DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

To my regret, I have found it necessary to vote against the Judgment as a whole, and I therefore append this dissenting opinion.

In the present case, as in the parallel case concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, the essential question before the Court is whether the extension by Iceland, as from 1 September 1972, of its zone of exclusive fisheries jurisdiction from the 12-mile to the 50-mile limit is well founded in international law. The parallelism between the two cases also extends to the source of the Court's jurisdiction, which in either case can only be sought in the agreement concluded between the Parties in 1961; what is more, the passages concerning jurisdiction in the Notes exchanged in 1961 are identical in either case. Though the cases were not joined, as I would have thought desirable, I may surely be permitted a broad reference to my dissenting opinion in the proceedings instituted against Iceland by the United Kingdom. As in that other case, and for the same reasons, I find: *(a)* that, in not ruling upon the conformity or otherwise of the extension of Iceland's fishery zone with international law, the Court has failed to fulfil the task incumbent upon it; *(b)* that, in devoting the Judgment to questions of preferential and historic rights and to questions of measures of conservation, the Court has exceeded the strictly limited jurisdiction conferred upon it by the 1961 agreement.

For the reasons indicated in my dissenting opinion in the other case, I consider that when Iceland extended its fishery zone it did so contrary to the prevailing international law. Yet it is clear from the reasoning of the present Judgment that the first part of its operative clause, in finding that the unilateral extension of Iceland's exclusive fishery rights is not opposable to the Federal Republic of Germany, is based entirely on considerations concerning the historic rights of the Federal Republic, and that the Court has deliberately avoided the adoption of any position on the question of the conformity of the extension of the fishery zone with international law. That being so, I was obviously unable to vote for that part of the operative clause.

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In the following part of the operative clause, subparagraphs 3 and 4, the Court, without the consent of Iceland, imposes upon the Parties the obligation to negotiate between themselves for the solution (which must include a conservation régime) of their differences concerning their

respective fishery rights beyond the 12-mile limit. As in my opinion the Court has exceeded its jurisdiction in hinging its Judgment on the establishment of a régime of preferential and historic rights and conservation measures, the creation of a duty to negotiate for the establishment of such a régime, coupled with an obligation to succeed, is *a fortiori*, in my view, *ultra vires*.

The Court observes in paragraph 70 that the interim measures which it indicated in the present case on 17 August 1972 cease to have effect as from the date of the Judgment, as an inevitable consequence of the provisions of Article 41 of the Statute. The Court then declares that the negotiations ordered in the Judgment involve in the circumstances of the case an obligation upon the Parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations. Now it is self-evident that States have the obligation to respect the rights of other States, and there would be no point in stating as much in a judgment unless the creation or definition of new rights was in contemplation. If it was the Court's intention to impose on the Parties, by way of replacement for the expired interim measures, the obligation of observing certain restraints in their fishing activities during the negotiations, it should have made this clear in the operative clause of the Judgment and not have confined itself to a vague sentence in the reasoning. But what this passage, to my mind, really signifies is something entirely different. It must be seen as symptomatic of the fact that, by the logic of the Judgment, the Court must be considered to possess, until the final settlement of the present dispute, a continuing jurisdiction over the whole of the relations between the Parties so far as fisheries in the belt between the 12-mile and 50-mile limits are concerned. In my view, no basis for such jurisdiction can be found in the 1961 agreement.

On the same part of the operative clause of the Judgment I venture to make one observation which follows on from those I have made in my opinion in the other case. The Court imposes on the Parties the obligation to base their negotiations on a series of considerations within whose enumeration, seek as one may, one can find no answer to the primordial question as to whether the waters between the 12-mile and 50-mile limits are to be considered as part of Iceland's fishery zone. Little imagination is needed to realize that any persistent disagreement on this point could condemn the negotiations to deadlock from the start. The remaining lifespan which the Federal Republic may claim for its historic rights depends, as the Judgment moreover admits in paragraph 61, on whether that question is answered affirmatively or negatively. Thus the procedural situation created by the present Judgment is embarrassing. The Application asked what was the legal status of the fishing waters in dispute; the Court, although it formed part of its judicial functions to answer this question, avoided doing so, and the Parties now find themselves enjoined to undertake negotiations for which a reply on that point is a prerequisite. I find it doubtful that negotiations imposed in such conditions would succeed.

Such are the reasons why I found myself obliged to vote against the second part of the operative clause.

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There remains the third and last part of the operative clause, sub-paragraph 5, concerning the fourth final submission requesting the Court to adjudge and declare that the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany.

This claim, which appeared in the Federal Republic's Memorial on the merits, was not included in the Application instituting proceedings filed in the Registry on 5 June 1972. In its Judgment of 2 February 1973, the Court found that it had jurisdiction to entertain the Application and to deal with the merits of the case. That Judgment was based entirely upon paragraph 5 of the Exchange of Notes of 1961, which 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 an extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

The point at issue is therefore whether the phrase "a dispute relating to such an extension" signifies that it is not only the question whether a future extension of Iceland's fishery jurisdiction is in conformity with international law that may be referred to the Court, but also such supplementary questions as the present compensation claim. Even in the affirmative, it would still be necessary that the Court's finding that it possessed jurisdiction to entertain the Application and deal with the merits of the dispute should further imply that the Court may adjudicate upon an additional claim concerning incidents subsequent to the filing of the Application. This question is all the more delicate in the present case because the respondent Party has chosen not to be represented before the Court and the situation calls for the application of Article 53 of the Statute.

Iceland's acceptance of the Court's jurisdiction was exceptional in character. It is plain that the Government of Iceland meant it to be strictly limited to the question of whether the next step in the extension of Iceland's fishery zone would be in conformity with international law. Considering the atmosphere in which the 1961 agreement was negotiated,

it may be supposed that the Government of the Federal Republic was conscious of the Icelandic Government's attitude in this respect. It was at a moment when memories of the first "cod war" were still fresh that the Althing approved the two 1961 agreements with the United Kingdom and the Federal Republic respectively. Would it have done so if it had believed that it was at the same time accepting that any pecuniary dispute arising out of a future extension of the Iceland fishery zone should be referred to the Court? I think not, and therefore consider that the Federal Republic's compensation claim does not fall within the scope of the jurisdictional clause of the 1961 agreement. That being so, it is scarcely necessary for me to consider the consequences of the fact that this claim was mentioned neither in the Application instituting proceedings nor in the Judgment on jurisdiction.

The Court finds that it has jurisdiction to deal with the compensation claim, but finds that it is unable to "accede" to it for want of sufficient evidence. In my view, the Court ought not to have dismissed the submission in this way, for it did not afford the Federal Republic the opportunity to complete its documentation in the course of the oral proceedings, in conformity with Article 54 of the 1946 Rules of Court. The oral proceedings enable the Court, *inter alia*, to lead litigants by its questions to fill in the gaps in the presentation of their arguments, or even to withdraw part of their claims.

The last sentence of paragraph 76 of the Judgment seems to imply that if the Federal Republic revived its compensation claim the Court would be ready to consider it. Leaving aside all considerations of procedural law, I will confine myself to stating that, according to my interpretation of the 1961 agreement, it cannot be accorded so prolonged an effect.

It follows from the foregoing that I found it necessary to vote against the last part of the operative clause.

(Signed) S. PETRÉN.