

## Case Comments

### Decisions of International and Foreign Tribunals

#### International Court of Justice

UNITED KINGDOM v. ICELAND; FEDERAL REPUBLIC OF GERMANY v. ICELAND (FISHERIES JURISDICTION)<sup>1</sup>

On July 25, 1974, the Court delivered its Judgment on the merits in the two cases concerning *Fisheries Jurisdiction*. By 10 votes to four, the Court has in each case:

- (1) found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines, are not opposable to the United Kingdom or Germany;
- (2) found that Iceland is not entitled unilaterally to exclude United Kingdom or German fishing vessels from areas between the 12-mile and 50-mile limits, or unilaterally to impose restrictions on their activities in such areas;
- (3) held that Iceland, on the one hand, and the United Kingdom and Germany, on the other, are under mutual obligations to undertake negotiations in good faith for an equitable solution of their differences; and
- (4) indicated certain factors which are to be taken into account in these negotiations (preferential rights of Iceland, established rights of the United Kingdom and Germany, interests of other States, conservation of fishery resources, joint examination of measures required).

In Germany's proceeding, the Court also found that it was unable to accede to the submission of Germany with reference to its claim to compensation.

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<sup>1</sup>See 6 INT'L LAW. 665 (July 1972) and 889 (Oct. 1972); 7 INT'L LAW. 232 (Jan. 1973), 505 (April 1973) and 920 (Oct. 1973); 8 INT'L LAW. 650 (July 1974).

Among the ten Members of the Court who voted in favor of each Judgment, the President and Judge Negendra Singh appended declarations; Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh (already mentioned) and Ruda appended a joint separate opinion; and Judges Dillard, de Castro and Sir Humphrey Waldock appended separate opinions. Of the four judges who voted against each Judgment, Judge Ignacio-Pinto appended a declaration and Judges Gros, Petrán and Onyeama appended dissenting opinions.<sup>2</sup>

In considering the applicable rules of International Law (¶¶ 49-78 of the Judgment), the court noted that the first United Nations Conference on the Law of the Sea (Geneva 1958) had adopted a Convention on the High Seas, Article 2 of which declared the principle of the freedom of the high seas, that is to say, freedom of navigation, freedom of fishing, etc., to "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. Arising out of the general consensus at that second Conference, however, two concepts had since crystallized as customary law: that of a fishery zone, between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction—it now being generally accepted that that zone could extend to the 12-mile limit—and the concept, in respect of waters adjacent to the zone of exclusive fishing rights, of preferential fishing rights in favor of the coastal State in a situation of special dependence on its fisheries. The Court was aware that in recent years a number of States had asserted an extension of their exclusive fishery limits. The Court was likewise aware of present endeavors, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of that branch of the law, as it was also of various proposals and preparatory documents produced in that framework. But it observed that, as a court of law, it could not render judgment *sub specie legis ferendae* or anticipate the law before the legislator had laid it down, but must take into account the existing rules of international law and the Exchange of Notes of 1961.

The concept of preferential fishing rights had originated in proposals submitted by Iceland at the Geneva Conference of 1958, which had confined itself to recommending 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 the territorial sea of a

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<sup>2</sup>The printed text of the Judgments, declarations and separate and dissenting opinions became available within the next few days after the decisions. Orders and inquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10; the Sales Section, United Nations, New York, N.Y. 10017; or any bookshop selling UN publications.

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 resulting from its dependence upon the fishery concerned while having regard to the interests of the other States.

At the 1960 Conference the same concept had been embodied in an amendment incorporated by a substantial vote into one of the proposals concerning the fishing zone. The contemporary practice of States showed that that concept, in addition to its increasing and widespread acceptance, was being implemented by agreements, either bilateral or multilateral. In the present case, in which the exclusive fishery zone within the limit of 12 miles was not in dispute, the United Kingdom had expressly recognized the preferential rights of the other party in the disputed waters situated beyond that limit. There could be no doubt of the exceptional dependence of Iceland on its fisheries and the situation appeared to have been reached when it was imperative to preserve fish stocks in the interests of rational and economic exploitation.

The Court further stated, however, that the very notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961.

The United Kingdom had pointed out that its vessels had been fishing in Icelandic waters for centuries, and Germany pointed out that its vessels had been doing so since the end of the nineteenth century, and each urged that their exclusion would have very serious adverse consequences. There, too, the economic dependence and livelihood of whole communities were affected, and both the United Kingdom and Germany shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the Applicants' historic and special interests in fishing in the disputed waters. Iceland's 1972 Regulations were therefore not opposable to either the United Kingdom or Germany, but they disregarded the established rights of those States and also the Exchange of Notes of 1961, and they constituted an infringement of the principle (1958 Convention on the High Seas, Art. 2) of reasonable regard for the interests of other States, including the United Kingdom and Germany.

The Court concluded that to reach an equitable solution of the present dispute it was necessary that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of the United Kingdom and Germany through the appraisal at any given moment of the relative dependence of each State on the fisheries in question, while taking into account the rights of other States and the needs of conservation. Thus, Iceland was not in law entitled

unilaterally to exclude United Kingdom or Germany fishing vessels from areas to seaward of the limit of 12 miles agreed to in 1961 or unilaterally to impose restrictions on their activities. But that did not mean that the United Kingdom or Germany was under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. Both sides had the obligation to keep under review the fishery resources in those waters and to examine together, in the light of the information available, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement that might at present be in force or might be reached after negotiation.

The most appropriate method for the solution of the dispute, the Court continued, was clearly that of negotiation with a view of delimiting the rights and interests of the parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. The obligation to negotiate flowed from the very nature of the respective rights of the parties and corresponded to the provisions of the United Nations Charter concerning peaceful settlement of disputes. The task before them would be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, to the facts of the particular situation and to the interests of other States with established fishing rights in the area.

#### AUSTRALIA AND NEW ZEALAND v. FRANCE (NUCLEAR TESTS)<sup>3</sup>

At public sittings held on July 4-9, 1974, Senator the Honorable Lionel Murphy, Q.C., Attorney General of Australia, Professor D. P. O'Connell, of the English, Australian and New Zealand Bars and Chichele Professor of Public International Law in the University of Oxford, Mr. E. Lauterpacht, Q.C., of the English Bar and Lecturer in the University of Cambridge, and Mr. M. H. Byers, Q.C., Solicitor-General of Australia, presented the observations of the Australian Government on the jurisdiction of the Court and the admissibility of the Application in Australia's case.

On July 10 and 11, 1974, Dr. A. M. Finlay, Attorney-General, Mr. R. C. Savage, Solicitor-General, and Professor R. Q. Quentin-Baxter, Agent, presented the observations of the New Zealand Government on the questions of the jurisdiction of the Court and the admissibility of the Application in New Zealand's case. Judge Sir Humphrey Waldock put to the Agent of New Zealand two questions, to which replies are to be given in writing. On July 11, 1974 the Court also heard the oral answer given by Mr. Byers, the Solicitor-General of Australia, to a question put by Judge Sir Humphrey Waldock in the *Australia* case.

<sup>3</sup>See 7 INT'L LAW. 762 (July 1973) and 918 (Oct. 1973); 8 INT'L LAW. 191 (Jan. 1974) and 652 (July 1974).

The French Government was not represented at the hearings.

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On July 9, Mr. Kurt Waldheim paid his first official visit to the International Court of Justice since becoming Secretary-General of the United Nations, when he and the judges held talks in the Peace Palace, the seat of the Court. The staff of the Registry of the Court were presented to the Secretary-General on this occasion, as also were the President of the Carnegie Foundation, Mr. van Rooijen, and Mr. Scheffer and Mr. Melgert, the President and Director, respectively, of the Netherlands United Nations Association (VIRO).