ORAL ARGUMENTS ON JURISDICTION OF THE COURT

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
on 8 January and 2 February 1973,
President Sir Muhammad Zafrulla Khan
presiding

THIRD PUBLIC SITTING (8 I 73, 3 p.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*;
Dr. D. von Schenk, Legal Adviser, Ministry of Foreign Affairs, *as Counsel*;
Dr. S. Vollmar, Ministry of Foreign Affairs,
Dr. R. Hilger, Ministry of Foreign Affairs,
Dr. D. Booss, Ministry for Food, Agriculture and Forests, *as Advisers.*

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to examine the question of its jurisdiction to deal with a dispute between the Federal Republic of Germany and the Republic of Iceland concerning the extension by the Government of Iceland of its fisheries jurisdiction. In these proceedings, instituted by Application[1] filed on 5 June 1972, the Federal Republic founds the jurisdiction of the Court on Article 36, paragraph 1, of the Court's Statute, and on 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 Iceland's claim to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland has no basis in international law, and could not therefore be opposed to the Federal Republic and to its fishing vessels.

By an Order[2] dated 18 August 1972, the Court decided that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute. By the same Order, the Court fixed 13 October 1972 as the time-limit for the Memorial of the Federal Republic of Germany and 8 December 1972 as the time-limit for the Counter-Memorial of the Government of Iceland.

The Memorial[3] of the Federal Republic was duly filed within the time-limit fixed therefor. No Counter-Memorial has been filed by the Government of Iceland; the written proceedings being thus closed, the case is ready for hearing on the issue of jurisdiction. In a telegram[4] received in the Registry on 5 December 1972, the Minister for Foreign Affairs of Iceland reiterated that no basis existed for the Court to exercise jurisdiction in the case, and informed the Court that the position of the Government of Iceland was unchanged.

The Federal Republic of Germany, in reliance on Article 31, paragraph 3, of the Statute, notified the Court of its choice of a person to sit as judge *ad hoc*[5] in this case. No objection to this was made by the Government of Iceland within the time-limit fixed for that Government to make its views known, in accordance with Article 3 of the Rules of Court.

However, the Court, after deliberating on the question, is unable to find that the appointment of a judge *ad hoc* by the Federal Republic of Germany in this phase of the case would be admissible. This decision affects only the present phase of the proceedings, that is to say that concerning the jurisdiction of the Court, and does not in any way prejudice the question whether, if the Court finds that it has jurisdiction, a judge *ad hoc* might be chosen to sit in the subsequent stages of the case.

I note the presence in Court of the Agent and counsel of the Government of the Federal Republic; the Court has not been notified of the appointment of any agent for the Government of Iceland, and I note that no representative of that Government is present in Court.

The Governments of the United Kingdom and Senegal have asked that the

---

[1] See pp. 3-11, *supra*.
[2] *I.C.J. Reports 1972*, p. 188.
[3] See pp. 65-96, *supra*.
[4] See p. 404, *infra*.
[5] See p. 420, *infra*, and *I.C.J. Reports 1973*, p. 51.

pleadings and annexed documents in this case should be made available to them in accordance with Article 44, paragraph 2, of the Rules of Court (1946 edition). The Parties having indicated that they had no objection, it was decided to accede to these requests.

In accordance with practice, the Court decided, with the consent of the Parties, that the pleadings and annexed documents so far filed in the case should be made accessible to the public also, pursuant to Article 44, paragraph 3, of the 1946 Rules of Court, with effect from the opening of the present oral proceedings. The Court further decided that a number of communications[1] addressed to the Court by the Government of Iceland should also be made accessible to the public at this time. The Parties have indicated that they have no objection to this course.

I declare the oral proceedings on the question of the Court's jurisdiction open.

---

[1] See pp. 380, 388, 399, 404 and 420.

ARGUMENT OF MR. JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Mr. JAENICKE: Mr. President, Members of the Court, when I had the honour, on behalf of the Federal Republic of Germany, to address the Court in this case, in the matter of our Request for interim protection[1], on 2 August 1972[2], I had regretted that the Government of Iceland had not felt able to appear before the Court in order to defend its case, and I had further given expression to our hope that the Government of Iceland would, at a later stage of the proceedings, *reconsider its decision and take part in the proceedings.* However, the seats reserved for the Icelandic delegation have again remained empty today. The Registrar of the Court has informed us of a telegram[3] received by the Court from the Minister for Foreign Affairs of Iceland on 5 December 1972, in which the Icelandic Minister declared that the earlier decision of the Icelandic Government not to appear before the Court has not been changed. Under these circumstances, the Government of the Federal Republic of Germany has no other choice than to ask the Court to proceed under Article 53 of its Statute. Under this Article, whenever a party does not appear before the Court, or fails to defend its case, the other party may then ask the Court to decide in favour of its claim, provided the Court has satisfied itself that it has jurisdiction and that the claim is well founded in fact and in law.

By Order[4] of 18 August 1972 the Court has decided that the first pleadings in this case should be addressed to the question of the jurisdiction of the Court. In its Memorial, filed with the Court on 13 October 1972, the Government of the Federal Republic of Germany has put forward all the necessary arguments to satisfy the Court that there is a clear and solid legal basis for the Court's jurisdiction in this case. In conformity with the Court's directions, my oral argument of today will equally concentrate on the question of jurisdiction.

By not appearing before the Court the Government of Iceland seems to deny even the competence of the Court to decide on its own jurisdiction. However, according to Article 36, paragraph 6, of the Statute of the Court it is undoubtedly within the competence of the Court to decide on its jurisdiction. This competence flows directly from the Statute of the Court, to which Iceland is a party, and is not conditioned by a prior specific acceptance of this competence by the parties. The Federal Republic appreciates the decision of the Court to deal with the jurisdictional issue separately before it will enter the merits of the case. A judgment of the Court in this phase of the proceedings which, as we hope, will affirm its jurisdiction, might, by its authority, eventually persuade the Republic of Iceland to join the proceedings on the merits of the dispute.

The Federal Republic of Germany has already, in its Memorial, expounded in much detail that the jurisdiction of the Court in this case cannot well be

---

[1] See pp. 23-31, *supra.*
[2] See p. 44, *supra.*
[3] See p. 404, *infra.*
[4] *I.C.J. Reports 1972*, p. 188.

disputed. I do not wish to bore the Members of the Court by repeating all the arguments which have been put forward in the Memorial; I shall rather confine myself to concentrating on those points of the matter which, in my view, are the most relevant to the jurisdictional issue. I should, however, make it clear that all arguments which we have advanced in our Memorial, in particular those arguments which I shall not repeat here, are fully maintained.

The jurisdiction of the Court to entertain the Application of the Federal Republic of Germany in the present case is based on paragraph 5 of the Exchange of Notes between the Government of the Federal Republic of Germany and the Government of Iceland, dated 19 July 1961. This paragraph reads as follows:

> "The Government of the Republic of Iceland shall continue to work for the implementation of the Althing Resolution of 5 May 1959 regarding the extension of the fishery jurisdiction of Iceland. However, it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such extension the matter shall, at the request of either party, be referred to the International Court of Justice."

That is the wording of this paragraph.

I should recall in this connection that the resolution of the Althing, that is the Icelandic Parliament, to which paragraph 5 refers, committed the Government of Iceland to obtain recognition of Iceland's alleged right to a fisheries zone covering the waters over the entire continental shelf of Iceland. In the final paragraph of the Notes exchanged it was expressly stipulated that the Notes exchanged constituted an agreement between the two Governments, and in paragraph 7 of the Notes exchanged the Government of the Republic of Iceland undertook to register this arrangement with the Secretary-General of the United Nations, in accordance with Article 102 of the Charter of the United Nations. The Notes exchanged were so registered on 27 September 1961.

The Federal Republic of Germany is of the opinion that this agreement is still in force and applicable between the Parties.

There can be no doubt that paragraph 5 of the Exchange of Notes of 19 July 1961 constitutes an international agreement by which the Parties to this case conferred jurisdiction on the Court in the sense of Article 36, paragraph 1, of its Statute, and that it was also the intention of the Parties to confer such jurisdiction upon the Court. There can further be no doubt that the dispute submitted to the Court by the Application of the Federal Republic of Germany of 5 June 1972 is exactly that kind of dispute to which paragraph 5 refers namely a dispute relating to the extension by Iceland of its fisheries jurisdiction beyond the 12-mile limit.

I need not repeat here all that has already been said by the Government of the Federal Republic of Germany in this respect in its Memorial, and also in its Application of 5 June 1972. I shall later show that the submissions in the Application of the Federal Republic of Germany of 5 June 1972 keep within the limits of the jurisdiction of the Court as defined in paragraph 5 of the Exchange of Notes of 1961.

As the Government of Iceland cannot well deny that the Parties have, by the agreement contained in paragraph 5 of the Exchange of Notes of 1961, conferred jurisdiction on the Court, all the arguments which the Government of Iceland has brought forward against the jurisdiction of the Court are

calculated to throw doubts on the validity and continuing applicability of this agreement. In my following statement I shall deal mainly with these arguments of the Government of Iceland in order to show that the jurisdiction of the Court in this case rests on a valid agreement which still governs the relations between the Parties, and that any doubts with respect to the validity and continuing applicability of this agreement have no legal foundation.

Before dealing with the various arguments which have been brought forward by the Government of Iceland against the validity and applicability of paragraph 5 of the Exchange of Notes, I would like to make some comment on the procedural relevance of those arguments, because they have not been pleaded before the Court in the proper form. In fact, there is no formal motion by the Government of Iceland before the Court which could be qualified as a preliminary objection to the jurisdiction of the Court, nor have the arguments put forward by the Government of Iceland in its various communications to the Court been supplemented by the necessary facts and evidence. However, Article 53 of the Statute requires the Court to satisfy itself that it has jurisdiction, and in order to give the Court a complete picture in this respect the Government of the Federal Republic of Germany has, in its Application, in its request for interim measures of protection and in its Memorial, submitted all facts and documents which it considers to be relevant to the question of the Court's jurisdiction, and in particular to the question of the validity and continuing applicability of the 1961 Agreement.

In the documentary evidence which we have submitted to the Court there appear also the various arguments which have been brought forward by the Government of Iceland, either in its public statements or in its communications to the Government of the Federal Republic of Germany, against the validity and applicability of the judicial settlement clause contained in paragraph 5 of the Exchange of Notes of 1961. It is for the Court to decide whether and to what extent, it will consider it necessary and proper to deal with any such argument which has not formally been pleaded before the Court. It is for this eventuality that I shall comment on these arguments. I hope to convince the Court that these arguments are wholly unfounded and I hope to dispel any doubts as to the Court's jurisdiction in this case.

The arguments with which the Government of Iceland has attacked the validity and applicability of the agreement contained in paragraph 5 of the Exchange of Notes have varied from time to time and are partly inconsistent with each other. The main arguments which have been brought forward by the Government of Iceland are the following: *first*, that the Exchange of Notes of 1961 had taken place "under extremely difficult circumstances"; *second*, that the object and purpose of the provision for recourse to judicial settlement contained in the Exchange of Notes of 1961 "had been fully achieved", and that this provision had therefore to be considered as "terminated"; *third*, that the agreement contained in the Exchange of Notes of 1961 was "not of a permanent nature", and *fourth*, that since the conclusion of the agreement, contained in the Exchange of Notes, circumstances had changed. I shall deal with each of these arguments in turn.

To the *first* argument: by alleging that the Exchange of Notes of 1961 had taken place "under extremely difficult circumstances", the Government of Iceland seems to question the initial validity of the agreement contained in that instrument. In dealing with this argument I can be rather brief. I should call the attention of the Court to the fact that the Government of Iceland in its communications to the Government of the Federal Republic of Germany

did not rely on this argument when it declared the agreement of 1961 terminated, neither in its aide-mémoire of 31 August 1971 nor in its aide-mémoire of 24 February 1972; this argument appears with respect to the Federal Republic of Germany *only* in the letter of the Minister for Foreign Affairs of Iceland of 27 June 1972 addressed to the Court. This argument seems to imply that the consent of the Government of Iceland to the provisions contained in the Exchange of Notes in 1961 had not been given of its own free will. However, the Government of Iceland has so far failed to explain to what difficult circumstances this vague formula was meant to refer; nor has the Government of Iceland ever mentioned any fact which could have shown to what kind of pressure the Government of Iceland had been exposed when it agreed with the Government of the Federal Republic of Germany on the terms of the Exchange of Notes in 1961. That such an allegation lacks any foundation has already been evidenced by the fact that the Government of Iceland in all the years after 1961 had never challenged the validity of the agreement embodied in this Exchange of Notes vis-à-vis the Government of the Federal Republic of Germany. On the contrary, the Government of Iceland was evidently rather satisfied with the contents of this agreement, by which Iceland obtained recognition of an exclusive 12-mile fisheries zone at a time when such an exclusive fisheries zone had not yet been generally recognized.

If the Government of Iceland had really considered the agreement embodied in the Exchange of Notes as invalid *ab initio*, it would have been quite inconsistent with such a position to declare in its aide-mémoire of 31 August 1971 that, in the opinion of the Icelandic Government, the object and purpose of the agreement had now been fully achieved. Equally, the Icelandic Parliament in its Resolution of 15 February 1972 requested the Icelandic Government to inform the Government of the Federal Republic of Germany that, because of the vital interests of the nation and owing to changed circumstances, the agreement of 1961 was "no longer", and I stress these words "no longer", applicable. This statement makes sense only if the Icelandic Parliament started from the position that, until then, the agreement of 1961 had been valid and applicable between the Parties. These Icelandic statements would already suffice to dispel any doubts as to the initial validity of the 1961 agreement. Nevertheless, the Government of the Federal Republic of Germany has taken pains to submit all relevant facts and documents about the history of the Exchange of Notes of 19 July 1961 to the Court, in order to show that there was no undue pressure of any kind from the side of the Government of the Federal Republic which might have induced the Government of Iceland to conclude this agreement against its will. The Court will allow me to refer in this respect to paragraphs 9 to 24 and 35 to 41 of the Memorial of the Federal Republic.

The history of the 1961 Agreement, which I need not repeat here, is plain evidence of the fact that this Agreement had been negotiated between the two Governments on the basis of perfect equality and freedom of decision on both sides. I shall only point to some important facts which clearly evidence the atmosphere in which the negotiations in 1961 were conducted:

First, from 1 September 1958, the date on which the Icelandic Government prohibited all foreign fishing within the 12-mile limit, until the date on which the Agreement contained in the Exchange of Notes of 19 July 1961 entered into effect, no incident occurred because the German trawler fleet voluntarily abstained, on the recommendation of the Government of the Federal Re-

public, from exercising their traditional fishing rights in the 12-mile zone. In order to preserve its rights, the Federal Republic resorted only to diplomatic protests. This attitude of the Federal Republic and of its trawler fleet could not possibly produce any pressure on the Government of Iceland.

Second, the Government of the Federal Republic needed nearly three years to persuade the Government of Iceland to negotiate a settlement on the fisheries question. In the meantime, the Federal Republic voluntarily sacrificed its fishing rights within the newly established Icelandic fisheries zone where German fishermen had until then been fishing traditionally. If anything ultimately induced the Government of Iceland to negotiate a settlement of the fisheries question in 1961, it had certainly not been the Federal Government of Germany but rather the state of current international law at that time, which did not yet allow a coastal State to claim exclusive fishing rights up to 12 nautical miles without regard to traditional fishing rights exercised by other States in these waters. It was in Iceland's own interest to obtain recognition of its policy by the Federal Republic of Germany.

Third, the Federal Republic had to offer special economic concessions in order to get a settlement on the lines of the Exchange of Notes of 1961. In the negotiations the Government of the Federal Republic had to give special assurances to the Icelandic Government with respect to the import of Icelandic fish into the Federal Republic and with respect to financial and technical help for the development of the Icelandic industry. That had to be done before agreement on the settlement of the fisheries question was reached. These assurances were embodied in an agreed memorandum which was handed to the Icelandic Government after the signing of the Exchange of Notes. The memorandum is reproduced in Annex H to the Memorial of the Federal Republic of 13 October 1972.

I therefore respectfully submit that all these facts lead to the conclusion that there is no valid ground to question the validity of the agreement contained in the Exchange of Notes of 19 July 1961 and that consequently the Parties have, by this agreement, validly conferred jurisdiction upon the Court.

To the *second* argument: I shall now deal with the contention of the Government of Iceland that the object and purpose of the provision for judicial settlement contained in paragraph 5 of the Exchange of Notes had been fully achieved and that, therefore, this provision had to be considered—I quote the words used in the Icelandic Government's aide-mémoire of 24 February 1972—as being "no longer applicable and consequently terminated". It has, however, never become quite clear whether this statement and the similar statement already made in the aide-mémoire of 31 August 1971 were to be understood in the sense that paragraph 5 had become inapplicable, or terminated *ipso jure*, or in the sense that the Government of Iceland thereby purported to exercise an alleged right to denounce the agreement contained in this paragraph. As the Government of Iceland is not represented here, we will not be able to get some enlightenment in this respect from the Government of Iceland about the exact juridical meaning of its statements. We may, however, leave this question in abeyance because in any case it cannot be maintained that the object and purpose of paragraph 5 of the Exchange of Notes of 1961 which provided for recourse to the International Court of Justice had already been achieved.

The Government of Iceland has so far failed to define in any detail what it considers to be the object and purpose of paragraph 5 of the Exchange of

Notes. Some indication of what the Government of Iceland had in mind may be found in its aide-mémoire of 31 August 1971. There the Government of Iceland stated that—

> "In the period of ten years which has elapsed, the Government of the Federal Republic of Germany enjoyed the benefit of the Icelandic Government's policy to the effect that further extension of the limits of exclusive fisheries jurisdiction would be placed in abeyance for a reasonable and equitable period" (Application of the Federal Republic of Germany dated 5 June 1972, Annex D, p. 15, *supra*).

Similarly, in a statement before the Icelandic Parliament the Prime Minister of Iceland said that the 1961 agreements with the Federal Republic and the United Kingdom "had already attained their main objective as both nations had fully benefited by the period of adjustment which they were given by the Agreements". We have quoted this statement at page 75, *supra*, of our Memorial.

These statements seem to indicate that in the view of the Government of Iceland the only object and purpose of paragraph 5 of the Exchange of Notes had been to give the Federal Republic of Germany some years' time within which Iceland would abstain from claiming a wider fisheries zone. The plain juridical meaning of this view would be that the arrangement contained in the Exchange of Notes of 1961 had been concluded for a certain time only, without, however, any indication as to how long this time should be. Such an interpretation of the Exchange of Notes of 1961 is untenable. It is in flat contradiction to the terms of its provisions and to the intention of the Parties when they concluded this agreement in 1961.

The terms of paragraph 5 of the Exchange of Notes, if they are understood in their natural meaning and in the context of the other provisions of the Exchange of Notes, lead to quite the opposite interpretation. It is evident from the terms of paragraph 5 that the Parties anticipated that Iceland was determined to pursue a policy which would seek recognition of an extended fisheries zone covering the whole continental shelf. In view of this situation the Parties provided that in case such an extension would lead to a dispute between the Parties, each Party might then refer the dispute to the International Court of Justice. It was not the object and purpose of that provision to prevent the Government of Iceland for some time from extending its fisheries jurisdiction beyond the 12 miles. It could do so at any time, and had in fact done so as soon as it considered such action appropriate and in its interests. It was rather the object and purpose of paragraph 5 to provide for judicial settlement between the Parties of any dispute that might ensue from such action of Iceland in accordance with Article 33 of the Charter of the United Nations and to ensure that any further extension by Iceland of its fisheries jurisdiction would be made in harmony with international law. There is not the slightest indication in the text of paragraph 5 that the Parties intended that procedure to apply only for a limited period of time, nor was such a limitation ever mentioned in the course of the negotiations which led to the Exchange of Notes in 1961.

I shall not repeat here all the arguments which the Government of the Federal Republic has advanced in support of this interpretation in its Memorial and I may respectfully refer in this respect to paragraphs 42 to 50 of our Memorial. Nevertheless, it might be useful to stress some points which, in my view, are particularly relevant for the interpretation of paragraph 5 of the Exchange of Notes of 1961:

First, paragraph 5 does not contain a time-limit for its application, nor may such a time-limit be implied in view of the terms and the meaning of this provision. I shall demonstrate this in some detail. The provisions contained in the Exchange of Notes can be classified into two categories: on the one hand, we find provisions which by their very terms were clearly of a transient character. I mean those provisions, as paragraphs 3 and 4, which allowed the fishing vessels of the Federal Republic of Germany to fish for a transitional period in the outer parts of the 12-mile limit. These provisions were to expire at a fixed date, namely 10 March 1964.

On the other hand, there are those provisions which are capable of being applied for an indefinite time and which are indeed still applicable today; I mean those provisions, as paragraphs 1 and 2 of the Exchange of Notes, which provide for the *de facto* acquiescence by the Federal Republic of Germany in an exclusive fishery zone of 12 miles and in the establishment of certain new baselines from which this zone is measured. The same is true for paragraph 5 which obliges Iceland to observe certain procedural requirements in case it would further extend its fishery zone beyond the 12-mile limit. While Iceland had the benefit of the de *facto* recognition of the 12-mile fishery zone already for more than ten years after 1961, the obligation for Iceland to observe the procedure prescribed in paragraph 5 has not become operative until now. It cannot possibly be argued that these provisions, and in particular paragraph 5, were now devoid of any purpose.

In view of the fact that the Parties fixed a definite time-limit for the transitional régime provided for in paragraphs 3 and 4 of the Exchange of Notes, but did not provide for a time-limit with respect to those provisions which were capable of indefinite application, it would require strong and cogent reasons to assume an implied intention of the Parties that the last-mentioned provisions should remain applicable only a few years more. However, no such reasons can be found. On the contrary, it would be a rather strange result if paragraph 5 would become inoperative at the very moment when it could be applied for the first time.

Second, paragraph 5 of the Exchange of Notes of 1961 is exclusively a procedural provision. It did not create an obligation for Iceland to leave the limits of its fisheries zone unchanged to the benefit of the Federal Republic of Germany. The Icelandic argument that the Federal Republic had benefited long enough from Iceland's policy not to extend its fisheries zone beyond the 12-mile limit within the last ten years is therefore beside the point. The sole purpose of paragraph 5 of the Exchange of Notes was to create for Iceland the obligation to obey a certain procedure in case it would think it appropriate and permissible to extend its fisheries zone beyond the 12-mile limit. These procedural requirements were: first, to give six months' notice of such action to the Federal Republic of Germany—which Iceland in fact properly did by its aide-mémoire of 31 August 1971 and second, to have its action reviewed by the International Court of Justice in case the legality of its action, under international law, would be disputed by the Federal Republic.

Paragraph 5 of the Exchange of Notes of 1961 did not provide for a time-limit in the sense that Iceland would be barred from extending its fisheries jurisdiction until a certain date but would be free to do so after this date. The provision for recourse to the International Court of Justice was intended to ensure that Iceland would extend its fisheries zone in harmony with the development of international law. It was left to the initiative of the Government of Iceland when it would consider such action appropriate and justified under international law. If Iceland did abstain from extending its

fisheries jurisdiction within the ten years after 1961 Iceland did so not because of any time-limit contained in this respect in paragraph 5, but rather because Iceland probably rightly realized that such action could not expect international recognition under international law at that time.

As it was left to the initiative of Iceland what date it would choose for the intended extension of its fisheries jurisdiction to which the procedural requirements contained in paragraph 5 should apply, any reasonable interpretation of this provision must come to the conclusion that it was the intention that these procedural requirements should remain applicable as long as Iceland remained in a position to extend its fisheries jurisdiction.

In view of the foregoing considerations I respectfully submit that it is impossible to assume that paragraph 5 of the Exchange of Notes of 1961 has already fulfilled its object and purpose and paragraph 5 should therefore be considered as terminated.

To the *third* argument: I shall now deal with the argument of the Government of Iceland that the agreement contained in paragraph 5 of the Exchange of Notes of 1961 was not of a permanent nature. By this argument the Government of Iceland seems to intimate that the agreement, although it did not contain an express clause allowing its denunciation, might nevertheless be terminated unilaterally after a certain time of its duration.

The question whether an international agreement which contains no provision concerning its termination may nevertheless be denounced by a party after a reasonable time had been extensively debated in the International Law Commission when it drafted the articles on the Law of Treaties, and it had again been debated at the Vienna Conference on the Law of Treaties in 1969.

We have given a fairly detailed account of these discussions in paragraphs 52 to 64 of our Memorial, to which I may refer. The outcome of these discussions has been Article 56 of the Vienna Convention of the Law of Treaties. According to Article 56, an international agreement which contains no provisions regarding its termination, and which does not provide for denunciation, is not subject to denunciation unless as a first alternative it is established that the parties intended to admit the possibility of the denunciation or, as a second alternative, a right of denunciation could be implied by the nature of the treaty. While the first alternative is certainly in conformity with the existing rules of general international law, it is rather doubtful whether the nature of an agreement alone can be regarded as a sufficient basis to construe an implied right to denounce the agreement unilaterally.

The opinions on this issue were divided, and the present formulation of this part of Article 56 was adopted only by a very narrow majority. It may, therefore, be safer to assume that the nature of a treaty is only a subsidiary means of interpretation in order to ascertain the otherwise undisclosed intention of the parties, provided the intention of the parties may be clearly inferred from the nature of the treaty.

Fortunately, for the purpose of the present case, we may leave this question in abeyance. Even if we were allowed to infer a right of denunciation from the nature of the agreement alone, no other result would follow in the present case because as far as the agreement contained in the Exchange of Notes, and in particular in so far as paragraph 5 is concerned, it can neither be established that the parties intended that one of the parties should be allowed to terminate the agreement unilaterally, nor is it possible to infer such a right from the nature of the agreement.

The main reason which forbids such an interpretation is the simple fact that the judicial settlement clause in paragraph 5 of the Exchange of Notes

has not created an indefinite or perpetual obligation which might be subject to some reasonable limitation with respect to its duration. It has rather created a definite obligation, the scope and duration of which are already limited by its object. A unilateral right of denunciation may be implied from the object of the treaty only in those cases where the parties, either by inadvertence or for some other special reason, have omitted to regulate the duration or the obligation under the agreement, and where it could reasonably be assumed that both parties were of the opinion that the agreement should not last indefinitely.

However, in the case of paragraph 5 of the Exchange of Notes of 1961 there was simply no need to make provision for the duration of the agreement, or for its denunciation, because the judicial settlement procedure prescribed by paragraph 5 was destined for a certain factual situation which it was anticipated would arise some time in the future. The obligation of Iceland to have its action eventually reviewed by the International Court of Justice was to become operative if, and when, Iceland put into effect its declared intention to extend its fisheries jurisdiction beyond the 12-mile limit, over part of the whole of its continental shelf. It could not be foreseen, nor did the Government of Iceland indicate, when it would do so. Therefore, paragraph 5 of the Exchange of Notes cannot be interpreted otherwise than that the obligation to submit to the jurisdiction of the International Court of Justice was to last until that day on which the Government of Iceland would think it fit to extend its fisheries jurisdiction beyond the 12-mile limit. Consequently, it would be contrary to this object and purpose of paragraph 5 of the Exchange of Notes of 1961 to admit a right to denounce the agreement contained therein before the factual situation had arisen which was envisaged to be settled by the procedure prescribed by paragraph 5.

The Government of Iceland had, in its letter[1] of 27 June 1972 to the Court, maintained that "an undertaking for judicial settlement cannot be considered to be of a permanent nature". By this remark the Government of Iceland seems to allude to the discussion which took place in the International Law Commission in 1963, when it had been suggested by the Special Rapporteur, then Sir Humphrey Waldock, that there were certain types of treaty which might by their very nature warrant an implied right of denunciation. Treaties of arbitration and judicial settlement were specifically listed by the Special Rapporteur among those types of treaties. However, strong opposition was voiced by quite a number of members of the International Law Commission against the wholesale inclusion of such treaties in a list of treaties which should be subject to unilateral denunciation although the parties had not provided for their termination.

In view of this opposition, the Article drafted by the International Law Commission which later became Article 56 of the Vienna Convention on the Law of Treaties avoided mentioning any category of treaties where a right of unilateral denunciation would *ipso facto* be implied. This discussion took place in the 689th and 709th meetings of the International Law Commission. We have quoted them in our Memorial at page 86, *supra*. But let us, for the sake of argument, admit that treaties of arbitration and judicial settlement are normally concluded only for a limited time, or made terminable upon notice, and that there may be a case for the presumption that the parties to a treaty of arbitration or judicial settlement which is silent in this respect intend that treaty also to be terminable upon notice after a reasonable time. Even if we

[1] See pp. 380-382, *infra*.

would admit that, which I do not do, such a presumption could not apply in the present case. The reason is that paragraph 5 of the Exchange of Notes of 1961 does not correspond to the normal type of treaties of arbitration and judicial settlement, where such a presumption may be justified. The treaties of arbitration and judicial settlement which the members of the International Law Commission had in mind were treaties designed for the settlement of all sorts of disputes for an indefinite period of time. It may be understandable that States are reluctant to submit beforehand to some kind of arbitration or judicial settlement without knowing the subject-matter, the scope and the circumstances of a future dispute which will have to be submitted to such procedure, and it may therefore be perhaps allowed to infer from this practice that States consider such treaties as being terminable after a reasonable time of duration.

These considerations, however, cannot apply to the compromissory clause contained in paragraph 5 of the Exchange of Notes of 1961. This agreement relates only to the specific dispute about a further extension by Iceland of its fisheries jurisdiction, to a dispute which the parties had already anticipated at the time of the conclusion of the agreement. Here, each party knew perfectly well what would be the kind of dispute that would have to be submitted to the International Court of Justice. The scope of this obligation was clearly defined and limited to this specific kind of dispute. While the indefiniteness of the obligations contained in general clauses of arbitration or judicial settlement might justify a right of a contracting party to reconsider its commitment after a reasonable time, there is here no such justification for the Government of Iceland to withdraw from the well-defined and limited obligation to have the intended extension of its fisheries jurisdiction reviewed by the International Court of Justice. As the history of the Exchange of Notes of 1961 shows, the Government of Iceland was well aware that the main purpose of the compromissory clause contained in paragraph 5 was to give the Federal Republic some assurance that any further extension by Iceland of its fisheries jurisdiction would be effected only in accordance with international law.

In view of these considerations, I respectfully submit that the agreement for recourse to judicial settlement contained in paragraph 5 of the Exchange of Notes of 1961 cannot be interpreted to the effect that it contained an implied right of either party to terminate this agreement unilaterally.

To the *fourth* argument: In order to justify the repudiation of its obligation under paragraph 5 of the Exchange of Notes, the Government of Iceland has also invoked "changed circumstances" and "vital interests". The Government of the Federal Republic of Germany has already, in its Memorial, disposed of the Icelandic arguments in this respect, and has shown that these arguments are either irrelevant or unfounded. The Court will allow me to refer for this purpose to the considerations set out in the paragraphs 72 to 82 of our Memorial. I should, however, make some additional comments on the Icelandic argument that Iceland had a right to terminate its obligation under paragraph 5 of the Exchange of Notes because of changed circumstances.

The Icelandic argument must fail already because the circumstances which allegedly have changed since 1961 bear no relevance whatever to the agreement of the Parties to submit a dispute about a further extension by Iceland of its fisheries jurisdiction to the International Court of Justice.

The Government of Iceland has first pointed to the fact that the technical development of fishing equipment and modern fishing techniques has made it more pressing than before to take conservation measures in order to prevent

over-fishing in the waters before the coast of Iceland. We need not, at this stage of the proceedings, investigate whether this is a correct description of the factual situation. Even if we would follow the Government of Iceland in this respect, such a situation should certainly induce Iceland, and other interested States, to take more speedy and more effective action in the field of conservation of fish stocks and prevention of over-fishing. The Federal Republic of Germany has always been prepared to assist in any conservation measure, including catch limitations, which has been proved necessary from scientific evidence and which will be enforced in an indiscriminatory manner. The Federal Republic has, in fact, actively taken part in the adoption and enforcement of such conservation arrangements. However, I fail to see how the growing necessity for conservation measures could have affected the basis of the agreement between the Parties to submit a dispute relating to the limits of Iceland's fisheries jurisdiction to the Court, because such conservation measures must in any case be taken in conformity with international law. There is no reason to assume that the International Court of Justice would interpret and apply the rules of maritime international law today with less regard to the factual situation and to technological developments than in 1961.

The Government of Iceland has further pointed to the fact that international legal opinion on fisheries jurisdiction has changed since 1961, and that the Government of Iceland would not have concluded the agreement contained in the Exchange of Notes if it had known how legal opinion would develop in this respect. Here again, it is difficult to perceive how it could possibly be maintained that the subjective expectations of the Government of Iceland as to the development of maritime international law constituted the common basis of the consent of both Parties to the Agreement of 1961. It may well be that the Government of Iceland is disappointed that the development of international law has, up till now, not yet legalized the Icelandic claim to a 50-mile exclusive fisheries zone around its coast, but such expectations were certainly not the basis of the agreement between the Parties in 1961.

The Government of Iceland has further pointed to the fact that the matter of the extension of Iceland's fisheries jurisdiction had become a matter of vital interest to the Icelandic nation. If the Government of Iceland would thereby like to assert the emergence of a new fact which has changed the circumstances under which the Exchange of Notes of 1961 had taken place, such an assertion cannot be admitted, for it has been the persistent attitude of the Government of Iceland, and certainly its attitude already in 1961, to declare the fisheries' question as a matter of vital concern to the Icelandic nation. This is therefore not a new fact which could have changed the circumstances under which the Exchange of Notes took place in 1961.

Moreover, under the doctrine of the *clausula rebus sic stantibus*, the subjective evaluation by one party of the interests which have been the object of an international agreement, is no external fact which could have formed the common basis on which both parties concluded the agreement. The assertion of vital interests may be an understandable, though regrettable, political motivation for a government not to enter into any legal commitment to have such interests adjudicated by an international court, but if a State, by an international agreement, has bound itself to submit a dispute about a legal question to an international court, this has become a contractual obligation which may only be terminated under the recognized rules relating to the termination of treaty obligations. The assertion that vital interests of a nation

are at stake is not a recognized ground for terminating such an agreement. If both Parties were, *in 1961, of the opinion* that the International Court of Justice was the competent organ to adjudicate on Iceland's claim for an extended fisheries zone, there is no reason to assume that the International Court of Justice would not be equally competent today to adjudicate on this question and to take account of the legitimate interests of both Parties.

I therefore respectfully submit that the Government of Iceland cannot invoke changed circumstances, or vital interests, as a ground for terminating its obligation under paragraph 5 of the Exchange of Notes of 1961, by which it has accepted the Court's jurisdiction.

In addition to these principal observations with respect to changed circumstances I would like to make some comments on the procedural situation when a State wishes to invoke changed circumstances, but does not appear before the Court. Such legal grounds, the facts of which do not appear on the face of the documentary evidence before the Court, should be formally pleaded and supplemented by the necessary factual evidence in the proper form as prescribed by the Rules of Court. Moreover, the assertion of changed circumstances does not, *ipso facto*, release the State invoking them from its treaty obligation unless it has been established, either by consent of the other party or by judicial or other settlement between the parties, that the changed circumstances are of such a kind which justify the release from existing treaty obligations. These procedural requirements presuppose that the Government of Iceland, if it wishes to invoke changed circumstances as a ground for terminating the 1961 Agreement, should have come to the Court and argued this point in fact and in law.

These last remarks conclude my comments on the four main arguments which have been brought forward by the Government of Iceland against the validity and continuing applicability of the compromissory clause contained in paragraph 5 of the Exchange of Notes. I hope to have convinced the Court that the arguments of the Government of Iceland against the jurisdiction of the Court are unfounded in fact and law, and that paragraph 5 of the Exchange of Notes of 1961 is a valid legal basis for the Court's jurisdiction.

The Federal Republic, not being a party to the Statute of the Court, has, by its declaration of 29 October 1971 addressed to the Court, accepted the jurisdiction of the Court *ratione personae* and thereby fulfilled the conditions prescribed under Article 35, paragraph 2, of the Statute, to be a party before the Court, and to ask the Court to entertain its Application filed in the Court on 5 June 1972 in the present case.

I would like to add some remarks in order to show that the subject-matter of the dispute submitted by the Application of the Federal Republic of Germany keeps strictly within the scope of the jurisdiction of the Court, as defined in paragraph 5 of the Exchange of Notes of 1961. I should recall that according to the terms of that provision the jurisdiction of the Court covers all disputes relating to an extension by Iceland of its fisheries jurisdiction over the adjacent waters above its continental shelf beyond the 12-mile limit. Disputes relating to such an extension of the fisheries jurisdiction are those which arise from any measure by which the Government of Iceland purports to exercise jurisdictional rights or powers over fishing activities in the waters beyond the 12-mile limit. Scope and intensity of this jurisdiction, which may give rise to disputes, are of secondary importance; the jurisdictional claim may vary as to the width of the zone in which Iceland attempts to exercise jurisdiction, as well as to the scope of the rights and powers which Iceland attempts to exercise therein. Iceland's jurisdictional claim may amount to a

claim for exclusive fishing rights in the extended zone, or may be confined to a claim for preferential fishing rights only. It may also consist in the enactment and enforcement of discriminatory or non-discriminatory conservation measures. Any such measure constitutes an extension of jurisdiction in the sense of paragraph 5 of the Exchange of Notes and, whenever such extension or the modalities of such extension give rise to a dispute between the Federal Republic of Germany and Iceland, the Court has jurisdiction to deal with this dispute on the application of either Party.

The Government of Iceland now claims an exclusive fisheries zone of 50 nautical miles; it has, by the Regulations issued on 14 July 1972, extended its jurisdiction to this zone by prohibiting all foreign fishing activities in this zone, and has, in fact, attempted to enforce this prohibition against the fishing vessels of the Federal Republic of Germany in this zone. The Government of the Federal Republic of Germany is of the opinion that this unilateral action of Iceland is contrary to international law, and is therefore without any legal effect vis-à-vis the Federal Republic of Germany and its fishing vessels which traditionally fish in these waters of the high seas. Thus a dispute has arisen from the unilateral extension by Iceland of its fisheries jurisdiction which undoubtedly falls within the scope of paragraph 5 of the Exchange of Notes of 1961. After repeated, but unsuccessful efforts to come to a negotiated settlement, this dispute still persists. The Federal Republic of Germany stands ready at any time to continue meaningful conversations with the Icelandic Government, in order to reach a settlement which takes account of the interests of both Parties. In the meantime, however, the Government of the Federal Republic has no other choice than to ask the Court to exercise its jurisdiction and to entertain the Application of the Federal Republic of Germany.

The subject-matter of the Application of the Federal Republic of Germany, and in particular the submissions contained in paragraph 21 of the Application of 5 June 1972, keep strictly within the scope of the jurisdiction of the Court which I have just defined:

The *first* submission asks the Court to adjudge and declare that the unilateral extension by Iceland of its fisheries jurisdiction to 50 nautical miles has no foundation in international law, and cannot therefore be opposed to the Federal Republic of Germany and its fishing vessels. The question of the legality of the Icelandic action under international law and the legal consequences of such action, if it is unlawful, are clearly questions which relate to the extension of Iceland's fisheries jurisdiction. Consequently, this submission keeps within the scope of the Court's jurisdiction under paragraph 5 of the Exchange of Notes of 1961.

The *second* submission asks the Court to adjudge and declare that conservation measures, if considered necessary by Iceland in the waters of the high seas adjacent to its coast, may not be taken, as far as they purport to affect also the fisheries of the Federal Republic of Germany, by a unilateral extension of Iceland's fisheries jurisdiction, but only on the basis of an agreement with the Federal Republic, either bilaterally or within a multilateral arrangement. Here again the question of the legality of the extension of Iceland's fisheries jurisdiction and the conditions under which such action, if necessary for conservation purposes, might eventually lawfully be taken, are submitted to the Court for decision. It cannot be denied that these questions too are intimately "related" to the extension of Iceland's fisheries jurisdiction. Consequently, the second submission also keeps within the scope of the Court's jurisdiction of the Exchange of Notes of 1961.

The Government of the Federal Republic reserves its right to make appropriate supplementary submissions with respect to the illegal acts which the Government of Iceland has already taken, or may take in the future against fishing vessels of the Federal Republic of Germany in its attempt to extend its jurisdiction beyond the 12-mile limit.

If I may summarize the arguments of the Government of the Federal Republic of Germany with respect to the jurisdiction of the Court, they can be summed up as follows: *First*, paragraph 5 of the Exchange of Notes of 19 July 1961 constitutes a valid and binding agreement which has conferred jurisdiction upon the Court with respect to any dispute between the Parties relating to the extension by Iceland of its fisheries jurisdiction beyond the 12-mile limit. *Second*, the various arguments of the Government of Iceland that the agreement contained in paragraph 5 of the Exchange of Notes of 1961 had been void *ab initio*, or were no longer applicable, or had validly been terminated before the institution of the proceedings, are unfounded in fact and law. *Third*, the assertion of the Government of Iceland that the subject-matter of the dispute affected vital interests of the Icelandic nation does not exclude or limit the jurisdiction conferred upon the Court by paragraph 5 of the Exchange of Notes of 1961. *Fourth*, the subject-matter of the dispute submitted to the Court by the Application of the Federal Republic of Germany on 5 June 1972, and in particular the submissions contained in paragraph 21 of this Application, fall within the scope of the jurisdiction of the Court as defined in paragraph 5 of the Exchange of Notes of 1961.

This leads to the conclusion that paragraph 5 of the Exchange of Notes of 19 July 1972 remains applicable between the Parties, and that it forms, together with the declaration of the Federal Republic of Germany of 29 October 1971 accepting the jurisdiction of the Court *ratione personae* required for non-members of the Statute by the United Nations Security Council resolution of 15 October 1946, the legal basis of the Court's jurisdiction in the present case.

On behalf of the Government of the Federal Republic of Germany I therefore respectfully request the Court to adjudge and declare: That the Court has full jurisdiction to entertain the Application submitted by the Federal Republic of Germany on 5 June 1972 and to deal with the merits of the case.

Mr. President and Members of the Court, the Court will be well aware of the grave importance of the decision on its jurisdiction which goes beyond the particular issue in the present dispute. It will have a widely felt influence on the prospects of international judicial settlement. The jurisdiction issue in the present case poses the more general question: how much reliance can be placed on an international agreement by which States have agreed to settle their disputes by submitting them to an international court? What would be the consequences if a State which originally had accepted the jurisdiction of the Court for a certain dispute would subsequently be allowed to denounce its commitment unilaterally the moment this State happens to come to the conclusion that the decision of the Court might turn out to be unfavourable to its policy?

In view of the general obligation of States, embodied in Article 33 of the United Nations Charter, to settle their disputes by peaceful means, the binding character of a treaty obligation to accept the jurisdiction of the International Court of Justice deserves special respect. This, Mr. President, concludes my oral argument on behalf of the Federal Republic of Germany, with respect to the jurisdiction of the Court.

The PRESIDENT: I thank the Agent for the Government of the Federal Republic of Germany for the assistance he has given the Court, and I request him to remain at the disposal of the Court for any further information it may require. With that reservation, I declare the oral proceedings on the question of the jurisdiction of the Court to entertain the dispute in this case closed. The Parties will be informed in due course of the date on which the Court's judgment will be delivered.

The Court rose at 4.40 p.m.

FOURTH PUBLIC SITTING (2 II 73, 11.15 a.m.)

Present: [See sitting of 8 I 73.]

READING OF THE JUDGMENT

The PRESIDENT: The Court meets now to deliver its Judgment on the question of its jurisdiction in the *Fisheries Jurisdiction* case instituted by the Federal Republic of Germany against the Republic of Iceland by Application filed on 5 June 1972.

The Parties were duly notified of the present sitting, in accordance with Article 58 of the Statute; I note the presence in Court of the Agent and counsel for the Federal Republic.

I shall now read the English text of the Judgment of the Court on the question of its jurisdiction.

[The President reads from paragraph 12 to the end of the Judgment [1].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[The Registrar reads the operative clause in French [2].]

I myself append a declaration to the Judgment. Judge Sir Gerald Fitzmaurice appends a separate opinion to the Judgment. Judge Padilla Nervo appends a dissenting opinion to the Judgment.

In order to avoid the delay involved in printing the Judgment, particularly in view of the fact that the composition of the Court will be altered in a few days' time, it has been decided to read the Judgment today from a stencil-duplicated text. The normal printed edition will be available in about a week's time.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

---

[1] *I.C.J. Reports 1973*, pp. 54-66.
[2] *Ibid.*, p. 66.