VI. OTHER INCIDENTAL PROCEEDINGS

A. REQUESTS FOR THE INDICATION OF PROVISIONAL MEASURES

The power of a tribunal to determine its own jurisdiction is one that belongs to all national judicial bodies, and its attribution to international judicial and arbitral organs is not in doubt. More controversial is the question whether the power, also enjoyed by most, if not all, municipal courts, to issue binding interim injunctions, that is to say directives requiring or prohibiting certain action pending settlement of the case before the court, is also a necessary and essential part of the armoury of international courts and of the International Court of Justice in particular. The Statute (Article 41) does in fact include a power of the Court to 'indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'; the debate is therefore in this instance not about the existence of *some* power of this kind, but whether the measures so indicated create an obligation to respect them, binding on the States addressed. The wording of the Statute is, to say the least, ambiguous, inasmuch as it uses such mild terms as 'indicate' and 'measures which ought to be taken' (rather then 'direct' or 'order', and 'measures which shall be taken'); and the trend of the *travaux préparatoires* of the drafting of the PCIJ Statute is rather such as to suggest that, like universal compulsory jurisdiction, a power of the new Court to indicate binding measures at a preliminary stage may have been regarded as more than States were ready to accept. Some scholars have been ready to appeal to the idea that a power to indicate binding measures is bound up with the power to settle disputes by binding final decisions, and thus belongs in principle to all international judicial bodies; from this they conclude that the power conferred by Article 41 must be interpreted in this sense.

The question remained unsettled until comparatively recently, when in the *LaGrand* case, the Court decided that provisional measures addressed to the United States, which had not been complied with, had created a legal obligation, the breach of which gave rise to a duty of reparation, independently of the rights and duties of the parties in respect of the original dispute.[28] It did not however base this conclusion on any general principle, analogous to that of the *compétence de la compétence*, but on an interpretation of Article 41 as having been intended to achieve that result.[29]

There is thus no doubt that the Court has incidental jurisdiction under Article 41 to indicate measures; but a question that has given rise to some difficulty is the

[28] *LaGrand (Germany* v *United States of America), Merits, Judgment, ICJ Reports 2001*, not yet reported, paras 98ff.

[29] In the light of the *travaux préparatoires* and of the general trend of interpretation of the text in practice, this view of Article 41 may be regarded as somewhat revolutionary: see the present writer's comments in (2001) 72 *BYIL* 37 at 114ff.

relationship between this incidental jurisdiction and the jurisdiction of the Court to hear and determine the merits of the case in which measures are requested. The problem only arises at the international level, because of the principle that international jurisdiction rests on consent, and consent has therefore to be proved in each case. If an indication of measures is requested in a case in which the respondent State has already made it clear that it denies the existence of jurisdiction over the merits, what is the relevance of this circumstance to the exercise of the power to indicate measures? At one extreme, it might be argued that if the Court has no jurisdiction to hear the case at all, then it has no power to indicate measures; at the other extreme, it might be said that, since Article 41 confers an independent power (and contains no reference to the question of merits jurisdiction), the Court could indicate measures, if it saw fit, in a case where it was very doubtful whether it had any jurisdiction over the merits, or even where it was almost certain that it had none.

The first view has the obvious defect that it tends to rob the provisional measures procedure of all meaning: if no measures can be indicated until the disputed question of merits jurisdiction has been thrashed out, then the measures cannot serve to meet the urgent needs that they were designed for.[30] The second view may however be seen as a threat to the principle of consensual jurisdiction, or even to the sovereign independence of States, if a State can be subjected to an order indicating measures that it is to comply with, in a case in which it asserts (justifiably, as it later turns out) that it has never consented to the Court having any jurisdiction at all.[31]

A middle solution has therefore become established in the jurisdiction of the Court: the possibility or probability of establishing jurisdiction over the merits is one of the factors to be weighed by the Court when considering whether to indicate measures. A number of different formulae has been employed to express this relationship. It is however clear that, on the one hand, the Court is not debarred from indicating measures by the existence of an objection to jurisdiction, even one which seems prima facie likely to be upheld; and on the other, that it is open to the Court to decline to indicate measures because there is a 'manifest lack of jurisdiction', or even a serious doubt as to the existence of merits jurisdiction. In several of the cases brought by Yugoslavia against members of NATO, the Court found, when examining the request for provisional measures, that it 'manifestly lack[ed] jurisdiction' to entertain the application instituting proceedings; it not only rejected the request for measures, but decided to remove the case from the list at that stage.[32] The fact that the Court's eventual finding on jurisdiction contradicts the expectations on which its decision on provisional measures was founded, will not retrospectively invalidate that decision:

[30] This view was nevertheless put forward by dissenting judges in the *Nuclear Tests* case in 1974, but has not been heard of since.

[31] The difficulty is exacerbated by the ruling in *LaGrand* that the measures indicated constitute an independent legal obligation, one which exists—apparently—even in face of a later finding of lack of jurisdiction.

[32] See, eg, *Legality of Use of Force (Yugoslavia* v *United States of America), Provisional Measures Order of 2 June 1999, ICJ Reports 1999*, p 916, para 29.

thus if it considers it justified to indicate measures on the basis of a likelihood of jurisdiction over the merits, a subsequent finding against jurisdiction will simply cause the measures to lapse, but they will have been valid until then.[33] If the Court refuses measures because of doubts as to jurisdiction, a subsequent finding upholding jurisdiction might justify a renewed request for measures, but the original refusal would not be undermined.

The purpose of the indication of provisional measures is, as stated in Article 41, 'to preserve the respective rights of either party'; and this means the rights that are in issue in the proceedings, and no others. Thus in a case concerning the formal validity of an arbitral award defining a maritime boundary, the Court declined to indicate measures directed to the conduct of the parties in the maritime areas concerned, since the only question before the Court was the validity or otherwise of the award, not the legal correctness of the boundary indicated.[34]

The indication of measures is an interlocutory measure justified by urgency: there must be a threat to the rights of a party that is immediate in the sense that the final decision in the case may come too late to preserve those rights. If therefore it is to be expected that the case will have been decided before irreparable injury is caused, no measures will be indicated. When Finland complained that the construction by Denmark of a bridge over a particular seaway would block the passage of ships and thus prevent Finland from exercising its rights to pass through the seaway, the Court declined to indicate measures because the timetable for the bridge works was such that there would be no interference with passage within the time likely to be required for the Court to decide the case.[35] The Court however included in its order a warning to the parties (and to Denmark in particular) that a party may not better its legal position by modifications it has made to the *status quo*, and that consequently the Court might, if it upheld Finland's claim, order Denmark to demolish works already completed that infringed Finland's rights.

B. PARTIES: JOINDER OF CASES; INTERVENTION BY THIRD STATES

Contentious proceedings before the Court are normally brought either by two States jointly (by Special Agreement), or by one State against another (by application); in either case there are only two parties to the proceedings. It is however possible for two or more States to bring proceedings as joint applicants against another State. In practice, it has been more frequent for two States to bring independent proceedings against the same respondent; and the Court then has power, if it sees fit, to 'direct that the proceedings . . . be joined' (Rules, Article 47). The cases are then heard and determined together, by a single judgment; and the Court may 'direct that the written or oral proceedings . . . be in common'. A joinder of this kind was ordered in the two

[33] Cf, eg, the *Anglo-Iranian Oil Co* case, where this situation arose.
[34] *Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990, ICJ Reports 1990*, p 64.
[35] *Passage through the Great Belt, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991*, p 12.