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I

DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

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Fisheries Jurisdiction Case (United Kingdom v. Iceland)¹

International Court of Justice, The Hague

17 August 1972 (Sir Muhammad Zafrulla Khan, *President*; Ammoun, *Vice-President*; Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga, *Judges*)

2 February 1973 (Sir Muhammad Zafrulla Khan, *President*; Ammoun, *Vice-President*; Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga, *Judges*)

12 July 1973 (Lachs, *President*; Ammoun, *Vice-President*; Forster, Gros, Bengzon, Petrén, Onyeama, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda, *Judges*)

25 July 1974 (Lachs, *President*; Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda, *Judges*)

Jurisdiction – territorial jurisdiction over fisheries – whether limited to 12 miles – whether extension to 50 miles permissible – Icelandic claim – whether opposable to United Kingdom – adjacent waters – rights of the coastal State – exceptional dependence upon fisheries – conservation of fish stocks – preferential rights of coastal State – historic rights of other States – duty of States to

¹ Comparable proceedings were also commenced against Iceland by the Federal Republic of Germany and appear at p. 71 below. The full Judgment of the International Court of Justice on the merits in those proceedings appears in *ICJ Reports 1974* at p. 175; also 56 *ILR* 146. On 17 January 1974, the Court decided that, despite the similarity of the issues in the two cases, it would not join them.

The United Kingdom was represented by the Rt Hon. Sir Peter Rawlinson QC, MP, Dr D. W. Bowett, Professor D. H. N. Johnson, Mr J. L. Simpson CMG TD, Mr G. Glynn and Mr P. Langdon-Davies.

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negotiate equitable balance between rights – Anglo-Icelandic Exchange of Notes 1961

Powers and procedures of tribunals – International Court of Justice – interim measures of protection – declaration that Icelandic Government not enforce new exclusive fishing zone against United Kingdom vessels by action inside disputed area or by measures in Icelandic waters against vessels fishing in the disputed area – limits on metric tons of fish permitted to be taken by British vessels in disputed area – whether measures sought were for protection of economic interests of private enterprises – interim measures granted

Sources of international law – custom – conditions for existence of rule of custom – the law of the sea – 12-mile fishing limit – concept of preferential rights for coastal States outside 12-mile limit – underlying purpose of conservation – evolution into rules of customary international law since 1960 – difference between preferential rights and exclusive rights – Iceland failed to have reasonable regard for interests of other States

SUMMARY *The facts* In 1958, Iceland proclaimed a 12-mile exclusive fishing zone. This proclamation was part of a wider policy reflected in a resolution of the Icelandic Parliament (the *Althing*), adopted on 5 May 1959. This stated:

... the *Althing* declares that it considers that Iceland has an indisputable 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 base-lines around the country are out of the question.

These measures resulted in a dispute with the United Kingdom, whose vessels had traditionally fished in the area. The dispute was ended by the conclusion of an Exchange of Notes of 11 March 1961² between the two governments. The United Kingdom recognised, subject to certain transitional arrangements, Iceland's exclusive fisheries jurisdiction within the 12-mile limit. With regard to the more extensive Icelandic claims, the 1961 Exchange of Notes provided that:

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

² UKTS No. 17 (1961), Cmnd 1328.

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In 1971, Iceland notified the United Kingdom that it intended to extend its exclusive fishing zone 'to include the areas of sea covering the continental shelf'. It declared also that it regarded the 1961 Exchange of Notes as having achieved its purpose and thus as having ceased to be effective. The United Kingdom replied that such an extension would have no basis in international law and reserved its rights under the 1961 Exchange of Notes.

Following the failure of negotiations, the United Kingdom applied on 14 April 1972 to the International Court of Justice for declarations that:

- (1) there was no foundation in international law for Iceland's extension of her fisheries jurisdiction; and
- (2) international law did not permit Iceland to determine the question of conservation of fish stocks by unilateral action of this nature.

Iceland did not appear and did not appoint an agent, but in a number of communications to the Court contended, *inter alia*, that the 1961 Exchange of Notes was no longer in force and, hence, that the Court did not have jurisdiction. On 14 July 1972, Iceland issued new fishery regulations establishing fishing limits of 50 miles and prohibiting fishing by foreign vessels within those limits.

Decision on Request for Interim Measures of Protection, 17 August 1972

On 19 July 1972, the United Kingdom asked the Court to indicate interim measures of protection. The measures requested were that the Icelandic Government should not seek to enforce the new limits against United Kingdom vessels either by action inside the disputed area or by taking measures within Icelandic waters against vessels which had been fishing in the disputed area. British vessels were to be allowed to take not more than 185,000 metric tons of fish in any one year from the disputed area and both parties were to avoid measures which might aggravate the dispute or prejudice the other party's rights. The Icelandic Government did not appear, but in a telegram of 28 July 1972 repeated its argument that the Court lacked jurisdiction and objected to the indication of interim measures on that ground. It objected also on the ground that the interim measures sought were for the protection of the economic interests of various private enterprises and so lacked the necessary connection with the United Kingdom's Application (which concerned a dispute between States).

Held by the International Court of Justice (by fourteen votes to one) (1) The United Kingdom's Application for a declaration that Iceland's extension of fishing limits was invalid was, in substance, a request for a declaration

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that this extension could not be opposed to United Kingdom vessels. It therefore had a sufficient connection with the interim measures sought. The Applicant's contention that its vessels were entitled to continue fishing within the zone of 50 nautical miles was part of the subject matter of the dispute. The request for provisional measures designed to protect such rights was therefore directly connected with the Application.

(2) On a request for interim measures it was not necessary for the Court finally to satisfy itself that it had jurisdiction. However, it should not indicate interim measures if the absence of jurisdiction was manifest. In the present case, the compromissory clause in the 1961 Exchange of Notes, *prima facie*, gave jurisdiction. The Icelandic contention that the compromissory clause had been terminated would fall to be decided at a later stage.

(3) For the purposes of interim measures the calculation of the average catch by UK vessels ought to be based on the available statistical data before the Court for the preceding five years.

(4) The immediate implementation of Iceland's new fishery regulations would prejudice the rights claimed by the United Kingdom and would affect the possibility of their full restoration in the event of a judgment in its favour. It was also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development and from that point of view, the need for the conservation of fish stocks in the Iceland area. Accordingly, the Court indicated interim measures substantially similar to those sought by the United Kingdom, with the qualification that the annual catch by United Kingdom vessels in the disputed area should be limited to 170,000 metric tons and not 185,000 tons as requested.

Vice-President Ammoun and Judges Forster and Jiménez de Aréchaga appended a brief declaration in support of the decision to the effect that interim measures should only be indicated by the Court where there was a likelihood of irreparable damage to the rights claimed and over which the Court would adjudicate in subsequent proceedings.

Dissenting Opinion of Judge Padilla Nervo The arguments developed in the request for interim measures appeared to have as their real object the protection of economic interests of private fishing enterprises rather than the 'rights' of the United Kingdom. The existence of those rights could not, in any event, be taken for granted at the preliminary stage of proceedings. Moreover, the claim of immediate and irreparable damage to the Applicant had not been proved but was based on the unfounded

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assumption that the dispute would not be settled by the Court for many years. Allegations that fishing enterprises would suffer financial losses and that eating habits would be disturbed could not be opposed to the sovereign rights of Iceland over its exclusive jurisdiction and the protection of the living resources of the sea covering its continental shelf. The Court should not indicate interim measures of protection without making at least a provisional determination that it had jurisdiction to hear the case on the merits. Moreover, it was not at all clear that Iceland had acted contrary to international law and its extension of its fishery limits was the exercise of a right impliedly recognised by the United Kingdom in the 1961 Exchange of Notes. By indicating interim measures which gave the United Kingdom almost everything for which it had asked, the Court had failed to maintain a proper balance between the parties.

On 18 August 1972, the Court decided, by nine votes to six, that the first pleadings should be devoted solely to the question of jurisdiction. It then fixed the time-limits for the written pleadings.³

Judgment on Jurisdiction, 2 February 1973

The United Kingdom claimed that the Court had jurisdiction by virtue of the compromissory clause in the 1961 Exchange of Notes. In its letter and telegrams to the Court, Iceland denied this claim on the grounds that:

- (1) the clause did not apply to this particular dispute;
- (2) the 1961 Exchange of Notes had been concluded after British warships had used force to protect trawlers;
- (3) the Exchange of Notes was not a permanent agreement and Iceland had exercised her right to terminate it;
- (4) since Iceland was now entitled to a 12-mile fisheries limit as of right, the United Kingdom was no longer providing consideration for Iceland's promises;
- (5) changes in the law of the sea and in fishing techniques constituted a fundamental change of circumstances which rendered the 1961 Exchange of Notes inoperative.

Held by the International Court of Justice (by fourteen votes to one) The Court had jurisdiction under the 1961 Exchange of Notes which remained a valid and effective treaty.

³ The Order fixing time-limits is not reproduced in this volume but can be found at *ICJ Reports 1972*, p. 181.

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(1) *Prima facie* this was exactly the type of dispute envisaged by the compromissory clause, so that there was no need to examine the *travaux préparatoires* of the 1961 Exchange of Notes. Nevertheless, a brief examination of them, undertaken because of the peculiar features of the case, made it clear that the clause was intended to cover the present dispute.

(2) Iceland's vague allegation that it had entered into the 1961 Exchange of Notes because of force used by the United Kingdom was rejected. However, had the Exchange of Notes been concluded under duress, it was clear from the United Nations Charter and Article 52 of the Vienna Convention on the Law of Treaties that the agreement would have been void.

(3) The Exchange of Notes was not a permanent agreement but it would only come to an end when Iceland had implemented the *Althing* Resolution or abandoned the intention of doing so. While Iceland's intention to implement the Resolution remained, so did the United Kingdom's right to refer the matter to the Court.

(4) The fact that Iceland was now entitled by law to claim a 12-mile limit, so that it was gaining nothing from the United Kingdom's promise to respect such a limit, did not render the 1961 Exchange of Notes inoperative. The purpose of the Exchange of Notes was far wider than the mere recognition of the 12-mile limit. Moreover, Iceland, having had the benefit of the United Kingdom's promises in the past, could not now fail to perform its side of the bargain.

(5) Alterations in fishing techniques could be an important consideration on the merits but were not a change of circumstances so fundamental as to affect the obligation to submit disputes to the Court.

President Sir Muhammad Zafrulla Khan appended a brief declaration in support of the decision agreeing that any consideration of the validity or otherwise of Iceland's action was irrelevant at this stage of the proceedings.

Separate Opinion of Judge Sir Gerald Fitzmaurice The question of fishery conservation had no relevance to the jurisdictional issue before the Court which involved its competence to adjudicate upon a dispute occasioned by Iceland's claim unilaterally to assert exclusive jurisdiction for fishery purposes up to a distance of 50 nautical miles from and around her coasts.

Dissenting Opinion of Judge Padilla Nervo The Judge repeated the comments which he had made at the Interim Measures stage, adding that Iceland's action was legitimate and that in this case questions of jurisdiction

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and merits were intertwined. The Exchange of Notes was no longer in force since there had been a fundamental change of circumstances.

Continuance of Interim Measures of Protection, 12 July 1973

The United Kingdom Government applied to the Court to continue the order for interim measures, which was due to be reviewed by 15 August 1973.

Held by the International Court of Justice (by eleven votes to three) The indication of interim measures of protection did not preclude the parties from negotiating interim arrangements but, in the absence of a negotiated arrangement, the interim measures indicated by the Court must continue. The interim measures indicated on 17 August 1972 would therefore remain operative until the Court gave judgment on the merits.

Declaration of Judge Ignacio-Pinto Circumstances had changed since the interim measures had first been indicated and the serious clashes between British and Icelandic vessels meant that different interim measures should have been indicated.

Dissenting Opinion of Judge Gros The Court's decision should have been preceded by an examination of all the prevailing circumstances with the help of the Applicant so as to verify any argument and allow the opportunity to decide whether a new time limit ought to be fixed for the merits proceedings. Paragraphs 7 and 8 of Article 61 of the 1946 Rules of Court, concerning the modification of existing provisional measures, should have been differently applied.

Dissenting Opinion of Judge Petrén In the light of negotiations between the Parties leading up to and during the dispute and of the interim measures, it was evident that the dispute between the Parties included disagreements as to the extent and scope of their respective rights in the fishery resources and the adequacy of measures to conserve them. Such disagreements were an element of the 'dispute in relation to the extension of fisheries jurisdiction around Iceland'.

Judgment on the Merits, 25 July 1974

On 13 November 1973, the parties concluded an interim agreement (the 1973 Exchange of Notes)⁴ which provided that British vessels would be entitled, for a period of two years, to catch not more than 130,000 metric tons of fish a year in the disputed area. The agreement was expressed to be without prejudice to the legal rights of either party on its termination.

⁴ UKTS No. 122 (1973), Cmnd 5484.

The United Kingdom therefore proceeded with its application for judgment on the merits, asking the Court to declare in its favour on four points:

- (1) that Iceland's claim to a 50-mile fishing limit was without foundation in international law;
- (2) that, as against the United Kingdom, Iceland was not entitled unilaterally to assert an exclusive fisheries jurisdiction beyond the limits agreed to in the 1961 Exchange of Notes;
- (3) that Iceland could not therefore exclude United Kingdom fishing vessels from the disputed area;
- (4) that the parties were under a duty to examine together the need for restrictions on fishing on conservation grounds and, if such a need was proved, to negotiate a regime which recognised both the preferential rights of Iceland, as a coastal State dependent on fishing, and the rights of the United Kingdom and other interested States.

Held by the International Court of Justice (by ten votes to four) (1) *Procedure in Iceland's absence* The Court was entitled to give judgment under Article 53 of the Statute but must first satisfy itself that the British claim was well founded in fact and law and to that end it must ascertain all the relevant rules of international law.

(2) *The effect of the interim agreement* The 1973 Exchange of Notes was stated to be without prejudice to the rights of the parties and did not affect the existence of the dispute. The Court was competent to pronounce upon the present legal position of the parties, although that legal position would be subject to the interim agreement so long as that remained in force. However, the Court could not anticipate what the legal position would be when the 1973 Exchange of Notes expired.

(3) *Competence of the Court* The Court was competent to pronounce upon issues of conservation of fisheries resources and of preferential fishing rights as raised in the United Kingdom's fourth claim. The Court had already considered such matters in its order indicating interim measures of protection.

(4) *The rules of international law* Since 1960 two concepts had evolved into rules of customary international law – the 12-mile fishing limit and the concept of preferential rights for the coastal State in adjacent waters outside those limits. Preferential rights came into being where the need for conservation necessitated some form of catch limitation and the coastal State was exceptionally dependent upon fisheries. Both requirements seemed to be satisfied in this case. However, the Icelandic regulations of 1972 claimed not preferential but exclusive rights in

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the disputed area, thus disregarding the historic interests of the United Kingdom and the dependence of part of its economy upon fishing in the disputed area. These interests gave rise to legal rights just as much as did Iceland's interests. Consequently, the Court held that the Icelandic regulations were:

- (a) a breach of the general principle, enshrined in Article 2 of the 1958 Geneva Convention on the High Seas, that all States in exercising their right of fishing must have reasonable regard for the interests of other States; and
- (b) a violation of the United Kingdom's rights under the 1961 Exchange of Notes.

The Court therefore held that the regulations were not opposable to the United Kingdom and that Iceland was not entitled to exclude United Kingdom vessels from the disputed area (points (2) and (3) of the United Kingdom submissions). The Court did not, however, make a decision on point (1) of the United Kingdom submissions.

The Court then held that it was necessary to achieve an equitable balance between the preferential rights of Iceland (the coastal State) and those of the United Kingdom and other interested States. Accordingly, the Court found in favour of the United Kingdom on point (4), holding that the parties were under a duty to negotiate an equitable solution "derived from the existing law". In seeking to do so, they were to take into account: (a) Iceland's preferential rights; (b) the special interests of the United Kingdom; (c) the interests of other States in conservation and equitable exploitation of the resources; (d) the need to give effect to the above rights and interests to the extent compatible with conservation and equitable exploitation of fish stocks; and (e) the obligation to keep the state of these resources under review.

Though the Court was aware of proposals made at the United Nations Conference on the Law of the Sea for progressive development of the law and the claims made by certain States, it had to decide the case on the basis of the present law and could not anticipate future developments.

President Lachs appended a short declaration in support of the reasoning and conclusions of the Court.

Declaration of Judge Ignacio-Pinto The Court should have given a decision on the first United Kingdom submission – that Iceland's actions were without foundation in international law – a submission which was well founded. By concentrating on questions of preferential rights and seeking to prescribe the guiding principles for negotiations between the parties, it had avoided the chief issue.