Gerald Fitzmaurice in *I.C.J. Reports 1963*, pages 102-103, as follows:

> "...the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction."

Article 17 of the General Act provides that the disputes therein referred to shall include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice. Among the classes of legal disputes there enumerated is that concerning "the existence of any fact which, *if established*, would constitute a breach of an international obligation" (emphasis added). At the preliminary stage it would seem therefore sufficient to determine whether the parties are in conflict as to their respective rights. It would not appear necessary to enter at that stage into questions which really pertain to the merits and constitute the heart of the eventual substantive decision such as for instance the establishment of the rights of the parties or the extent of the damage resulting from radio-active fall-out.

Judge Sir Humphrey WALDOCK makes the following declaration:

I concur in the Order. I wish only to add that, in my view, the principles set out in Article 67, paragraph 7, of the Rules of Court should guide the Court in giving its decision on the next phase of the proceedings which is provided for by the present Order.

Judge NAGENDRA SINGH makes the following declaration:

While fully supporting the reasoning leading to the verdict of the Court, and therefore voting with the majority for the grant of interim measures of protection in this case, I wish to lend emphasis, by this declaration, to the requirement that the Court must be satisfied of its own competence, even though prima facie, before taking action under Article 41 of the Statute and Rule 61 (New Rule 66) of the Rules of Court.

It is true that neither of the aforesaid provisions spell out the test of competence of the Court or of the admissibility of the Application and the request, which nevertheless have to be gone into by each Member of the Court in order to see that a *possible* valid base for the Court's competence exists and that the Application is, prima facie, entertainable. I am, therefore, in entire agreement with the Court in laying down a positive test regarding its own competence, prima facie established, which was enunciated in the *Fisheries Jurisdiction*[1] case and having been reiterated in this

[1] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, *I.C.J. Reports 1972*, Order of 17 August 1972, paras. 15 to 17, pp. 15 to 16.

case may be said to lay down not only the latest but also the settled jurisprudence of the Court on the subject.

It is indeed a *sine qua non* of the exercise of judicial function that a court can be moved only if it has competence. If therefore in the exercise of its inherent powers (as enshrined in Art. 41 of its Statute) the Court grants interim relief, its sole justification to do so is that if it did not, the rights of the parties would get so prejudiced that the judgment of the Court when it came could be rendered meaningless. Thus the possibility of the Court being ultimately able to give a judgment on merits should always be present when interim measures are contemplated. If, however, the Court were to shed its legal base of competence when acting under Article 41 of its Statute, it would immediately expose itself to the danger of being accused of discouraging governments 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." (Separate opinion of Sir Hersch Lauterpacht in *Interhandel* case, *I.C.J. Reports 1957*, p. 118.)

It needs to be mentioned, therefore, that even at this preliminary stage of prima facie testing the Court has to examine the reservations and declarations made to the treaty which is cited by a party to furnish the base for the jurisdiction of the Court and to consider also the validity of the treaty if the same is challenged in relation to the parties to the dispute. As a result of this prima facie examination the Court could either find:

(a) that there is no possible base for the Court's jurisdiction in which event no matter what emphasis is placed on Article 41 of its Statute, the Court cannot proceed to grant interim relief; or

(b) that a possible base exists, but needs further investigation to come to any definite conclusion in which event the Court is inevitably left no option but to proceed to the substance of the jurisdiction of the case to complete its process of adjudication which, in turn, is time

consuming and therefore comes into conflict with the urgency of the matter coupled with the prospect of irreparable damage to the rights of the parties. It is this situation which furnishes the "raison d'être" of interim relief.

If, therefore, the Court, in this case, has granted interim measures of protection it is without prejudice to the substance whether jurisdictional or otherwise which cannot be prejudged at this stage and will have to be gone into further in the next phase.

Judge *ad hoc* Sir Garfield BARWICK makes the following declaration:

I have voted for the indication of interim measures and the Order of the Court as to the further procedure in the case because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the French Government's declaration to the compulsory jurisdiction of the Court with reservations each provide, prima facie, a basis on which the Court might have jurisdiction to entertain and decide the claims made by Australia in its Application of 9 May 1973. Further, the exchange of diplomatic notes between the Governments of Australia and France in 1973 afford, in my opinion, at least prima facie evidence of the existence of a dispute between those Governments as to matters of international law affecting their respective rights.

Lastly, the material before the Court, particularly that appearing in the UNSCEAR reports provides reasonable grounds for concluding that further deposit in the Australian territorial environment of radio-active particles of matter is likely to do harm for which no adequate compensatory measures could be provided.

These conclusions are sufficient to warrant the indication of interim measures.

I agree with the form of the provisional measures indicated, understanding that the action prescribed is action on the part of governments and that the measures are indicated in respect only of the Australian Government's claim to the inviolability of its territory.

Judges FORSTER, GROS, PETRÉN and IGNACIO-PINTO append dissenting opinions to the Order of the Court.

(Initialled) F.A.

(Initialled) S.A.