

## FISHERIES JURISDICTION CASE (FEDERAL REPUBLIC OF GERMANY v. ICELAND) (JURISDICTION OF THE COURT)

Judgment of 2 February 1973

In its Judgment on the question of its jurisdiction in the case concerning Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), the Court found by 14 votes to 1 that it had jurisdiction to entertain the Application filed by the Federal Republic on 5 June 1972 and to deal with the merits of the dispute.

The Court was composed as follows: President Sir Muhammad Zafrulla Khan, Vice-President Ammoun and Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrán, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga.

The President of the Court appended a declaration to the Judgment. Judge Sir Gerald Fitzmaurice appended a separate opinion, and Judge Padilla Nervo a dissenting opinion.

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### *Résumé of the Proceedings* (paras. 1–13 of the Judgment)

In its Judgment the Court recalls that on 5 June 1972 the Government of the Federal Republic of Germany instituted proceedings against Iceland in respect of a dispute concerning the proposed extension by the Icelandic Government of its exclusive fisheries jurisdiction to a distance of 50 nautical miles from the baselines round its coasts. By a letter of 27 June 1972 the Minister for Foreign Affairs of Iceland informed the Court that his Government was not willing to confer jurisdiction on it and would not appoint an Agent. By Orders of 17 and 18 August 1972 the Court indicated certain interim measures of protection at the request of the Federal Republic and decided that the first written pleadings should be addressed to the question of its jurisdiction to deal with the case. The Government of the Federal Republic of Germany filed a Memorial, whereas the Government of Iceland filed no pleadings.

Taking into account the proceedings instituted against Iceland by the United Kingdom on 14 April 1972 in the case concerning *Fisheries Jurisdiction* and the composition of the Court in this case, which includes a judge of United Kingdom nationality, the Court decided by eight votes to five that there was in the present phase, concerning the jurisdiction of the Court, a common interest in the sense of Article 31, paragraph 5, of the Statute which justified the refusal of the request of the Federal Republic of Germany for the appointment of a judge *ad hoc*.

On 8 January 1973 a public hearing was held in the course of which the Court heard oral argument on the question of its jurisdiction on behalf of the Federal Republic of Germany, but Iceland was not represented at the hearing.

In order to found the jurisdiction of the Court, the Government of the Federal Republic of Germany relies (a) on an Exchange of Notes between the Government of the Federal Republic and the Government of Iceland dated 19 July 1961, and (b) on a declaration for the purpose of securing access to the Court, in accordance with a Security Council resolution of 15 October 1946, which it made on 29 October 1971 and deposited with the Registrar of the Court on 22 November

1971. On 28 July 1972 the Minister for Foreign Affairs of Iceland pointed out in a telegram that the Federal Republic had thus accepted the jurisdiction of the Court only "after it had been notified by the Government of Iceland, in its aide-mémoire of 31 August 1971, that the object and purpose of the provision for recourse to judicial settlement of certain matters had been fully achieved". The Court observes that the binding force of the 1961 Exchange of Notes bears no relation to the date of deposit of the declaration required by the Security Council resolution and that the Government of the Federal Republic complied with the terms both of the resolution in question and of Article 36 of the Rules of Court.

It is, the Court observes, to be regretted that the Government of Iceland has failed to appear to plead the objections to the Court's jurisdiction which it is understood to entertain. Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine the question on its own initiative, a duty reinforced by Article 53 of the Statute whereby, whenever one of the parties does not appear, the Court must satisfy itself that it has jurisdiction before finding on the merits. Although the Government of Iceland has not set out the facts and law on which its objection is based, or adduced any evidence, the Court proceeds to consider those objections which might, in its view, be raised against its jurisdiction. In so doing, it avoids not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits.

### *Compromissory clause of the 1961 Exchange of Notes* (paras. 14–23 of the Judgment)

By the 1961 Exchange of Notes the Federal Republic of Germany undertook to recognize an exclusive Icelandic fishery zone up to a limit of 12 miles and to withdraw its fishing vessels from that zone over a period of less than 3 years. The Exchange of Notes featured a compromissory clause in the following terms:

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

The Court observes that there is no doubt as to the fulfilment by the Government of the Federal Republic of its part of this agreement and that the Government of Iceland, in 1971, gave the notice provided for in the event of a further extension of its fisheries jurisdiction. Nor is there any doubt that a dispute has arisen, that it has been submitted to the Court by the Federal Republic of Germany and that, on the face of it, the dispute thus falls exactly within the terms of the compromissory clause.

Although, strictly speaking, the text of this clause is sufficiently clear for there to be no need to investigate the preparatory work, the Court reviews the history of the negotiations

which led to the Exchange of Notes, finding confirmation therein of the parties' intention to provide the Federal Republic, in exchange for its recognition of the 12-mile limit and the withdrawal of its vessels, with the same assurance as that given a few weeks previously to the United Kingdom, including the right of challenging before the Court the validity of any further extension of Icelandic fisheries jurisdiction beyond the 12-mile limit.

It is thus apparent that the Court has jurisdiction.

*Validity and duration of the 1961 Exchange of Notes*  
(paras. 24–25 of the Judgment)

The Court next considers whether, as has been contended, the agreement embodied in the 1961 Exchange of Notes either was initially void or has since ceased to operate.

In the above-mentioned letter of 27 June 1972 the Minister for Foreign Affairs of Iceland said that the 1961 Exchange of Notes "took place under extremely difficult circumstances" and the Federal Republic of Germany has interpreted this statement as appearing "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". The Court, however, notes that the agreement appears to have been freely negotiated on the basis of perfect equality and freedom of decision on both sides.

In the same letter the Minister for Foreign Affairs of Iceland expressed the view that "an undertaking for judicial settlement cannot be considered to be of a permanent nature" and, as indicated above, the Government of Iceland had indeed, in an aide-mémoire of 31 August 1971, asserted that the object and purpose of the provision for recourse to judicial settlement had been fully achieved. The Court notes that the compromissory clause contains no express provision regarding duration. In fact, the right of the Federal Republic of Germany to challenge before the Court any claim by Ice-

land to extend its fisheries zone was subject to the assertion of such a claim and would last so long as Iceland might seek to implement the 1959 Althing resolution.

In a statement to the Althing (the Parliament of Iceland) on 9 November 1971, the Prime Minister of Iceland alluded to changes regarding "legal opinion on fisheries jurisdiction". His argument appeared to be that as the compromissory clause was the price that Iceland had paid at the time for the recognition by the Federal Republic of Germany of the 12-mile limit, the present general recognition of such a limit constituted a change of legal circumstances that relieved Iceland of its commitment. The Court observes that, on the contrary, since Iceland has received benefits from those parts of the agreement already executed, it behoves it to comply with its side of the bargain.

The letter and statement just mentioned also drew attention to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the seas surrounding Iceland". It is, notes the Court, admitted in international law that if a fundamental change of the circumstances which induced parties to accept a treaty radically transforms the extent of the obligations undertaken, this may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. It would appear that in the present case there is a divergence of views between the Parties as to whether there have been any fundamental changes in fishing techniques in the waters around Iceland. Such changes would, however, be relevant only for any eventual decision on the merits. It cannot be said that the change of circumstances alleged by Iceland has modified the scope of the jurisdictional obligation agreed to in the 1961 Exchange of Notes. Moreover, any question as to the jurisdiction of the Court, deriving from an alleged lapse of the obligation through changed circumstances, is for the Court to decide by virtue of Article 36, paragraph 6, of its Statute.