DISSENTING OPINION OF JUDGE PADILLA NERVO

I cannot concur in the Judgment of the Court in the present proceedings.

I am unable to agree with the manner and reasoning through which the Court easily disposed of and rejected the objections and *arguments* raised against its jurisdiction to deal with the merits of the Application.

The Court might give the impression by the development of too dogmatic and formalistic assertions that its main concern has been the search for juridical foundations to justify a previously admitted premise of somewhat axiomatic character.

That of course is not the case, but, in my view, the objections raised have not been answered convincingly.

The formulation of general principles and the invocation of a settled practice of the Court regarding certain issues in former decisions, do not necessarily solve the problem in a case like the present one, which has exceptional characteristics and very special features, and where jurisdiction and merits are interdependent from several points of view.

All these circumstances were in fact apparent in the *Fisheries Jurisdiction* case, *Interim Protection, Order of 17 August 1972.* The views I then expressed are still valid now.

In the present proceedings a judgment is given regarding a State which denies its consent to jurisdiction of the Court, which is not a party to such proceedings, and whose rights as a sovereign State are placed in jeopardy.

The claim of the Republic of Iceland to extend its fisheries jurisdiction to a zone of 50 nautical miles around Iceland, has not been proved to be contrary to international law.

The Court relies mainly as a source of its jurisdiction on the Exchange of Notes of 19 July 1961, an agreement which the Republic of Iceland contends has fully achieved its purpose and object, and the provisions of which it considers no longer to be applicable and, consequently, terminated.

The Minister for Foreign Affairs of Iceland sent to the Registrar on 27 June 1972 a letter regarding the filing on 5 June 1972 of an Application by the Government of the Federal Republic of Germany, instituting proceedings against Iceland.

With that letter were sent several documents dealing with the background and termination of the agreement of 19 July 1961, and "with the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland".

The letter refers to the dispute with the Federal Republic who opposed the 12-mile fishery limit established by the Icelandic Government in 1958, and to the 1961 Exchange of Notes.

Iceland states that "the 1961 Exchange of Notes took place under extremely difficult circumstances".

Paragraph 5 of the Application by the Federal Republic instituting proceedings refers to—

> ". . . incidents involving, on the one hand, Icelandic coastguard vessels and, on the other hand, British fishing vessels and fisheries protection vessels of the Royal Navy of the United Kingdom".

It appears from the above-quoted statements, that such circumstances were not the most appropriate to negotiate and conclude the 1961 Agreement. The Foreign Minister of Iceland further indicates:

> "The agreement by which that dispute was settled, and consequently the possibility of such recourse to the Court (to which the Government of Iceland was consistently opposed as far as concerns disputes over the extent of its exclusive fisheries jurisdiction), was not of a permanent nature. In particular, an undertaking for judicial settlement cannot be considered to be of a permanent nature. There is nothing in that situation, or in any general rule of contemporary international law, to justify any other view.
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> . . . . . .
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> After the termination of the agreement recorded in the Exchange of Notes of 1961, there was on 5 June 1972 no basis under the Statute for the Court to exercise jurisdiction in the case to which the Government of the Federal Republic refers.
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> The Government of Iceland, considering that the vital interests of the people of Iceland are involved, respectfully informs the Court that it is not willing to confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland, and specifically in the case sought to be instituted by the Government of the Federal Republic of Germany on 5 June 1972."

The Exchange of Notes on which the Application founds the jurisdiction of the Court, dated 19 July 1961, makes reference to the Resolution of the Parliament of Iceland of 5 May 1959, which declared that a recognition of the rights of Iceland to fisheries limits *extending to the whole continental shelf* "should be sought".

In the Note of 19 July 1961 it is stated that: "The Icelandic Govern-

ment shall continue to work for the *implementation* of the Althing Resolution of 5 May 1959 regarding the *extension* of the fishery jurisdiction of Iceland . . ." (italics added).

The claim of Iceland that its continental shelf must be considered to be a part of the country itself, has support in the Convention on this subject, done at Geneva on 29 April 1958.

This Court, in its Judgment of 20 February 1969, stated:

> ". . . the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, . . . namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent." (*I.C.J. Reports 1969*, p. 22, para. 19.)

The Government of Iceland in its information and documents sent to the Court, has given well-founded reasons and explanations of its sovereign right to extend its fisheries jurisdiction to the entire continental shelf area.

The coastal fisheries in Iceland have always been the foundation of the country's economy.

The coastal fisheries are the *conditio sine qua non* for the Icelandic economy; without them the country would not have been habitable.

Iceland rests on a platform or continental shelf whose outlines follow those of the country itself. In these shallow underwater terraces, ideal conditions are found for spawning areas and nursery grounds upon whose preservation and utilization the livelihood of the nation depends. It is increasingly being recognized that coastal fisheries are based on the special conditions prevailing in the coastal areas which provide the necessary environment for the fishstocks. This environment is an integral part of the natural resources of the coastal State.

The continental shelf is really the platform of the country and must be considered to be a part of the country itself.

The vital interests of the Icelandic people are therefore at stake. They must be protected.

The priority position of the coastal State has then always been recognized through the system of fishery limits. In the past these limits have to a great extent not been established with any regard to the interests of the coastal State. They owe their origin rather to the preponderant influence of distant water fishery nations, who wished to fish as close as possible to the shores of other nations, frequently destroying one area and then proceeding to another.

In a system of progressive development of international law the question of fishery limits has to be reconsidered in terms of the protection and utilization of coastal resources regardless of other considerations which apply to the extent of the territorial sea. The international community has increasingly recognized that the coastal fishery resources are to be considered as a part of the natural resources of the coastal State. The special situation of countries who are overwhelmingly dependent on coastal fisheries, was generally recognized at both Geneva Conferences in 1958 and 1960. Since then this view has found frequent expression both in the legislation of various countries and in important political statements. The course of events is decidedly progressing in this direction.

Reiterating the considerations which led the Government of Iceland to issue new regulations relating to exclusive fisheries jurisdiction in the continental shelf area, it stated the following:

> "In the aide-mémoire of 31 August 1971 it was intimated that 'in order to strengthen the measures of protection essential to safeguard the vital interests of the Icelandic People in the seas surrounding its coasts, the Government of Iceland now finds it essential to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the areas of sea covering the continental shelf'. It was further stated that in the opinion of the Icelandic Government, the object and purpose of the provisions in the 1961 Exchange of Notes for recourse to judicial settlement in certain eventualities have been fully achieved. The Government of Iceland, therefore, considers the provisions of the Notes exchanged no longer to be applicable and consequently terminated." (Government of Iceland's aide-mémoire of 24 February 1972, Annex H to Application of the Federal Republic).
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> "In the period of ten years which has elapsed, the Government of the Federal Republic 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.* Continuation of that policy by the Icelandic Government, in the light of intervening scientific and

> economic evolution (including the ever greater threat of increased diversion of highly developed fishing effort to the Icelandic area) has become excessively onerous and unacceptable, and is harmful to the maintenance of the resources of the sea on which the livelihood of the Icelandic people depends." (Italics added.) (Government of Iceland's aide-mémoire of 31 August 1971, Annex D to Application of the Federal Republic.)

Not only Iceland but many coastal States in all regions of the world know by experience the harmful effects of the ever greater threat of highly developed fishing effort near their shores, by foreign fishing fleets equipped—like the modern trawlers of the Federal Republic of Germany—with *sophisticated technical gear.* Technical progress in this field implies a change of circumstances which may fundamentally change the former situation.

In the Exchange of Notes of 19 July 1961, the agreement *already envisaged* the prospect that the Republic of Iceland would extend the fisheries jurisdiction beyond the 12-mile limit.

If it is contrary to international law to envisage such extension, the United Kingdom and the Federal Republic of Germany would not have accepted the inclusion of such statement in the formal Exchange of Notes.

There is in such Exchange of Notes an implicit recognition of the right of Iceland to extend its fisheries jurisdiction.

The Federal Republic of Germany, in view of its recognition of the exceptional importance of coastal fisheries to the Icelandic economy, *accepted* the proposals put forward by the Government of Iceland, among them, the proposal contained in paragraph 5, which states that "the Government 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" (italics added), which declares that a recognition of its rights to the whole continental shelf should be sought, as provided in the Law concerning the Scientific Conservation of the Continental Shelf Fisheries of 1948.

The Federal Republic did not object to the existence of such rights; it accepted the proposal which contained as counterpart or consideration the obligation of Iceland to give six months' notice of any such extension.

If a dispute did arise in respect of such extension, it would not affect the previous implicit recognition of Iceland's right to extend its fisheries jurisdiction.

The most essential asset of coastal States is to be found in the living resources of the sea covering their continental shelf and in the fishing zone contiguous to their territorial sea.

The progressive development of international law entails the recogni-

tion of the concept of the *patrimonial* sea, which extends from the territorial waters to a distance fixed by the coastal State concerned, in exercise of its sovereign rights, for the purpose of protecting the resources on which its economic development and the livelihood of its people depends.

This concept is not a new one. It has found expression in declarations by many governments proclaiming as their international maritime policy, their sovereignty and exclusive fisheries jurisdiction over the sea contiguous to their shores.

There are nine States which have adopted a distance of 200 nautical miles from their shores as their exclusive fisheries jurisdiction. Some of them have enacted and enforced regulations to that effect since 20 years ago, when the "Santiago Declaration" was signed by the Governments of Chile, Ecuador and Peru in August 1952.

The text of the Notes dated 19 July 1961 is susceptible of different interpretations as regards its duration, its purpose, and the obligations it contains.

The compromissory clause cannot be said to be of a permanent nature, or one binding Iceland for ever to freeze its fisheries jurisdiction to the 12-mile limit.

If the *object* and purpose of the provision to recourse to judicial settlement has been fully achieved and validly terminated, there would be no basis in that provision for the jurisdiction of the Court—and that is in my opinion the case.

There are many valid arguments and reasons in favour of the Icelandic thesis to the effect that the Exchange of Notes has *lapsed.*

Since the Exchange of Notes was negotiated, a fundamental change of circumstances has taken place, and new customary international rules and norms have emerged and developed, permitting coastal States to claim fisheries jurisdiction over the waters covering their continental shelves.

At the present time (and since the two Conferences on the Law of the Sea took place) it has been a universal understanding that any coastal State has the right to extend to a distance of 12 miles its territorial waters. Many States have adopted that limit, including the Federal Republic of Germany. Iceland could not be legally bound to pay the price or *quid pro quo* for the recognition of its own right. But it is more important that with respect to exclusive or preferential rights regarding fisheries in waters beyond the territorial sea, many States in America have claimed jurisdiction to a distance of 200 nautical miles from their shores. In other regions several States have made similar claims and new norms have been adopted in that respect. Senegal, by a law dated 19 April 1972, claimed jurisdiction to a distance of 110 nautical miles beyond the limit of its territorial sea.

Other instances regarding the emerging of new norms may be found in the Conclusions and Recommendations of the African States' Regional Seminar on the Law of the Sea, among which is the following:

> "The Participants: Recommend to African States to extend their sovereignty over all the resources of the high sea adjacent to their Territorial Sea within an economic zone to be established and which will include at least the continental shelf.
>
> Call upon all African States to uphold the principle of this extension at the next International Conference on the Law of the Sea."

In paragraph 5 of the Exchange of Notes it was stated that Iceland will go on working for the implementation of the Althing Resolution. The admission of such a statement meant an implicit recognition that if and when Iceland were to do so, no violation of international law would take place.

The interest of the Government of Iceland in seeking the recognition of its rights to fisheries limits extending to the whole continental shelf is a continuous and permanent interest as affecting its own sovereignty and is an interest which will be fortified each day by the will and resolve of the people of Iceland and will endure for ever as the country itself. The aim, the intention and the purpose of Iceland's claim to exclusive fishery rights over its entire continental shelf area was asserted since 1959 and in the 1961 Exchange of Notes such a claim was recognized to exist. In my view Iceland's right to seek the implementation of the Althing Resolution cannot be denied.

I cannot subscribe therefore to the assertion in the Judgment that the right of the Federal Republic of Germany to challenge such an extension would last "so long as Iceland might seek to implement the Althing Resolution".

The consequence appears to be (theoretically) that the right of the Federal Republic to invoke the Court's jurisdiction in this matter would last for ever, regardless of fundamental changes of circumstances, the emerging of new customary norms, and other factors which challenge the actual validity of the so-called "compromissory clause".

On 29 September 1972, in the general debate of the United Nations General Assembly, the Foreign Minister of Iceland said, with reference to the proceedings instituted by the United Kingdom:

> "My Government's view is that the absence of jurisdiction is manifest since its consent no longer existed when the proceedings were sought to be instituted" (italics added) (Art. 34, Vienna Convention).

It may be concluded, therefore, that the circumstances existing in 1961 when the Exchange of Notes took place, have changed in many fundamental respects, which Iceland has validly invoked to sustain that the agreement is no longer in force.

In the last decades great changes have taken place in the political, social, economic and technical fields. The need to strike a fair balance between strong and weak nations, between industrial countries and those in the course of development, is each day more urgent.

The struggle for freedom and self-determination of dependent peoples has been successful. Many new States are now giving fresh views, force and co-operation to the community of nations.

The struggle to assert their sovereign rights over the natural resources belonging to them, is a common denominator among the coastal States the world over.

Old practices and unfair so-called traditional situations have already ended or will soon disappear. The need and the will to liquidate the unjust privileges obtained through the assertion of superior strength, is each day more pressing. These facts have created new circumstances producing new changes.

Emerging customary laws on the problems of the sea have found expression in many political statements, in declarations of governments, in laws and regulations implemented by coastal States in many parts of the world, for the purpose of asserting their sovereign rights and jurisdiction not only over their territorial sea but over the waters covering their continental shelves.

In international regional conferences, important declarations of principles were proclaimed, which advance the progressive development of the law of the sea.

The concepts and ideas which found new expression in the adoption of such principles were prevalent among jurists and statesmen in America more than two decades ago. Those principles apply to the situation of other coastal States in other continents as well, and Iceland could not be excluded.

The Specialized Conference of the Caribbean Countries formulated a Declaration of Principles; some of them are quoted below because of their relevance to the points in issue:

> "*Recalling:* That the International American Conferences held in Bogotá in 1948, and in Caracas in 1954, recognized that the peoples of the Americas depend on the natural resources as a means of subsistence, and proclaimed the right to protect, conserve and develop those resources, as well as the right to ensure their use and utilization.
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> That the 'Principles of Mexico on the Legal Régime of the Sea'

which were adopted in 1956 and which were recognized 'as the expression of the juridical conscience of the Continent and as applicable, by the American States', established the basis for the evolution of the Law of the Sea which culminated, that year, with the annunciation by the Specialized Conference in the Capital of the Dominican Republic, of concepts which deserved endorsement by the United Nations Conference on the Law of the Sea, Geneva, 1958.

Considering: . . . That the renewable and non-renewable resources of the sea contribute to improve the standard of living of the developing countries and to stimulate and accelerate their progress;

That such resources are not inexhaustible since even the living species may be depleted or extinguished as a consequence of irrational exploitation or pollution; . . .

Formulate the following Declaration of Principles:

Territorial Sea . . . The breadth of the territorial sea and the manner of its delimitation should be the subject of an international agreement, preferably of a worldwide scope. In the meantime, each State has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles to be measured from the applicable baseline . . .

Patrimonial Sea. The coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the *patrimonial sea.*

The coastal State has the duty to promote and the right to regulate the conduct of scientific research within the patrimonial sea, as well as the right to adopt the necessary measures to prevent marine pollution and *to ensure its sovereignty over the resources of the area.*

The breadth of this zone should be the subject of an international agreement, preferably of a worldwide scope. The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of *200* nautical miles . . .

Continental Shelf. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

The continental shelf includes the sea-bed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas.

In addition, the States participating in this Conference consider

that the Latin American Delegations in the Committee on the Sea-bed and Ocean Floor of the United Nations should promote a study concerning the advisability and timing for the establishment of precise outer limits of the continental shelf taking into account the outer limits of the continental rise.

In that part of the continental shelf covered by the patrimonial sea the legal régime provided for this area shall apply. With respect to the part beyond the patrimonial sea, the régime established for the continental shelf by International Law shall apply." (Italics added.)

The obligation to negotiate is a principle of general international law. The Federal Republic of Germany and Iceland agreed to negotiate with the aim of arriving at an agreement by peaceful means. There were many reasonable offers by Iceland during the negotiations. If the Federal Republic wanted more concessions and unilaterally stopped the negotiating process, by instituting proceedings before the Court, that does not mean that agreement by negotiation was impossible and that all efforts in that direction should be abandoned.

The Federal Republic of Germany sent to the Court information regarding the proposals made by Iceland during their negotiations for a provisional agreement.

No objection was then made by the Federal Republic to the right of Iceland to exercise jurisdiction over fishing areas inside the 50-mile limit. The Federal Republic does not dispute the right of Iceland to impose restrictions and to establish conditions according to which vessels registered in the Federal Republic could be permitted to fish in the waters claimed by Iceland in implementation of the Althing's Resolution.

In examining the first specific Icelandic proposal made in the course of negotiations, the Federal Republic did not argue that it was contrary to international law to claim jurisdiction over waters beyond the 12-mile limit. The Federal Republic objected to the nature of the proposed restrictions and their effects on the German vessels' *catch* of fish. Iceland proposed that the arrangement should run until the end of 1973. In this respect the Federal Republic informed the Court that the restrictions proposed by Iceland "would in their combination result in a drastic reduction of the amount of annual catches of fishing vessels of the Federal Republic of Germany to approximately only 20 per cent. of the actual annual catches".

Instead of continuing negotiation, the Federal Republic by its Application to the Court and by requesting measures of protection expected Iceland to give way to its demands in circumstances as difficult as those which prevailed when the Exchange of Notes of 19 July 1961 put an

end to the opposition of the Federal Republic to the 12-mile fishery limit.

The very fact of negotiating an arrangement which will allow the United Kingdom and the Federal Republic of Germany to fish in certain areas within the 50-mile zone of Iceland's fishery jurisdiction, is an explicit recognition of the right of Iceland to extend its fishery limit and is an implicit admission that *such extension is not contrary to international law*, because the right to do it either exists or does not exist, but cannot be the subject of bilateral negotiation. If such extension was encroachment on the freedom of the high seas, the consent of the Federal Republic of Germany cannot make legal an illegal act, nor can its *consent* determine what extension of the so-called "high seas" Iceland may take—12 nautical miles in 1961 and 50 nautical miles now, provided that the Federal Republic gives its consent and a bilateral agreement is concluded to that effect.

The assertion that the 1961 Exchange of Notes took place under extremely difficult circumstances is not denied (para. 5 of the Application of the Federal Republic of Germany). The Court should not overlook that fact, and does not need to request documentary evidence as to the kind, shape and manner of force which was used (Art. 52, Vienna Convention on the Law of Treaties).

A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting in having its view recognized and accepted. It is well known by professors, jurists and diplomats acquainted with international relations and foreign policies, that certain "Notes" delivered by the government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force.

There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda.*

(Signed) Luis PADILLA NERVO.