cases where the Court has thought it advisable to order interim measures of protection, we find some striking similarities. In all these cases, one of the parties was likely to employ measures of enforcement or execution in order to change, during the pendency of the proceedings, the factual situation according to its own legal point of view. In all these cases it had been the Court's concern to preserve the status quo with respect to the position of the parties which existed at the time when the dispute was brought before the Court. The reasons given by the Court in these cases do not indicate how much further aggravating circumstances had influenced the decision of the Court to order interim protection, or whether the Court had already found sufficient grounds for ordering interim protection in the fact that the status quo was going to be changed by one of the parties during the pendency of the proceedings.

It is true that in the *Sino-Belgian Treaty* case the President of the Court intimated that the prospect of mere pecuniary loss to one of the parties or its nationals would probably not justify the indication of interim measures; but nevertheless, he issued an Order which was designed to secure for the Belgian nationals the undisturbed enjoyment of their treaty rights, relating to the protection of their property and the carrying on of their business. He granted interim protection in this case, although one might have argued that the interference with these rights could later have been made good by the payment of damages.

In its later Orders, the Court did never revert in its reasoning to this aspect, and it may safely be concluded from the practice of the Court that there is sufficient ground for the indication of interim measures if, in case the dispute concerns such rights, the legal status or the business of the nationals of one party might be impaired or destroyed by actions of the other party during the pendency of the proceedings.

One of the main provisions which the Court usually inserted in its Orders

under Article 41 of the Statute was to the effect that no action should be taken by one of the parties which might prejudice the rights of the other party in respect of the carrying out of any decision on the merits which the Court may subsequently render. Although this provision was but only one of the several provisions in the Orders which were issued under Article 41 of the Statute, it had been argued that the power of the Court to grant interim protection was limited to such situations; in other words, the Court should grant interim protection only in those situations where the rights of a party could otherwise not be restored if subsequently the Court would decide in favour of these rights.

The cases to which I have referred do not support, in my view, such a narrow interpretation of the Court's powers under Article 41 of the Statute. I cannot share the view that it is a necessary condition, for the exercise of the power to grant interim protection, that the action of one of the parties will affect the rights of the other party in such a way as to make it impossible to restore these rights in case of a favourable judgment.

It will be rather sufficient that the right which is in dispute might be "prejudiced" by the action of the other party during the pendency of the proceedings, that is to say that the action of the other party will make it necessary to restore this right again if subsequently the Court would decide in favour of such a right. In short, any action during the pendency of the proceedings which disturbs the status quo as it existed before the proceedings were started, will be and should be a sufficient ground for indicating interim protection, because otherwise it will be more difficult to restore the legal situation if the final judgment would so require.

In this connection the special situation in the present case should be recognized. The dispute in the present case concerns the question whether Iceland could change the existing status of the waters of the high seas around its coast by unilaterally extending its fisheries jurisdiction beyond the 12-mile limit. The Court will have to decide whether Iceland is entitled to such an extension of its jurisdiction or not. Until this decision is rendered, the maintenance of the status quo will not in any way interfere with the fishing or other rights of both Parties as presently exercised by them in these waters, and there will then be no difficulty in carrying out any judgment which this Court may render in this case. If, however, the Republic of Iceland, by prohibition and other sanctions under the Regulations of 14 July 1972, purports to prevent the Federal Republic of Germany and its fishing vessels from exercising their hitherto undisturbed and unchallenged right to fish in the extended fisheries zone for a considerable time, such action constitutes a serious and lasting impairment of these fishing rights to the effect that they will not automatically be restored if the final judgment would declare the extension of Iceland's fisheries jurisdiction as being contrary to international law.

The Federal Republic of Germany, therefore, maintains that the Regulations which have been issued by the Government of Iceland on 14 July 1972, and which purport to prevent further fishing operations by German fishing vessels in the extended fisheries zone, are by themselves already a sufficient ground for the indication of interim measures of protection. There are, however, additional circumstances which should be taken into consideration. These circumstances are the following:

(1) the immediate and irreparable damage that will be inflicted on the German fisheries by the loss of their traditional fishing grounds in the waters around Iceland; and

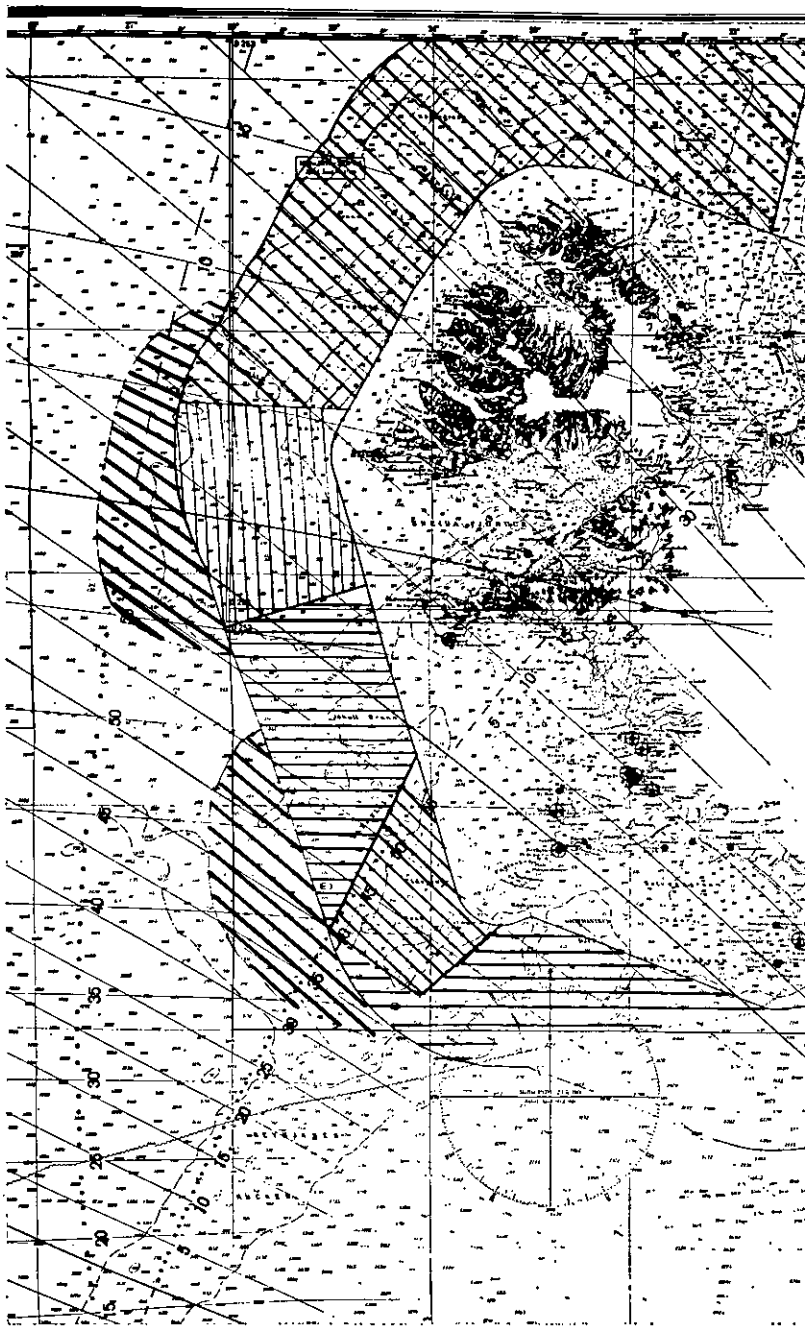
(2) the assertion of powers of jurisdiction and executory control over large parts of the high seas which hitherto were common property of mankind and open to common use.

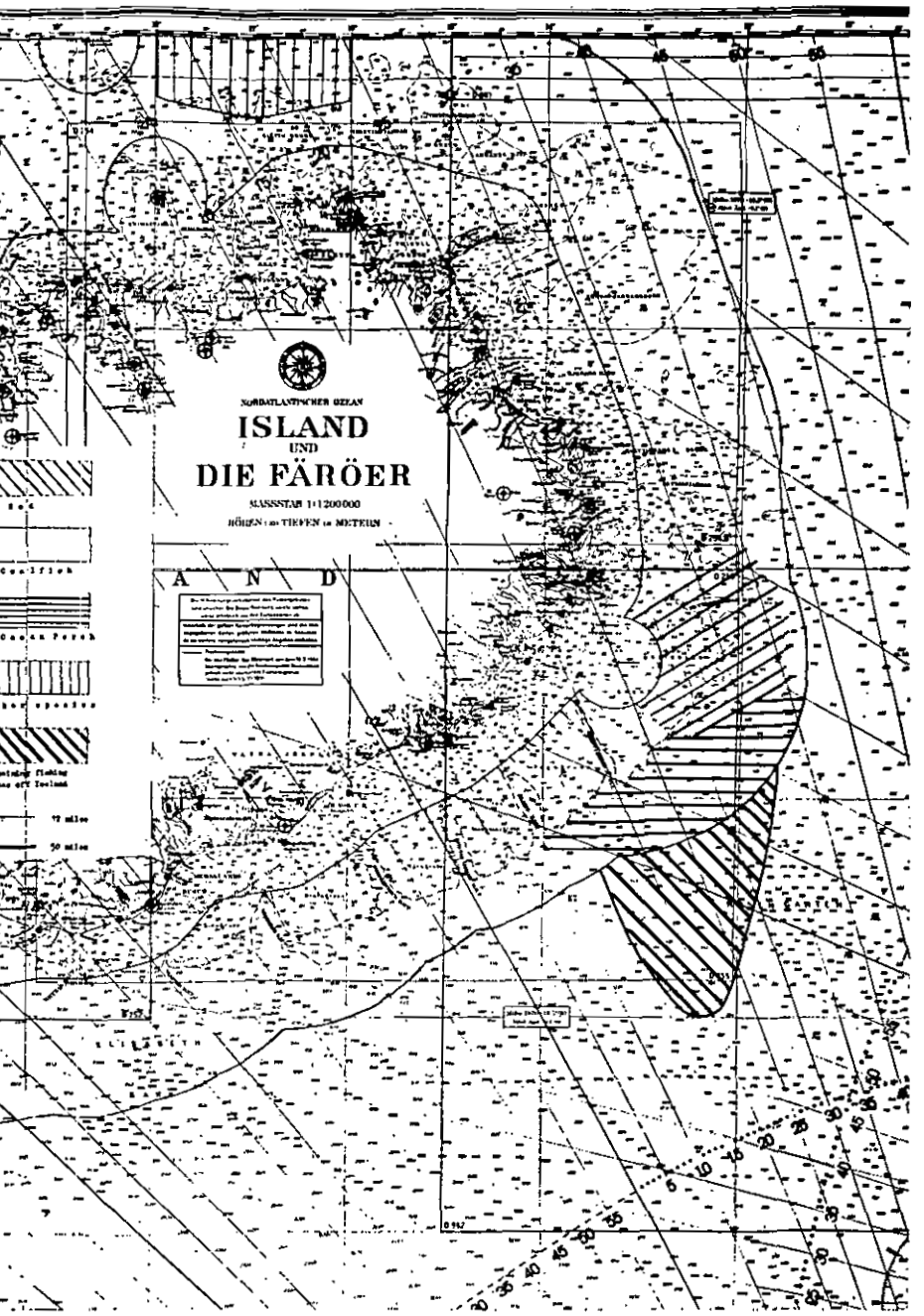
I should first deal with the immediate and irreparable damage that will ensue for the German fisheries by the loss of their traditional fishing grounds in the waters around Iceland. I should not repeat here all the facts and arguments which we have already advanced in our request filed on 21 July 1972; I may, respectfully, refer in this respect to paragraphs 11 to 16 of that request. Today I would rather focus on some important points which should be kept in mind if the importance of the fishing grounds around Iceland for the German distant-water fishing fleet had to be evaluated.

The distant-water fishing fleet, as distinct from short range coastal fishing vessels, of the Federal Republic of Germany comprises, according to the statistical status of 31 December 1971, 75 "wet fish" and 27 "freezer" trawlers, the number mentioned in paragraph 12 of our request. All of them visit the fishing grounds around Iceland and are to a varying degree dependent on uninterrupted fishing on these grounds. The so-called "wet fish" trawlers are those which are most dependent on fishing in the Iceland area. In contrast to the so-called "freezer" trawlers the "wet fish" trawlers have no processing and deep-freezing installations on board; they have to store the catch on ice. This method does not allow keeping the fish fresh longer than 12 to 14 days; that has the consequence that "wet fish" trawlers cannot do their main fishing on more distant fishing grounds than Iceland because otherwise the time left for fishing between the voyages to and from the more distant fishing grounds would be too short to allow to catch enough fish to sustain such a fishing voyage economically. This accounts for the fact that about 62 per cent. of the landings by "wet fish" trawlers have been taken in the waters around Iceland. This illustrates already the heavy dependency of the "wet fish" trawler fleet on undisturbed fishing in these waters.

The Icelandic Regulations of 14 July 1972, which prohibit foreign fishing within the 50-mile zone around Iceland, would practically close 90 per cent. of the available fishing grounds around Iceland to German fishing vessels. May I refer the Court to the map which has already been distributed, with your permission and is before you on your table. This map shows the fishing grounds in the Iceland area which are visited by German trawlers. On this map you will find two black lines around Iceland, the innermost line represents the 12-mile limit, the outermost line represents the 50-mile limit. The hatched areas between these two lines and on some parts reaching over the outermost line represent the fishing grounds which are usually visited by German trawlers. The different hatching in these areas shows which species of fish are mainly caught in these areas. As you see from this map only a very limited area of these fishing grounds reaches over the 50-mile limit and would then be still available for German trawlers. Other fishing grounds beyond the 50-mile limit are not available in this part of the Atlantic because the concentration of fish in the deeper waters beyond the 50-mile limit is much too low to allow economic fishing.

If 90 per cent. of the fishing grounds around Iceland would be closed to the "wet fish" trawler fleet of the Federal Republic of Germany, they would have to look for other fishing grounds within their reach. However, there are no other fishing grounds available which could be exploited by "wet fish" trawlers with a result that would compensate them for the loss of the fishing grounds around Iceland. The nearer fishing grounds which are within the

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reach of the "wet fish" trawlers, as the North Sea, Faroe Islands and the Norwegian Coast, are already exploited by German "wet fish" trawlers. The concentration of the international fishing effort on these grounds has already reached a level at which any additional effort would only result in lower catch rates and later in regulations limiting the allowable catch. Therefore, the ship-owners will have no other alternative than to tie up and eventually to scrap a considerable part of their vessels. Such a wholesale tying up or scrapping would not only result in unbearable financial losses for the owners, but would also considerably reduce the tonnage of the German distant-water fishing fleet from which the latter could hardly recover within a foreseeable time. There would also result a shortage in the supply of fish which might disrupt market conditions or change consumer habits because the Icelandic fishing fleet would the next time not be able to make up for the catch deficit caused by the missing German and English fishing effort. And it is also very probable that the reduction in the landings of fish will affect very seriously the coastal areas of the Federal Republic of Germany, especially the towns which are the basis of the German fishing fleet, in their economies.

Although the impact of the closure of the fishing grounds around Iceland would in the first line affect the "wet fish" trawlers, it should, nevertheless, be recognized that the "freezer" trawlers, too, would have difficulties in compensating their loss by exploiting other distant fishing grounds more heavily.

At the fishing grounds of the north-west Atlantic, especially at those before Labrador and New England, which are visited by German freezer trawlers, fishing is already regulated by quotas for the most important fish stocks—cod and haddock—which provide the bulk of the catch in that region. Quotas have been allotted to the member countries of the North-West Atlantic Fisheries Commission in proportion to their average catch within the last years so that there is not much room for an additional fishing effort on economic levels. In the area of Greenland, where German freezer trawlers take a considerable catch, the seasonal conditions do not allow all-year fishing so that this region could only provide marginal compensation for the loss of catches in the Iceland area.

I respectfully submit that the decisive factor which makes interim measures for the protection of the traditional fishing rights of the Federal Republic in the waters around Iceland most imperative, is the almost certain prospect that otherwise the German fishing fleet, if excluded from their traditional fishing grounds, will be forced to reduce its tonnage considerably and that it will then, in case of a favourable judgment, have the greatest difficulty to recover to its previous position, if that will be possible at all.

The Minister for Foreign Affairs of Iceland, in his telegram dated 28 July, and delivered on 29 July to the Court, maintains that the Application of the Federal Republic of 5 June 1972 referred to the legal position of the two States and "not to the economic position of certain private enterprises". By that remark he probably wants to intimate that all these considerations relating to the economic consequences for German fisheries were irrelevant, and went beyond the scope of the subject-matter of the dispute before the Court. I am unable to accept the validity of this argument. In our submission *(a)* of our Application in this case, filed on 5 June 1972, we have asked the Court to adjudge and declare that the unilateral extension by Iceland of its exclusive fisheries jurisdiction, having no foundation in international law, could not be opposed to the Federal Republic of Germany and to its fishing vessels. I specifically call your attention to those last words: "and to its fishing vessels."

Thus, the right of the Federal Republic, that its fishing vessels may continue fishing in Iceland's extended fisheries zone, is certainly part of the subject-matter of the dispute, and interim measures, which are designed to protect this right pending the final decision of the Court, are, consequently, also within the scope of the subject-matter of the dispute between the Parties to this case. It needs no further argument that the Federal Republic is entitled to take up and defend the rights of its nationals to fish on the high seas in accordance with generally recognized rules of international law. This being so, it cannot be argued that any one of the effects which the Icelandic Regulations of 14 July 1972 might have on the exercise of these fishing rights, be they legal, economic, or other effects, should be excluded from the consideration whether or not the circumstances require the interim protection of these rights.

I should now turn to the other aggravating aspect of the situation created by the Regulations of 14 July 1972, the assertion of powers of jurisdiction and control over large parts of the high seas.

It is this fact which distinguishes this case from earlier cases, where the Court had granted or rejected interim measures of protection. In the earlier cases protection had been asked against actions which one of the parties might take against the rights of the other within its own territory in the exercise of its territorial sovereignty, how lawful or unlawful that may have been. In the present case, the Government of Iceland not only deprives the fishing vessels of the Federal Republic of their traditional fishing rights, but, by prohibiting all foreign fishing activities in the extended fisheries zone and by applying criminal sanctions against those foreign nationals who do not comply with these Regulations, the Government of Iceland asserts sovereign powers over parts of the high seas which hitherto were open to common use of all nations. By excluding foreign fishing vessels from the extended fisheries zone and reserving the exploitation of its living resources for its own nationals, the Government of Iceland appropriates these parts of the high seas which had hitherto been the common property of mankind.

In short, the action of the Government of Iceland purports to change the status of the waters of the high seas unilaterally by establishing a *fait accompli*. The action of the Government of Iceland does not stop at the mere assumption of control rights in order to secure compliance with indiscriminately applied conservation measures, but goes so far as to regard the living resources in these waters as belonging exclusively to the Republic of Iceland and to disregard completely the traditional fishing rights of other nations—and among them of the Federal Republic of Germany—in these waters. Such action extends the dispute between the Parties into much wider dimensions, and one might very well argue that this is an additional ground which justifies interim measures for the protection of the fishing rights of the Federal Republic of Germany and its nationals.

It is submitted that the action of the Government of Iceland is not, during the pendency of the proceedings before the Court, in any way necessitated by reasons of Iceland's economy. The Government of Iceland has not yet asserted that foreign fishing in the waters around Iceland has resulted in lower catches by the fishing vessels of Iceland, or reduced Iceland's predominant share in the exploitation of the fishing grounds before its coasts.

If, on the other hand, the Government of Iceland would be allowed to suceeed in excluding the fishing vessels of the Federal Republic of Germany from their traditional fishing grounds, that would give the Republic of Iceland full satisfaction of its disputed claim for a 50-mile exclusive fisheries

zone, and establish a *fait accompli* before the Court has an opportunity to decide the validity of such a claim. In view of this situation, it seems particularly imperative to preserve the status quo and to protect the long-established fishing rights of the Federal Republic and its fishing vessels by appropriate interim measures.

By asking the Court for the protection of the fishing rights of the Federal Republic of Germany in order to preserve the status quo between the Parties, we are not going to ignore the fact that the Republic of Iceland has an equal interest in the preservation of the status quo. The Federal Republic has always recognized the special dependency of the Icelandic people and their economy on the exploitation of the fishing grounds before their coasts, and on the conservation of these resources. If, on the basis of a thorough scientific investigation, catch limitations should become necessary for the conservation of fish stocks, the Federal Republic is fully prepared to enter into a bilateral or multilateral agreement which will provide for such limitation and for the equitable allocation of these resources among those nations which have regularly fished in this area and are dependent on their exploitation.

Up till now Iceland has taken the bulk of the total catch in the waters around its coast, on the average more than 50 per cent., while the United Kingdom has taken 26 per cent. and the Federal Republic of Germany only 17 per cent. of the total catch in these waters. You will find the statistical data about the total catch and its distribution over the years 1960 to 1969 in Annex C to our written request. We have no information that the capacity of the Icelandic fishing fleet was not fully utilized. The modernization and expansion of Iceland's fishing fleet, which is in progress, indicates rather the contrary. Thus, the preferential right of Iceland in the exploitation of the resources before its coasts has been amply preserved.

The Government of Iceland tries to justify the exclusion of foreign fishing vessels from the waters around Iceland by asserting a need to protect its fisheries against an increased fishing effort by other nations, directed specifically to the fishing grounds around Iceland, and asserting on this basis the need to prevent overfishing of certain important fish stocks in these waters. I may refer in this respect to the various statements of Icelandic Ministers which are reproduced in the Appendices of the Memorandum on *Fisheries Jurisdiction in Iceland* issued by the Icelandic Ministry of Foreign Affairs in February 1972 and attached to the aide-mémoire of 24 February 1972, which is annexed to our Application as Annex H; I may quote one statement given by the Minister for Foreign Affairs of Iceland on 29 September 1971, which is at I, page 52 of this Memorandum, and which reads:

> "The Icelandic Government considers that as far as Iceland is concerned we have to protect our interests now. It is quite clear that at any time the highly developed fishing fleets of distant water fishing countries will be increasingly directed to the Iceland area. These fleets have now for some time had huge catches from the Barents Sea. Fishing there is no longer as profitable as it was, and they are directing their attention to the Iceland area."

I doubt whether these apprehensions of the Government of Iceland are already justified at present. The consistent volume of the catch taken in the Iceland area, according to the statistical data reproduced in Annex C to our written request for interim measures, rather shows that, at least at present, the danger of overfishing has not yet materialized. Furthermore, the Government of the Federal Republic of Germany has repeatedly assured the Govern-

ment of Iceland that there is no intention of increasing the German fishing effort in the waters around Iceland.

However, in order to allay the fear of the Government of Iceland that the German fishing effort might increase in the waters around Iceland as a result of declining catches or quota regulations in other parts of the Atlantic, the Government of the Federal Republic is also prepared to maintain the status quo in this respect. We have therefore suggested, in paragraph 17 of our written request, that the Court may consider it appropriate to indicate as part of the interim measures that the fishing vessels of the Federal Republic do not take more fish in the Iceland area during the pendency of the proceedings than the average catch they have taken throughout the years 1960 to 1969, —these are the years for which statistical data is already available—namely 120,000 metric tons per annum; I refer to Annex C to our request filed on 21 July 1972 where you find the figure of the average German catch in this region.

If the Court would indicate interim measures which, on the one hand, protect the hitherto undisturbed and undisputed fishing rights of the German fishing vessels and, on the other hand, secure that their annual catch is limited to the average figure of the last years, the interests of both Parties in the maintenance of the status quo until the final judgment of the Court will be equally observed.

Mr. President and Members of the Court, in this last part of my statement I would like to make some additional remarks on the jurisdictional basis for an Order of the Court under Article 41 of the Statute. In the request of 21 July we have already dealt with this question at some length. I will not repeat here all that had been stated in the paragraphs 7 to 9 of this request, to which I may respectfully refer, for the moment. There the Federal Republic has maintained:

(1) that the power of the Court to indicate interim measures of protection flows directly from Article 41 of the Statute of the Court and is not dependent on any direct consent of the Parties to the exercise of that power, and that therefore no prior affirmative determination of the Court's jurisdiction to deal with the merits of the case is necessary;
(2) that, according to the practice of the Court, it is sufficient for the exercise of the power under Article 41 that proceedings have been instituted in a proper way on the basis of an instrument whereby both Parties had previously conferred jurisdiction on the Court, and that any objection raised by one of the Parties against this jurisdiction is irrelevant at this stage, but has to be dealt with at a later stage of the proceedings under the procedure relating to preliminary objections; and
(3) that at all events, the jurisdiction of the Court is well founded in this case and that *a fortiori* there is an equally well-founded jurisdictional basis for the exercise of the Court's power to order interim measures of protection under Article 41 of the Statute.

As the Government of Iceland, in a telegram from its Minister for Foreign Affairs transmitted to the Court and dated 28 July 1972, has again questioned the jurisdictional basis of the Court's power to entertain the request of the Federal Republic of Germany for interim measures of protection, some supplementary remarks will be necessary.

The question whether an objection raised by the defendant to the jurisdiction of the Court may affect the Court's power to grant interim protection has been dealt with by the Court on two occasions: in the *Anglo-Iranian Oil Co.*

case and in the *Interhandel* case. In both cases the Court expressly declined to make a prior affirmative determination on its jurisdiction to deal with the merits of the case or to consider the objection to its jurisdiction as in any way relevant at this stage of the proceedings. I think that there are valid reasons for this attitude of the Court. The purpose of Article 41 of the Statute of the Court would be defeated if the defendant could, by raising objections to the Court's jurisdiction, prevent the expeditious exercise of that power to preserve the status quo. It is the main function of the power under Article 41 to give the Court sufficient time to decide the controversial issues, the jurisdictional as well as the substantive issues, unhampered by the pressure of time. The Court should not be obliged to form already an opinion on the prospects of the case because such a preliminary determination might otherwise be clothed with an authority which the Court does not want to confer on its action under Article 41 of the Statute. The Court has, therefore, taken pains to make it perfectly clear that the indication of interim measures under Article 41 of the Statute in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case.

It is true that in the two cases referred to above not all the Judges concurred fully in this attitude but the difference of opinion seems to have been more apprent than real because none of the Judges went so far as to require that the Court should, if only on a summary consideration, reach a previous affirmative determination of its jurisdiction. If there was a difference between the majority of the Court and the Judges who did not feel able to concur fully in the reasoning of the Court, it related to the question whether there was such an apparent lack of jurisdiction that judicial caution would make it advisable not to engage the authority of the Court. In his separate opinion to the Order of the Court in the *Interhandel* case, Judge Sir Hersch Lauterpacht circumscribed these cases with the following words:

> "Governments . . . have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction is manifest . . . Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The Court may properly act under the terms of Article 41 provided that there is in existence such an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute which, prima facie, confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction."

I do not think that the Court has ever disregarded the question of its competence altogether. In the *Interhandel* case the Court expressly referred to the fact that both Parties had accepted the jurisdiction of the Court by declarations under Article 36 of the Statute, so that prima facie jurisdiction had been established. In the present case, the Government of Iceland and the Government of the Federal Republic of Germany have, by the Exchange of Notes of 19 July 1961, concluded an agreement whereby they have recognized the jurisdiction of the Court and agreed to submit disputes about the extension of fisheries limits to the Court. In the Exchange of Notes there is no provision which allows a unilateral denunciation of this agreement by either Party and, therefore, the unilateral denunciation of this agreement by Iceland has been rejected as being invalid and without legal effect by the Government of the Federal Republic of Germany.

In view of these facts, there is no manifest absence of jurisdiction which could, if one would follow the views of Judge Lauterpacht, prevent the Court

from exercising its power to indicate interim measures of protection under Article 41 of the Statute. This is, rather, a clear case of prima facie jurisdiction pending the decision of the Court on the validity of Iceland's unilateral denunciation of the agreement contained in the Exchange of Notes of 19 July 1961.

In the above-mentioned telegram transmitted to the Court and dated 28 July 1972, the Minister for Foreign Affairs of Iceland has referred to the Declaration of the Federal Republic of Germany of 29 October 1971, made in accordance with the Resolution of the Security Council of the United Nations of 15 October 1946, whereby the Federal Republic recognized the jurisdiction of the Court, subject to the conditions of the Charter of the United Nations and the Statute of the Court, with respect to the disputes mentioned in paragraph (5) of the Exchange of Notes of 19 July 1961. The Minister for Foreign Affairs of Iceland mentions the fact that this Declaration had been transmitted to the Court after the Government of Iceland had, by aide-mémoire [1] of 31 August 1971, already made known its intention to terminate the agreement on the jurisdiction of the Court contained in that Exchange of Notes.

By mentioning this fact, the Minister for Foreign Affairs of Iceland seems to suggest that this fact might have had some effect on the binding force of the agreement contained in the Exchange of Notes of 19 July 1961. Such an argument, however, cannot be sustained: the validity and the binding force of the agreement between the Parties contained in the Exchange of Notes of 19 July 1961, according to which certain disputes between the Federal Republic and the Republic of Iceland have to be referred to the Court, does not in any way depend on the date on which the declaration required by the Security Council resolution had been transmitted to the Court. While for those States which are Members of the United Nations and parties to the Statute of the Court no further declaration is necessary, for those States which are not members of the United Nations or parties to the Statute of the Court, a supplementary declaration is necessary to enable them to be a party before the Court, and to subject them to the provisions of the Statute of the Court. No time-limit exists for the filing of this supplementary declaration, and it may be done at any time until proceedings are instituted under the agreement by which the parties undertook the obligation to refer such disputes to the Court. I may refer, in this respect, also to Article 36 of the Rules of Court which states that the necessary steps to enable a State not party to the Statute to appear before the Court should be done, at the latest, when its agent is appointed—this means the time of the application. Therefore, the date of the filing of this instrument does not add a new argument to the previous arguments advanced by the Government of Iceland against the binding force of the compromissory clause contained in paragraph (5) of the Exchange of Notes of 19 July 1961.

Mr. President, Members of the Court, before concluding my statement, I would like to submit that the Government of the Federal Republic of Germany maintains the suggestions for interim measures of protection which are contained in paragraph (22) of our request filed on 21 July 1972. In accordance with these suggestions, I respectfully request, on behalf of the Government of the Federal Republic of Germany, that the Court may consider indicating the following interim measures of protection, pending the final judgment of the Court:

[1] See p. 15, *supra*.

(a) The Federal Republic of Germany and the Republic of Iceland should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.

(b) The Republic of Iceland should refrain from taking any measure purporting to enforce the Regulations issued by the Government of Iceland on 14 July 1972 against, or otherwise interfering with, vessels registered in the Federal Republic of Germany and engaged in fishing activities in the waters of the high seas around Iceland outside the 12-mile limit of fisheries jurisdiction agreed upon in the Exchange of Notes between the Government of the Federal Republic of Germany and the Government of Iceland dated 19 July 1961.

(c) The Republic of Iceland should refrain from applying or threatening to apply administrative, judicial or other sanctions or any other measure against ships registered in the Federal Republic of Germany, their crews or other related persons, because of their having been engaged in fishing activities in the waters of the high seas around Iceland outside the 12-mile limit as referred to in subparagraph *(b)* above.

(d) The Federal Republic of Germany should ensure that vessels registered in the Federal Republic of Germany do not take more than 120,000 metric tons of fish in any one year from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va, as marked on the map Annex B to the Request.

(e) The Federal Republic of Germany and the Republic of Iceland should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision on the merits the Court may subsequently render.

That concludes my statement, Mr. President and Members of the Court, and I thank you for listening to my statement.

The PRESIDENT: On behalf of the Court, I wish to thank the Agent of the Federal Republic of Germany for his assistance. The oral proceedings on the request for the indication of interim measures of protection are now completed, but I would ask the Agent of the Federal Republic of Germany to be at the disposal of the Court to furnish any further information [1] the Court may require. Subject to that reservation, I declare the hearing closed. The decision of the Court on the request for the indication of interim measures of protection will be given in due course in the form of an Order. The sitting is closed.

The Court rose at 11.35 a.m.

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[1] See pp. 393-396, *infra*.

SECOND PUBLIC SITTING (17 VIII 72, 10 a.m.)

Present: [See sitting of 2 VIII 72.]

READING OF THE ORDERS

[I, pp. 119-120]