Die einstweiligen Anordnungen des Internationalen Gerichtshofs im Fisheries Jurisdiction Case

Vorbemerkung[1])

Am 17. August 1972 hat der Internationale Gerichtshof (IGH) zwei einstweilige Anordnungen gemäß Art. 41 seines Statuts[2]) erlassen. Bisher haben StIGH und IGH von dieser Befugnis nur in wenigen Fällen Gebrauch gemacht[3]).

In allen diesen Fällen treten hauptsächlich fünf Probleme hervor, mit denen sich der Weltgerichtshof zu befassen hatte: 1. Zuständigkeit des Gerichtshofs, 2. Präjudizierung der Hauptsache, 3. Konnexität des Objekts der Anordnung mit dem der Hauptsache, 4. Dringlichkeit, 5. Verbindlichkeit und Durchsetzbarkeit der Anordnung. Wie der IGH in den vorliegenden Anordnungen[4]) sich mit diesen Hauptproblemen auseinandergesetzt hat, soll hier im Lichte der bisherigen Praxis der Haager Cour skizziert werden.

Bei einstweiligen Anordnungen auftretende weitere Fragen, die weniger kontrovers sind, werden hier nicht berücksichtigt, so die des Nichterscheinens einer Partei (§ 1).

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[1]) Fisheries Jurisdiction Case *Federal Republic of Germany* v. *Iceland*, Request for the indication of interim measures of protection, Order of 17 August 1972, I.C.J. Reports 1972, S. 30 ff., abgedruckt unten S. 570 ff.; und *United Kingdom* v. *Iceland*, Request for the indication of interim measures of protection, Order of 17 August 1972, I.C.J. Reports 1972, S. 12.

[2]) Art. 41: "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council".

[3]) StIGH A 8, 12, A/B 48, 54, 58, 79; IGH 1951, S. 89; 1957, S. 105.

[4]) Behandelt wird hier nur die in der Sache *Bundesrepublik Deutschland* gegen *Island* ergangene Anordnung; die Anordnung im Parallelfalle *Großbritannien* gegen *Island* ist praktisch übereinstimmend; das hier Gesagte gilt also auch für sie. Im folgenden bedeutet § mit Ziffer ohne Zusatz die fortlaufende Bezifferung in der Anordnung des IGH vom 17. 8. 1972 im Falle *BRD* gegen *Island;* Seiten ohne Zusatz verweisen auf die Paginierung von I.C.J. Reports 1972.

Den Streitgegenstand der Hauptsache, ohne dessen Kenntnis die Anordnung nicht verständlich ist, bildet die Frage, ob die von Island zum 1. September 1972 beschlossene Ausdehnung seiner ausschließlichen Fischereizone von 12 auf 50 Seemeilen rechtmäßig ist. Die Bundesrepublik Deutschland verneint dies auf Grund des § 5 ihres Notenwechsels mit Island vom 19. Juli 1961 (§ 17). Island hingegen hatte in einer Regierungserklärung vom 15. Februar 1972[5]) diesen Notenwechsel durch Zweckerreichung für hinfällig *(no longer applicable and consequently terminated)* erklärt und hält somit den IGH für in der Sache unzuständig.

Mit dem Antrag auf einstweilige Anordnung erstrebt die BRD im wesentlichen, bis zum Erlaß des Urteils in der Hauptsache den *status quo ante* zu wahren, d. h. weiterhin auch in dem Gebiet zwischen 12 und 50 Seemeilen um Islands Küsten Fischfang betreiben zu können (vgl. § 1). Island beschränkte sich darauf, die Zuständigkeit des IGH auch für die einstweilige Anordnung zu bestreiten (§ 5).

1. Das Zusammentreffen einer Zuständigkeitseinrede mit einem Antrag auf einstweilige Anordnung ist ein den IGH nicht zum ersten Mal[6]) beschäftigendes Problem: Einerseits kann im summarischen Verfahren die Zuständigkeitsfrage nicht abschließend geprüft werden; andererseits wäre ein Tätigwerden eines internationalen Gerichts ohne Zuständigkeit ein *excès de pouvoir*. Die Zuständigkeit aber besteht nur insoweit, wie sie von den Parteien anerkannt worden ist. Zwischen diesen beiden Extremen hat die Cour eine befriedigende Lösung zu finden. Ihre ständige Rechtsprechung besagt, daß eine einstweilige Anordnung ohne Entscheidung über die Zuständigkeit in der Hauptsache zulässig und nur bei evidentem Fehlen dieser Zuständigkeit unzulässig ist[7]).

Bei Vorliegen einer allgemeinen Unterwerfungserklärung wie hier im Notenwechsel zwischen BRD und Island sei ein evidentes Fehlen der Zuständigkeit zu verneinen. Zu dieser Praxis bekennt sich der IGH auch hier (§ 16). In der knappen Erläuterung hierzu (§§ 17, 18), in der er betont, daß der Notenwechsel als zweiseitiges Abkommen *prima facie* für die Zuständigkeit des IGH spreche, scheint der IGH jedoch einen Schritt in die Richtung der Meinung zu machen, die bisher bei allen Zuständigkeitsfragen im Rahmen einstweiliger Anordnungen von der Mehrzahl der dissentierenden Richter vertreten wurde, wie auch im vorliegenden Fall von Richter Padilla Nervo, der sich ausdrücklich auf vorhergehende abweichende

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[5]) International Legal Materials Bd. XI Nr. 3, May 1972, S. 643.
[6]) Vgl. StIGH A 8, A/B 79; IGH 1951, S. 89, und 1957, S. 105.
[7]) StIGH A 8, S. 7; IGH 1951, S. 92 f., 1957, S. 111.

Meinungen beruft (S. 38, unten S. 577). Diese auch in der Doktrin[8]) weitverbreitete Meinung sagt, daß eine Trennung der Frage der Zuständigkeit von einstweiligen Anordnungen unzulässig sei, daß vielmehr die Vorausprüfung der Zuständigkeit in der Hauptsache schon im Verfahren der einstweiligen Verfügung soweit erfolgen müsse, daß der Gerichtshof zum Ergebnis komme, daß *prima facie* seine Zuständigkeit gegeben sei; hierfür genüge nicht, daß der IGH seine Unzuständigkeit *prima facie* verneint[9]).

Zwar kann man die genannte Ausführung des IGH noch nicht als einen Wandel in der Auffassung ansehen, jedoch liegt darin zumindest eine Annäherung an diese Meinung, die damit begründet wird, daß Art. 41 des Statuts von »Parteien« spricht und außerdem in dem Abschnitt »Verfahren« zu finden ist, so daß also ein Verfahren mit Parteien vorliegen müsse; das aber sei nur möglich, wo Zuständigkeit bestehe. Die Auffassung des IGH hingegen findet ihre Stütze in Art. 62 der Verfahrensordnung[10]), wonach die Prüfung der Zuständigkeitseinrede v o r der Prüfung der Hauptsache zu erfolgen habe, aber n a c h der Prüfung des Antrags auf einstweilige Anordnung, was sich daraus ergibt, daß diese gemäß Art. 61 der Verfahrensordnung Vorrang vor allen anderen Rechtssachen hat[11]).

Diese Andeutung eines Wandels der Auffassung des IGH ist begrüßenswert, da das Vertrauen der Staaten und die Bereitwilligkeit, einstweilige Anordnungen anzuerkennen, *de facto* sicher gestärkt wird, wenn die Zuständigkeit, soweit mit dem Dringlichkeitsverfahren vereinbar, geprüft wird, also die *prima facie*-Zuständigkeit durch das Gericht auf Grund summarischer Prüfung bejaht wird.

2. Von großer Bedeutung ist neben dem Zuständigkeitsproblem das der Konnexität der Objekte des Antrags auf einstweilige Anordnung und des Antrags in der Hauptsache[12]) (§ 12). Einstweiliger Rechtsschutz kann demgemäß nur dann gewährt werden, wenn ein zwischenzeitlicher Schutz der in der Hauptsache anhängigen Rechte erforderlich ist[13]). Würde, wie Island behauptet, mit der Anordnung der Schutz wirtschaftlicher und finanzieller Interessen, nicht aber der in der Hauptsache streitigen Rechtsposition be-

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[8]) Vgl. L a u t e r p a c h t, The Development of International Law by the International Court (1958), S. 112.

[9]) Vgl. IGH 1951, S. 97.

[10]) Beziffert nach der für die Anordnung noch maßgebenden, bis 31. 8. 1972 gültigen Fassung.

[11]) Vgl. IGH 1957, S. 111.

[12]) Vgl. Art. 61 Abs. 1 Verfahrensordnung.

[13]) Vgl. dazu auch StIGH A/B 48, S. 285, und A/B 58, S. 178, wo es an dieser Verbindung fehlte.

gehrt, so wäre zum Erlaß der einstweiligen Anordnung kein Anlaß gewesen. Der IGH jedoch sieht die Konnexität als gegeben an, da diese wirtschaftlichen und finanziellen Interessen Teil der in der Hauptsache streitigen Rechtsposition sind, deren sofortiger Schutz erforderlich ist, um die Effektivität des Endurteils zu wahren.

3. Nicht zu verwechseln mit der Frage der Konnexität ist die der Präjudizierung der Hauptsache. Denn wenn auch das Objekt des Antrags auf Erlaß einstweiliger Maßnahmen mit dem der Hauptsache identisch, mindestens aber konnex sein muß, so darf doch das Begehren des Antrags der Hauptsache nicht vorgreifen; d. h. die Anordnung darf nicht die Entscheidungsfreiheit des Gerichts in der Hauptsache beeinträchtigen[14]). Wie in der bisherigen Rechtsprechung, so beschränkt sich der IGH auch hier auf eine mehr allgemeine Feststellung, daß die einstweilige Anordnung der Entscheidung in der Hauptsache in keiner Weise vorgreife, weder bezüglich der Zuständigkeit noch bezüglich ihres Inhalts[15]). Allein eine derartige Auffassung ist vertretbar, da eine definitive Prüfung der Sache im Eilverfahren weder erfolgen kann noch soll, was deutlich in der der Anordnung beigefügten Erklärung der Richter Ammoun, Forster und Jiménez de Aréchaga (S. 36 unten S. 575) zum Ausdruck kommt. Dagegen ist unhaltbar die hier vom dissentierenden Richter vertretene Auffassung (S. 42 unten S. 580), daß allein durch die Tatsache des Erlasses von Maßnahmen zum Schutze bestimmter Rechte das Bestehen dieser Rechte als gegeben angesehen werde. Sie könnte nur dazu führen, einstweilige Verfügungen überhaupt für unzulässig zu erklären. Auf Grund der verschiedenen Prüfungsfaktoren schützt das Gericht im Wege der einstweiligen Verfügung stets die schützenswerter erscheinenden streitigen Rechte, deren Gefährdung zugleich die Wirksamkeit des Endurteils zu gefährden droht, ohne an diese Entscheidung in der Hauptsache gebunden zu sein. Daß eine einstweilige Verfügung für einige Zeit eine Regelung schafft, deren Berechtigung im Endurteil verneint werden kann[16]), ist gerade die Crux dieses Instituts, das zugunsten eines überhaupt möglichen sofortigen einstweiligen Rechtsschutzes diesen Unsicherheitsfaktor hinnehmen muß, weshalb es von den Staaten mit so viel Vorbehalten betrachtet wird.

4. Ein weiterer Punkt, dessen konkrete Ausgestaltung der Rechtsprechung zu verdanken ist, ist die Frage der »Dringlichkeit« des Erlasses einstweiliger Maßnahmen; nur wenn sofortiger Rechtsschutz geboten ist, kann eine einst-

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[14]) Vgl. StIGH A 12, S. 10.
[15]) Vgl. dazu StIGH A 8, S. 7.
[16]) Vgl. den *Anglo-Iranian Oil Company*-Fall.

weilige Verfügung ergehen. Sofortiger Schutz ist geboten, wenn in der Hauptsache zur Entscheidung anstehende Rechte von einem Schaden bedroht sind, der unersetzbar ist und somit die Wirksamkeit des Endurteils hinfällig machen würde. D. h. also, daß sich hinter dem vagen Begriff der Dringlichkeit die Frage nach dem drohenden Schaden verbirgt[17]). Fraglich ist, welcher Art dieser Schaden sein muß: ob er irreparabel sein muß oder ob ein schwerer Schaden ausreicht. Im vorliegenden Fall geht der IGH gemäß seiner bisherigen Praxis von dem strikteren Schadensbegriff aus, nämlich dem des durch Geld nicht wiedergutzumachenden, irreparablen Schadens (§§ 22, 23). Einen irreparablen Schaden verneinte der IGH immer dann, wenn die Gegenpartei sich bereit erklärte, keine Zwangsmaßnahme zu ergreifen[18]), bejaht wurde er in all den Fällen, in denen die Gegenseite keine solche Bereitwilligkeit zeigte[19]). Dieser Rechtsprechung entspricht die vorliegende Entscheidung, gegen die sich der dissentierende Richter wendet (S. 44 unten S. 582), indem er das Fehlen einer genaueren Prüfung dieses Punktes seitens des IGH rügt. Wenn es auch fraglich erscheinen mag, ob eine bis zum eventuell positiv ausgehenden Endurteil für die BRD erfolgende Einstellung des Fischfangs in der Tat in Geld nicht wiedergutzumachen sei, so muß doch bedacht werden, daß, wie die BRD vorbringt (S. 41 f. unten S. 580), das Schicksal einer Anzahl Fischer von der Entscheidung abhängt, bei denen ein reiner Geldersatz für entgangenen Gewinn keine völlige Wiedergutmachung des Schadens bedeuten könnte, so daß die Abwägung der von Schaden bedrohten Güter durch den IGH hier doch vertretbar erscheint.

5. Die Frage der Verbindlichkeit und Durchsetzbarkeit erhob sich mit der Erklärung Islands, daß es eine Anordnung nicht als verbindlich anerkennen würde. Das Problem der Verbindlichkeit, sowie das der Durchsetzbarkeit der einstweiligen Anordnung, ist eines der schwierigsten. Der Gerichtshof selbst hat sich zu dieser Frage wohlweislich nie geäußert. Obwohl der schwache Ausdruck in Art. 41 des Statuts, daß der Gerichtshof Maßnahmen anzeigen kann *(indicate)*, in dem Sinn der Unverbindlichkeit der Anordnung ausgelegt werden kann, steht die Doktrin[20]) überwiegend auf dem gegenteiligen Standpunkt, im wesentlichen mit der Begründung, daß die Parteien eines internationalen, vor einem internationalen Gericht anhängigen Rechts-

[17]) Vgl. besonders StIGH A/B 48, S. 277.

[18]) Vgl. StIGH A/B 48, S. 285; A/B 54, S. 153; sowie IGH 1957, S. 105.

[19]) Vgl. z. B. StIGH A 8 sowie IGH 1951, S. 89.

[20]) Vgl. z. B. M. O. Hudson, The Permanent Court of International Justice 1920–1942 (1943), S. 425 f.; E. Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice, in: Rechtsfragen der internationalen Organisation, Festschrift für Hans Wehberg zu seinem 70. Geburtstag (1956), S. 167.

streits sich jedes Aktes zu enthalten haben, der die Entscheidung uneffektiv machen könnte. Damit aber sei die Verbindlichkeit der einstweiligen Anordnung gegeben, da die Anordnung diese Pflicht der Parteien nur konkretisiere. Würde dieser Konkretisierung keine Verbindlichkeit zukommen, so würde ein Widerspruch zum Grundsatz der Effektivität im Völkerrecht vorliegen.

In der Praxis jedoch hat die Verbindlichkeit der Anordnung nicht unbedingt Einfluß auf das Verhalten der Parteien, wie besonders das Betragen Islands nach Erlaß der einstweiligen Anordnung zeigt. Immerhin könnte die Anordnung selbständige Schadenersatzgrundlage sein. Auch an dieser Entscheidung zeigt sich, daß ohne den kooperativen Willen der Staaten die Effektivität einstweiliger Anordnungen, wie gerichtlicher Streiterledigung überhaupt, fraglich bleiben muß.

Karin Oellers-Frahm

INTERNATIONAL COURT OF JUSTICE

Fisheries Jurisdiction Case

(Federal Republic of Germany v. Iceland)
Request for the Indication of Interim Measures of Protection

ORDER OF 17 AUGUST 1972 *)

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, JIMENÉZ DE ARÉCHAGA; *Registrar* AQUARONE.

The International Court of Justice,
Composed as above,
After deliberation,
Having regard to Articles 41 and 48 of the Statute of the Court,
Having regard to Article 61 of the Rules of Court,

Having regard to the Application by the Federal Republic of Germany filed in the Registry of the Court on 5 June 1972, instituting proceedings against the Republic of Iceland in respect of a dispute concerning the proposed extension by the Government of Iceland of its fisheries jurisdiction, by which the Government of the Federal Republic asks the Court to declare that Iceland's claim to extend its

*) Fisheries Jurisdiction *(Federal Republic of Germany* v. *Iceland)*, Interim Protection, Order of 17 August 1972, General List No. 56, I.C.J. Reports 1972, p. 30.

exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland has no basis in international law and could therefore not be opposed to the Federal Republic and to its fishing vessels,

Makes the following Order:

1. Having regard to the request dated 21 July 1972 and filed in the Registry the same day, whereby the Government of the Federal Republic, relying on Article 41 of the Statute and Article 61 of the Rules of Court, asks the Court to indicate, pending the final decision in the case brought before it by the Application of 5 June 1972, the following interim measures of protection:

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

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

(c) The Republic of Iceland should refrain from applying or threatening to apply administrative, judicial or other sanctions or any other measures against ships registered in the Federal Republic of Germany, their crews or other related persons because of their having been engaged in fishing activities in the waters of the high seas around Iceland outside the 12-mile limit as referred to in paragraph 22 *(b)* [of the request].

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

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

2. Whereas the Government of Iceland was notified of the filing of the Application instituting proceedings, on the same day, and a copy thereof was at the same time transmitted to it by air mail;

3. Whereas the submissions set out in the request for the indication of interim measures of protection were on the day of the request communicated to the Government of Iceland, by telegram of 21 July 1972, and a copy of the request was at the same time transmitted to it by express air mail, and in the telegram and the letter it was indicated that the Court, in accordance with Article 61, paragraph 8, of the

Rules of Court, was ready to receive the observations of the Government of Iceland on the request in writing, and would hold hearings, opening on 2 August at 10 a.m., to hear the observations of the Parties on the request;

4. Whereas the Application founds the jurisdiction of the Court on Article 36, paragraph 1, of the Statute and on an Exchange of Notes between the Governments of Iceland and of the Federal Republic of Germany dated 19 July 1961;

5. Whereas by a letter dated 27 June 1972 from the Minister for Foreign Affairs of Iceland, received in the Registry on 4 July 1972, the Government of Iceland asserted that the agreement constituted by the Exchange of Notes of 19 July 1961 was not of a permanent nature, that its object and purpose had been fully achieved, and that it was no longer applicable and had terminated; that there was on 5 June 1972 no basis under the Statute of the Court to exercise jurisdiction in the case; and that the Government of Iceland, considering that the vital interests of the people of Iceland were involved, was not willing to confer jurisdiction on the Court, and would not appoint an Agent;

6. Whereas by a telegram dated 28 July 1972, received in the Registry of the Court on 29 July, the Minister for Foreign Affairs of Iceland, after reiterating that there was no basis under the Statute for the Court to exercise jurisdiction in the case to which the Application of the Federal Republic referred, stated that there was no basis for the request for provisional measures and that, without prejudice to any of its previous arguments, the Government of Iceland objected specifically to the indication of provisional measures by the Court under Article 41 of the Statute and Article 61 of the Rules of Court in the present case, where no basis for jurisdiction was established;

7. Whereas at the opening of the public hearing which had been fixed for 2 August 1972, there were present in court the Agent, counsel and other advisers, of the Government of the Federal Republic;

8. Having heard the observations of Professor Dr. Günther Jaenicke on behalf of the Government of the Federal Republic, on the request for provisional measures;

9. Noting that the Government of Iceland was not represented at the hearing;

10. Having taken note of the written replies given on 4 and 5 August 1972 by the Agent of the Government of the Federal Republic to questions put to him by the Court on 2 August 1972 on two points raised in the oral observations;

11. Whereas according to the jurisprudence of the Court and of the Permanent Court of International Justice the non-appearance of one of the parties cannot by itself constitute an obstacle to the indication of provisional measures, provided the parties have been given an opportunity of presenting their observations on the subject;

12. Whereas in its message of 28 July 1972, the Government of Iceland stated that the Application of 5 June 1972 was relevant only to the legal position of the two States and not to the economic position of certain private enterprises or other interests in one of those States, an observation which seems to question the connec-

tion which must exist under Article 61, paragraph 1, of the Rules between a request for interim measures of protection and the original Application filed with the Court;

13. Whereas in the Application by which the Government of the Federal Republic instituted proceedings, that Government requested the Court to declare that the contemplated measures of exclusion of foreign fishing vessels could not be opposed by Iceland to the Federal Republic and to its fishing vessels;

14. Whereas the contention of the Applicant that its fishing vessels are entitled to continue fishing within the above-mentioned zone of 50 nautical miles is part of the subject-matter of the dispute submitted to the Court, and the request for provisional measures designed to protect such rights is therefore directly connected with the Application filed on 5 June 1972;

15. Whereas in its message of 28 July 1972, the Government of Iceland further recalled that the Federal Republic of Germany had only accepted the jurisdiction of the Court by its declaration of 29 October 1971, transmitted to the Registrar of the Court on 22 November 1971, after it had been notified by the Government of Iceland, in its aide-mémoire of 31 August 1971, that the object and purpose of the provision for recourse to judicial settlement of certain matters had been fully achieved;

16. Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest;

17. Whereas paragraph 5 of the Exchange of Notes between the Governments of Iceland and of the Federal Republic dated 19 July 1961 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";

18. Whereas the above-cited provision in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded;

19. Whereas the complaint outlined in the Application of the Federal Republic is that the Government of Iceland has announced its intention, as from 1 September 1972, to extend unilaterally its exclusive jurisdiction in respect of the fisheries around Iceland to a distance of 50 nautical miles from the baselines mentioned in the 1961 Exchange of Notes; and whereas on 14 July 1972 the Government of Iceland issued Regulations to that effect;

20. Whereas the contention of the Government of Iceland in its letter of 27 June 1972, that the above-quoted clause contained in the Exchange of Notes of 19 July 1961 has been terminated, and the question raised by that Government in its

message of 28 July 1972 as to the date of the acceptance of the Court's jurisdiction by the Federal Republic, will fall to be examined by the Court in due course;

21. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits;

22. Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue;

23. Whereas the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the Federal Republic and affect the possibility of their full restoration in the event of a judgment in its favour;

24. Whereas it is also necessary to bear in mind the exceptional importance of coastal fisheries to the Icelandic economy as expressly recognised by the Federal Republic in its Note addressed to the Foreign Minister of Iceland dated 19 July 1961;

25. Whereas from that point of view account must be taken of the need for the conservation of fish stocks in the Iceland area;

26. Whereas the total catch by vessels of the Federal Republic in that area in the year 1970 was 111,000 metric tons and in the year 1971 was 123,000 metric tons; and whereas the figure of 120,000 metric tons mentioned in the Federal Republic's request for interim measures was based on the average annual catch for the period 1960–1969;

27. Whereas in the Court's opinion the average of the catch should, for purposes of interim measures, and so as to reflect the present situation concerning fisheries of different species in the Iceland area, be based on the available statistical information before the Court for the five years 1967–1971, which produces an approximate figure of 119,000 metric tons,

Accordingly, THE COURT, by fourteen votes to one,

(1) Indicates, pending its final decision in the proceedings instituted on 5 June 1972 by the Federal Republic of Germany against the Republic of Iceland, the following provisional measures:

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

(b) the Federal Republic of Germany and the Republic of Iceland should each of them ensure that no action is taken which might prejudice the rights of the other

Party in respect of the carrying out of whatever decision on the merits the Court may render;

(c) the Republic of Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the Federal Republic and engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone;

(d) the Republic of Iceland should refrain from applying administrative, judicial or other sanctions or any other measures against ships registered in the Federal Republic, their crews or other related persons, because of their having engaged in fishing activities in the waters around Iceland outside the 12-mile fishery zone;

(e) the Federal Republic should ensure that vessels registered in the Federal Republic do not take an annual catch of more than 119,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va;

(f) the Government of the Federal Republic should furnish the Government of Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area.

(2) Unless the Court has meanwhile delivered its final judgment in the case, it shall, at an appropriate time before 15 August 1973, review the matter at the request of either Party in order to decide whether the foregoing measures shall continue or need to be modified or revoked.

Done in English and in French, the English text being authoritative, at the Peace Palace. The Hague, this seventeenth day of August, one thousand nine hundred and seventy-two, in four copies, one of which will be placed in the archives of the Court, and the others transmitted respectively to the Government of the Republic of Iceland, to the Government of the Federal Republic of Germany, and to the Secretary-General of the United Nations for transmission to the Security Council.

(Signed) ZAFRULLA KHAN, President. *(Signed)* S. AQUARONE, Registrar.

Vice-President AMMOUN and Judges FORSTER and JIMENÉZ DE ARÉCHAGA make the following joint declaration:

We have voted for this Order taking into account that the serious problems of the contemporary law of the sea which arise in this case are part of the merits, are not in issue at the present stage of the proceedings and have not in any way been touched upon by the Order. When indicating interim measures the Court must only take into account whether, if action is taken by one of the Parties pending the judicial proceedings, there is likelihood of irremediable damage to the rights which have been claimed before it and upon which it would have to adjudicate. It follows therefore that a vote for this Order cannot have the slightest implication as to the validity or otherwise of the rights protected by such Order or of the rights claimed by a coastal State dependent on the fish stock of its continental shelf or of a fishery

zone. Those substantive questions have not been prejudged at all since the Court will, if it declares itself competent, examine them, after affording the Parties the opportunity of arguing their cases.

Judge PADILLA NERVO appends a dissenting opinion to the Order of the Court.

(Initialled) Z. K. *(Initialled)* S. A.

DISSENTING OPINION OF JUDGE PADILLA NERVO

I am unable to concur in the Order of the Court, and therefore I voted against its adoption.

In my view, the Court should not have indicated measures of protection. Notwithstanding contrary opinion, the special features of this case do not justify such measures against a State which denies the jurisdiction of the Court, which is not a party to these proceedings and whose rights as a sovereign State are thereby interfered with.

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 question regarding the jurisdiction of the Court has not been fully explored. It 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, which 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.

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.

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".

In the *Anglo-Iranian Oil Co.* case, Judges Winiarski and Badawi Pasha gave the following reasons for their dissenting opinion which, in my view, are applicable and valid in the present case:

"The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits" (I.C.J. Reports 1951, p. 96).

"In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State" (*Ibid.*, p. 97).

"We find it difficult to accept the view that if prima facie the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated" (*Ibid.*, p. 97).

In my opinion such doubts do exist in the present case.

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 Government shall continue to work for the *implementation* of the Althing Resolution of 5 May 1959, regarding the *extension* of the fishery jurisdiction of Iceland . . .".

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 lead 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).

"... 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" (Government of Iceland's *Aide-Mémoire* of 31 August 1971, Annex D to Application of the Federal Republic).

In the request by the Government of the Federal Republic for the indication of interim measures of protection the grounds of the request are stated at length.

It is stated therein that Iceland's regulations to extend the limits of its fisheries

jurisdiction, if carried into effect for any substantial period, would result in an immediate and irreparable damage to the fisheries of the Federal Republic of Germany and the related *industries*, and that such damage could not be remedied by the payment of an indemnization by Iceland.

Another argument is that the distant water fishing vessels of the Federal Republic of Germany cannot compensate the loss of their fishing grounds off Iceland by directing their activities to other areas; the range of wet fish trawlers is limited by technical and *economic* factors.

It is claimed that any intensification of fishing effort by vessels of the Federal Republic diverted from the Iceland area would (among other things) *depress the profits* of the traditional coastal fisheries in the nearer fishing grounds of the fleet of the Federal Republic.

The request for interim measures states (para. 13):

"It can be concluded therefore that trawlers such as have been fishing traditionally in the high seas around Iceland which are equipped with expensive technical gear and which operate on high costs, could not, if excluded from the high seas around Iceland, hope to find other fishing grounds where they could continue their activities under comparable and economic conditions".

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 *expensive technical gear.*

The arguments developed in the request for measures of protection and in the oral hearing of 2 August 1972, appear, in my view, to have as their real object the protection of the interests, financial or economic, of private fishing enterprises rather than the "rights" of the Federal Republic.

Furthermore, the existence of those rights cannot be taken for granted. This matter belongs to the merits of the case, to be decided when the Court deals with them.

The assertion that the indication or interim measures of protection *in no way prejudges* the rights which the Court may subsequently adjudge to belong either to the Applicant or to the Respondent, is an assertion contradicted by the obvious implication that questionable rights are presumed to exist by the mere fact of indicating measures intended to protect them.

The measures indicated in the Order have the character of a preliminary decision on the merits. The implementation of those measures will amount to execution of such a preliminary decision. This fact cannot be denied simply by asserting that such measures in no way prejudge the substance of the case.

The claim of immediate and irreparable damage is based on the *assumption* that the dispute on the merits or even the jurisdictional issue, will not be settled by the Court for many years.

That is a wrong assumption and therefore the plea of a disruption of the whole fishing industry will not have any force or weight if the Court, as should be expected, does consider the matter of jurisdiction before the end of this year.

The Applicant has invoked Article 53 of the Statute and calls upon the Court to decide in favour of its claim.

According to paragraph 2 of that Article, the Court must, *first of all*, satisfy itself that it has jurisdiction.

Relevant to the issue of jurisdiction is the provision in Article 61, paragraph 1, of the Rules: "A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made".

The objective requirement *ratione temporis* for the exercise of this jurisdiction is, that the request is filed during the proceedings in the case.

"If it is clear on the face of the document instituting proceedings that the jurisdiction of the Court to hear the case on its merits requires some step on the part of the respondent State for its perfection, then, ... there will be no 'proceedings' and consequently no inherent jurisdiction to indicate provisional measures, until that step has been taken" (Rosenne, The Law and Practice of the International Court, Chap. XII, Incidental Jurisdiction, p. 424).

The Government of Iceland, on 28 July 1972, acknowledged receipt of a telegram from the Registrar of the Court concerning the request of the Federal Republic of Germany, for interim measures, filed 21 July 1972. The message from the Government of Iceland states in part:

"... there is no basis for the request to which your telegram refers. In any event *the Application of 5 June 1972 refers to the legal position of the two States and not to the economic position of certain private enterprises or other interests in one of those States* ... Without prejudice to any of its previous arguments the Government of Iceland objects specifically to the indication by the Court of provisional measures under Article 41 of the Statute and Article 61 of the Rules of the Court in the case to which the Government of the Federal Republic refers, where no basis for jurisdiction is established" (Emphasis added).

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 Federal Republic of Germany and the United Kingdom 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, 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", 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 recognition 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.

My last observation is the following. The claim of irremediable damages to the Applicant has not, in my opinion, been proved. They are only allegations that the fishing enterprises would suffer financial losses and also allegations that the eating habits of people in the countries concerned will be disturbed. Such an argument cannot, in my opinion, be opposed to the sovereign rights of Iceland over its exclusive jurisdiction and the protection of the living resources of the sea covering its continental shelf. The Order does not strike, in my view, a fair balance between the two sides as required by the relevant article of the Statute. The restrictions indicated in the Order are obviously against Iceland, interfering with its unlimited right to legislate over its own territory as it considers it essential (cf. para. 1, sub-para. *(d),* of the operative clause of the Court's Order). In the measures indicated in that Order the only substantial restriction to the Applicant consists in limiting the amount of its annual catch to 119,000 metric tons instead of its claim to 120,000 metric tons, 1,000 metric tons less than the Applicant had asked for in its request for measures of protection. All the other measures of protection requested in the Application the Court had accepted. On this aspect also I am not able to agree with the indication of measures in the Order of the Court.

(Signed) Luis PADILLA NERVO.