# MEMORIAL ON JURISDICTION SUBMITTED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

## INTRODUCTION

1. This Memorial is submitted in pursuance of the Order of the Court dated 18 August 1972 in the Fisheries Jurisdiction Case *(Federal Republic of Germany* v. *Iceland)*. By this Order the Court decided that the first pleadings in this case should be addressed to the question of jurisdiction of the Court to entertain the dispute which had been submitted by the Application of the Federal Republic of Germany filed in the Registry of the Court on 5 June 1972.

2. The Federal Republic of Germany appreciates the decision of the Court, taken under the authority of Article 48 of the Statute of the Court and Article 37 of the Rules of Court, to deal with the jurisdictional issue separately, before entering the merits of the case. Till now, the Government of Iceland has objected to the jurisdiction of the Court to deal with the dispute submitted by the Federal Republic of Germany and has, in its letter of 27 June 1972 addressed to the Court, declared that it would not appoint an agent to represent the Republic of Iceland before the Court. The Federal Republic earnestly hopes that, by treating the jurisdictional issue separately from the subject-matter of the dispute, the Government of Iceland might be induced to appear before the Court, or that, if the Government of Iceland would still persist in its negative attitude in this phase of the proceedings, a decision of the Court affirming its jurisdiction might eventually persuade the Government of Iceland to join the proceedings at a later stage when the merits of the case will be argued before the Court. By separating the jurisdictional issue from the substance-matter of the dispute, the Court provides the Government of Iceland with a fair chance to argue its claim for an extended fisheries zone at that later stage of these proceedings without being precluded with any argument it might wish to advance in this respect. The Government of Iceland should, however, realize that according to Article 36, paragraph 6, of the Statute of the Court to which Iceland has subscribed, it is within the unquestionable competence of the Court to decide on its jurisdiction. No individual party is allowed to decide unilaterally by itself whether or not the Court has jurisdiction to decide a dispute submitted to the Court in due form.

### I. The Basis of the Court's Jurisdiction: Paragraph 5 of the Exchange of Notes of 19 July 1961

3. The subject-matter of the dispute has already been defined in the Application instituting proceedings on behalf of the Federal Republic of Germany against the Republic of Iceland, filed in the Registry of the Court on 5 June 1972. It is the validity or otherwise of the extension by Iceland of its exclusive fisheries zone to 50 nautical miles from the present baselines. This extension has been put into effect on 1 September 1972 by the Regulations issued by the Icelandic Ministry of Fisheries on 14 July 1972. (These Regulations have been reproduced in Annex A to the Request for the Indication of Interim Measures of Protection filed on behalf of the Federal Republic of Germany in the Registry of the Court on 21 July 1972.) In its Application of 5 June 1972 the Federal Republic of Germany has asked the Court to adjudge and declare:

*(a)* that the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, to be effective from 1 September 1972, which has been decided upon by the Parliament (Althing) and the Government of Iceland and communicated by the Minister for Foreign Affairs of Iceland to the Federal Republic of Germany by aide-mémoire handed to its Ambassador in Reykjavik on 24 February 1972, would have no basis in international law and could therefore not be opposed to the Federal Republic of Germany and to its fishing vessels;

*(b)* that if Iceland, as a coastal State specially dependent on coastal fisheries, establishes a need for special fisheries conservation measures in the waters adjacent to its coast but beyond the exclusive fisheries zone provided for by the Exchange of Notes of 1961, such conservation measures, as far as they would affect fisheries of the Federal Republic of Germany may not be taken, under international law, on the basis of a unilateral extension by Iceland of its fisheries jurisdiction, but only on the basis of an agreement between the Federal Republic of Germany and Iceland concluded either bilaterally or within a multilateral framework.

When the Application of 5 June 1972 containing these Submissions was filed, the aforementioned Icelandic Regulations No. 189/1972 had not yet been issued; Submission *(a)* could, therefore, refer only to the Althing Resolution and to the aide-mémoire of the Minister for Foreign Affairs of Iceland which had announced that measure. Since the Regulations No. 189/1972 which purport to extend the exclusive fisheries zone of Iceland to 50 nautical miles and prohibit all foreign fishing activities in this zone, have been put into effect by the Icelandic authorities on 1 September 1972, Submission *(a)* will have to be amended accordingly in the later pleadings on the merits of the case. The subject-matter of the dispute will not be changed thereby.

4. In submitting this dispute to the Court, the Federal Republic of Germany relies on the Exchange of Notes between the Government of the Federal Republic of Germany and the Government of Iceland dated 19 July 1961 (the text of the Notes exchanged is reproduced in Annex C of the Application of 5 June 1972). Paragraphs 1 to 4 of these Notes provided that the Federal Republic of Germany would no longer object to the 12-mile exclusive fishery zone proclaimed by Iceland in 1958 and that, for a transitional period until 10 March 1964, fishing by vessels registered in the Federal Republic of Germany in certain areas within the outer six miles of this zone would not be objected to by the Government of Iceland; then, paragraph 5 of the Notes exchanged reads as follows:

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

The final clause of the Notes contained the statement of both Governments that the exchanged Notes "constituted an agreement" between the two Governments and should enter into force immediately. The Government of Iceland undertook to register the Exchange of Notes with the Secretary-General of the United Nations in accordance with Article 102 of the Charter

of the United Nations, and the Exchange of Notes was so registered on 27 September 1961 (*UNTS*, Vol. 409, p. 47).

5. Consequently, there could be no doubt that paragraph 5 of the Exchange of Notes of 1961 contains a valid international agreement between the Government of the Federal Republic of Germany and the Government of Iceland which conferred jurisdiction on the Court to deal with any dispute "relating to such an extension" as envisaged in the first sentence of paragraph 5, that is to any dispute arising from an extension of the fisheries jurisdiction of Iceland beyond the 12-mile limit to the outer limit of the continental shelf around Iceland to which the Government of Iceland had been committed by the Resolution of the Icelandic Parliament (Althing) of 5 May 1959.

The relevant part of the Althing Resolution of 5 May 1959 reads as follows:

> "The Althing declares that it considers that Iceland has an undisputable right to fishery limits of 12 miles, that recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948 concerning the Scientific Conservation of the Continental Shelf Fisheries and that fishery limits of less than 12 miles from baselines around the country are out of the question."

Paragraph 5 of the Exchange of Notes covers disputes as to the international validity of any extension of Icelandic fisheries jurisdiction beyond 12 miles as well as to the modalities of the régime instituted by Iceland in the extended zone. Consequently, there can again be no doubt that the subject-matter of the dispute as defined in the Submissions contained in the Application of the Federal Republic of Germany (see para. 3 above), that is, whether or not the extension by Iceland of its fisheries jurisdiction to 50 nautical miles is valid under international law, falls within the scope of the jurisdiction of the Court. The present dispute is precisely of such a nature as the parties had anticipated in formulating paragraph 5 of the Exchange of Notes.

6. Paragraph 5 of the Exchange of Notes expressly stipulates that any dispute relating to the extension by Iceland of its fisheries jurisdiction may be referred to the Court "at the request of either party". These words clearly indicate that such a dispute may be brought before the Court by unilateral application; no further consent of the other party is needed to enable the Court to exercise its jurisdiction upon the application by one of the parties. Any other interpretation would render the special proviso "at the request of either party" meaningless. Consequently, the Federal Republic of Germany was entitled, under the terms of the agreement contained in paragraph 5 of the Exchange of Notes, to submit the dispute to the Court by means of an application in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 32, paragraph 2, of the Rules of Court. That a "dispute" exists between the Parties to the present case had already been stated in the Application by the Federal Republic of Germany of 5 June 1972; since then, the dispute has persisted with no settlement in sight.

7. The terms of the agreement on the jurisdiction of the Court contained in paragraph 5 of the Exchange of Notes neither limit the duration of the agreement nor do they admit its unilateral denunciation. Therefore, the Federal Republic of Germany maintains that this agreement is still in force and provides the legal basis for the Court's jurisdiction to entertain the Application of the Federal Republic of Germany in this case.

8. The Government of Iceland, however, which previously had never raised its voice against the validity and applicability of the agreement con-

tained in paragraph 5 of the Exchange of Notes has now declared, by aide-mémoire of 31 August 1971 (see Annex D to the Application of the Federal Republic of Germany), that "the object and purpose of the provision for recourse to judicial settlement ... have been fully achieved" and, by aide-mémoire of 24 February 1972 (see Annex H to the Application of the Federal Republic of Germany), that it "considers the provisions of the Notes exchanged no longer applicable and consequently terminated". The Government of Iceland has reiterated these contentions, which had immediately been rejected by the Government of the Federal Republic of Germany in its aide-mémoires of 27 September 1971 and 14 March 1972 (see Annexes E and J of the Application of the Federal Republic of Germany), in the letter of its Minister for Foreign Affairs addressed to the Court, dated 27 June 1972. In this letter, the Government of Iceland again contended that the agreement on judicial settlement embodied in paragraph 5 of the Exchange of Notes of 19 July 1961 was "no longer applicable" and "terminated" and declared that it would not recognize the jurisdiction of the Court in the present case and not appoint an agent to represent the Icelandic Government before the Court. However, before dealing with the arguments of the Government of Iceland against the jurisdiction of the Court, it may be convenient first to inform the Court about some facts which could throw some light on the genesis of the Exchange of Notes of 19 July 1961 and on the intention of the parties when they concluded the agreement contained in these Notes.

## II. The History of the Exchange of Notes of 19 July 1961

9. The agreement between the Federal Republic of Germany and the Republic of Iceland contained in the Exchange of Notes of 19 July 1961 must be interpreted in the light of the persistent campaign of the Government of Iceland to extend its fisheries jurisdiction beyond the traditional limits of national jurisdiction over the waters adjacent to its coast. The beginning of this campaign dates back to the year 1948.

10. On 5 April 1948, the Parliament (Althing) of Iceland enacted a Law entitled "Law concerning the Scientific Conservation of the Continental Shelf Fisheries". Under this Law the Minister for Fisheries of Iceland was authorized to issue "regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland wherein all fisheries shall be subject to Icelandic rules and control" and to issue "the necessary regulations for the protection of the fishing grounds within the said zones" (Art. 1). According to the declared purpose of that Law, the extended jurisdiction was ostensibly sought for the enactment of conservation measures; it could not be anticipated at that time that this Law was to provide the basis for the later campaign of the Government of Iceland to monopolize fisheries in the waters around Iceland for Icelandic fishermen. No immediate action, however, was taken by the Government of Iceland after the enactment of this Law.

11. On 19 March 1952, after the International Court had rendered its Judgment in the Norwegian Fisheries case of 18 December 1951, the Minister for Fisheries of Iceland issued the Regulations No. 21/1952 by which the fisheries limits of Iceland were extended to 4 miles measured from specified straight baselines, and all fishing activities by foreign vessels were prohibited within the 4-mile zone. The regulations went into effect on 15 May 1952. The

Government of the Federal Republic of Germany did not protest against this action of the Government of Iceland.

12. On 1 June 1958, after the failure of the First Conference on the Law of the Sea to reach agreement on the breadth of the territorial sea, the Government of Iceland anounced its intention to extend Iceland's fisheries limits to a distance of 12 nautical miles from the existing baselines around the coast of Iceland. In a Verbal Note dated 9 June 1958 and delivered to the Minister for Foreign Affairs of Iceland on 16 June 1958, the Government of the Federal Republic of Germany declared that the intended measure could not affect the right of other nations to fish in the areas of the high seas in the respective zone, and that international law does not entitle any nation to bring parts of the high seas wholly or partially by unilateral action under its jurisdiction and thus impair the rights of other nations which have fished there unrestrained since many decades.

The Verbal Note of the Embassy of the Federal Republic of Germany in Reykjavik dated 9 June 1958 is reproduced in Annex A to this Memorial.

13. On 30 June 1958 the Minister for Fisheries of Iceland issued the Regulations No. 70/1958 whereby the fisheries limits of Iceland were extended to 12 nautical miles from newly defined baselines and all fishing activities by foreign vessels were prohibited within these limits.

The Regulations No. 70/1958 concerning the Fisheries Limits off Iceland, Stjórnartidindi 1958, B. 5, are reproduced in Annex B to this Memorial.

In a Verbal Note dated 16 July 1958 and handed to the Icelandic Ministry for Foreign Affairs on the same day, the Government of the Federal Republic of Germany protested against the unilateral step of the Government of Iceland and expressed the urgent hope that the Government of Iceland would be ready to enter into negotiations in order to negotiate an agreement which would take into account the principles of International Law as well as the traditional rights of all nations concerned.

The text of the Verbal Note dated 16 July 1958 is reproduced in Annex C to this Memorial.

14. The Regulations No. 70/1958 took effect on 1 September 1958. In order to avoid incidents and to prevent an aggravation of the dispute, the Government of the Federal Republic of Germany issued, on 30 August 1958, a recommendation to the German Trawlers' Association to abstain from fishing within the 12-mile zone proclaimed by the Government of Iceland. The German trawlers have followed this recommendation until the settlement by the Exchange of Notes of 19 July 1961 had been reached. No incident had been reported during that time.

15. The efforts of the Federal Republic of Germany to initiate negotiations for the settlement of the dispute on a multilateral basis between the States concerned did not meet with success. The dialogue between the Governments of the Federal Republic of Germany and Iceland was resumed by a Note of the Ministry for Foreign Affairs of Iceland, dated 26 February 1959 and delivered to the Embassy of the Federal Republic of Germany in Reykjavik.

The text of the Note of 26 February 1959 is reproduced in Annex D to this Memorial.

This Note did not respond to the proposal contained in the Note of 16 July 1958 of the Government of the Federal Republic of Germany for multilateral

negotiations. Instead, it referred to the discussions held in the General Assembly of the United Nations which were interpreted by the Government of Iceland as showing an increasing trend in favour of a 12-mile limit, and to the decision of the Assembly to call a second Conference on the Law of the Sea in 1960.

16. The dialogue was continued by a further Note of the Government of Iceland, dated 5 August 1959 and delivered by the Embassy of Iceland in Bonn to the Foreign Ministry of the Federal Republic of Germany on 6 August 1959.

The text of the Note of 5 August 1959 is reproduced in Annex E to this Memorial.

In this Note, the Government of Iceland explained in some detail the position it had taken at the Conference on the Law of the Sea in 1958 and the reasons for its policy with respect to the extension of Iceland's fisheries jurisdiction to 12 nautical miles. The Government of Iceland emphasized that its claim for an exclusive 12-miles fisheries zone was "a problem of its existence"; referring to the growing number of States claiming or supporting a 12-miles fisheries limit, the Government of Iceland expressed the conviction "that it is only a question of time before the 12-miles limit will be accepted as a genral rule", and added that it would greatly appreciate "if the Government of the Federal Republic of Germany would consider the special situation and wishes of Iceland". It is not necessary here to go into the details of the Government of Iceland's Note, but it should be recorded what the Government of Iceland had to say in this Note with respect to a further extension of its fisheries limits beyond 12 miles, which it considered to be justified in view of the particular situation of Iceland as a coastal State specially dependent on its fisheries:

> "The Icelandic Government thinks that where a nation is overwhelmingly dependent upon fisheries, it should be lawful to take special measures, and to decide a further extension of the fishing zone for meeting the needs of such a nation.
>
> This idea was sympathetically considered by the third committee of the Geneva Conference, even though some representatives feared that such departure from the general rule might open the door for abuse. The Icelandic Delegation, therefore, proposed that a possible disagreement should be settled by arbitration. With this addition it was carried by the committee but rejected at the plenary meeting.
>
> A similar thought was, however, expressed in a resolution proposed by South Africa and carried with 67 votes with none against.
>
> The Icelandic Delegation, however, pointed out that this resolution could only apply to areas of the high seas outside the generally accepted fishery limits, as they might be at any given period.
>
> It was necessary that the coastal State can unilaterally include an adjacent area in its fishing zone, subject to arbitration in case of disagreement."

It is interesting to note that the idea to provide for arbitration in case of a dispute arising out of a further extension by Iceland of its fisheries zone originated from Iceland. The Government of Iceland concluded its Note by urging friendly States "to consider its special situation and accept measures they would otherwise think unnecessary and unacceptable as a general rule of International Law".

17. The Government of the Federal Republic of Germany replied to this Note by a Verbal Note delivered to the Embassy of Iceland in Bonn on 7 October 1959.

The text of the Note of 7 October 1959 is reproduced in Annex F to this Memorial.

Replying specifically to the part of the Note of the Government of Iceland cited above, the Government of the Federal Republic of Germany pointed out that it was prepared to recognize the special dependency of Iceland on its fisheries, but could not accept the view of the Government of Iceland that the coastal State had a right to include an adjacent area in its fishing zone unilaterally. The Government of the Federal Republic of Germany added that even on the basis of the Resolution of the Geneva Conference which the Government of Iceland had mentioned in its Note and which is identical with the Resolution on Special Situations relating to Coastal Fisheries of 26 April 1958 (reproduced in Annex K to the Application of the Federal Republic of Germany), preferential rights of the coastal State in areas of the high seas adjacent to its coast could not be established unilaterally, but only by agreement between the coastal State and the other States which have fishing interests in this area.

18. The expectations that the second Conference on the Law of the Sea, which ended on 28 April 1960, would reach agreement on the breadth of the territorial sea and on the fishery limits were not fulfilled. In particular, the question how far a coastal State should be entitled to extend its fisheries jurisdiction and to what extent traditional fishing rights of other States in this zone would have to be respected, remained unsettled, although a trend towards recognition of a 12-miles zone could be observed. After the failure of the Conference, the Government of the United Kingdom approached the Government of Iceland to take up bilateral negotiations for a settlement of the fisheries question. This offer was accepted by the Government of Iceland after some hesitation and negotiations started on 1 October 1960. The negotiations which lasted a considerable time resulted ultimately in the Exchange of Notes of 11 March 1961. The text of these Notes has already been reproduced in Annex B to the Application of the Federal Republic of Germany in this case. The main features of the agreement contained in the Exchange of Notes of 11 March 1961 were:

*(a)* a de facto acceptance of the 12-miles fisheries zone by the United Kingdom;

*(b)* a phasing-out period of three years during which Iceland would not object to fishing by British trawlers in certain areas in the outer six miles of this zone;

*(c)* an assurance that a dispute about the legality of any further extension of the Icelandic fisheries zone could be submitted to the International Court of Justice by either party.

19. On 13 March 1961, the Minister for Foreign Affairs of Iceland notified to the Embassy of the Federal Republic of Germany in Reykjavik copies of the Exchange of Notes between the Government of Iceland and the Government of the United Kingdom and, at the same time, informed the Embassy of the Federal Republic of Germany about new regulations issued by the Minister for Fisheries of Iceland on 11 March 1961 which proclaimed some modifications of the baselines agreed upon in the British-Icelandic Exchange of Notes. Thereupon, the Government of the Federal Republic of Germany

approached the Government of Iceland through its Ambassador in Reykjavik to take up negotiations in order to reach a similar settlement of the fisheries question. In the aide-mémoire, dated 12 April 1961 and handed by the Ambassador of the Federal Republic of Germany to the Foreign Minister of Iceland, the Government of the Federal Republic of Germany made it clear that it could not regard the 12-miles fisheries zone as well as the enlarged baselines as valid in law before such an agreement had been reached. The Government of the Federal Republic added, however, that it was still prepared, in the hope of an early agreement, to recommend to its fishing vessels to observe the fishery limits claimed by Iceland, including the new baselines, for the purpose of avoiding any incidents.

The text of the aide-mémoire of 12 April 1961 is reproduced in Annex G to this Memorial.

The offer to negotiate an agreement was after some hesitation accepted by the Government of Iceland which was rather reluctant to enter into negotiations.

20. Negotiations took place in Bonn between 19 June and 6 July 1961. At their beginning, on 20 June 1961, the Icelandic Delegation handed an aide-mémoire to the Delegation of the Federal Republic of Germany which outlined and specified the concept with which the Government of Iceland approached these negotiations.

The text of the aide-mémoire dated 20 June 1961 is reproduced in Annex H to this Memorial.

In order to illustrate the atmosphere in which these negotiations were conducted, the following statement in this document should be noted:

> "The Icelandic Delegation would submit, in view of the difficulties involved, that the future settlement of this question, as far as German trawlers are concerned, should be based on a realistic endeavour which would take into account the interests of our two countries. On this basis and realizing the good-will which the Federal Government has shown in this matter, the Icelandic Government is now prepared to grant a period of adjustment to German trawlers in Icelandic waters . . ."

In addition, the Delegation of Iceland expressed the hope that the Government of the Federal Republic of Germany would be prepared to take into account Iceland's interests concerning its fish imports into the European Common Market and to provide technical and financial help for programmes aimed at the diversification and strengthening of the Icelandic economy. Although the Government of the Federal Republic of Germany did not feel able to enter into any firm commitment in this respect, nevertheless an understanding was reached during the negotiations that after an agreement had been concluded along the lines of the British-Icelandic Exchange of Notes, the Government of the Federal Republic of Germany would by way of a confidential Memorandum declare its preparedness to give sympathetic consideration to the respective wishes of the Government of Iceland. Such a Memorandum was, in fact, handed to the Ambassador of the Republic of Iceland in Bonn on 21 July 1961.

The text of the Memorandum handed to the Ambassador of the Republic of Iceland on 21 July 1961 is reproduced in Annex I to this Memorial.

21. The negotiations centred more on these economic questions than on the terms of the fisheries agreement which were mainly modelled after the

British-Icelandic Exchange of Notes of 11 March 1961. The Icelandic Delegation tried to persuade the German side to drop the provision for judicial adjudication in case of a dispute relating to a further extension by Iceland of its fisheries jurisdiction; the German Delegation, however, insisted on the inclusion of the same provision as in the British-Icelandic Exchange of Notes. On 6 July 1961, agreement was reached on the text of the Notes to be exchanged and on the aforementioned Memorandum. The text of these Notes has already been reproduced in Annex C to the Application of the Federal Republic of Germany in this case; the main provisions contained in the Notes have already been outlined in paragraph 9 of the said Application and need not be repeated in the present context. In the files of the Foreign Ministry of the Federal Republic of Germany no summary records or notes relating to the discussions between 19 June and 6 July 1961 can be found. It can be gathered from scattered drafts and reports of the German officials who were in charge of the negotiations, that the German delegation tabled a draft which followed the wording of the British-Icelandic Exchange of Notes rather closely. It is reported that the German delegation requested the same three years phasing-out period Iceland had granted British fishing vessels, from the date the arrangement would take effect. Later, however, the delegations agreed on the same date for the end of the phasing-out period which had been fixed in the British-Icelandic Exchange of Notes, namely 10 March 1964, because the Icelandic side very much insisted on this point. This resulted for the German fishing vessels in a shorter phasing-out period of approximately two years and eight months only.

22. After agreement had been reached between the delegations of both Governments on 6 July 1961, but before the Exchange of Notes was effected on 19 July 1961, the Government of Iceland informed the Government of the Federal Republic of Germany that it would be necessary to seek the consent of the Parliament of Iceland (Althing) and that a respective provision should be added to the Agreement. The Government of the Federal Republic conceded to this request of the Government of Iceland; therefore, the Exchange of Notes was accompanied by an Exchange of Letters by which both parties took note of the fact that the agreement contained in the Exchange of Notes would require the consent of the Althing and would be laid before the Althing during its next Session in the autumn of 1961, but that, nevertheless, the Agreement would take effect immediately.

The text of the two Letters exchanged on 19 July 1961 is reproduced in Annex K to this Memorial.

The proceedings in the Parliament of Iceland with respect to the Exchange of Notes took considerable time. It was not before 28 March 1962 that the Icelandic Althing gave its approval.

23. That the two Agreements with the United Kingdom and with the Federal Republic of Germany by which Iceland had succeeded in consolidating its position and had even secured a de facto recognition of its 12-miles fisheries zone, were regarded in Iceland rather a success than an onerous burden was evidenced by subsequent statements of members of the Icelandic Government. When, in 1963, the Minister for Foreign Affairs of Iceland, in the Icelandic Parliament, defended the Agreement against criticism by the opposition, he emphasized that the 12-miles limit, the recognition of which had been achieved by the Agreement, was not the final goal and that the Agreement did not prevent Iceland from further implementing the Althing Resolution of 5 May 1959 regarding the further extension of the fisheries

jurisdiction of Iceland over the whole continental shelf. Referring to the clause which obliged Iceland to accept the jurisdiction of the International Court of Justice, he made the following remark: "That we have committed ourselves to act according to the rules of international law in my view and in the view of the Icelandic Government has been done in conformity with our Icelandic legal tradition." (Cited from a report of the Ambassador of the Federal Republic of Germany in Reykjavik dated 8 May 1963.)

24. On 10 March 1964, the transitional period, during which British and German vessels were still allowed to fish within the outer 6 miles of the 12-miles fisheries zone, came to an end. This day was hailed in Iceland as a day of victory; members of the Government of Iceland took the opportunity to emphasize this fact in public addresses to the Icelandic people. On 11 March 1964, in the Icelandic papers a statement of the Prime Minister of Iceland was published which contained the following sentences on the 1961 Agreement:

> "This day must be regarded as a day of rejoicing. We have not yet attained our final goal, but the 1961 Agreement has opened to us the only practical way to attain that goal.
>
> It has sometimes been asserted that we had given away rights without compensation. The provisions of the Agreement, however, are in full harmony with the Resolution of the Althing of 5 May 1959. We cannot extend our fishery zone over the whole continental shelf unless international law allows us to do so. In the 1961 Agreement, we have declared that we shall continue to work for the recognition of the Resolution of the Althing by the international community. Eventually the International Court of Justice will have to decide on the validity of our claim. The agreement on the jurisdiction of the International Court of Justice is a safeguard which secures that no party goes further than international law permits and which prevents that a party resorts to the use of force . . . Later it will turn out what an advantage it will be for the Icelanders that the International Court of Justice will decide on possible disputes about our rights over the continental shelf." (Translation from the 11 March 1964 edition of the *Morgunbladid*.)

## III. The Validity and Applicability of the Agreement Contained in Paragraph 5 of the Exchange of Notes of 19 July 1961

### 1. The Various Arguments of the Government of Iceland Against the Validity and Applicability of the 1961 Agreement

25. The Government of Iceland has, in its public statements as well as in its communications addressed to the Court, put forward various arguments in support of its contention that the agreement embodied in paragraph 5 of the Notes exchanged on 19 July 1961—hereafter referred to in short as the 1961 Agreement—were no longer in force.

Although the arguments advanced by the Government of Iceland in this respect have not been brought forward in the proper form, namely by way of pleading them before the Court, the Federal Republic of Germany will, nevertheless, deal with all these arguments.

26. It is somehow difficult to grasp the precise juridical meaning of the arguments put forward here and there by the Government of Iceland in its various utterances; the statements have been oscillating between different

lines of argumentation and the language used has not always been couched in precise legal terms. Therefore, it seems necessary at first to list all the various arguments used by the Government of Iceland:

27. The first indication that the Government of Iceland contemplated the repudiation of the Agreement of 1961 was contained in the Policy Statement of the Government of Iceland made on 14 July 1971 when it had taken office after the elections of that year. There it was stated that the Fisheries Agreements with the United Kingdom and the Federal Republic of Germany would be "terminated". It was by then not quite clear whether the intention to terminate the Agreement of 1961 related only to the substantive provisions with respect to the 12-miles fisheries limit or whether it would extend to the compromissory clause contained in paragraph 5 of the Agreement as well.

28. The intentions of the Government of Iceland were soon made clear by the aide-mémoire handed to the Ambassador of the Federal Republic of Germany in Reykjavik on 31 August 1971: In this document the Government of Iceland declared that in its opinion "the object and purpose of the provision for recourse to judicial settlement have been fully achieved". In the talks which followed between a German and an Icelandic Delegation on 8 and 9 November 1971 in Bonn the legal adviser of the Foreign Ministry of Iceland explained that, in the view of the Government of Iceland, paragraph 5 of the Exchange of Notes of 1961 which contained the compromissory clause, had been the price paid by Iceland for the recognition of the 12-miles fishery limit by the Federal Republic of Germany at that time, and as today the 12-miles fishery limit was a matter of course, the Exchange of Notes had now achieved its purpose.

29. On 9 November 1971, the Prime Minister made a rather comprehensive statement in the Parliament (Althing) of Iceland with respect to the grounds for terminating the 1961 Agreement.

> The following quotations are taken from the brochure *Iceland and the Law of the Sea*, published by the Government of Iceland, Reykjavik 1972, pages 34-36.

He stated that the Agreements with the United Kingdom and the Federal Republic of Germany would be terminated because these Agreements "had already attained their main objective as both nations had fully benefited by the period of adjustment which they were given by the Agreements", and that the obligation to refer any dispute relating to the extension of the fishery limits to the International Court of Justice in perpetuity, would be an "unnatural restriction which clearly the Icelanders need to terminate". After admitting that the Agreements with the United Kingdom and the Federal Republic of Germany contained no provision for termination the Prime Minister of Iceland continued that Iceland could "not agree that they were made for eternity", and that it must be possible "to terminate them by giving proper notice". The Prime Minister then went on to say that the Agreements were made "under extremely difficult and unusual circumstances", and that "all the circumstances are completely changed from what they were when the Agreements were made, both as regards fisheries and fishery techniques, as well as legal opinion on fisheries jurisdiction", and that these Agreements would not have been made if the Government of Iceland had "then known how these matters would evolve".

30. On 15 February 1972 the Icelandic Parliament (Althing) in its Resolution by which it resolved that the fishery limits should be extended to 50 miles as from 1 September 1971, requested the Government of Iceland to inform

again the Governments of the United Kingdom and the Federal Republic of Germany that "because of the vital interests of the Nation and owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland".

The text of the Althing Resolution of 15 February 1972 has been reproduced in Annex G to the Application of the Federal Republic in this case.

31. In pursuance of this Resolution the Government of Iceland, by aide-mémoire of 24 February 1972, informed the Government of the Federal Republic of Germany of its decision to issue new regulations providing for fishery limits of 50 miles to become effective on 1 September 1972 as set forth in the Resolution of the Althing adopted on 15 February 1972, and reiterated in this aide-mémoire 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" and that the Government of Iceland, therefore, "considers the provisions of the Notes exchanged no longer applicable and consequently terminated".

The text of the Icelandic aide-mémoire of 24 February 1972 has been reproduced in Annex H of the Application of the Federal Republic in this case.

In the accompanying Statement read by the Minister for Foreign Affairs of Iceland when he delivered the aide-mémoire to the Ambassador of the Federal Republic of Germany, the Foreign Minister of Iceland added that this aide-mémoire should be interpreted "should the occasion arise as implying all arguments relative to the rules of international law in this field including all aspects of the termination of agreements in the light of the aide-mémoire of 31 August 1971, as well as the present aide-mémoire".

The text of the Statement of the Icelandic Minister for Foreign Affairs of 24 February 1972 has been reproduced in Annex I to the Application of the Federal Republic in this case.

32. After the Federal Republic of Germany had filed its Application in the Registry of the Court on 5 June 1972, the Government of Iceland addressed a letter dated 27 June 1972 to the Court whereby it objected to the jurisdiction of the Court and stated that it would not appoint an agent to represent the Government of Iceland before the Court. In this letter, the Minister for Foreign Affairs, after referring to the aide-mémoires of 31 August 1971 and 24 February 1972 as well as to the resolution of the Althing of 15 February 1972, reiterated that the 1961 Agreement "was not of a permanent nature", that "the object and purpose of the 1961 Agreement had been fully achieved", and "that the 1961 Exchange of Notes was no longer applicable and terminated"; he added that 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".

33. These arguments cover a rather wide field of various legal grounds for terminating an international agreement. They show the desire of the Government of Iceland to get released from an undertaking which it regards now as unnecessarily restraining its freedom of action; but all these arguments are merely assertions, not accompanied by any fact which might sustain the validity of any one of these arguments advanced against the continuing validity of the 1961 Agreement.

34. If one tries to analyse the juridical essence of the various arguments of the Government of Iceland, these arguments can be classified under the following headings:

*(a)* arguments which question the initial validity of the 1961 Agreement;
*(b)* arguments which assert a limited duration of the 1961 Agreement;
*(c)* arguments which assert grounds for terminating the 1961 Agreement;
*(d)* arguments which assert the non-applicability of the 1961 Agreement because "vital interests" are affected.

The various arguments of the Government of Iceland will be examined in this order in the following paragraphs. It will be shown that none of these arguments can be sustained, and that the 1961 Agreement is still valid and governs the relations between the Parties to this dispute.

## 2. The Initial Validity of the 1961 Agreement

35. By alleging that the Exchange of Notes effected on 19 July 1961 had taken place "under extremely difficult circumstances" the Government of Iceland seems to intimate that the conclusion of the 1961 Agreement had taken place, on the part of the Government of Iceland, under some kind of pressure and not by its own free will. However, the Government of Iceland has failed in so far to explain to what "difficult circumstances" this vague formulation refers, and has not alleged any fact which might show to what kind of pressure the Government of Iceland had been exposed before or during the negotiations which led to the conclusion of the agreement contained in the Exchange of Notes of 19 July 1961.

36. The history of the 1961 Agreement which has been described in some detail in paragraphs 9 to 24 of this Memorial, is plain evidence of the fact that this Agreement had been freely negotiated between the Government of Iceland and the Government of the Federal Republic of Germany on the basis of perfect equality and freedom of decision on both sides. In support of this the following facts should be specifically mentioned:

37. *First:* From 1 September 1958, the date on which the Government of Iceland had put into effect the Regulations No. 70/1958 which prohibited all foreign fishing within the 12-miles limit, until the date on which the 1961 Agreement had entered into effect, the trawlers registered in the Federal Republic of Germany voluntarily abstained, on the recommendation of the Government of the Federal Republic, from fishing activities within the 12-miles zone claimed by Iceland. The Federal Republic had not taken any steps to continue to exercise its traditional fishing rights in the extended fisheries zone, which were illegally impaired by the new Icelandic Regulations. Instead the Federal Republic resorted only to a diplomatic protest in order to reserve its rights in view of the unilateral enforcement measures taken by the Government of Iceland. This attitude of the Federal Republic and of its trawler fleet could not possibly produce any pressure on the Government of Iceland.

38. *Second:* Nearly three years were needed until the Government of the Federal Republic persuaded the Government of Iceland to agree on negotiations for a settlement of the fisheries question. During this time Iceland had the full benefit of its unilaterally proclaimed exclusive fisheries zone. The attitude and the various statements of the Government of Iceland during this time contained in the Notes and aide-mémoires mentioned in paragraphs 16 and 17 of this Memorial showed that the Government of Iceland was

marking time in the hope that in the United Nations or at the Second Conference on the Law of the Sea the trend for recognition of a national 12-miles fisheries zone would eventually materialize into a recognized rule of International Law. It was only after it became evident in 1960 that an international consensus on such a zone could not yet be reached that the Government of Iceland reluctantly consented to negotiations for a bilateral settlement in order to obtain some form of recognition of its claim for a 12-miles zone from the two States whose traditional fisheries had been primarily affected by the Icelandic measure. If there were some circumstances which put some kind of pressure on the Government of Iceland to negotiate, these were not actions of the Federal Republic of Germany; it was rather the state of international legal opinion at that time which made the Government of Iceland realize that general international recognition of its claim for an exclusive fisheries zone was not obtainable.

39. *Third:* It was plainly visible that the Government of Iceland approached the negotiations on the 1961 Agreement with the idea to make a deal in the sense that the Federal Republic should pay for a settlement of the fisheries question with some economic concessions. This had been the main issue in the discussions leading to the 1961 Agreement, and the Government of Iceland succeeded in extracting from the Government of the Federal Republic a declaration of good will contained in the Memorandum of 21 July 1961 (mentioned in para. 20 of this Memorial) which went halfway to satisfy specific wishes of the Government of Iceland with respect to its fish imports into the Federal Republic and financial and technical help for the development of its industry. It follows from this that no economic pressure of any kind was exercised by the Federal Republic of Germany; on the contrary: the Federal Republic had to offer special economic advantages to Iceland in order to get the same settlement of the fisheries question as had been agreed upon between the United Kingdom and Iceland.

40. *Fourth:* It should be noted that it had been originally an Icelandic idea that in case of a further extension by Iceland of its fisheries jurisdiction, disputes on the international validity of such extension should be submitted to arbitration (cf. the Icelandic Note of 5 August 1959, mentioned in para. 16 of this Memorial and reproduced in Annex E to this Memorial). This being so, it would be rather strange to intimate, as the Government of Iceland seems inclined to do, that the agreement on the jurisdiction of the International Court of Justice contained in paragraph 5 of the Exchange of Notes had been an undue advantage extracted from the Government of Iceland by some undefined kind of pressure.

41. It follows from the considerations in paragraphs 35 to 40 of this Memorial that there is no valid ground to question the initial validity of the Exchange of Notes of 19 July 1961. It is therefore respectfully submitted that the agreement contained in paragraph 5 of these Notes constitutes a valid agreement which conferred jurisdiction on the Court with respect to any dispute relating to the extension by Iceland of its fisheries jurisdiction beyond the 12-miles limit.

### 3. The Duration of the 1961 Agreement

42. By asserting that the "object and purpose of the 1961 Agreement had been fully achieved" and that, therefore, this Agreement was "no longer applicable" and "terminated", the Government of Iceland proceeds from the

assumption that the 1961 Agreement had only a very limited purpose. The Government of Iceland, however, has failed to specify the alleged "limited" object and purpose of the 1961 Agreement and to indicate at which date it considers the Agreement to have expired.

43. The Exchange of Notes of 19 July 1961 does not contain a provision which would, by express terms, determine the duration of the agreement contained in paragraph 5 of the Notes; nor is there a provision which would allow one of the parties to terminate the agreement unilaterally by giving notice to the other party. According to the overriding principle of *pacta sunt servanda* which governs treaty relations between States, such an agreement can only be terminated by consent of both parties unless it can be established that the parties intended to limit the duration of the agreement or to admit the possibility of denunciation by one of the parties. It is, therefore, exclusively a question of interpretation of the 1961 Agreement whether such an intention of the parties can be established, and if so, under what conditions the termination of the Agreement may be brought about. In the following paragraphs we shall consider first the question whether the 1961 Agreement could be interpreted, as the Government of Iceland would wish, to the effect that the parties had intended the Agreement to lapse after a certain time; the question whether the parties had intended to admit unilateral renunciation of the Agreement will be considered in the later paragraphs.

44. By asserting that the 1961 Agreement had "fully achieved its object and purpose", the Government of Iceland seems to assume that the 1961 Agreement had only the limited object and purpose to give the German side a short breathing time until the Government of Iceland would effect a further extension of its fishery limits. It is difficult to ascertain what the Government of Iceland regards as the object and purpose of the 1961 Agreement, as it has neither in the aide-mémoires addressed to the Government of the Federal Republic of Germany nor in its communications to the Court ever defined what it considers the object and purpose of the 1961 Agreement. The Prime Minister of Iceland, in his Statement before the Icelandic Parliament (Althing) on 9 November 1971, has, however, hinted that the Agreements between Iceland on the one hand and the United Kingdom and the Federal Republic of Germany on the other hand had attained their main objective because these two States had already "fully benefited by the period of adjustment which they were given by the Agreements"; this remark points in the direction of an interpretation that the 1961 Agreement had been solely designed to allow the German side to adjust itself to the 12-miles fisheries limit until Iceland would take the next step in extending its fishery limits beyond the 12-miles limit. Such an interpretation, however, would be in complete contradiction to the text of the 1961 Agreement as well as to the circumstances under which it was concluded. There are no facts discernible, and the Government of Iceland has not been able to produce any facts which might sustain such a narrow interpretation of the object and purpose of the 1961 Agreement. The Government of Iceland seems to take its own interest which induced them to conclude the 1961 Agreement, for the object and purpose of the Agreement. It may well be that this interest had in the meantime disappeared since a 12-miles fishery zone is today generally recognized although the treatment of traditional fishing rights in this zone is still an open question; the Federal Republic, on the other hand, still has a great and legitimate interest to maintain the Agreement.

45. An objective interpretation of the 1961 Agreement has to start from the terms of the different provisions of the Exchange of Notes of 19 July 1961

and from their context. The provisions contained in these Notes can be clearly divided into two sets:

*(a)* Those provisions—as paragraphs 3 and 4—which had only a transient character. By these provisions fishing vessels of the Federal Republic of Germany were allowed to fish for a transitional period of nearly three years within areas of the outer 6 miles of the 12-miles fishery zone of Iceland until 10 March 1964. These provisions clearly expired at the fixed date.

*(b)* Those other provisions, as paragraphs 1, 2 and 5, which are capable of application for an indefinite time. Paragraphs 1 and 2 still require the Federal Republic of Germany not to object to the 12-miles fishery zone claimed by Iceland and to the baselines from which it is measured, while on the other hand Iceland is required to observe the conditions contained in paragraph 5 in case of a further extension of its fisheries zone.

46. It cannot be argued that the obligations under *(b)* are today devoid of their original purpose; on the contrary: if one compares the settlement contained in paragraphs 1 and 2 of the 1961 Exchange of Notes with the European Fisheries Convention of 1964, the obligation contained in the 1961 Agreement still goes further than is generally recognized in the European Fisheries Convention; moreover the obligation of Iceland contained in paragraph 5 of the Exchange of Notes could not become operative before Iceland extended its fisheries zone beyond the 12-miles limit. It has been Iceland that has drawn most of the benefits from the 1961 Agreement during the last 10 years, and it is only now that the other part of the Agreement, namely paragraph 5 of the Exchange of Notes comes into operation and may provide some protection for the Federal Republic of Germany. Under these circumstances it is difficult to see how one could possibly say that the Exchange of Notes of 1961 and in particular the agreement on the jurisdiction of the Court contained in paragraph 5 of these Notes are now devoid of any purpose. The Government of Iceland seems to take a rather one-sided view if it tries to assert that the 1961 Agreement has served its purpose because, in view of the trend towards the recognition of a 12-miles limit of the territorial sea, Iceland would probably draw no more benefits from the Agreement in the future.

47. If we take paragraph 5 of the Exchange of Notes of 1961 alone for itself, it cannot be interpreted as having the only purpose to prevent further extension of the Fisheries Jurisdiction by Iceland for a limited period, say 5, 10 or 20 years. Neither the travaux préparatoires nor the text of this paragraph nor the circumstances under which the Notes were exchanged on 19 July 1961, could support the interpretation that such was the intention of the parties when they concluded this Agreement. As has been rightly remarked during the discussions between the Government of Iceland and the Government of the Federal Republic by the Legal Adviser to the Foreign Minister of Iceland (see above para. 28), the acceptance of jurisdiction of the Court in case of a dispute about the further extension of the Icelandic fisheries limits was the price paid by Iceland for the readiness of the Federal Republic of Germany to tolerate the 12-miles exclusive fisheries zone which at that time was by no means generally recognized, and to abstain from exercising its traditional fishing rights in this zone for the future. It was the interest of the Federal Republic to be protected in the future against further unilateral extensions of the Icelandic Fisheries jurisdiction and to get some guaranty that

such an extension would only take place in accordance with the development of general international maritime law.

48. It follows from the text of paragraph 5 of the Exchange of Notes of 1961 that both parties started from the basis that the Government of Iceland would try to extend its fisheries jurisdiction beyond the 12-miles limit in accordance with the general trend in international maritime law. There was no indication neither from the discussions which led to this Agreement nor from the text of paragraph 5 of the Notes exchanged that the purpose was to prevent the Government of Iceland from any action in this direction, or, to put it into more juridical terms, to create a so-called "stand-still" obligation for the Government of Iceland. It was rather the purpose of paragraph 5 to give the Federal Republic of Germany the right to challenge such an extension if it considered it to be contrary to the state of international law at that time. Both parties were fully aware that the international maritime law was in a state of change and that it might develop in such a way as to allow Iceland to extend its fisheries jurisdiction beyond the 12-miles limit in the future. It is not the object and purpose of paragraph 5 of the Exchange of Notes to prevent Iceland from exercising any such right if it came into existence; it was rather the purpose and object of this Agreement to provide in such a case for a development of the law by consent between the parties concerned, or, in case of a dispute, by impartial adjudication in accordance with Article 33 of the United Nations Charter. There is not the slightest indication in the text of paragraph 5 of the Exchange of Notes of 1961 that the parties intended this procedure to apply only for a limited period of time; this is the more so as the parties did not, in contrast to paragraphs 3 and 4 of the Exchange of Notes, provide for any time-limit.

49. In his letter addressed to the Court, dated 27 June 1972, the Minister for Foreign Affairs of Iceland emphasized several times that the 1961 Agreement was, in the view of the Government of Iceland, not of a permanent nature, but he did not add any facts or considerations which might throw some light upon the question for what period the parties had intended that settlement to remain in force. Fortunately, it is possible to answer this question on the basis of the text of paragraph 5 of the Notes exchanged on 19 July 1961 without being forced to have recourse to subsidiary means of interpretation: The Federal Republic of Germany does not assert that the Agreement contained in paragraph 5 of the Notes exchanged is an Agreement which was meant to remain in force "in perpetuity". The text of this provision clearly indicates that its application was intended to be limited to the efforts of the Icelandic Government to implement the Althing Resolution of 5 May 1959 relating to the extension of the fisheries jurisdiction of Iceland, that is to say, to any action of the Icelandic Government to extend its zone of fisheries jurisdiction beyond the 12-miles limit to the seaward boundary of its continental shelf, but only to such action. While the scope of the agreement on the jurisdiction of the Court is thereby limited *ratione materiae* very strictly, the applicability of this provision is not limited *ratione temporis*; it could not possibly make any difference whether the Government of Iceland would have extended its fisheries jurisdiction 5 years after the conclusion of this arrangement, or 10 or 20 years after. Otherwise the undertaking contained in paragraph 5 of the Notes exchanged on 19 July 1961 would have been without any value.

50. It follows from the foregoing considerations that there is no basis for the contention of the Government of Iceland that the 1961 Agreement has already achieved its object and purpose and should, therefore, be considered as terminated.

### 4. The Absence of any Right to Terminate the 1961 Agreement

51. By arguing that the 1961 Agreement was not of a permanent nature and that changed circumstances and vital interests of Iceland made it necessary for Iceland to terminate the 1961 Agreement, the Government of Iceland seems to assert a right of unilateral denunciation of the 1961 Agreement although it still is not clear on which of these different grounds the Government of Iceland wishes to rely, probably on all of these grounds. Therefore, it will be necessary to examine all these points.

#### (a) *The Right to Denounce an International Agreement containing no Provision concerning its Termination*

52. As the 1961 Agreement contains no provision which admits the renunciation of this Agreement by one of the parties, the question may be posed whether, nevertheless, each party has a right to denounce the Agreement after a reasonable time and giving reasonable notice to this effect. This question raises important issues such as the principle of *pacta sunt servanda* and the methods of treaty interpretation. In essence it is primarily a question of the interpretation of the particular agreement whether the obligations of the parties may be construed in such a way as to allow each party a renunciation of the agreement.

53. Article 56 of the Vienna Convention on the Law of Treaties of 23 May 1969 does not offer much help to solve this question in this case, not only because it is not applicable to the 1961 Agreement and it is doubtful how far it constitutes a codification of existing international law in all its parts, but foremost because Article 56 makes the answer again dependent upon the interpretation of the particular agreement without giving any guidelines for interpretation. According to Article 56, a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal, unless:

*(a)* it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

*(b)* a right of denunciation or withdrawal may be implied by the nature of the treaty.

While the alternative *(a)* is certainly in conformity with the existing rules of customary international law, it is doubtful whether alternative *(b)* represents a generally recognized rule of customary international law unless reference to the nature of the treaty is to be understood only as a subsidiary means of interpretation in order to ascertain the otherwise undisclosed intention of the parties and if such an intention of the parties may then be clearly inferred from the nature of the treaty.

That was also the opinion of Lord McNair, *Law of Treaties*, 1961, p. 511, when he wrote: "Just as there is nothing juridically impossible in the existence of a treaty which is incapable of termination except by the consent of all parties, so also there is nothing juridically impossible in the existence of an implied term giving a party the right to terminate it unilaterally by denunciation. It is a question of the intention of the parties which can be inferred from the terms of the treaty, the circumstances in which it was concluded, and the nature of the subject-matter."

54. It is important to note that the International Law Commission had, in its draft Articles on the Law of Treaties, only proposed the alternative *(a)*

because the majority of the Commission did not regard the nature of a treaty without recurring to the intention of the parties, as a sufficient basis for allowing a party to denounce a treaty unilaterally.

See Summary Record of the 689th Meeting of the International Law Commission (29 May 1963), *Yearbook of the International Law Commission* 1963, Vol. I, pp. 99-106, and of the 709th Meeting (27 June 1963), *ibid.*, pp. 239-241.

The text adopted at the 717th Meeting on 9 July 1963 (*ibid.*, p. 294) read as follows:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal".

After re-examination of this text at the 829th Meeting (12 January 1966), *Yearbook of the International Law Commission* 1966, Vol. I, pp. 43-48, the Commission adopted the following shortened text in its 841st Meeting on 27 January 1966 unanimously (*ibid.*, p. 122):

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it otherwise appears that the parties intended to admit the possibility of denunciation or withdrawal."

55. Thus, the view prevailed among the members of the International Law Commission that the existence of a right of denunciation or withdrawal from the treaty could not be implied from the character of the treaty alone, and that such right may not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal.

See the Commentary of the International Law Commission to Article 53 (which later became Article 56 of the Vienna Convention) of its draft Articles, contained in the Report of the International Law Commission to the United Nations General Assembly, *Yearbook* 1966, Vol. II: "(4) Some Members of the Commission considered that in certain types of treaty such as treaties of alliance, a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there are indications of a contrary intention. Other members took the view that, while the omission of any provision for it in the treaty does not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right is not to be implied from the character of the treaty alone. According to these members, the intention of the parties is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless 'it is established that the parties intended to admit the possibility of denunciation or withdrawal'. Under this rule, the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it

appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal."

56. When the United Nations Conference on the Law of Treaties in its First Session (26 March to 24 May 1968) at the Committee stage discussed this Article as proposed by the International Law Commission, several amendments were tabled to the effect that a right of denunciation or withdrawal could be implied already from the character of the treaty alone; among them was the amendment submitted by the United Kingdom (A/CONF.39/C.1/L.311) according to which at the end of that Article the following words should be added:

"... or unless the character of the treaty is such that a right of denunciation or withdrawal may be implied".

In the discussion on the Article proposed by the International Law Commission and on the amendments submitted thereto opinions were very much divided as to the advisability to allow the nature or character of a treaty to be an independent basis for an implied right of denunciation which did not make it necessary to establish the existence of a joint intention of the parties to this effect. On the one hand, several delegations were reluctant to admit the possibility of denouncing a treaty too easily since that would endanger the stability of treaties, while other delegations stressed the need for allowing to terminate treaties which had lost their purpose and, therefore, advocated a more flexible rule; other delegations pointed to the difficulty to ascertain the intention of the parties. The United Kingdom Delegation defended its amendment by arguing that its amendment purported to strike a balance between the binding character of a treaty and the need to terminate it in certain circumstances; while the stability of treaties had to be ensured in the interests of international peace and security, "provision had to be made for parties to withdraw from treaties which, although of indefinite duration, were intrinsically temporary in character", and that it should be taken into account that "in certain cases the character of the treaty was the only guide".

See discussion at the 58th (paras. 18-38) and 59th (paras. 1-56) Meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, First Session, *Official Records* (UN Publ. E 68.V.7), pp. 336-343.

When the amendments were put to the vote, the United Kingdom Amendment was adopted by the narrow margin of 26 votes to 25, with 37 abstentions.

See *ibid.*, p. 343.

57. When the amended Article which had been slightly redrafted by the Drafting Committee of the Whole, was again submitted to the Committee of the Whole, the Finnish Delegation asked for a separate vote on the provision now contained in subparagraph 1 *(b)* of Article 56 according to which the right of denunciation or withdrawal might be implied solely from the nature of the treaty, in the hope that the previous version of that Article as proposed by the International Law Commission would thereby be restored. However, subparagraph 1 *(b)* was approved by 56 votes to 10 with 13 abstentions.

See Summary Record of the 81st Meeting of the Committee of the Whole (22 May 1968), paras. 11-17, United Nations Conference on the Law of Treaties, First Session, *Official Records*, p. 477.

In the plenary meeting of the Conference doubts were again expressed against

the advisability of allowing to infer a right of denunciation from the nature of the treaty. The Australian Delegation which had raised this point, did not however press for a separate vote, and Article 53 was then adopted without change in the version as it had already been adopted at the Committee Stage of the Conference.

See Summary Record of the 20th Plenary Meeting (12 May 1969), paras. 83-88, and of the 21st Plenary Meeting (13 May 1969), paras. 1-9, United Nations Conference on the Law of Treaties, Second Session, *Official Records*, pp. 108-110.

58. Thus, it seems rather doubtful whether, under general international law, the nature of an international agreement alone can be regarded as a sufficient basis to assume an implied right to denounce that agreement unilaterally. However, it will not be necessary in the present case to dwell on this intricate question of treaty interpretation any longer; even if one would accept the rule contained in Article 56 of the Vienna Convention as being now part of general international law, no other result will follow in the present case: As far as the 1961 Agreement is concerned, neither can it be established that the parties intended to admit a unilateral right of denunciation nor is it possible to infer such a right from the nature of this Agreement.

### (b) *The Nature of the 1961 Agreement Provides no Basis for an Implied Right of Denunciation*

59. If it would be assumed, for the purpose of argument, that the special nature of a treaty alone, without requiring the proof of a respective intention of the parties, could in certain cases imply a right of either party to terminate such a treaty unilaterally at its discretion, then the question arises whether there are any elements in the 1961 Agreement which would justify such an interpretation. For the purpose of the examination of the 1961 Agreement in this respect, we have to start from the following basic considerations:

60. The assumption that the nature of a treaty implies a right of either party to terminate the treaty unilaterally, is an exception to the general rule that a treaty which does not by its express terms provide for a right of denunciation by either party, may only be terminated by consent of both parties. The exceptional character of such an implied right has been clearly brought out in the formulation of Article 56 of the Vienna Convention on the Law of Treaties. Therefore, the onus of proof is on the side of those who claim such an exceptional right. As one of the previous Rapporteurs of the International Law Commission (Sir Gerald Fitzmaurice) has pointed out in his report on this question, such an interpretation of the treaty is only permissible where the very nature of the treaty "imposes such an implication as a necessary characteristic of the type of obligation involved".

"Second Report on the Law of Treaties", *Yearbook of the International Law Commission* 1957, Vol. II, p. 39.

61. The nature of a treaty can imply a right of unilateral denunciation only if it has not been possible to ascertain the intention of the parties whether or not such a right should be admitted; a treaty cannot be interpreted in contradiction to the intention of the parties. This means that the nature of a treaty could imply a right of denunciation only in those cases, where each party; if the parties had thought of the matter and had made an express stipulation to this effect, would have readily consented to provide for such a right. Or, to put

it differently, a treaty cannot imply a right of denunciation where it is obvious to one of the parties that the other would not have consented to a unilateral right of either party to terminate the treaty at any time at its discretion.

62. In view of these basic considerations it seems rather doubtful whether it might be possible at all to define certain abstract categories of treaties which by their very nature imply a right of unilateral denunciation by either party; if at all, such an implication could only rest on the special features and character of the obligations contained in a particular treaty. It was these considerations which had led the members of the International Law Commission to avoid the listing of certain types of treaties which should be generally considered as allowing their unilateral denunciation by each of the parties.

63. Originally, the last Special Rapporteur of the International Law Commission on the Law of Treaties (Sir Humphrey Waldock) had set out four classes of treaties which by their nature appeared to him to raise a presumption that they were to be regarded as essentially of a limited duration, and he proposed that these treaties should be considered to be terminable upon giving 12-months' notice. These four categories of treaties included:

*(a)* commercial treaties, other than one establishing an international régime;
*(b)* treaties of alliance or of military co-operation;
*(c)* treaties for technical co-operation in economic, social, cultural, scientific communications or any other such matters;
*(d)* treaties of arbitration, conciliation or judicial settlement.

64. In the International Law Commission objections had been raised against the generality of this proposal. Particularly strong objection was voiced by most of the members of the International Law Commission against the inclusion of treaties of arbitration, conciliation, or judicial settlement in the list of treaties which might be terminated unilaterally by one of the parties.

See Discussion at the 689th Meeting (29 May 1963) and *Yearbook of the International Law Commission* 1963, Vol. I, pp. 99-107.

In view of this opposition, the special Rapporteur replaced its original Article by a new Article which did not mention any category of treaties, but the proposed rule was restricted to those cases where it appeared from the nature of the treaty and from the circumstances of its conclusion that the parties did not intend to exclude the possibility of the denunciation.

See 709th Meeting (27 June 1963) and *Yearbook of the International Law Commission* 1963, Vol. I, p. 239.

One might, therefore, safely conclude, that it is not the type of a treaty but the particular nature of a treaty and the particular character of the obligations contained in such a treaty from which it might be inferred that a party should have the right to terminate the treaty unilaterally.

65. Turning now to an examination of the 1961 Agreement it is obvious that the compromissory clause contained in paragraph 5 of this Agreement cannot be classified under the treaties of arbitration or judicial settlement which the Special Rapporteur (Sir Humphrey Waldock) had in mind, namely treaties designed for the settlement of disputes of different kinds for an indefinite period. The Special Rapporteur had been induced to include this type of treaties under the category of terminable treaties by the trend of modern State practice in this respect, according to which such treaties are almost invariably concluded either only for a fixed term, or for renewable terms subject to a right of denunciation, or made terminable upon notice. It

cannot be denied that State practice has tended to accept only limited obligations to submit to arbitration or judicial settlement: while during the time of the Permanent Court of International Justice declarations under the Optional Clause contained no time-limit, it had now become the normal practice to make such declarations only for a limited time, normally five years, or to reserve the right to terminate them upon notice. The European Convention for the Peaceful Settlement of Disputes of 29 April 1957 allows a party to withdraw from the obligation to submit a dispute to judicial settlement after five years from the date of its entry into force for that party (Art. 40). The reason for this regrettable development must be sought in the reluctance of States to submit beforehand to some form of arbitration or judicial settlement without knowing the subject-matter, the scope and the circumstances of a future dispute which will have to be submitted to such procedure. Therefore the conclusion of the Special Rapporteur, if at all, that in view of this practice treaties of arbitration or judicial settlement must be regarded as essentially of a terminable character, could apply only to those treaties of arbitration or judicial settlement which cover all sorts of disputes within an indefinite time; his conclusion could not apply to the 1961 Agreement between the Federal Republic of Germany and Iceland relating only to the judicial settlement of a dispute about a further extension of the fishery limits of the Icelandic fisheries jurisdiction beyond the 12 miles already anticipated by both parties at the time of the conclusion of that Agreement. Here, each party knew perfectly well what would be the kind of dispute that would have to be submitted to the International Court of Justice for adjudication, and the scope of this obligation was at the same time clearly defined and limited to this specific kind of dispute.

66. While the indefiniteness of the obligations involved in general clauses of arbitration and judicial settlement might justify a right of either contracting party to reconsider its commitment after a reasonable time in the light of changed circumstances, there is no such justification here for the Government of Iceland to withdraw from the well-defined and limited obligation to have a further extension of its fisheries jurisdiction reviewed by the International Court of Justice. As the history of the 1961 Agreement shows, the Government of Iceland was perfectly well aware that it was the main purpose of the compromissory clause contained in paragraph 5 of the 1961 Exchange of Notes to give the Federal Republic of Germany the assurance that any further extension would be effected in accordance with International Law as interpreted by the International Court of Justice. In view of this purpose of the Agreement, and as it cannot be assumed that the Federal Republic of Germany would have consented to a unilateral right of denunciation of this obligation which would have deprived this Agreement of all its value, there is no basis for an interpretation of the 1961 Agreement to the effect that it implied a right to terminate the Agreement unilaterally before the anticipated extension of the fisheries jurisdiction by Iceland had taken place.

67. In this connection the fundamental difference between general clauses of arbitration or judicial settlement and the compromissory clause contained in the 1961 Agreement should not be overlooked: if a general clause which provides for arbitration or judicial settlement is terminated under the express or implied terms of the Agreement, such termination normally affects only future disputes, the scope and subject-matter of which are not yet known, but does not affect a right of the other party to have a particular dispute submitted to arbitration or judicial settlement. The 1961 Agreement, however, gives the Federal Republic of Germany a right to have a particular dispute which had

already been anticipated by the parties submitted to the International Court of Justice; the compromissory clause contained in that Agreement gives the Federal Republic of Germany a right to ask for a review of any extension of Iceland's Fisheries Jurisdiction by the International Court if the Federal Republic would consider such an extension as not being in conformity with International Law. It cannot be implied from the terms and nature of the 1961 Agreement that this right of the Federal Republic could be taken away at will by the other contracting party. The termination of a general clause of arbitration and judicial settlement works both ways, releasing both parties from the same obligation; the termination of the 1961 Agreement, however, would take away a right of the Federal Republic of Germany which had been the quid pro quo for the toleration of the 12-miles fishery limit proclaimed by Iceland, and which was meant to protect the Federal Republic of Germany against a further unilateral extension by Iceland of its fisheries limits in case such an extension were not in harmony with the development of International Law.

(c) *The Definite Object of the 1961 Agreement*

68. The main argument which is put forward in support of the contention that the nature of a treaty alone, irrespective whether such an intention of the parties could be established, may justify a right of unilateral denunciation after a reasonable time, is the fact that the parties to a treaty could in all probability not have intended a treaty of this nature to last perpetually. This argument, however, is by no means convincing under all circumstances:

Even if the parties did not intend to set up a permanent régime (such as boundaries, special international régimes for a particular waterway or an economic union), and even if they were aware of the non-permanent character of the obligations created between them, this does not mean that the parties were prepared to admit the unilateral denunciation of such obligations. They might rather have been convinced that in view of the friendly relations between them, the treaty would, if it had outlived its purpose, be terminated by mutual consent. It is more in line with the reciprocal character of treaty relations that it should be established not by unilateral action, but by consent of the parties whether the obligations under the treaty have achieved their purpose and that the treaty should, therefore, be terminated.

69. There may have been various reasons why the parties did not insert a definite time-limit or a denunciation clause in the treaty: they may not have been able to foresee how long the treaty would be needed, or they may have differed as to the conditions under which the treaty should terminate, or they may have, for political reasons, purposely avoided touching on that issue. It is no defence for the assumption of a unilateral right of denunciation that, if a treaty cannot be terminated, the obligations contained in this treaty may eventually turn out to be an unbearable burden for one party upsetting the balance of reciprocal obligations. Such a case, however, does not call for an implied right of denunciation but rather for an examination under the rule relating to a fundamental change of circumstances *(clausula rebus sic stantibus)*. We shall revert to this aspect later (see paras. 72 to 77 below).

70. If the 1961 Agreement between the Federal Republic of Germany and Iceland is examined in this respect, the circumstances under which this Agreement had been concluded do not in any way indicate that the parties had for some special reason or by inadvertence omitted to regulate the duration of the obligations under the Agreement; nor is a character of the Agreement con-

tained in paragraph 5 of the Exchange of Notes of 19 July 1961 such as to necessitate a unilateral right of denunciation. There was simply no need to make provision for a time-limit of the Agreement on the jurisdiction of the Court or to provide for unilateral renunciation of this Agreement because the application of the Agreement was conditioned on and, at the same time, confined to the existence of a certain factual situation which was anticipated to arise some time in the future. The obligation under the Agreement was to become operative if and when the Government of Iceland would put into effect its declared intention to extend its fisheries jurisdiction over part or the whole of its continental shelf: it could not be foreseen nor did the Government of Iceland indicate when that would be. Under these circumstances the terms of that Agreement could not be interpreted otherwise than that the obligation to submit to the jurisdiction of the International Court of Justice was to last until the Government of Iceland was going to implement the Resolution of the Icelandic Parliament (Althing) of 5 May 1959 relating to the extension of Iceland's fisheries jurisdiction over the whole continental shelf. Therefore, the question whether or not the 1961 Agreement is of a permanent nature or a so-called "perpetual" treaty, goes in the wrong direction and is devoid of any substance. The 1961 Agreement has a specific purpose, namely to provide for judicial settlement in case of an extension by Iceland of its fisheries jurisdiction, and the Agreement is, therefore, by its very nature finite. Agreements which serve a specific purpose cannot by their very nature imply a unilateral right of denunciation until that specific object has been reached.

71. It follows from the foregoing considerations that the 1961 Agreement cannot be interpreted in such a way as to give Iceland an implied right to terminate the Agreement until it had become operative.

### (d) *The Assertion of Changed Circumstances*

72. In the last resort the Government of Iceland had used the argument that changed circumstances gave them the right to terminate the 1961 Agreement. This at least seemed to be the view of the Prime Minister of Iceland when, on 9 November 1971, he declared before the Parliament of Iceland that it must be possible to terminate the 1961 Agreement because, as he put it, "all the circumstances are completely changed from what they were when the Agreements were made, both as regards fisheries and fishery techniques, as well as legal opinion on fisheries jurisdiction. It is safe to say that it is unlikely that these Agreements would have been made, if we had then known how these matters would evolve . . ." In its resolution of 15 February 1972 the Parliament (Althing) of Iceland also declared that "owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland". The Government of Iceland, in its aide-mémoires to the Government of the Federal Republic dated 31 August 1971 and 24 February 1972 and in its letter to the Court dated 27 June 1972, did not rely specifically on this argument, probably realising its weakness; however, in view of the Prime Minister's statement of 9 November 1971, this argument has to be examined in order to show that it is wholly unfounded.

73. The right to terminate an international agreement because of a change of circumstances is an exceptional remedy and should be kept in narrow limits if it should not degenerate into an excuse for the repudiation of international commitments which are felt no longer advantageous or unnecessarily restraining the freedom of action. Article 62 of the Vienna Convention on the

Law of Treaties, which Article is generally recognized as codifying existing general international law, allows a party to invoke a change of circumstances as a ground for terminating an agreement only under the following four conditions, which all must be present, namely if:

(1) the change of circumstances is fundamental, and
(2) the change was not foreseen by the parties, and
(3) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and
(4) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

*It is obvious that these conditions are not fulfilled in the present case.*

74. The arguments used in the Prime Minister's statement of 9 November 1971 are in no way affecting the basis of the 1961 Agreement and the extent of the obligations to be performed under the 1961 Agreement: That fishery techniques have developed quicker and have become more efficient than anticipated may be a ground for intensified efforts for conservation measures and may have prompted the Government of Iceland to take earlier action towards a further extension of its fisheries jurisdiction. But it has already been stated that paragraph 5 of the Exchange of Notes of 19 July 1961 leaves it to the Government of Iceland when and to what extent it might think it right to extend its fisheries limits in accordance with International Law, the obligation to submit a dispute relating to such extension to the International Court of Justice remaining the same. As far as the development of international legal opinion on fisheries jurisdiction is concerned, to which the Prime Minister referred on 9 November 1971, it is difficult to see how this development could have affected the basis of the 1961 Agreement and the scope of the obligations contained therein. If the Prime Minister's remark was meant in the sense that under the present state of International Law, it would not have been necessary to conclude an agreement on the de facto recognition of the 12-miles fishery limit, this may well be doubted; although international legal opinion now generally admits a 12-miles fishery zone, the question of the treatment of traditional fishing rights exercised within this zone by foreign fishermen is still unresolved. By securing an exclusive fisheries zone in the 1961 Agreement, the Government of Iceland has certainly gained an advantage which was not a matter of course at that time, and still derives some benefit from this Agreement.

75. The primary consideration which has motivated the Government of Iceland to repudiate the Agreement on the jurisdiction of the International Court of Justice seems to have been the realization that a consensus among the States has not yet emerged which would sustain the claim of Iceland for an exclusive fisheries zone up to 50 miles without regard to existing traditional fishing rights. In a brochure, entitled *Iceland and the Law of the Sea*, distributed by the Government of Iceland in the beginning of 1972 it was explained why the Government of Iceland did not want to take the issue to the International Court of Justice:

> "The question is sometimes asked whether it would not be wise for Iceland to submit its claim to the International Court. These suggestions are somewhat unrealistic because, as we have seen, at present there are no provisions in International Law which cover the width of the territorial sea or the fishery limit. It would, therefore, be extremly difficult for the International Court to render judgement in a dispute over a fishery

limit. Due to lack of recognized rules in International Law on the territorial sea and fishery limits and due to the diversity of opinion on the matter expressed in different multilateral treaties, it would function as a court of arbitration rather than as an International Court of Justice if it were to rule on the width of the fishery limit."

76. It might well have been that the Government of Iceland, when it concluded the 1961 Agreement, had expected that some time later international legal opinion and practice would sustain a further extension of its fisheries jurisdiction. That this expectation had, however, not materialized as early as the Government of Iceland would have wished, or that it felt forced to act before it could rely in this respect on settled rules of International Law, is certainly not a relevant element under the rule of the *clausula rebus sic stantibus* as such expectations were not the agreed basis under which both Governments acted when they concluded the 1961 Agreement. It was rather the common understanding that a further extension of the fisheries jurisdiction of Iceland should be effected in accordance with International Law and that the International Court of Justice should be the competent organ to decide a dispute between the parties in this respect. There is no reason to question today the competence and ability of the Court to protect the legitimate rights and interests of both parties.

77. It follows from the foregoing considerations that since 1961 no fundamental change of circumstances has taken place which would entitle the Government of Iceland to terminate the 1961 Agreement.

### 5. The Assertion of "Vital Interests"

78. The Prime Minister of Iceland is reported in the Icelandic Parliament (Althing) on 9 November 1971 to have made the following statement with respect to the submission of the present dispute to the Court:

> "But most important of all is that the nature of this issue touches the right of existence of the Icelandic nation. And the Icelandic nation cannot agree to give to others, neither to an international body nor to other States, the right to decide on its right of existence" (reported in the brochure *Iceland and the Law of the Sea*, published by the Government of Iceland, Reykjavik 1972, p. 34).

On 15 February 1972 the Icelandic Parliament (Althing) requested the Government of Iceland to inform the Governments of the United Kingdom and the Federal Republic of Germany that—

> ". . . because of the vital interests of the Nation and owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland" (the text of the Resolution has been reproduced in full in Annex G to the Application of the Federal Republic filed 5 June 1972 in this case).

The Minister for Foreign Affairs of Iceland in his letter addressed to the Court and dated 27 June 1972, stated:

> "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."

79. It is not quite clear from the foregoing quotations whether the assertion of the "right of existence" or of "vital interests" is meant as an argument for terminating the 1961 Agreement under the aspect of changed circumstances or whether it is alleged to be a legal ground which excludes the application of the judicial settlement clause in the present situation; the formulation in the letter of the Minister of 27 June 1972 may possibly be understood merely as refusing to recognize the jurisdiction of the Court by way of forum prorogatum. Be it as it may, the assertation of "vital interests" is, under no circumstances, a valid ground which could entitle the Government of Iceland to regard paragraph 5 of the Exchange of Notes of 19 July 1961 as being not applicable in the present case.

80. Under the aspect of changed circumstances, the argument that the 1961 Agreement in so far as it conferred jurisdiction on the Court could be terminated because the Government of Iceland now considers the question of the further extension of its fisheries jurisdiction as a matter of "vital interest", must fail for the simple reason that the Government of Iceland had always regarded the question of its fisheries jurisdiction as being of vital interest to the Icelandic nation. Furthermore the subjective appreciation by one party of its interests which are at stake when a treaty is concluded is never the basis on which both parties have given their consent in concluding the treaty unless such a subjective element is expressly made a condition for the application of the treaty. When the Government of the Federal Republic of Germany and the Government of Iceland agreed that any further extension by Iceland of its fisheries jurisdiction should be subject to review by the International Court of Justice, both parties acted on the basis that the Court would be the most competent body to adjudicate on the legal and factual issues involved and to recognize the legitimacy of any claim of Iceland for a further extension of its fisheries jurisdiction. Nothing has changed since in this respect.

81. The argument that, if in a dispute interests are at stake which are considered "vital" by one of the parties, such a consideration may form a legitimate ground for the refusal to submit the dispute to the Court in pursuance of an otherwise applicable judicial settlement obligation, must equally fail. It is true that States are reluctant to submit disputes on issues which they consider "vital" to their existence, to arbitration or judicial settlement by special agreement, and it is also true that in quite a number of arbitration treaties which had been concluded in the first part of this century, a party was specifically authorized to refuse to submit a dispute to arbitration if it considered the matter as affecting its vital interests. This, however, is only a description of the practice of States under what conditions they were prepared to submit to arbitration or judicial settlement. No authority in international law asserts that matters which are considered by one or both parties as affecting their vital interests, are per se incapable of being submitted to arbitration or judicial settlement clause. As long as a State is free to decide whether or not it will agree to submit a dispute with another State to the Court, it is a legitimate political consideration to decide this question in the negative if it considers its vital interests as being affected; but if a State has bound itself to submit a certain dispute to the Court, this has become a legal obligation which may only be terminated under the recognized rules concerning the termination of

treaties. None of these rules does apply, as we have seen, in the present case, and none of them entitles the Government of Iceland to regard its obligation arising out of paragraph 5 of the Exchange of Notes of 19 July 1961 as inapplicable in the present case. It may be understandable, although regrettable that States sometimes regard it more advisable to take the protection of their vital interests or what they consider to be their vital interests, into their own hands. But there is no valid ground to assume that the International Court of Justice, if it has jurisdiction to deal with the dispute, is not competent to take account of the legitimate vital interests of a nation.

82. It follows from the foregoing considerations that the assertion of "vital interests" by the Government of Iceland is irrelevant and does not affect the legal basis of the Court's jurisdiction in the present case.

### 6. Conclusion

83. In view of the arguments put forward in paragraphs 25 to 82 it is respectfully submitted that there is no valid ground which would entitle the Government of Iceland to regard the agreement on the jurisdiction of the Court contained in paragraph 5 of the Exchange of Notes of 19 July 1961 as invalid, terminated or not applicable to the dispute presently submitted to the Court. Therefore, this agreement forms a valid basis for the Court's jurisdiction in the present case.

## IV. The Declaration of the Federal Republic of Germany recognizing the Jurisdiction of the Court in Pursuance of the United Nations Security Council Resolution of 15 October 1946

84. The Federal Republic of Germany not being a party to the Statute of the Court has to comply with the conditions laid down by the Security Council Resolution of 15 October 1946 in order to be entitled to appear before the Court (Art. 35 of the Statute of the Court). In accordance with this Resolution, the Government of the Federal Republic of Germany has, by Declaration dated 29 October 1971 and filed in the Registry of the Court on 22 November 1971, recognized ipso facto and without special agreement the jurisdiction of the Court in respect of all disputes which may arise between the Federal Republic of Germany and the Republic of Iceland envisaged in paragraph 5 of the Exchange of Notes of 19 July 1961. The full text of the Declaration has been reproduced in Annex A to the Application of the Government of the Federal Republic of Germany filed in the Registry of the Court on 5 June 1972.

85. According to Article 36 of the Rules of Court, a State which is not a party to the Statute of the Court has to satisfy the Court that it has complied with any condition prescribed by the United Nations Security Council for its admission to the Court. In accordance with Article 36 of the Rules of Court, the Government of the Federal Republic of Germany has set forth in its Application dated 5 June 1972 that the conditions prescribed by the Security Council in its Resolution dated 15 October 1946 for the admission to the Court of States not parties to the Statute have been complied with by the Declaration of 29 October 1971, transmitted to the Court on 22 November 1971. The requirements of Article 36 of the Rules of Court have therefore been

fulfilled within the time-limit prescribed in that Article. The Federal Republic of Germany is therefore entitled to be a party before the Court. Iceland being a party to the Statute of the Court is under Article 35, paragraph 1, of the Statute *ipso iure* entitled to be a party before the Court. Thus, the Court has jurisdiction *ratione personae* with respect to both parties in the present case.

86. The Government of Iceland has, in the telegram of its Minister for Foreign Affairs transmitted to the Court on 28 July 1972, directed the attention of the Court to the fact that the Federal Republic of Germany had filed its Declaration of 29 October 1971 at a date 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 contained in the Exchange of Notes of 19 July 1961 had been fully achieved. By pointing to the date of the Declaration the Government of Iceland seems to intimate that the binding force of the agreement contained in paragraph 5 of the Exchange of Notes of 19 July 1961 might be regarded as imperfect as long as the Government of the Federal Republic of Germany had not effected this Declaration and that the Government of Iceland had denounced an imperfect agreement. If this were the contention of the Government of Iceland, it would misunderstand the relationship between the compromissory clause in the 1961 Agreement and the Declaration required by the Security Council Resolution of 29 October 1946.

87. The agreement between two States to recognize the jurisdiction of the Court for a particular kind of dispute and the declaration which forms the basis of the capacity to be a party before the Court are legal acts on different levels which are only indirectly related to each other. The agreement between the two States confers jurisdiction on the Court with respect to this particular kind of dispute *ratione materiae*; the declaration prescribed by the United Nations Security Council Resolution of 15 October 1946 subjects those States which are not parties to the Statute of the Court to the Statute and the Rules of Court, i.e., it establishes the jurisdiction *ratione personae* of the Court over such parties.

Cf. H. Blomeyer, "Der Internationale Gerichtshof und die Nichtmitgliedstaaten des Statuts", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Band 16 (1955), S. 256-276, who deals with the position of States which are not parties to the Statute, in relation to the Court and reflects particularly on the legal situation of the Federal Republic of Germany.

If two States agree to submit a particular kind of dispute between them to the Court, such a commitment constitutes a contractual relationship between the two States. Therefore, such a commitment may only be terminated in conformity with the rules relating to the termination of treaties. Should it happen that one of these States is not a party to the Statute of the Court, that State is under an ancillary obligation which results from its main obligation to submit a dispute to the Court, to take the necessary steps to become entitled to appear before the Court. This will be effected by the aforementioned declaration and has to be done at the latest when a dispute is submitted to the Court.

Cf. Article 3 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which specifically obliges a contracting party which is not a party to the Statute of the Court to take the necessary steps for securing admission to the Court, but does not prescribe a time-limit

when this should be done. Article 3 reads as follows: "The High Contracting Parties which are not parties to the Statute of the International Court of Justice shall carry out the measures necessary to enable them to have access thereto."

The declaration prescribed by the United Nations Security Council may be either particular or general. It is at the discretion of the State in making such a declaration either to restrict its effect to the particular kind of disputes covered by the agreement on judicial settlement or to issue it in the form of a general declaration corresponding to a declaration under Article 36, paragraph 2, of the Statute of the Court. It follows from these considerations that the Declaration of the Federal Republic of Germany, dated 29 October 1971, was not a constitutive element of the 1961 Agreement but merely the fulfillment of an ancillary obligation resulting from this Agreement which could be effected at any time until a dispute would be submitted to the Court. Article 36 of the Rules of Court reflects this legal situation fully.

88. It follows from the foregoing considerations that the binding force of the 1961 Agreement did not depend on the Declaration required by the Security Council Resolution of 15 October 1946.

## V. Conclusions

In view of the facts and arguments put forward in this Memorial the following conclusions are respectfully submitted:

(1) Paragraph 5 of the Exchange of Notes of 19 July 1961 constitutes a valid and binding agreement which has conferred jurisdiction upon the Court with respect to any dispute between the Parties relating to an extension by Iceland of its fisheries jurisdiction beyond the 12-miles limit;

(2) The dispute submitted to the Court by the Application of the Federal Republic of Germany of 5 June 1972 and which relates to the extension of the Icelandic fisheries jurisdiction beyond the 12-miles limit effective from 1 September 1972, falls within the scope of the agreement contained in paragraph 5 of the Exchange of Notes of 19 July 1961;

(3) The various arguments of the Government of Iceland that the agreement contained in paragraph 5 of the Exchange of Notes of 19 July 1961 had been void ab initio, or had lapsed or had validly been terminated by the Government of Iceland before the institution of the proceedings in this case, are unfounded;

(4) The assertion repeatedly made by the Government of Iceland that the subject-matter of the dispute submitted to the Court by the Federal Republic of Germany affected vital interests of the Icelandic nation, does not exclude or limit the jurisdiction conferred upon the Court by paragraph 5 of the Exchange of Notes of 19 July 1961;

(5) The agreement contained in paragraph 5 of the Exchange of Notes of 19 July 1961 is therefore valid and remains applicable between the Parties; it forms, together with the Declaration of the Federal Republic of Germany of 29 October 1971 accepting the jurisdiction of the Court in accordance with the United Nations Security Council Resolution of 15 October 1946, the legal basis for the exercise of the jurisdiction by the Court in the present case.

## VI. Submission

Therefore, the Federal Republic of Germany respectfully requests the Court to adjudge and declare:

That the Court has full jurisdiction to entertain the Application submitted by the Federal Republic of Germany to the Court on 5 June 1972 and to deal with the merits of this case.

13 October 1972.

*(Signed)* Günther JAENICKE,
Professor Dr. jur.
*Agent for the Government*
*of the Federal Republic of Germany.*

## ANNEXES TO THE MEMORIAL ON JURISDICTION

### Annex A

VERBAL NOTE OF THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY IN REYKJAVIK OF 9 JUNE 1958

The Embassy of the Federal Republic of Germany presents its compliments to the Ministry for Foreign Affairs of the Republic of Iceland and has the honour under instructions received to communicate the following:

On June 1, 1958, the Icelandic Government published its intention to amend on June 30, 1958, the Law of March 19, 1952, regulating the fishing off the Icelandic coast. The amendment is to reserve the right of fishing within an area of 12 miles from the baseline exclusively to Icelandic fishermen from September 1, 1958. Furthermore the Federal Government understands from the announcement that the Icelandic Government reserves itself the right to extend the fishing zone beyond these limits by modification of the baseline.

The Federal Government declares that the proposed decree of the Icelandic Government does not affect the right of other nations to fish in the areas of the high seas concerned by these steps. The international law does not entitle any nation to bring parts of the high seas wholly or partially by unilateral action under its jurisdiction and thus impair the rights of other nations.

Furthermore the Federal Government has the honour to draw the attention to the fact that since many decades German fishermen have been fishing unrestrained in the areas of the high seas which in future are exclusively to be reserved to Icelandic fishermen by the intended steps of the Icelandic Government. In the opinion of the Federal Government the German fishing vessels are also in the future not to be interfered with fishing in this zone by a unilateral act of the Icelandic Government. Moreover the interdiction of fishing in the extended zone of 12 miles as intended by the Icelandic Government would considerably encroach on the interests of the German deep-sea fishery.

The Federal Government is conscious of the fact that economically the Icelandic people is in a great measure dependent on fishing. Owing to this special situation of Iceland the Federal Government is and will be ready to enter into negotiations aiming at an agreement. The Federal Government is convinced that it would be possible to reach a settlement which will be convenient to all interested nations and at the same time will take into consideration the special Icelandic interests. Such a friendly settlement would furthermore guarantee the maintenance of good relations which have always existed between the Federal Republic of Germany and Iceland.

Reykjavik, June 9, 1958.

(L.S.)

To the Ministry for Foreign Affairs
of the Republic of Iceland,
Reykjavik.

## Annex B

REGULATIONS ISSUED BY THE GOVERNMENT OF ICELAND ON 30 JUNE 1958

(Icelandic text published in the official Icelandic law gazette *Stjórnartidindi*, No. 70 of 30 June 1958)

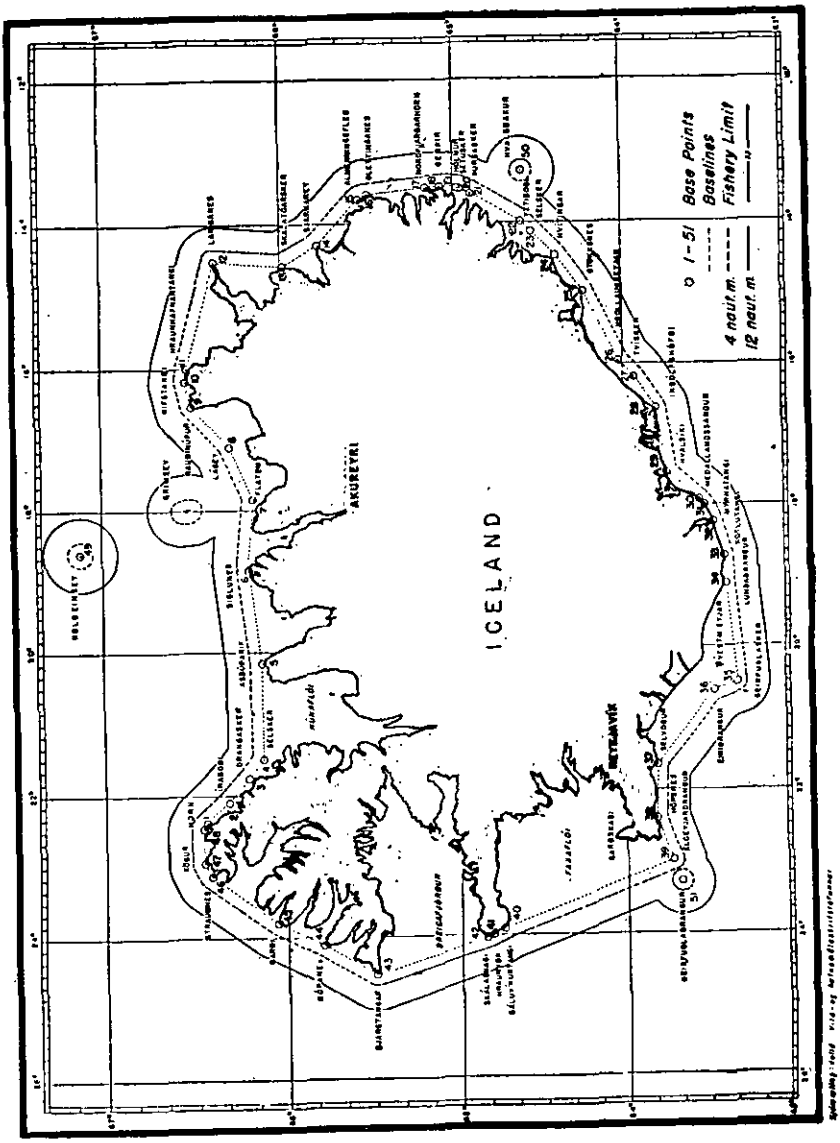
Botschaft
der
Bundesrepublik Deutschland
Reykjavik

### Regulations concerning the Fisheries Limits off Iceland

*Article 1*

The fisheries' limits off Iceland shall be drawn 12 nautical miles outside base lines drawn between the following points:

| | | |
|---|---|---|
| 1. | Horn | 66°27'4 N., 22°24'5 W. |
| 2. | Íraboði | 66°19'8 — 22°06'5 — |
| 3. | Drangasker | 66°14'3 — 21°48'6 — |
| 4. | Selsker | 66°07'5 — 21°31'2 — |
| 5. | Ásbúðarif | 66°08'1 — 20°11'2 — |
| 6. | Siglunes | 66°11'9 — 18°50'1 — |
| 7. | Flatey | 66°10'3 — 17°50'5 — |
| 8. | Lágey | 66°17'8 — 17°07'0 — |
| 9. | Rauðinúpur | 66°30'7 — 16°32'5 — |
| 10. | Rifstangi | 66°32'3 — 16°11'9 — |
| 11. | Hraunhafnartangi | 66°32'3 — 16°01'6 — |
| 12. | Langanes | 66°22'6 — 14°32'0 — |
| 13. | Skálatóarsker | 65°59'7 — 14°37'5 — |
| 14. | Bjarnarey | 65°47'1 — 14°18'3 — |
| 15. | Almenningsfles | 65°33'1 — 13°40'6 — |
| 16. | Glettinganes | 65°30'6 — 13°36'4 — |
| 17. | Norðfjarðarhorn | 65°10'0 — 13°31'0 — |
| 18. | Gerpir | 65°04'7 — 13°29'8 — |
| 19. | Hólmur | 64°58'9 — 13°30'7 — |
| 20. | Setusker | 64°57'7 — 13°31'6 — |
| 21. | Pursasker | 64°54'1 — 13°36'9 — |
| 22. | Yztiboði | 64°35'2 — 14°01'6 — |
| 23. | Selsker | 64°32'8 — 14°07'1 — |
| 24. | Hvítingar | 64°23'8 — 14°28'1 — |
| 25. | Stokksnes | 64°14'1 — 14°58'5 — |
| 26. | Hrollaugseyjar | 64°01'7 — 15°58'8 — |
| 27. | Tvísker | 63°55'6 — 16°11'4 — |
| 28. | Ingólfshöfði | 63°47'8 — 16°38'6 — |
| 29. | Hvalsíki | 63°44'1 — 17°33'7 — |
| 30. | Meðallandssandur I | 63°32'4 — 17°56'0 — |


ICELAND
AKUREYRI
REYKJAVIK
Base Points
Baselines
Fishery Limit
4 nauit m.
12 nauit m

| | | |
|---|---|---|
| 31. | Meðallandssandur II | 63°30'6 N., 18°00'0 W. |
| 32. | Myrnatangi | 63°27'4 — 18°12'0 — |
| 33. | Kötlutangi | 63°23'4 — 18°43'0 — |
| 34. | Lundadrangur | 63°23'5 — 19°07'6 — |
| 35. | Geirfuglasker | 63°19'0 — 20°30'1 — |
| 36. | Einidrangur | 63°27'4 — 20°37'2 — |
| 37. | Selvogur | 63°49'1 — 21°39'4 — |
| 38. | Hópsnes | 63°49'3 — 22°24'6 — |
| 39. | Eldeyjardrangur | 63°43'8 — 22°59'6 — |
| 40. | Gáluvíkurtangi | 64°44'9 — 23°55'3 — |
| 41. | Hraunvör | 64°49'6 — 24°01'0 — |
| 42. | Skálasnagi | 64°51'3 — 24°02'6 — |
| 43. | Bjargtangar | 65°30'2 — 24°32'3 — |
| 44. | Kópanes | 65°48'3 — 24°06'3 — |
| 45. | Barði | 66°03'7 — 23°47'6 — |
| 46. | Straumnes | 66°25'7 — 23°08'5 — |
| 47. | Kögur | 66°28'3 — 22°55'8 — |
| 48. | Horn | 66°27'9 — 22°28'5 — |

Besides, limits shall be drawn around the following points, 12 nautical miles outside:

| | | |
|---|---|---|
| 49. | Kolbeinsey | 67°07'5 N., 18°36'0 W. |
| 50. | Hvalbakur | 64°35'8 — 13°16'7 — |
| 51. | Geirfugladrangur | 63°40'6 — 23°17'3 — |

Finally, limits shall be drawn around the island of Grimsey, 12 nautical miles outside its outermost points and rocks.

Each nautical mile shall be equal to 1852 metres.

*Article 2*

Within the fisheries' limits all fishing activities by foreign vessels shall be prohibited in accordance with the provisions of Act No. 33 of June 19, 1922, concerning Fishing in Territorial Waters.

*Article 3*

Icelandic vessels using bottom trawl, floating trawl or Danish seine-netting shall be allowed to fish within the fisheries' limits but outside the limits determined by Regulations No. 21 of March 19, 1952.

Before these Regulations become effective special provisions about such licences shall be promulgated stating further about fishing zones and periods.

*Article 4*

Trawlers shall have all their fishing gear properly stowed aboard while staying at places where fishing is prohibited.

*Article 5*

Fisheries' statistics shall be forwarded to the Fiskifélag Íslands (Fisheries Association of Iceland) in the manner prescribed by Act No. 55 of June 27, 1941, concerning Catch and Fisheries' Reports.

If the Ministry of Fisheries envisages the possibility of overfishing the Ministry may limit the number of fishing vessels and the maximum catch of each vessel.

*Article 6*

Violations of the provisions of these Regulations shall be subject to the penalties provided for by Act No. 5 of May 18, 1920, concerning Prohibition against Trawling, Act No. 45 of June 13, 1937, concerning Prohibition against Danish seine-netting in Territorial Waters, Act No. 33 of June 19, 1922, concerning Fishing in Territorial Waters, as amended, or, if the provisions of said Acts do not apply, to fines from Kr. 1,000.00 to 100,000.00.

*Article 7*

These Regulations are promulgated in accordance with Act No. 44 of April 5, 1948, concerning the Scientific Conservation of the Continental Shelf Fisheries, as amended by Act No. 81 of December 8, 1952. As soon as it becomes operative Regulations No. 21 of March 19, 1952, concerning Conservation of Fisheries off the Icelandic Coasts shall cease to be effective.

*Article 8*

These Regulations become effective on September 1, 1958.

*Ministry of Fisheries, Reykjavik, June 30, 1958.*

**Lúðvík Jósepsson.**

*Gunnlaugur E. Briem.*

## Annex C

### VERBAL NOTE OF THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY IN REYKJAVIK OF 16 JULY 1958

The Embassy of the Federal Republic of Germany presents its compliments to the Ministry for Foreign Affairs of the Republic of Iceland and has the honour, under instructions received, to communicate the following:

According to articles 1 and 8 of the decree published by the Icelandic Government in the official law gazette *Stjórnartidindi*, No. 70, of June 30th, 1958, the fishing limits off the Icelandic coast are to be 12 nautical miles counted from the base-line from September 1st, 1958. As directed by article 2 of the said decree foreign fishermen are to be prohibited from any fishing within these fishing limits.

Through its verbal note of June 9th, 1958, handed over to the Secretary General of the Icelandic Ministry for Foreign Affairs on June 10th, 1958, the German Embassy conveyed the Federal Government's point of view on the unilateral extension of the fishing limits off the Icelandic coast to 12 nautical miles as made public by the Icelandic Government already on June 1st, 1958. The Federal Government regrets this one-sided procedure extremely and is compelled to express its profound disappointment about the fact that the Icelandic Government has now taken the above-mentioned unilateral steps without having accepted the suggestions of the Federal Government previously to seek an agreement on fishing off the Icelandic coast by friendly negotiations with the Federal Government or other interested nations. The situation created by these steps compels the Federal Government to confirm its unchanged legal standpoint outlined in the verbal note of June 9th, 1958. Furthermore, it expresses once again its urgent hope that the Icelandic Government will now declare its readiness to enter immediately into negotiations in which should also participate the governments of all nations who were hitherto fishing off the Icelandic coast. In the opinion of the Federal Government the aim of the negotiations should be to bring about an agreement *before* September 1st, 1958, taking into account as well the principles of International Law as the historic interests of all nations concerned. In the opinion of the Federal Government only thus can be avoided the rising of a situation which might create a serious strain of the up to now so friendly relations between the Federal Republic and the Republic of Iceland.

Reykjavik, July 16th, 1958.

To the Ministry for Foreign Affairs
of the Republic of Iceland,
Reykjavik.

## Annex D

VERBAL NOTE OF THE ICELANDIC MINISTRY FOR FOREIGN AFFAIRS OF 26 FEBRUARY 1959

The Ministry for Foreign Affairs presents its compliments to the Embassy of the Federal Republic of Germany and has the honour to refer to the Embassy's Notes of June 9th and July 16th 1958 relative to the question of the Icelandic fishery limits.

During the period which has elapsed since the Embassy's Notes were received the Icelandic Government in various international organisations has endeavoured to explain the vital importance of the fishery limits to the Icelandic people whose economy is based on the coastal fisheries and to work towards a solution of the problem of fishery limits. At the last session of the U.N. General Assembly, the Icelandic Delegation suggested that the Assembly itself should deal with the problems of the extent of the territorial sea and fishery limits, since these problems had in fact been before the Assembly for almost a decade, on the basis of an Icelandic proposal submitted in 1949. This suggestion was not adopted but instead it was decided to call a second Conference on the Law of the Sea early in 1960. In the opinion of the Icelandic Government the discussion in the Sixth (Legal) Committee showed once more that an increasing majority is in favour of a twelve-mile limit, even where no special considerations are involved. Also, it was clear that in almost all cases the extent of coastal jurisdiction has been unilaterally determined by the State concerned. The views of the Icelandic Government are explained in the enclosed memorandum.

Although the Icelandic Government regrets that the Assembly itself did not deal with these questions as suggested, it hopes that the forthcoming Conference will be able to deal successfully with the task submitted to it and that *inter alia* the interests of people who are dependent upon the coastal fisheries for their livelihood will be fully safeguarded.

The Ministry avails itself of this opportunity to renew to the Embassy of the Federal Republic of Germany the assurance of its highest consideration.

Ministry for Foreign Affairs,
Reykjavik, February 26, 1959.

The Embassy of the Federal Republic of Germany,
Reykjavik.

## Annex E

VERBAL NOTE OF THE EMBASSY OF ICELAND IN BONN OF 5 AUGUST 1959

The Embassy of Iceland presents its compliments to the Ministry for Foreign Affairs of the Federal Republic of Germany and has the honour to submit the following for friendly consideration.

As the Ministry knows there will be held a Conference on the Law of the Sea in the spring of the year 1960 to deal with questions of the extent of the Territorial Sea and Fishery Limits.

This question has been examined by a Commission of Experts of the United Nations, whose findings were presented to the General Assembly of the United Nations in 1956, which decided to convene a United Nations Conference on the Law of the Sea, which was held in Geneva from 24th of February to 27th of April 1958. In spite of the good work of this Conference it unfortunately failed to reach an agreement on the extent of the Territorial Sea.

It could however be ascertained that the three-mile territorial limit seemed unsatisfactory and the proposals suggesting twelve miles as a limit received a majority but not the 2:1 majority to make it a binding rule of international law.

For Iceland this problem of the Fishery Limits is a problem of its existence. It has no mines or forests. Its land is barren and the climate harsh. Its agriculture cannot compete with that of more favoured regions. The mainstay of its economy is the fishery and its products are 97% of its exports. Its industry is ancillary to the fishing, such as netmaking and freezing the catch. This means that it has only fish to pay for its imports with. And it must import many vital necessities. If the Icelanders cannot fish and sell their catch they will be unable to buy the industrial products they have been importing and so that much buying power will be lost to the world markets.

As a means of subsistence fishing is not only a dangerous trade, and hazardous occupation. Its whole basis can be ruined by unsuitable fishing methods. Not only have the whale fisheries in the Northern Atlantic been ruined, but all such fisheries that have as its basis slow growing fish. The spawn and fry has been destroyed by intensive fishing with heavy trawls, as these destroy many times more undersized fish than those fit for consumption.

The policy of the Icelandic Government has therefore been to try to conserve the fisheries for the good of all. It works on the theory that if the spawn and fry can be spared the fisheries of not only Iceland but of the whole of the North Atlantic will benefit. Experiments with bottles thrown in the sea north of Iceland show that the great swirls in the ocean formed around Iceland by the Gulf Stream carry these not only to Norway but to the coasts of Denmark, Germany, Holland, Ireland, France and Greenland. Young fishes are carried by those same currents all over the North Atlantic and fish marked at Iceland have been caught in Norwegian waters and in the North Sea as well as at the West Coast of Greenland.

This matter of conserving the life of the sea around Iceland has taken on a new urgency with the improved methods and apparatus of fishing in the last years.

Since 1920 Iceland has tried to reach an agreement to conserve the breeding

grounds and nursery areas around Iceland, but England has consistently refused to take part in even a discussion of the matter. As England has more trawlers than all the other fishery nations of the North Atlantic Area put together, a conference without them would be futile.

The fishery limit of Iceland used to be 16 miles. This was recognized by England, which made several attempts to get the right to fish closer to the coast. In 1901 a treaty was made between the British and the Danish Governments, allowing British, and therefore all other nations, to fish up to three miles from the coast of Iceland.

This agreement terminated in 1951 after notice had been given three years before, as stipulated in the Treaty. As the Icelandic Government did not wish to have any doubt about the legality of its action it did not extend the fishery limit immediately back to 16 miles, but waited for the decision of the International Court in The Hague in the Anglo-Norwegian Fisheries Case (1951).

The decision of that Court was clearly for Norway and the Court decided that Norway had the right to decide not only "the breadth of her territorial sea, but also to the manner in which it is to be reckoned".

Iceland therefore in 1952 established a fishery zone of four miles as Norway and closed the bays of Iceland against all trawl fishing. This meant also trawl fishing by Icelandic trawlers. This was of course a severe loss for them, but the Government hoped it would effect a recuperation of the fisheries and that they would be recompensed by better fishing a few years later.

Even though there could be no dispute about the legality of this action the decision of the Court was circumvented by Britain, which instituted a boycott against the landing of fish caught by Icelanders. This caused great harm to the country which had sold a main part of their catch in Britain. The International Law Commission chosen by the United Nations in 1949 laid its findings before the General Assembly of 1956. Their opinion is that International Law does not recognize a limit over 12 miles.

This would mean that a fishery zone of 12 miles would be legal.

The Government of Iceland did however not extend its fishery zone immediately, but waited for the results of the Geneva Conference in 1958. This did not reach an agreement on the question of territorial limits or fishing zones, but it showed a greater support for a 12-mile limit than for any other proposal.

As the situation of overfishing was urgent, and there was no certainty when an agreement would be reached the Government of Iceland issued a regulation on June 30th, 1958, declaring a fishery limit of 12 miles from base lines.

This move has been protested against by a few States, as a unilateral act and against international law.

In the above-mentioned Anglo-Norwegian Fisheries Case the International Court states: "the act of delimitation of the sea area is necessarily a unilateral act of the coastal State". Also it must be kept in mind that two international conferences in 1930 and 1958 have failed to reach an agreement. The Icelandic Government could have no hope of reaching an agreement in forseeable future. Therefore it had to act on its own, as all other States have done in deciding the limit of its fishing zone.

Regarding the question of the extent of the fishing zone, it seems difficult to concur in the opinion that the 25 States or more which have proclaimed a fishery limit of 12 miles have all acted contrary to international law, and only the 10-15 States that have upheld the three-mile limit are right. This is in

spite of findings of the International Court of The Hague and the United Nations Commission of experts.

The Icelandic Government trusts that it is only a question of time before the 12-mile limit will be accepted as a general rule, and would greatly appreciate if the Government of the Federal Republic of Germany would consider the special situation and wishes of Iceland.

I. It has been suggested at the Geneva Conference that a coastal State should exercise exclusive fishing rights up to a maximum of 12 miles, provided that such rights were subject to the right of the vessels of any State whose vessels have fished regularly in that portion of the zone for the period of five years.

In the opinion of the Icelandic Government such departure from the 12-mile rule would be disastrous for the preservation of the fisheries of Iceland and its economy.

II. The Icelandic Government thinks that where a nation is overwhelmingly dependent upon fisheries it should be lawful to take special measures, and decide a further extension of the fishing zone for meeting the needs of such a nation.

This idea was sympathetically considered by the third committee of the Geneva Conference even though some representatives feared that such departure from the general rule might open the door for abuse. The Icelandic delegation therefore proposed that a possible disagreement should be settled by arbitration. With this addition it was carried by the committee, but rejected at the plenary meeting.

A similar thought was however expressed in a resolution proposed by South Africa and carried with 67 votes with none against.

The Icelandic delegation however pointed out that this resolution could only apply to areas of the high seas outside the generally accepted fishery limits, as they might be at any given period.

It is necessary that the Coastal State can unilaterally include an adjacent area in its fishing zone, subject to arbitration in case of disagreement.

III. The Icelandic Government also most wholeheartedly agrees with the thought expressed in the resolution proposed by South Africa:

> "That where for the purpose of conservation it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to a coastal State any other States fishing in that area should *collaborate with the coastal State to secure just treatment of such* situation by establishing agreed measures which shall recognize any preferential requirements of the coastal State relating to its dependence upon the fishery concerned while having regard to the legitimate interests of the other States."

On the other hand it does not think that this can satisfy the need of Iceland of an adjacent fishing zone as suggested under II.

So far it seems impossible to diversify the economy of Iceland. Therefore the people of Iceland and its Government see with apprehension the great increase in the efficiency of the fishing fleets around Iceland.

If the efficiency improves with the same speed as it has done in the last years, it might cause overfishing to such an extent as to make Iceland uninhabitable.

Therefore the Icelandic Government urges friendly States to consider its special situation and accept measures they would otherwise think unnecessary and unacceptable as a general rule of international law.

The Embassy avails itself of this opportunity to renew to the Ministry for Foreign Affairs the assurances of its highest consideration.

*Bad Godesberg, August 5th, 1959.*

(L.S.)

To the
Ministry for Foreign Affairs
of the Federal Republic of Germany,
Bonn.

## Annex F

VERBAL NOTE OF THE MINISTRY FOR FOREIGN AFFAIRS OF THE FEDERAL REPUBLIC OF GERMANY OF 7 OCTOBER 1959

*[Translation* [1]*]*

The German Federal Foreign Ministry presents its compliments to the Icelandic Embassy and has the honour to reply as follows to the Embassy's Note of 5 August 1959.

1. The Federal Government, too, deplores the fact that the First International Conference on the Law of the Sea in Geneva, 1958, did not settle the question of the breadth of the territorial sea. The Federal Government fails, however, to understand the conclusions which the Icelandic Government evidently draws from the discussions and results of that Conference.

*(a)* It is correct that during the 1958 Geneva Conference a proposal to concede to coastal States fishing privileges in a zone of up to 12 sea miles off the coast received more votes than any other proposal discussed and voted upon. But this proposal, which was made by the United States (A/Conf.13/L.29) contained a qualification to the effect that States which previously used to fish in the zone between 6 and 12 sea miles would be allowed to continue to do so. Only because of that qualification did the majority of NATO States (except Iceland and Canada) vote for the United States compromise proposal.

*(b)* The Federal Government cannot agree either to the conclusion drawn in the Icelandic Embassy's Note of 5 August 1959 from the interpretation by the International Law Commission ". . . that international law does not permit an extension of the territorial sea beyond 12 miles" (Article 3, para. 2, of the Report by the International Law Commission). For this interpretation does not mean that the extension of the territorial sea up to 12 miles or a unilateral claim to a fishing zone of 12 sea miles are consistent with the applicable international law. Apart from the fact that the conclusion drawn from Article 2, para. 3, of the Report of the International Law Commission is inconsistent with the wording of para. 3 of the same Article, the Rapporteur of the International Law Commission stated explicitly during the negotiations in Geneva (at the 21st meeting of the First Commission on 19 March, 1958, Conference document A/Conf.13/C.1/L.10, pp. 8 and 9) that the interpretation in Article 3, para. 2, of the Report, as quoted in the Icelandic Note of 5 August 1959, "ne produit pas l'intention de la commission". The Rapporteur continued to say ". . . en ce qui concerne une délimitation entre 3 et 12 milles, la commission s'abstint de la déclarer soit légitime soit illégitime; elle ne se prononce pas là-dessus".

It is not possible, therefore, to invoke the interpretation of the International Law Commission for the purpose of substantiating the Icelandic viewpoint that the extension of the territorial sea to 12 sea miles is consistent with the applicable international law.

*(c)* It is the Federal Government's opinion that neither the discussions held during the 1958 Geneva Conference nor the votes on proposals relating to the

[1] Original text not reproduced.

various draft Conventions, particularly such proposals as fell short of the necessary two-thirds majority effected any change in the applicable international law. The unilateral proclamation of claims is equally incapable of overriding the applicable international law, and it is therefore of no legal relevance that a number of States have unilaterally proclaimed a fishing zone of 12 sea miles. For, according to the applicable international law, no State is entitled to subject any part of the high seas either wholly or partially to its jurisdiction and thereby prejudice the rights of other States. The Federal Government must therefore emphatically contradict the view expressed in the Icelandic Embassy's Note of 5 August 1959 that a coastal State ". . . can unilaterally include an adjacent area in its fishing zone, subject to arbitration in case of disagreement".

2. The Icelandic Note of 5 August 1959 furthermore refers to the decision of the International Court of Justice in The Hague on 18 December 1951 in the British-Norwegian fishing dispute, commenting thereon as follows, ". . . the Court decided that Norway had the right to decide not only 'the breadth of her territorial sea, but also to the manner in which it is to be reckoned' ".

The Federal Foreign Office regrets having to point out to the Icelandic Embassy that the International Court of Justice made no such decision in the said litigation, and that the phrase quoted in the Note of 5 August 1959 is not contained in the *Reports of Judgments, Advisory Opinions and Orders 1951*, pp. 116-143, published by the International Court of Justice. In fact, the quotation appears to have been taken from the dissenting opinion of Judge Alvarez (p. 153, *loc. cit.*).

The decision of the International Court of Justice of 18 December 1951 does not deal with the breadth of the territorial sea or of a contiguous fishing zone (p. 126, *loc. cit.*) but merely with the question whether the methods prescribed in the Norwegian decree of 12 July 1935 for the determination of the baselines are consistent with international law. On this point the International Court of Justice says on page 132, *loc. cit.*: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."

Hence the International Court of Justice holds that the validity of the delimitation of the territorial sea made by a coastal State depends upon international law.

3. In substantiation of the Icelandic claim to a fishing zone of 12 sea miles it was stated in the Note of 5 August 1959 that owing to the growing number and capacity of foreign fishing fleets the fish stocks in the waters around Iceland were being increasingly over-exploited, the country thus being more and more deprived of the natural foundations of its economy.

The Federal Government is of the opinion that the available statistics on fisheries do not justify such a conclusion. Nor is that conclusion corroborated by the results of other scientific studies. It is true that the stocks of all fish species are subject to considerable fluctuation because of continuous biological and hydrographical changes; but so far it has not been possible, for technical reasons, to exploit more than a fraction of the marine food resources.

The economic limits to fishing in any given sea area are far narrower than

the biological ones, and thus nature will always restore the balance between the intensity of fishing and the stocks of fish.

This is not to deny, of course, that the stocks of certain species of fish (e.g., salmon, halibut, or other flat fish) have in the past been, or may in future be, over-exploited at times. However, to meet such a danger, arrangements can be made by way of international conventions on fishing that would be acceptable to all fishing nations parties to them. Such regional conventions on fishing were concluded already before and soon after World War II, and experience shows that this is the best way of dealing with the problem of over-exploitation of fish stocks.

4. The Federal Government does not fail to see that the question of the Icelandic fishing zone is of the greatest importance to Iceland. It has repeatedly expressed to the Icelandic Government its great understanding for the problems of the Icelandic economy. Nevertheless, without wanting to examine the question of the interpretation and application of the Resolution proposed by the South African Union at the First Geneva Conference on the Law of the Sea with regard to regions particularly dependent on fisheries, the Federal Government must point out that that Resolution, too, does in no case justify any unilateral Icelandic measures, since it merely provides for the elaboration of agreed measures and explicitly lays down that consideration must be given to the interests of other States.

The Federal Foreign Office avails itself of this opportunity to renew to the Icelandic Embassy the assurances of its high consideration.

Bonn, 7 October 1959.

(L.S.)

The Icelandic Embassy,
Bad Godesberg.

*Annex G*

AIDE-MÉMOIRE OF THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY OF 12 APRIL 1961

From the Verbal Note of the Icelandic Ministry for Foreign Affairs, dated March 13, 1961, the Government of the Federal Republic of Germany has learned with interest that the Government of the Republic of Iceland has settled an agreement with the Government of Great Britain concerning the question of fishery limits. This fact induces the Embassy, according to directions received from its Government, to submit to the Icelandic Ministry for Foreign Affairs the proposal also to discuss this question with the Government of the Federal Republic of Germany in order to come to an Icelandic-German agreement. It may be recalled that the Embassy already had suggested such discussions, attaining a peaceful and appreciative settlement of the fishery dispute, in its Verbal Notes from June 9th and July 16th, 1958—501-82—.

From the above-mentioned Verbal Note of the Icelandic Ministry for Foreign Affairs the Government of the Federal Republic of Germany likewise learned that the Government of the Republic of Iceland had issued new regulations concerning the fishery limits of Iceland, in which the new base-line, opposite to the old base-line, has been changed on several points so that the fishery limits now became still more enlarged.

The Embassy of the Federal Republic of Germany regrets, according to instructions given by its Government, to have to inform the Ministry for Foreign Affairs that the Federal Republic of Germany not earlier can regard these new fishery limits as well as those limits ordained on June 30th, 1958, as valid in law for itself than both Governments will come to an understanding about this question. Moreover, the Embassy begs to remind of the fact, that the legal points of view of the German Federal Government to this question have been laid down in the above-mentioned Verbal Notes of the Embassy from June 9th and July 16th, 1958, as well as in the Verbal Note of the German Foreign Office from October 7th, 1959—500-80.52/1—, directed to the Embassy of the Republic of Iceland in Bonn.

Awaiting a soon conclusion of such an agreement and for the purpose of avoiding any incidents, the Government of the Federal Republic, however, is prepared to recommend to the German deep-sea fishing-boats to observe the fishery limits, also with its new base-line, claimed by the Icelandic Government. But, in order not to continue this state of uncertainty too long time, the Embassy asks the Ministry for Foreign Affairs to take into consideration a soon beginning of discussions about this question and would be thankful for an information about date and place of those talks.

Reykjavik, April 12, 1961.

## Annex H

### AIDE-MÉMOIRE OF THE ICELANDIC DELEGATION IN BONN OF 20 JUNE 1961

The Icelandic Delegation already has explained the difficulties with which the Icelandic Government would be faced if the rights already established for British trawlers in Icelandic waters were to be extended to German trawlers. It was then said that, on the one hand, we were more or less forced into making concessions to the British and that, on the other hand, it would be a foregone conclusion that other nations would make similar demands, as indeed they have already done.

The Icelandic Delegation would submit, in view of the difficulties involved, that the future settlement of this question, as far as German trawlers are concerned, should be based on a realistic endeavour which would take into account the interests of our two countries. On this basis and realizing the goodwill which the Federal Government has shown in this matter the Icelandic Government is now prepared to grant a period of adjustment to German trawlers in Icelandic waters, but in that connection the following points should be kept in mind.

(1) *Base-lines.* It is quite clear that the U.K. Government, from their point of view, made certain concessions in this field. The British negotiators realized that this was a relatively easy matter for the U.K. Government because the Geneva Conference on the Law of the Sea adopted a rather vague formula in this respect. We know that German trawlers, generally speaking, fish farther off shore than the British do and, therefore, it might be possible for us to agree on other base-lines which would not unduly harm the interests of German trawlers. What we have in mind in this connection would be a further straightening out of the base-lines for instance along the south coast.

(2) *The duration of the adjustment period.* The period of adjustment would come to an end at the time provided for in the Anglo-Icelandic Agreement.

(3) *Reference to the International Court of Justice.* It is only fair to say that it should not be necessary for the Federal Republic to insist on this point for the obvious reason that if Iceland were to extend the limits beyond 12 miles the U.K. Government certainly would refer that matter to the Court, on its own initiative.

(4) *Economic problems.* It is a matter of great concern to the Icelandic Government that the present groupings of the countries of Western Europe into the Common Market and EFTA will make Icelandic exports of fish products to Europe increasingly difficult. In this connection we would mention especially the outer tariff of the Common Market which is due to be introduced shortly and will greatly affect the Icelandic trade with the countries of the Common Market.

It would be of great interest to us to know to what extent the Federal Republic would be prepared to take our interests in this field into account.

The Icelandic Government is now implementing a programme of stabili-

zation in close co-operation with the OEEC and the IMF. In this connection the Icelandic Government is preparing plans for the diversification and strengthening of the Icelandic economy. This, in our opinion, would provide a fertile field for close co-operation between our two countries which we indeed look forward to and hope for.

Bad Godesberg, June 20th, 1961.

## Annex J

### MEMORANDUM OF THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY OF 21 JULY 1961

*[Translation* [1]*]*

1. In connexion with plans for the development and diversification of the basis of the Icelandic economy the Federal Government is prepared to give sympathetic consideration to any wishes the Icelandic Government may have for technical and economic assistance.

   In particular the Federal Government is prepared to examine favourably, and possibly to send to Iceland experts for this purpose, two projects in the fields of electrification and extension of hydro-electric and thermal power-stations which have already been discussed with the competent agencies of the Federal Government, and concerning which the Icelandic Government will submit documents to the Federal Government.
2. Should the Icelandic Government consider association with the EEC, the Federal Government would be prepared to advise it as to the possibilities envisaged for association in the EEC treaty.
3. There is no reason to suppose that the present degree of liberalization of trade in fish and fish products in the Federal Republic will be reduced, unless the conditions for such liberalization undergo profound changes.
4. The Federal Government shall continue to take a favourable attitude towards future direct landings by Icelandic fishing trawlers in German harbours. It requests, however, that Iceland follows the marketing recommendations of the German *Marktbeschickungskommision* (Market Supply Commission), in order to avoid an undesirable depression of prices.
5. The Federal Government has already, with regard to the EEC Commission, taken the possible steps under the EEC treaty to ensure a satisfactory supply of fish and fish products from third countries to the German market.

---

[1] Original text not reproduced.

## Annex K

EXCHANGE OF LETTERS BETWEEN THE ICELANDIC FOREIGN MINISTER AND THE AMBASSADOR OF THE FEDERAL REPUBLIC OF GERMANY IN REYKJAVIK OF 19 JULY 1961

*[Translation*[1]*]*

Reykjavik, 19 July 1961.

Excellency,

In connexion with the Agreement between the Government of the Republic of Iceland and the Government of the Federal Republic of Germany which was concluded today and is to take immediate effect, I have the honour to inform you that this Agreement requires the approval of the Althing and will be submitted to the Althing when it meets in the autumn.

I would request Your Excellency to communicate to me your agreement with the contents of this letter.

Accept, Excellency, the expression of my highest consideration.

*(Signed)* Gudmundur J. GUDMUNDSSON.

His Excellency
the Ambassador of the
Federal Republic of Germany
Hans-Richard Hirschfeld
Reykjavik.

---

Reykjavik, 19 July 1961.

Excellency,

I have the honour to confirm the receipt of your letter of 19 July 1961, which reads as follows:

> "In connexion with the Agreement between the Government of the Republic of Iceland and the Government of the Federal Republic of Germany which was concluded today and is to take immediate effect, I have the honour to inform you that this Agreement requires the approval of the Althing and will be submitted to the Althing when it meets in the autumn.
>
> I would request Your Excellency to communicate to me your agreement with the contents of this letter."

---

[1] Original text not reproduced.

I have the honour to communicate to Your Excellency my agreement with the contents of the above letter.

Accept, Excellency the expression of my highest consideration.

*(Signed)* Hans-R. HIRSCHFELD.

His Excellency
The Minister for Foreign Affairs
of the Republic of Iceland
Mr. Gudmundur J. Gudmundsson
Reykjavik.