DISSENTING OPINION OF JUDGE GROS

[Translation]

I consider that Iceland's claim to establish an exclusive fishing zone over the superjacent waters of the continental shelf is contrary to the rules of international law, but the reasoning which leads me to that opinion, and my analysis of the dispute itself, are different from what is contained in the Judgment, from both the reasoning and the decision of the Court; a judgment of the Court comprises the reasoning part and the operative clause, and to understand the scope of the judgment it is not possible to separate either of these elements from the other, and an elliptical operative clause only reveals its meaning when read with the reasoning leading up to it. Adapting myself to the method adopted by the Court, I have cast a negative vote on the questions which it has selected; I must explain how I understood the Court's mission in the present case, the meaning of the question put to it, the answer to be given thereto, and thus the reasons supporting my dissenting opinion.

1. The first question which was raised for the Court in this merits-phase of the case was to determine what its task was. The Court has recognized in its Judgment of 2 February 1973 on jurisdiction that the Exchange of Notes of 11 March 1961 contained in its penultimate paragraph, a "compromissory clause" which conferred jurisdiction on the Court to give judgment in any dispute which might arise concerning the extension of fisheries jurisdiction around Iceland. Examination of that agreement and of the negotiations which led up to its being concluded leads me to an interpretation different from that in the Judgment as to the definition of the disputes which could be brought before the Court.

2. The basic principle of the Court's jurisdiction is the acceptance of that jurisdiction by the Parties; whether what is in question is a compromissory clause providing for the jurisdiction, or a special agreement, the rule is that interpretation cannot extend the jurisdiction which has been recognized. It should be added in the present case that, Iceland having failed to appear, and Article 53 of the Statute being applied by the Court, it is particularly necessary to satisfy oneself that the Court is passing upon a dispute which has been defined as justiciable by Iceland and the United Kingdom, and not some other dispute constructed during consideration of the case by the Court. An obligation to bring a dispute before a court is always reciprocal and of equal extent for each State which has accepted it; hence the need to proceed to a special verification in this case, since Iceland has not co-operated in the precise definition of the dispute. I have stated on another occasion that I disagreed with the penalizing approach of the Court with regard to a State which fails to appear, in its interpretation of Article 53 (*Fisheries Jurisdiction*, *I.C.J.*

Reports 1973, p. 307); the present phase has strengthened my conviction on this point.

3. The Exchange of Notes of 1961 would not appear to leave room for any doubt, and I will quote the English text which is the authoritative text:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

Thus the reference is to a possible dispute in relation to the extension by the Government of Iceland of its fisheries jurisdiction around Iceland in relation to the limits recognized in the 1961 agreement. The Court, in its Judgment of 2 February 1973, stated in the last explanatory paragraph on this point:

> "The compromissory clause enabled either of the parties to submit to the Court any dispute between them *relating to an extension of Icelandic fisheries jurisdiction* in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the compromissory clause of the Exchange of Notes." (*I.C.J. Reports 1973*, p. 21, para. 43; emphasis added.)

It is important to note that the formula underlined may be found in paragraphs 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 40 and 41 of the Judgment. To rely on the form of words used in the operative clause of the 1973 Judgment in order to assert that the Court found that it had jurisdiction to entertain the Application, with the implication that the content of that Application binds the Court, is to disregard, first the inherent connection between the reasoning of the 1973 Judgment, which is based solely on the concept of extension of fisheries jurisdiction, and the form of the operative clause; and secondly the rule that it is the 1961 treaty which determines what the subject-matter of the justiciable dispute is, and not the Application or the submissions of one of the Parties. The Court should decide what the extent of its jurisdiction is, without being bound by the argument addressed to it on the point.

I have quoted the original-language text of the Judgment to avoid any ambiguity resulting from translation, and to show that I cannot accept the argument that a form of words as precise as "dispute in relation to the extension of fisheries jurisdiction" can be interpreted as impliedly including any connected question which one of the Parties may have had occasion to refer to in the course of the negotiations preceding the 1961 agreement, if the other Party refused to make that question the subject of the agreement itself. That an idea or even a proposal may have been

put forward in the course of negotiations is not sufficient for them to survive rejection, and acceptance of that rejection by the author of such proposals; any other view of the matter would enable multiple disputes to be artificially created, simply by the introduction into a negotiation, as a matter of principle, of various problems. No negotiations could be usefully carried on if courts had such freedom to extend their results. It would become necessary to draw up minutes of agreement as to the meaning of the most important articles of a treaty, and then, as suspicion increased, of all its articles.

In the present case, it is clear that the 1961 agreement only contemplated one sort of dispute as justiciable, namely the extension of Iceland's fisheries jurisdiction.

4. If any confirmation from a textual source were necessary on this point, it should be recalled that the only passage where any more general consideration is mentioned is in the United Kingdom reply to the Icelandic Note of 11 March 1961, in the last paragraph and in the following form:

> "I have the honour to confirm that in view of the exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development, and without prejudice to the rights of the United Kingdom under international law towards a third party, the contents of Your Excellency's Note are acceptable to the United Kingdom and the settlement of the dispute has been accomplished on the terms stated therein." (Application, p. 25.)

Nothing further need be said; this is an opinion held by the Government of the United Kingdom, and not a term of the agreement.

5. The kind of dispute which the parties to the 1961 agreement had in contemplation, and which they agreed to bring before the Court, was pegged to a legal point which was specially defined, in a limited way, and because assurances, which were also special and precise, had been sought and obtained on this one point. If, as I hold, this definition of the justiciable dispute has not been applied in the present Judgment, the Court has gone beyond the bounds of its jurisdiction.

Iceland, which is absent from the proceedings, has from the outset disputed that the Court has any jurisdiction, and this claim was rejected in the Judgment of 2 February 1973 by an almost unanimous Court, which observed that the dispute was exactly of the character anticipated in the 1961 agreement (cf. para. 3 above) and that that agreement was still in force and applicable. The Judgment on the merits, on the other hand, departs from the definition of the dispute on which judgment is to be given on two points:

(a) in that it does not decide the precise question of law contemplated in the compromissory clause of 1961, i.e., the conformity with inter-

national law of the extension to 50 miles of Iceland's fisheries jurisdiction;

(b) in that it adopts an extensive interpretation, in relation to the text, of the 1961 agreement on the scope of the Court's jurisdiction, as if it had read: any dispute on any question whatever connected with a modification of the fisheries régime fixed by the present agreement.

With some internal contradiction, the Judgment simultaneously declines to exercise the jurisdiction conferred upon the Court by the 1961 agreement and exercises jurisdiction which was not created by that agreement. Study of the records of the negotiations which led to the 1961 agreement will show that this is so.

6. A first series of meetings took place between 1 October and 4 December 1960, and a second series between 17 and 20 December 1960 (documents deposited in the Registry of the Court by the United Kingdom on 13 October 1972 [1]).

At the first meeting the views of the Icelandic Government were explained extremely clearly as being a claim to exclusive fisheries jurisdiction, but "in accordance with international law", and for the time being it was a matter of obtaining the United Kingdom's recognition of the 12-mile limit. These talks also show that the Icelandic Government was already talking of establishing a more or less continuous belt of reserved waters around Iceland, possibly extending for 12 miles, from which British ships would be barred from navigation as well as fishing, and it is at this point that the British idea appears of the necessary guarantee against any fresh extension of the fishing zone, if the 12-mile limit were recognized in the current negotiations.

United Kingdom delegation:

> "Moreover, we should need to have some guarantee in any agreement that after the transitional period the Icelandic Government would not seek to exclude our vessels from any of the waters outside 12 miles, unless of course there were to be some change in the general rule of international law agreed under United Nations auspices. Would your Government be prepared to give us such a guarantee in any agreement?" (Records, p. 14.)

This request for a guarantee is repeated incessantly (cf. para. 8 on p. 17, and para. 14: ". . . an assurance that there would be no further extensions towards the Continental Shelf"), and the first formulation of a guarantee was provided by the Government of Iceland in these terms:

[1] I note that the Government of Iceland, having been informed of the deposit of these records and of the possibility of consulting them in the Registry of the Court, did not take advantage of this possibility. The records prepared by the United Kingdom delegation to these negotiations have been widely used by the United Kingdom in its pleadings and by the Court in its Judgment of 2 February 1973. The Court has not been able to take cognizance of any similar record on the Icelandic side.

> "The Icelandic Government reserves its right to extend fisheries jurisdiction in Icelandic waters in conformity with international law. Such extension would, however, be based either on an agreement (bilateral or multilateral) or decisions of the Icelandic Government which would be subject to arbitration at the request of appropriate parties." (Records, p. 20.)

(See also page 27 where the link between what was to be included in the proposed agreement and the "guarantee" is openly recognized, and what was included in the agreement was no more than the adjustment of the jurisdiction of Iceland in a 12-mile fishing zone; further, the Icelandic delegate only refers to an "assurance" in respect of a possible extension of jurisdiction after the agreement, never in respect of anything else, cf. page 31.)

7. The basic element to which the guarantee which was contemplated related was thus clearly the extension of fishing rights claimed by Iceland over waters beyond the 12-mile limit, in accordance with whatever the current state of international law might be at the chosen moment; the means contemplated by Iceland were negotiation, bilateral or multilateral, or a unilateral decision of the Icelandic Government which would be subject to arbitration. At no time during the further talks on this question of the guarantee does it appear that there was any modification of this position taken up by Iceland as to the content of the commitment which it contemplated undertaking, and the form of words proposed by the Icelandic delegation (and reproduced in para. 6 above) was gradually altered to what ultimately became the penultimate paragraph of the Exchange of Notes of 1961 (see text in para. 3 above). The United Kingdom position was an immediate recognition that any extension of fishery limits effected in accordance with international law would be opposable to the United Kingdom; on the other hand, an agreement would be necessary, not a unilateral decision, even with the possibility of arbitration. Thus the British counter-proposal was the following:

> "Except in accordance with the terms of any subsequent agreement between the United Kingdom and Iceland, or of any subsequent multilateral agreement which embodies a generally accepted rule of law in relation to fishing limits, the Icelandic Government will not take any action to exclude vessels registered in the territory of the United Kingdom from fishing in any area outside the 12-mile limit." (Records, p. 33.)

8. The immediate response of the Icelandic delegate, after studying this text, was that it was necessary to "leave the Icelandic Government's hands 'untied' " in respect of possible further extensions of fishery jurisdiction, in particular, he explained, by applying customary law which developed more easily than treaty law as the two Geneva Conferences had shown (*ibid.*, p. 33, last paragraph). The point was taken up by a

member of the British delegation who said that a unilateral extension was not acceptable, even when based on custom; the Icelandic representative then confirmed that there was a conflict of views on this by saying that "further extension beyond 12 miles would only be on a basis of a change either of international law or of customary law" (*ibid.*, p. 34, para. 2).

9. At the following meeting the point in dispute was defined by the United Kingdom delegation as follows:

> "They appreciated Mr. Andersen's desire that the draft should cover the possibility of a further extension of Icelandic fishery limits in conformity with a new rule of customary law, as distinct from an international agreement. The difficulty, however, would be how to establish that such a customary rule existed. In the United Kingdom view such a rule would not only have to reflect the practice of a number of States, but also be generally accepted, *i.e.*, established by general consent and recognized as such by the International Court of Justice." (Records, p. 38.)

The same day, the United Kingdom delegation handed to the other party the following draft:

> "*Assurance by the Icelandic Government on no extensions of fishery limits beyond 12 miles*
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> The Icelandic Government will not take any action to exclude vessels registered in the United Kingdom from fishing in any area outside the 12-mile limit except in accordance with the terms of a subsequent international agreement embodying a generally accepted rule of law in relation to fishery limits, or in conformity with a rule of international law, established by general consent and recognized as such by the International Court of Justice, which would permit such an extension of fishery jurisdiction." (Records, p. 40.)

10. There can therefore be no doubt as to the concrete expression of the legal point in issue between the two States; Iceland was proposing to take a unilateral decision, based upon international law—treaty law or customary law—according to its own assessment of the state of the law at the time of a fresh extension of the fishery limits, and the United Kingdom was asking that the existence of the rule permitting the extension should be susceptible of being decided by the Court (cf. a revised draft of the assurance quoted in para. 9 above: "Any dispute as to whether such a rule exists may be referred at the request of either party to the International Court of Justice." (Records, Annex 2, para. 6, p. 40.)). According to the United Kingdom delegation, the assurance would have to cover three essential points:

> "(1) The Icelandic Government will not claim an extension of

fishery limits beyond 12 miles except in accordance with a *rule* of international law which has been clearly established *(a)* by embodiment in an international agreement, or *(b)* accepted by general consent as a rule of customary international law.

(2) *Any dispute about whether such a rule of international law has been established shall be submitted to the International Court of Justice*: and pending the Court's decision, any measure taken to give effect to such a rule will not apply to British vessels.

(3) The assurance on this point will form an essential part of the agreement.

If these three points could be met then Her Majesty's Government would do all they could to help the Icelandic Government on the form and presentation of the assurance. In particular, if a reference to the Althing's Resolution of May 5 1959 was important, they would have no objection to including one." (Records, p. 42, emphasis added in para. 2.)

I take note of the mention of the Resolution of 5 May 1959, to which the United Kingdom did not object, but which was left as entirely under the responsibility of Iceland, and was not incorporated in the agreement so as to become one of the terms thereof. The Icelandic Law remains what it was, without it being possible for the United Kingdom to invoke it, if it were not observed by Iceland, in support of an international claim based on the idea that an extension of Iceland's jurisdiction would only be lawful if carried out on the basis and in the spirit of the Law of 1948.

The Icelandic delegate replied to the British proposed text that while the formula proposed in London was not acceptable to his Government:

"there did not seem to be any real differences of opinion between the two sides. The Iceland Government must state that their aim was the Continental Shelf. They were, however, ready to state their intention to base their action on rules of international law and also their willingness to submit any dispute to the International Court" (Records, pp. 42-43, para. 7).

What was contemplated was clearly a dispute over a future action by Iceland, announced quite unequivocally, directed to exclusive jurisdiction over the waters of the continental shelf, and that a judicial decision should be obtained on such an action according to international law, and no more, but that is what the British party was seeking. On 2 December 1960 the Icelandic delegate said that the most difficult feature of the problem of the assurance was to meet the British requirement that no measure to apply an extension would be taken pending reference to the International Court of a dispute relating to such measures (Records, p. 44, para. 5, *in fine*).

11. The last meeting of the first series of talks confirms that the essential feature of the assurance would be that "it would . . . be for the International Court to decide whether [any act extending Icelandic jurisdiction] was in fact in accordance with International Law" (Records, p. 46, para. 3).

It was at this point that the British proposal appears, for six months' advance notice before any extension, making it possible to refer the matter to the Court before the measure was actually applied (Records, p. 46, para. 6), and the drafting of the penultimate paragraph of the Exchange of Notes of 1961 thereafter progressed more easily. The United Kingdom delegation proposed three draft texts, and each of these contained in one form or another the basic idea that possible disputes would relate to the question whether a rule of international law exists permitting an extension of Icelandic fisheries jurisdiction (Records, p. 48 and p. 49, para. 5). Annex A at page 50 gives the final version of the text expressing in concrete form the British views on the guarantee which should result from the referral of the matter to the Court to ensure that any fresh extension of Iceland's jurisdiction would be in accordance with international law.

12. This detailed study of the negotiations is necessary to dissipate any doubt as to what was involved in the commitment to judicial settlement undertaken by Iceland and the United Kingdom in March 1961. There was never any question of "guaranteeing" the United Kingdom against anything other than possible Icelandic measures to extend its fisheries jurisdiction, of which the United Kingdom was already aware, affecting the superjacent waters of the continental shelf, by means of a recourse to judicial settlement limited to the question of the conformity of such measures with international law. All the drafts which were discussed are quite clear on this point, up to the final text of the Exchange of Notes of March 1961, where the reference to the conformity of the measures with international law disappears. Examination of the records relating to the disappearance of these terms supplies the explanation of it. The United Kingdom obtained what it had always asked for, but to spare Icelandic feelings, it accepted a form of words which was less explicit than the drafts which had been discussed; this is recorded *expressis verbis* in the Record for 5 December 1960, page 48, paragraph 1.

It is thus apparent how little in accordance with historical truth it would be to deduce, from this purely formal concession by the British Government, that there was a transformation and extension of the system of a jurisdictional guarantee which that Government had unceasingly sought as a condition *sine qua non* of any agreement with Iceland. The United Kingdom wished to be assured of possible examination by the Court, according to international law, of any subsequent measure extending Iceland's jurisdiction as it was to be recognized in the contemplated agreement; it obtained this assurance as it had been negotiated, and finally accepted by Iceland on the understanding that the formulation should be pitched in a low key.

13. The second series of talks, held from 17 to 20 December 1960, confirms that the United Kingdom was seeking a "watertight" agreement on the basis of an assurance that Iceland "would not attempt to extend [its fishery limits] beyond 12 miles . . . otherwise than with the agreement of the International Court" (Record for 17 December, p. 3, para. 15; again on 18 December, p. 4, para. 3, in the same terms). Furthermore the Icelandic delegate said that this form of assurance, accepted in principle by Iceland, "would have the additional advantage, from the British point of view, of including an undertaking by the Icelandic Government to the effect that the existing base-lines would not be altered otherwise than with the agreement of the International Court". This again confirms, if it were necessary, that the dispute contemplated involved the examination according to international law of the extension of the limits, and nothing else. This was also to draw inspiration from the Court's Judgment in the *Fisheries* case in 1951, where it was said that: "the method employed for the delimitation of the fisheries zone . . . is not contrary to international law" (*I.C.J. Reports 1951*, p. 143). For completeness the identical terminology used on 19 December 1960 by the Foreign Minister of Iceland should be mentioned:

> "recognition by Her Majesty's Government of Iceland's 12-mile fishery jurisdiction in return for an assurance against further extension" (Records, p. 5, para. 1).

14. The Judgment also invokes (para. 32) the attempts to negotiate an interim agreement in 1972, which were unsuccessful, in support of the contention that Iceland agreed to negotiate on the basis of a preferential right. In 1972 Iceland only entered into negotiations with several States in order to fix very short adjustment periods in respect of its Regulations extending exclusive jurisdiction to 50 miles, which it never for a moment contemplated withdrawing or modifying (cf. para. 25 below) and, as regards the United Kingdom, the kind of discussion which took place is indicated by the Note of the Icelandic Government of 11 August 1972 (Annex 10 to the United Kingdom Memorial), the very one in which it is claimed that a request by Iceland for a discussion of preferential rights can be found, for it ends with the following words: "*(c)* The term of the agreement would expire on 1 June, 1974." This Note of 11 August 1972 dates from after the hearing held by the Court, in Iceland's absence, on 1 August 1972, on the request for interim measures of protection, and is prior to the Order of 17 August 1972, which Iceland has not accepted: what was contemplated was an agreement for less than two years, and the Icelandic Government stated that it intended to "have full rights . . . to enforce the regulations [of 14 July 1972] . . . inside the 50-mile limit".

The abortive negotiations of 1972 are totally irrelevant to the definition of the subject of the dispute; on the Icelandic side they were directed to the conclusion of an agreement leading to the extinction of the rights of the United Kingdom in 1974, and organizing an interim régime until

then, the Regulations of 14 July being kept in force, in application of the Althing Resolution of 15 February 1972, which only contemplated transitional agreements. Confirmation of this is supplied by an Icelandic Memorandum of 19 January 1973 (Annex 13 to the Memorial), proposing an agreement to be in force until 1 September 1974, i.e., for 18 months only. Finally the fact that the agreement ultimately concluded on 13 November 1973 entirely reserved the legal position of each party cannot be overlooked, and for Iceland that position was not a claim to preferential rights but to exclusive jurisdiction extending to 50 miles. That the United Kingdom may have had a different conception of Iceland's rights is not an element of interpretation of the position of that State.

15. The history of the negotiation of the text founding the jurisdiction of the Court in the present case explains—if there were any need, the text being clear—the laconic provision in the penultimate paragraph of the 1961 agreement. When Iceland entered into an undertaking in 1961 it did so to a limited extent. The Court should give an answer on the only question which could be brought before it; since it has not done so, it has not exercised the jurisdiction conferred by the agreement. I have made it clear for my own part that I regarded the extension from 12 to 50 sea miles as contrary to general international law, and therefore non-opposable to any State fishing in the waters adjacent to the 12-mile limit around Iceland. The Court stated in its Judgment in the *North Sea Continental Shelf* cases that: "The coastal State has no jurisdiction over the superjacent waters." (*I.C.J. Reports 1969*, p. 37, para. 59.) The claim of Iceland is expressly in relation to those waters. As to the lawfulness of an encroachment into sea areas which all States fishing in the area, without exception, regarded as forming part of the high seas on 1 September 1972, it is unarguable that it was lawful; Articles 1 and 2 of the Convention on the High Seas and Article 24 of the Convention on the Territorial Sea are provisions which are in force, and since the only argument relied on to exclude them is that they are outdated, no reply on this point is needed; the calling of a third codifying Conference in July 1974 amply demonstrates that certain procedures, and agreement, are necessary to replace codifying texts. Until different texts have been regularly adopted, the law of the sea is recorded in the texts in force.

It has also been said that a claim extending beyond 12 miles is not *ipso jure* unlawful, because there have been many claims of this kind; but by conceding that these claims are also not *ipso jure* lawful one admits that acceptance by others is necessary to make them opposable. What could a claim which was disputed by all the States concerned in a given legal situation be, if it were not unlawful? But since all States fishing in the Icelandic waters in question are opposed to the extension, what is the reason for not stating this and drawing the necessary conclusion?

There is no escaping the fact that if the States which oppose the extension cannot do so on the basis of a rule of international law, their opposition is ineffective, and this must be said; but if they can base their opposition on such a rule, it is equally necessary not to hesitate to say that. It is

the accumulation and the constancy of the opposition which should have obliged the Court to make a general pronouncement in the present case.

This was in fact the purpose of the first submission of the United Kingdom, which is not answered in the Judgment; furthermore the Agent said in the course of his argument that it was understood and accepted "that submissions *(b)* and *(c)* are based on general international law and are of course not confined merely to the effect of the Exchange of Notes". The Court has decided entirely otherwise. As a result of its refusal to give judgment on the conformity of the 50-mile extension with general international law, the Court has had to treat the 1961 agreement as the sole ground of non-opposability of that extension to the United Kingdom, interpreting that agreement as a recognition by Iceland that the Court has jurisdiction for any dispute concerning any measure relating in any way to fisheries.

16. Going beyond the events of 1961, it should be added that analysis of Iceland's position on the fisheries problem for the last quarter-century and more leads to the conclusion that that State has unremittingly advanced, and secured recognition of, the view that claims as to the extent of the fishery zone were entirely distinct from problems of conservation. Thus under the North-West Atlantic Fisheries Convention of 8 February 1949 (Art. I, para. 2), and then under the North-East Atlantic Fisheries Convention of 24 January 1959, Iceland was to be one of the parties which attached the greatest importance to the formal reservation that those conventions did not affect the rights, claims, or views of any contracting State in regard to the extent of jurisdiction over fisheries.

The constant element in the policy of Iceland appears to me to be the distinction between limits of an exclusive fishery zone, and a claim to preferential rights beyond that zone. These are two clearly different problems; by asserting, by means of its Regulations of 14 July 1972, exclusive fisheries jurisdiction up to a 50-mile limit Iceland took up its position in the field of its claims as to the extent of its exclusive fishing zone, as the two parties to the 1961 agreement had foreseen; this was the legal point which the Court was to decide.

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17. Subparagraph 3 of the operative clause of the Judgment contains a decision that there is an obligation to negotiate between Iceland and the United Kingdom "for the equitable solution of their differences concerning their respective fishery rights . . .", and subparagraph 4 indicates various considerations as guidelines for such negotiations. I consider that the role of the Court does not permit of it giving a pronouncement on these two points, and that by doing so, the Court has exceeded the bounds of its jurisdiction.

18. Subparagraph 3 refers to differences concerning the "respective" fishery rights of the two States. There are of course differences, since Iceland is claiming to exclude the United Kingdom finally from the area up to 50 miles, but this claim is made *erga omnes*, and it is somewhat unreal to treat as a bilateral problem, capable of being bilaterally resolved, the effects of the Icelandic Regulations of 14 July 1972 asserting exclusive jurisdiction over the superjacent waters of the continental shelf, after having declined to reply to the question raised as to the unlawfulness of such Regulations in international law. Although in subparagraph 4 there are formal safeguards for the position of the other States, the Court has regarded it as possible, to isolate, as it were, the bilateral differences and settle them by the Judgment. This is the first point that I should deal with before turning to the substance of subparagraphs 3 and 4 of the operative clause of the Judgment.

19. The origin of these subparagraphs 3 and 4 of the operative clause is in the last part of the United Kingdom's submissions (final submission *(d)*) which gave the dispute a wider dimension than the sole question of the lawfulness of the unilateral extension of jurisdiction, and on the basis of that submission problems of conservation have been extensively discussed in argument. But the bounds of a judgment are not fixed by a party in its Application, nor in its final submissions, nor, *a fortiori*, in its argument, when the jurisdiction being exercised is one specially laid down by a treaty, with a view to bringing before the Court a precise question of law. Particularly when the other Party is absent from the proceedings, the Court cannot simultaneously decline to reply to the joint request for a declaratory judgment which was indisputably made in the 1961 agreement, and decide what the conditions shall be of negotiations over conservation as to which no-one but the Applicant has ever asked its opinion, since it should be remembered that according to Iceland there are 11 States regularly fishing in the waters around Iceland (cf. *Fisheries Jurisdiction in Iceland*, Reykjavik, February 1972, table 1, p. 14). As for the United Kingdom, its counsel, in reply to a question on 29 March 1974, stated that in the United Kingdom's pleadings, the only States which were regarded as interested or affected or concerned by the question of fisheries around Iceland were those which have in the past fished in that area, that is to say, apart from the United Kingdom and Iceland, the Federal Republic of Germany, the Faroes, Belgium and Norway. Thus questions also arose as to the nature of the interest in the fisheries of the geographical area in question, which the Judgment neither takes into account nor resolves.

20. It is now some considerable time ago that attention was drawn to the difficulties which result from submissions being drafted both as a restatement of the arguments in support of the claim and as the final definition of what the Court is asked to decide (cf. "Quelques mots sur les 'conclusions' en procédure internationale", J. Basdevant, *Mélanges Tomaso Perassi*, p. 175). The present case affords a fresh example of this. The Court, which is the sole judge of its jurisdiction, must therefore sort

out what in the submissions is a statement of arguments and what is the precise statement of the claim; the claim cannot go beyond the subject of the jurisdiction conferred upon the Court, and that jurisdiction was limited to a declaratory decision as to the conformity of Iceland's unilateral extension of jurisdiction from 12 to 50 miles with existing international law on 1 September 1972, the date on which the Icelandic Regulations were brought into force.

21. If one reads the second submission in the United Kingdom's Application it is apparent that the second part thereof was so drafted that it could not constitute a claim, but merely an argument in support of the first part of that submission, by which the Court was asked to declare that questions of conservation cannot be regulated by a unilateral extension of limits to 50 miles, as a sort of consequence of the declaration asked for as to the non-conformity of the Icelandic regulations with general international law, in the first submission of the United Kingdom. The submission continues with the following:

> "[questions of conservation] are matters that may be regulated, as between Iceland and the United Kingdom, by arrangements agreed between those two countries, *whether or not together with other interested countries* and whether in the form of arrangements reached in accordance with the North-East Atlantic Fisheries Convention of 24 January, 1959, or in the form of arrangements for collaboration in accordance with the Resolution on Special Situations relating to Coastal Fisheries of 26 April, 1958, *or otherwise in the form of arrangements agreed between them* that give effect to the continuing rights and interests of both of them in the fisheries of the waters in question" (Application, para. 21; emphasis added).

A further version of this submission was given in the Memorial on the merits (reproduced in para. 11 of the Judgment) where the obligation to negotiate appears formally expressed, and was to be maintained as a final submission. The Court would have exhausted its jurisdiction by saying, in reply to the first part of the submission, that questions of conservation cannot be regulated by a unilateral extension of limits to 50 miles and a claim by Iceland to exclusive jurisdiction in that zone.

How could such a general question of law as conservation involving at least 11 fishing States be judicially settled "between Iceland and the United Kingdom ... whether or not together with other interested countries"? While it was possible in 1961 for Iceland and the United Kingdom to agree on an assurance against any fresh extension of jurisdiction, the effect of which would be suspended as between those two States by recourse to the Court, it is not reasonable to imagine that a system of conservation of marine resources concerning 11 States could be worked out by two of them. The importance of the United Kingdom's interest in the fisheries around Iceland is recognized. But the question put to the Court is not the equitable sharing of the resources of these fisheries, a suggestion analagous to that which the Court rejected in its

Judgment with regard to the delimitation of the continental shelf of the North Sea (*I.C.J. Reports 1969*, p. 13, para. 2, and pp. 21 to 23, paras. 18 to 20), from which Judgment I would adopt the expression that in the present case, there is nothing "undivided to share out" between the United Kingdom and Iceland. The idea of the "respective" fishing rights is not a correct description of the position in fact and in law. The legal status of the fisheries between 12 and 50 miles from Iceland can only be an objective status, which takes account of the interests of all States fishing in those waters. Further, the problems of "fishing rights" in the waters around Iceland have been under study for a considerable time with the States concerned, and Iceland has recognized the need to resolve those problems with such States, as has also the United Kingdom.

22. On 22 July 1972—at the height of the Iceland fishery crisis and one week after the promulgation of the Icelandic Regulations of 14 July 1972 which constitute the act impugned in the United Kingdom Application—there was signed in Brussels an agreement between the European Economic Community and Iceland in order to "consolidate and to extend . . . the economic relations existing between the Community and Iceland". The first article relates that "the aim is to foster in the Community and in Iceland the advance of economic activity [and] the improvement of living and employment conditions". The agreement applies to fish products (Art. 2), to which a Protocol No. 6 is specially devoted; Article 2 of that Protocol provides:

> "The Community reserves the right not to apply the provisions of this Protocol *if a solution satisfactory to the Member States of the Community and to Iceland has not been found for the economic problems arising from the measures adopted by Iceland concerning fishing rights.*" (Emphasis added.)

In application of this Article 2 of Protocol No. 6, and at the request or with the approval of member States of the Community (including the United Kingdom and the Federal Republic of Germany), although the agreement with Iceland had come into force on 1 April 1973, the implementation of the Protocol on Icelandic fish products has already been postponed five times, the last time on 1 April 1974. To prevent Iceland from benefiting from a customs arrangement granted it by a treaty because there is an unsettled dispute over "fishing rights" is, to say the least, to declare oneself concerned or affected by that dispute. Thus the European Economic Community has five times declared its direct interest in coming to a settlement regarding fishing rights in the waters round Iceland by refusing to grant Iceland the implementation of the special tariff provisions laid down in the agreement of 22 July 1972. This agreement is moreover mentioned in the *White Book* on the fishing dispute published by the British Government in June 1973 *(Cmnd. 5341)*: the reference occurs in paragraph 22, immediately following a paragraph on Anglo-German co-operation, and we read:

"It will be for the Community to declare when a satisfactory solution to the fisheries dispute has been achieved and, consequently, when to decide that the terms of the Protocol should take effect."

23. The common interest evinced by the member States of the European Economic Community, and the terms of Article 2, paragraph 1, of the above-cited Protocol No. 6, alike show that these States are not indifferent to the elaboration of a régime for fisheries in the waters round Iceland. For its part, Iceland, by accepting the agreement and Protocol No. 6, has recognized the interest of the European Economic Community in the settlement of the question of fishing rights. Thus the memorandum explaining the grounds of the first proposal to postpone implementation of Protocol No. 6, submitted by the Commission to the Council on 20 March 1973, refers to the "economic problems arising from the measures adopted by Iceland concerning fishing rights" for the member States of the Community. This position of Iceland vis-à-vis the EEC may usefully be compared with that of Norway in its agreement of 14 May 1973 with the EEC, which came into force on 1 July 1973: the concessions granted therein by the EEC will only be valid provided Norway respects "fair conditions of competition"; on 16 April 1973, the date when the agreement was initialled, the Commission indicated that all the tariff-reductions granted on certain fish products of Norwegian origin had been agreed to subject to the continued observance of the existing conditions of overall competition in the fishing sector, which covers the eventuality of any unilateral extension of the fishery zone.

As is well known, the member States of the European Community constitute a majority in the North-East Atlantic Fisheries Commission; what is more, an observer of the Community as such takes part in its work, as is also the case of the North-West Atlantic Fisheries Commission. The catch-quotas of the participant Community members could, according to a proposal made by the Commission of the Communities to the Council, be negotiated and administered on a Community basis.

24. Now an agreement whereby Iceland formally accepts that treaty provisions of undoubted economic importance for that country should be suspended for so long as the problem of the economic difficulties arising out of the measures it has taken in respect of fishing rights remains unresolved would appear to constitute a recognition by Iceland and the EEC of an obligation to negotiate. The negotiations concern the economic consequences of Iceland's claim to exclusive fisheries jurisdiction, and the context of the negotiations is no longer, directly, fishing rights; but what the EEC understood in an analogous situation has been seen in the instance of Norway, and the distinction should not be over-nicely drawn. The question of fishing rights is necessarily affected by any decision regarding the economic consequences, whatever solution is reached for dealing with the economic consequences and whatever the chosen method; but the debate is one of wider scope, and extends to

general economic relations between all the countries concerned. While the Court, in subparagraph 4 of the operative part of the Judgment, has not sought to define more than the conservation aspect of fishing rights in the prescriptions directed to the United Kingdom and Iceland, the working-documents of the Community accurately convey an all-round picture of the various aspects of the problem of fishing in the waters round Iceland. One more example: a Danish memorandum on fishing submitted to the Council on 20 March 1973 recommends, after reviewing the problem of regions almost wholly dependent on fishing (Greenland, the Faroes), special measures of both a structural and a regional nature.

By finding, in the Judgment, that there is a bilateral obligation to negotiate concerning "respective" rights of a bilateral character, when Iceland has accepted a multilateral obligation to negotiate on much wider bases in institutions and international bodies which do not come within the purview of the Court's jurisdiction, the Court has formulated an obligation which is devoid of all useful application.

25. The necessity of dealing with the problem of fisheries in the waters round Iceland comprehensively and with those States particularly interested is also accentuated by the fact that certain States have concluded agreements of an interim character with Iceland, as the United Kingdom did on 13 November 1973, in order to mitigate the difficulties caused them by the application of the Icelandic Regulations of 14 July 1972. The first negotiations were conducted with the local government of the Faroe Islands and enabled fishermen from these islands to fish within the 50-mile limit (Reykjavik agreements of 15-16 August on bottom-line and handline fishing and of 19 September 1972 on trawl fishing). A Danish *Note verbale* of 23 August 1972 states that "questions concerning fishing in the North Atlantic should . . . be settled in an international context" and expresses the hope that negotiations "with the Parties whose interests are threatened by the new Icelandic regulations may be resumed as quickly as possible" (cited in *Revue générale de droit international public*, 1974, pp. 343 f. [1]).

Belgium, on 7 September 1972, concluded with Iceland an agreement which was renewed for 18 months in March 1974; Article 1 reserves the position of the parties on the extent of fisheries jurisdiction, but when the text was transmitted to the Council of the European Communities, the following indication was given: "the Belgian Government considers that, so far as Belgium is concerned, this agreement constitutes a satisfactory, albeit temporary solution within the meaning of Article 2 of Protocol No. 6 to the EEC-Icelandic Agreement of 22 July 1972". Another agreement was concluded with Norway on 10 July 1973. These agreements, even when they reserve the legal position of each of the States vis-à-vis Iceland, necessarily take account of the 1972 Regulations which are the source of the dispute, and Iceland doubtless views them as provisional accommodations of very limited duration which have been made pending

[1] Quotations translated from French by the Registry.

the general acceptance of its claim. (The agreement of 19 September 1972 concluded with the Faroes is subject to denunciation by Iceland at any time, while it may denounce that of 15-16 August at six months' notice.) Hence all one may deduce therefrom is an affirmation of the interest of those States in reaching an objective solution of the problem. These agreements, added to the treaty with the EEC which one of them mentions, give concrete support to the dual conclusion that there exists a group of specially interested States concerning which the Court has no means of knowing what intentions they may have of negotiating with a view to establishing an objective fisheries régime, and that it has no jurisdiction to lay down the law to them, not even by way of directions for negotiation. The failure of all these bilateral negotiations to arrive at anything other than phasing-out agreements which leave the substantive problem aside shows that the situation will be resolved solely by a multilateral agreement corresponding to the objective character of the régime desired.

26. It was not a series of accidents which caused these problems to be considered successively under the auspices of the OEEC (in 1956, in order to put an end to the difficulties of landing Icelandic fish catches in British ports) and of NATO (informal talks in 1958 between representatives of Iceland, the United Kingdom, the Federal Republic of Germany and France), before being raised in the framework of the European Economic Community and the treaty of 1972, but the recognition of the objective character of the régime of these fisheries.

If a bilateral agreement with Iceland was possible in 1961, that was because the essential content of that agreement consisted of the United Kingdom's recognition of the 12-mile limit; but in the last portion of the operative part of its Judgment the Court passes upon a question regarding a fisheries régime for the conservation of resources, and there is nothing bilateral about that. Iceland pointed this out in clear terms to the United Kingdom during the London conversations of 3 and 4 November 1971 (United Kingdom Memorial on the merits, para. 23) before enacting its 1972 Regulations: Iceland's purpose was to protect its fishing industry against massive competition by "super-trawlers" from Spain, Portugal, Poland, the USSR and Japan and to facilitate the planned expansion of Iceland's own fishing industry (it will be noted that Iceland here adds three States, to the eleven listed in paragraph 19 above, but, in any event, the circle of States concerned is not unlimited even if such variations are to be found; it is thus wholly irrelevant to look into the claims of States which are equally far removed from the Iceland fishery area and Iceland's preoccupations). Iceland has wider aims than conservation. A review of Iceland's economic problems seen in relation to an extension of fisheries jurisdiction is to be found in the already-quoted OECD report of 1972 (in particular, pp. 32-39). As the Court did not touch upon this aspect of the situation, I will simply say that any tribunal that wished to study the régime of Iceland's fisheries would have found it indispensable to consider these problems; it is not sufficient to say in general

terms that Iceland is dependent on its coastal fisheries "for its livelihood and economic development" if no attempt is made to grasp the economic realities underlying the phrase. Indeed, for want of all research on the point, the Court's pronouncement constitutes simply an abstract reply to an abstract question. Even from the standpoint adopted by the Court, whereby a problem of objective régime may purportedly be resolved by means of bilateral negotiations, the question should have been placed within its true dimensions, these being of wider scope than conservation procedure, which, in the unique case of Iceland, is probably not the only factor capable of reconciling the legitimate interests that stand confronted (cf. para. 31 below).

27. The obligation to negotiate in the present case does not originate in a kind of general undertaking drawn from Article 33 of the Charter, which is above all a list of means of settlement; this theory makes of the obligation to negotiate a universal but an uncertain remedy, since when negotiations take place without a specific objective the Parties necessarily remain free to appraise their desirability and the necessity of their success. There is only one obligation laid down in Article 33, that of seeking a solution to any dispute likely to endanger peace and security, and parties are left entirely free to adopt the "peaceful means of their own choice". There is nothing to authorize selecting one of those means, negotiation, and turning it into a legal obligation, when all the other methods remain open. The danger in this new construction is that it may have the result of imposing upon States which are before the Court in relation to a specific dispute, in the form of directions for negotiations occasioned by that dispute—but not on the dispute itself—, rules of conduct which a mediator or conciliation commission might propose, though without compulsory effect. Thus it is as if, in creating the idea of an obligation to negotiate on account of Article 33, it were desired to lend one of the means greater effect than the others. This interpretation would enable the Court, in any grave dispute, to transform itself into an arbitrator, conciliator or mediator, as the case might be, and that is what it has done in the present instance. Article 33 of the Charter does not permit this evolution in the role of the Court, which is contrary both to the Charter and to the Court's own Statute. In paragraph 100 of its 1969 Judgment the Court said that one must not "over-systematize" (*I.C.J. Reports 1969*, p. 54).

The source of the obligation to negotiate in this case is the legal nature of the fisheries régime which is the subject of the dispute, and that can only be actualized by means of negotiation among all the States concerned; it is there, solely, that the Court could have found the answer to the question it had chosen to ask itself and discovered that it could not incorporate it into its decision but at most give it a place in the reasoning of the judgment.

28. To conclude my observations on subparagraphs 3 and 4 of the operative part: by virtue of the interpretation placed on the 1961 agreement and the negotiations that enabled it to be concluded (see in parti-

cular paras. 25 and 47 of the Judgment) the Court considers that Iceland has agreed to the inclusion of problems of conservation (zones and methods), preferential rights and historic rights within the categories of dispute which it might find the Court adjudicating. I have already indicated that it appeared to me to be an unwavering constant of Icelandic policy always to distinguish problems of conservation and preferential rights from the problem of the extension of fisheries jurisdiction (para. 16 above) and that the 1961 agreement was one of the proofs of this. If this position had shifted in 1961, why is there nothing in the records to reveal as much? Yet what would have been the concession in point?—the recognition that, in relation to any extension beyond the 12-mile limit of the exclusive fishery zone, any problems of conservation or preferential and historic rights might also be referred to adjudication as elements of a dispute over the extension of the zone. I must say that I find this improbable in the absence of any formal admission on the part of Iceland and considering its constant attitude of opposition to all confusion of problems concerning the breadth of the exclusive fishery zone with problems of the fishery régime beyond that zone.

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29. One further point remains to be examined: what is the effect of this last part of the operative clause of the Judgment? The interim agreement of 13 November 1973 is a treaty which the Court is obviously powerless to modify; and it applies as an interim agreement until 13 November 1975 "pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government on the question" (this is from the first sentence of the agreement). In 1972 the Parties conducted unsuccessful negotiations directed to the conclusion of an interim agreement for the duration of the proceedings before the Court; the agreement of November 1973 is different: it guarantees the United Kingdom a certain provisional position for two years in any event, while expressly reserving the question of settlement of the dispute. It is clearly contrary to the first paragraph of the agreement, cited above, and contrary to all the probabilities, to say that by using this expression Iceland agreed that a decision of the Court on the merits could settle the dispute. The legal position of Iceland is in fact recognized by the agreement, and it is reserved—thus left outside the agreement. If Iceland had tacitly accepted that the Court should be empowered to settle the dispute on the merits, which it has always refused to do, it would thus have recognized the jurisdiction of the Court. That amounts to saying that it would have granted what in its eyes was a favourable position to the United Kingdom for two years, and in addition recognized that the Court would give judgment on the merits of a dispute as to which Article 7 of the agreement indicates that the Parties are aware that it will no doubt be still in existence in November 1975: "Its termination [that of the agree-

ment] will not affect the legal position of either Government with respect to the substantive dispute." Comparison of this Article 7 with the first paragraph seems to me to leave no room for doubt. Furthermore, the history of Article 7 was already available in a British document (*White Book*, Ann. A, Doc. 9) which reproduces the counter-proposals for an interim agreement made by the United Kingdom on 3-4 May 1973 in the course of talks in Reykjavik. The Icelandic ministers had asked that at these talks the question should be examined whether, if an interim arrangement were agreed, the proceedings before the Court could be suspended (*White Book*, Ann. A, Doc. 6 *(f)*, p. 16). The draft counter-proposal of the United Kingdom shows how the negotiations went on this point (*White Book*, Ann. A, doc. 9, para. 6) and my colleague, Judge Petrén, has demonstrated in his dissenting opinion that Iceland refused to accept a form of words for Article 7 which would have provided for an obligation to negotiate with the United Kingdom on the merits before November 1975; that obligation having been formally excluded, it is impossible to go against the clear text of the treaty and impose it. The 1973 agreement, which maintains the legal position of the Parties as they stand at present and as they may be in November 1975, therefore prevents the bilateral obligation to negotiate pronounced by the Court from having any effect. The two Governments could of course decide to negotiate tomorrow, if they so wish, but there is nothing to oblige them to do so, and the 1973 agreement recognizes this.

This is not all. The general considerations in subparagraph 4 of the operative clause of the Judgment, being intended for bilateral Anglo-Icelandic negotiations, are in danger of being overtaken by events by November 1975. If it is suggested that before November 1975 the United Kingdom could come back to the Court, in one way or another, I should explain briefly that it seems to me that the position is otherwise.

30. The Judgment (subpara. 4 of the operative clause) is not applicable until 1975, since the interim settlement for British fishing was reached with the reservation of any settlement on the merits. This again confirms the abstract, not to say illusory, aspect of this final part of the operative clause. It also follows from this that any change in international law in this field will render the Judgment obsolete.

Paragraph 76 of the Judgment states that the agreement of November 1973 does not relieve the Parties from their obligation to negotiate; even if such a bilateral obligation existed, which has here been contested, the 1973 agreement broke new ground, where modification is not possible, as defined in the following way by the Prime Minister of the United Kingdom in the House of Commons:

> "Our position at the World Court remains exactly as it is, and the agreement is without prejudice to the case of either country in this matter. This is an interim agreement covering two years from the moment of signature this afternoon, in the expectation that the Conference on the Law of the Sea will be able to reach firm conclu-

> sions. We all know the difficulties facing a conference on the law of the sea, but *both Governments hope that it will have been possible by the expiration of this agreement to reach agreement on the law of the sea and that that will then govern the situation.*" (*Hansard, Commons*, 13 November 1973, column 252; emphasis added.)

If the British Government recognizes that the agreement is without prejudice to the legal position of the Icelandic Government, and is not contemplating any possibility prior to the expiration of the agreement other than general agreement on the law of the sea in connection with the proceedings of the Third Conference on the Law of the Sea, it definitely appears that the two Governments considered that the 1973 agreement "relieved" them from bilateral negotiation for so long as no general agreement has been reached in the general framework of the proceedings in progress. These statements would also appear to exclude the hypothesis of any return to the Court prior to the termination of the agreement of November 1973, to seek judgment on the substantive dispute, which is agreed to be reserved.

31. Since a dissenting or separate opinion should be kept within limits, I will not deal with other points on which I also disagree with the Judgment,—with the exception of one of these. The invocation of the Judgment in the *North Sea Continental Shelf* cases to support the present decision, with regard to the recognition of a bilateral obligation to negotiate and the reference to equity in paragraphs 75 and 78 of the Judgment and in the final part of the operative clause, is unjustified. The present legal position is quite distinct, since it was the special agreements which had decided that the task of actually fixing the boundaries should be reserved to the Parties, who undertook to do so "on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable" (*I.C.J. Reports 1969*, p. 13, para. 2 of the Judgment). Thus in 1969 the Court did exactly the opposite of what it has done today, when instead of giving a judicial statement of the state of international law on the subject, and leaving the application thereof to the Parties, the Judgment disregards the obligation to state the law, and falls back on an obligation to negotiate which was not provided for in the 1961 agreement by the two States. Furthermore, in 1969 the delimitation of the continental shelf only concerned the three States which were Parties before the Court, and they alone were competent to effect it. That is not the case here for the matters which the Court has sought to resolve in subparagraph 4 of the operative clause: that is, the bilateral organization of a fishery conservation régime while there is a multilateral obligation to negotiate.

Since I also attach particular importance to the question of equity, I would recall that the Court on that occasion took the greatest possible precautions in its drafting specifically in order to prevent its observations being treated as of general application. The inequity of the geographical

situation was simple, and was the result of the natural configuration of the coast; the adjustment involved a single operation, which was also simple, namely, as just a modification as possible of the boundary. The fisheries situation of Iceland is quite unrelated to this, since it involves interests which are of their nature extremely diverse; to inject the concept of equity into a recommendation of negotiations is not sufficient to make it applicable, because of the circumstance, which is unique in the world, of the absolute economic dependence of a State on fisheries. "Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy" (*I.C.J. Reports 1969*, p. 50, para. 91). To hold the balance between the economic survival of a people and the interests of the fishing industry of other States raises a problem of the balanced economic development of all, according to economic criteria, in which fishing is only one of the elements taken into account, and of which the bases are international interdependence and solidarity. The concepts of rate of economic growth, industrial diversification, vulnerability of an economy faced with the "caprices" of nature, population structure and growth, use of energy, investment needs, development of external markets for fish products, regularization of such markets, foreign participation in Icelandic undertakings, industrial development funds, among many others, define the economic interests of Iceland in obtaining a certain settlement of the fisheries problem. Not merely have these expressions never been used, but it is clear that differences of views on these questions do not give rise to justiciable disputes, since these are problems of economic interests which are not the concern of the Court. But the Court cannot make them disappear by refusing to see anything but a conservation problem; the balance of facts and interests is broken.

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32. In effect the Judgment decides that Iceland did not have the right to extend its fisheries limits from 12 to 50 miles on grounds of conservation, which will be generally conceded, but this is to choose a ground which is not that of Iceland, after having avoided deciding that, in the present state of existing law, the extension to 50 miles is not opposable to the fishing States, whatever ground may be relied on for such an extension, including the interests of Iceland as it has explained them; but to disregard a line of argument amounts to rejecting it. Then, sticking to this single theme of conservation, the Court constructs for the two parties to a dispute a system of consultation on conservation problems as if the solution of these could take the place of the only decision which was contemplated in 1961, namely that on the lawfulness of any fresh extension of limits beyond 12 miles. To respond to a dispute over a claim to exclusive jurisdiction by giving guidelines for a conservation agreement is not a fulfilment of the Court's task; even if the Court thought that the question raised under the agreement was too narrow, it is the question which was

defined by the parties. An agreement can never define anything other than what was subject to negotiation at the appropriate time between the parties who concluded it; as the Court has said: "no party can impose its terms on the other party" (*I.C.J. Reports 1950*, p. 139). Nor can a court impose its interpretation of an agreement on the States which concluded it, so as to make it say something more than, or something different from, what it says. Here again the Court has already spoken:

> ". . . though it is certain that the Parties, being free to dispose of their rights, might . . . embody in their agreement any provisions they might devise . . ., it in no way follows that the Court enjoys the same freedom; as this freedom, being contrary to the proper functions of the Court, could in any case only be enjoyed by it if such freedom resulted from a clear and explicit provision . . ." (*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 11).

33. By centring its decision around problems of conservation which are not the subject of the dispute which arose in 1972 as a result of Iceland's extension of its fisheries jurisdiction from 12 to 50 miles, the Court has raised an abstract question to which it has given, in the last part of the operative clause of the Judgment, an abstract reply. In contentious cases, the Court is bound by what it is asked to adjudge; when it applies Article 53 of the Statute, the rule is still stricter, since the Court must satisfy itself that it is not going further or in a direction other than what was agreed to by the State which is absent from the proceedings, in the instrument which established the competence of the tribunal. Thus the Court observed in the *Ambatielos* case that: "in the absence of a clear agreement between the Parties . . . the Court has no jurisdiction to go into all the merits of the present case" (*I.C.J. Reports 1952*, p. 39); the least that can be said is that the problems of conservation were not the subject of such discussion in 1960 between the United Kingdom and Iceland, and that it is difficult to see by what unequivocal agreement it could have become a dispute in itself under the Exchange of Notes of 1961.

34. The Court has not fulfilled its mission in the present case, since is has not decided the legal question which the Parties to the 1961 agreement had envisaged laying before it, for purposes which they were free to decide upon, and since it has dealt with the problem of the conservation of Icelandic fisheries as being the substance of the dispute. Such a judgment cannot therefore be effective for the settlement of the real substantive dispute, even if there were an intention to achieve this, as appears from paragraph 48 and from certain covert allusions in the text.

The real task of the Court is still to "decide in accordance with international law such disputes as are submitted to it" (Art. 38 of the Statute). To introduce into international relations an idea that the decisions of the Court may be given according to what on each occasion the majority thought to be both just and convenient, would be to effect a profound transformation. It will be sufficient to quote the Court itself:

> "Having thus defined . . . the legal relations between the Parties . . ., the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical . . . solution . . ." (*I.C.J. Reports 1951*, p. 83.)

That this new concept must be rejected as in contradiction with the role of an international tribunal appears to me to be clear, simply from the observation that an international court is not a federal tribunal; the States—of which there are now not many—which come before the Court do not do so to receive advice, but to obtain judicial confirmation of the treaty commitments which they have entered into, according to established international law, in relation to a situation with which they are well acquainted. The Court saw all this in the Judgment in the *Fisheries* case, in which the special nature of the situation was the dominant feature in the decision *(I.C.J. Reports 1951, Judgment of 18 December 1951)*; by seeking to effect, under cover of a case limited to Icelandic fisheries, a pronouncement of universal effect, the Court contradicts its whole previous attitude. As long ago as 1963, Charles De Visscher wrote in his commentary on judicial interpretation:

> "The function of interpretation is not to perfect a legal instrument with a view to adapting it more or less precisely to what one may be tempted to envisage as the full realisation of an objective which was logically postulated, but to shed light on what was in fact the will of the Parties."

There could be no better response to the philosophy which inspires the Judgment and the postulates it contains (particularly paras. 44-48).

(Signed) André GROS.