SEPARATE OPINION OF JUDGE SIR HERSCH LAUTERPACHT

In its Order the Court has assumed jurisdiction with regard to the request of the Swiss Government, made under Article 41 of the Statute of the Court, to indicate interim measures of protection with a view to safeguarding the rights of that Government. Acting under Article 41 of the Statute, the Court has found that, in the circumstances now obtaining, there is no need to indicate the interim measures of protection as requested by the Swiss Government. By necessary implication it has left open the possibility of indicating such measures, at a renewed request of the Swiss Government, at some future date if circumstances should so require—for instance, if the proceedings now pending before the Supreme Court of the United States of America were to terminate in a way enabling the Government of the United States of America to proceed with the measures which form the subject-matter of the Swiss request. In my view—so long as the Government of the United States of America continues to determine that the object of the request of the Swiss Government pertains to a matter which is essentially within the domestic jurisdiction of the United States of America—the Court has no power to assume jurisdiction with regard to interim measures of protection and to proceed under Article 41 of the Statute by either granting or declining the request.

In its Declaration of Acceptance of the jurisdiction of the Court of 4th April 1946 the Government of the United States excluded from its Acceptance "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America". In its request for an indication of interim measures of protection of 3rd October 1957 the Government of Switzerland, referring to its Application of 1st October 1957, asked the Court to indicate, *inter alia*, that "the Government of the United States is requested not to sell the shares of the General Aniline and Film Corporation ... so long as the proceedings in this dispute are pending". On 11th October 1957 the Government of the United States of America filed, in conformity with Article 62, paragraph 1, of the Rules of the Court, a Preliminary Objection in which it informed the Court that it had determined that the sale or disposition of the shares in the Corporation in question is a matter essentially within its domestic jurisdiction.

In reliance on the Preliminary Objection thus filed, the Government of the United States has asserted that the Preliminary Objection removed the basis for any assumption of a *prima facie* juris-

diction of the Court on the merits of the dispute and that the Court therefore lacked the power to exercise jurisdiction under Article 41 of the Statute. That contention I consider to be well founded. In my view, having regard to the determination made by the Government of the United States under the terms of its Declaration of Acceptance, the Court possesses no such power.

In deciding whether it is competent to assume jurisdiction with regard to a request made under Article 41 of the Statute the Court need not satisfy itself—either *proprio motu* or in response to a Preliminary Objection—that it is competent with regard to the merits of the dispute. The Court has stated on a number of occasions that an Order indicating, or refusing to indicate, interim measures of protection is independent of the affirmation of its jurisdiction on the merits and that it does not prejudge the question of the Court's jurisdiction on the merits (*Case concerning the Polish Agrarian Reform and the German Minority*, Series A/B, No. 58, p. 178; *Anglo-Iranian Oil Company Case, I.C.J. Reports 1951*, p. 93). Any contrary rule would not be in accordance with the nature of the request for measures of interim protection and the factor of urgency inherent in the procedure under Article 41 of the Statute. However, it is one thing to say that action of the Court under Article 41 of the Statute does not in any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection. Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima*

facie confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction. These conditions do not exist in the case now before the Court.

Unless and until the peremptory reservation included in the Declaration of Acceptance made by the Government of the United States of America and now formally invoked by that Government is declared invalid in appropriate proceedings before the Court, it must be deemed to exclude the jurisdiction of the Court on the merits with regard to the claim of the Government of Switzerland for the restitution of the property of the Corporation in question—a claim which is directly related to the request for interim measures with regard to the sale and the disposition of the shares of that Corporation. If the Court subsequently holds that reservation to be valid, that will automatically terminate its jurisdiction with regard to the sale of the shares. Should, on the other hand, the Court eventually declare the reservation in question to be invalid, such invalidity may well entail the invalidity of the Declaration of Acceptance as a whole and thus render impossible altogether the jurisdiction of the Court. While I do not wish to prejudge the eventual decision of the Court on these questions it is apparent that, on either alternative, the Court will be without jurisdiction to entertain the Application so far as it relates to the sale and disposition of the shares. I do consider that the third possibility—namely, that the Court may declare the reservation to be invalid and nevertheless uphold the validity of the Declaration of Acceptance as a whole—is sufficiently remote to permit its exclusion as a factor in the *prima facie* appreciation of the possibility of the Court's jurisdiction on the merits. Moreover, quite irrespective of any future decision of the Court on the question of the validity of the reservation in question, the latter must, so long as it remains a valid expression of the will of the Government of the United States, be given full and unqualified effect. Unlike in other similar cases, there is no question here of any uncertainty or controversy as to whether the subject of the dispute is covered by the reservation. That reservation must be deemed to embrace all aspects of the procedure of the Court under its Statute. The Court is legally not in a position, at any stage of the procedure, to exercise jurisdiction —whether by granting the request for an indication of interim measures or by declining it—unless in conformity with the terms of the Declaration of Acceptance. In the matter of its jurisdiction there is no other legal basis for its action under the Statute.

It might be said that as the Government of the United States of America has invoked what may be described as the "automatic reservations" only in respect of the sale or other disposition of the shares, there is nothing to prevent the Court from acting under Article 41 with respect to other aspects of the request of the Swiss Government. This may be so. However, the Swiss request for

interim measures of protection covers primarily the question of sale and disposition of the shares. The present Order of the Court is concerned exclusively with that aspect of the request as being the only one which fulfils the requirements of Article 61, paragraph 1, of the Rules of the Court. In its Order the Court has assumed jurisdiction with regard to the request thus defined. It has declined to grant it. As already stated, by clear implication it leaves open the possibility of affirmative action should circumstances undergo a change. In both respects the Order is, in my opinion, contrary to a conclusive condition under which the jurisdiction of the Court has been accepted.

In my view it is not open in the present case to the Court to find either that there is a need or that there is no need for interim measures of protection on the basis of Article 41. The Court ought to declare that it is without jurisdiction to entertain the request.

For these reasons, while I am in agreement with the operative part of the present Order, I cannot otherwise subscribe to it.

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I have refrained from referring to or elaborating the additional, and no less decisive, reason why, in my view, the Court is without jurisdiction to entertain the request for interim measures filed by the Swiss Government. In my Separate Opinion in the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957*, pp. 43-66) I came to the conclusion that a reservation of the kind as now before the Court is invalid and that its invalidity entails the invalidity of the Declaration of Acceptance as a whole. If that is so, the Government of the United States cannot validly become either a plaintiff or a defendant under its Declaration of Acceptance—although it is open to it, in respect of any claim brought against it in reliance on its Declaration of Acceptance, to submit to the jurisdiction of the Court on some other basis. However, I have abstained from adopting that view as a ground of the present Opinion seeing that the question of the validity of the above reservation of the United States of America is not now before the Court and that it may, with the possible participation of other Signatories of the Optional Clause intervening by virtue of Article 63 of the Statute, form the subject-matter of a decision of the Court at a subsequent stage of the proceedings.

(Signed) HERSCH LAUTERPACHT.