JOINT DISSENTING OPINION OF JUDGES BENGZON AND JIMÉNEZ DE ARÉCHAGA

1. We voted against the first operative paragraph of the Order in which the Court decides that the Memorial and Counter-Memorial shall be addressed to the question of the jurisdiction of the Court to entertain the dispute.

In our view, the Court should have followed its normal procedure in fixing time-limits for the Memorial and Counter-Memorial without prescribing their contents or confining them to the jurisdictional issue. This practice has been followed by the Court in every case, even when, as occurs here, the Respondent had failed or refused to appoint an Agent at the time when the Order fixing time-limits for the Memorial and Counter-Memorial was issued. (*Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1951*, p. 100; *Nottebohm* case, *I.C.J. Reports 1952*, p. 10; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth* case, *I.C.J. Reports 1959*, p. 260.)

2. We fail to see any reasons or grounds to depart now from the established practice. The Order does not invoke nor base itself on Article 53 of the Statute, and it could hardly do so since the conditions required for a default under this provision are not fulfilled at the present stage of the proceedings.

3. In the absence of such an application or invocation of Article 53, it seems to us there are no grounds in the Statute or the Rules for instructing the Parties to address their Memorial and Counter-Memorial to the jurisdictional issue.

The Memorial and Counter-Memorial are referred to in Article 43 (2), of the Statute and their contents are prescribed in Article 42 of the Rules, which says:

> "1. A memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.
>
> 2. A Counter-Memorial shall contain an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions."

4. In our view, the only basis under the Rules for asking the Applicant to submit a pleading confined to jurisdiction would have been to consider the letter of the Foreign Minister of Iceland of 27 June 1972 as raising a preliminary objection against the Court's jurisdiction. The Court could

then have requested observations limited to the jurisdictional issue, in accordance with Article 62, paragraph 3, of the Rules. This was done in the *Nottebohm* case, the Court dealing with a telegram from the Foreign Minister of Guatemala as though it had raised a preliminary objection (*I.C.J. Reports 1953*, p. 7).

There are however important differences between these two communications, in particular as to the time of their presentation and this, in our view, makes it impossible to consider the letter of the Icelandic Foreign Minister as constituting a preliminary objection. A preliminary objection must be filed within the time-limit assigned for the Counter-Memorial, that is to say, after the presentation of the Memorial, not before it: it is only then that it may have the suspensive effects provided for in Article 62, paragraph 3, of the Rules. Otherwise, a respondent might be able to block the proceedings before the Memorial is filed.

5. The foregoing reasons, based on the Statute and the Rules, are not the only ones which determined our negative votes. There are, in our view, even stronger considerations of convenience and of the due protection of the interests of both Parties which made it advisable in this case to request the Parties to submit a proper and complete Memorial and Counter-Memorial.

There is a possibility that Article 53 may have to be applied if the Court finds itself competent and Iceland fails to file a Counter-Memorial. If that occurs, it is indispensable, in our view, that the Memorial should contain a complete statement of the Applicant's claim, full supporting arguments of fact and law and the submissions.

It is only in the presence and in the light of such a complete Memorial that (1) the respondent must take a final decision as to whether it shall appear to defend its case or not, and (2) the Court must, in case of default, base its final pronouncement as to whether it will "decide in favour of [the applicant's] claim". For such a purpose the Court must determine "that the claim is well founded in fact and in law".

How will this be done if the Memorial is defective in respect of the facts or the law concerning the merits of the claim?

6. A possible answer could be that, in such an event, the applicant would be asked to submit a further pleading—a Reply—with a full development of the merits of its case.

However, to allow the applicant to present new submissions and develop its supporting arguments after the default has occurred would be contrary to the general principles of law recognized in national legislations concerning default proceedings.

The party which decides not to contest a case must know with precision before taking this attitude which questions are going to be decided and which precisely are the claims and grounds of law and fact the other party invokes. Therefore the respondent, before the term expires for the

deposit of its Counter-Memorial, should have before it a complete Memorial from the applicant and not one confined to jurisdiction.

We fear, therefore, that as a result of this decision, the Court, if it reaches the stage of the merits, might be confronted with serious difficulties in the event that Article 53 would need to be applied.

7. Finally, while we agree with the consideration that it may be convenient in this case to decide in the first instance the question of the Court's jurisdiction, it seems to us to be a *non sequitur* to infer from such consideration the consequence that the initial pleadings must therefore be confined to jurisdictional questions.

The Court would be in a much better position to isolate and examine the jurisdictional issue after receiving a proper Memorial and Counter-Memorial, dealing with both jurisdiction and merits.

A full explanation by the Parties of all aspects of the question would seem to be particularly necessary in a case such as the present one, where both jurisdiction and merits appear to be in many respects interrelated.

(Signed) C. BENGZON.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.